IN THE MATTER OF AN ARBITRATION PURSUANT TO SECTION 148.2(1) OF THE REVISED REGULATION 1984 UNDER THE *INSURANCE (VEHICLE) ACT*, B.C. REG 44/83 AND THE *ARBITRATION ACT*, R.S.B.C. 1996, C.55

BETWEEN:

K.P. ON HER OWN BEHALF AND AS THE LITIGATION GUARDIAN OF N.P., AN INFANT

CLAIMANTS

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

DECISION
Re: Costs

Counsel for the Claimants	Matthew G. Siren Vertlieb & Company 16 – 988 Beach Avenue Vancouver, BC V6Z 2N9
Counsel for the Respondent	Mary-Helen Wright Pacific Law Group 1550 – 777 Hornby Street Vancouver, BC V6Z 1S4
Date of Hearing	September 5, 2019
Place of Hearing	Vancouver, British Columbia
Arbitrator	Donald W. Yule, Q.C.
Date of Award	September 10, 2019

INTRODUCTION

1. The final issue in this underinsured motorist protection ("UMP") arbitration is the determination of the costs to which the Claimants are entitled. The UMP claim arises out of a motor vehicle accident on October 14, 2014 in which JP was killed. The Family Compensation action of his wife KP and his son NP was settled for $1.1 million in damages plus costs. The agreed upon damages were apportioned between KP and NP. The motorist solely responsible for the accident was uninsured. This UMP arbitration was commenced by the Claimants to recover their UMP compensation. The parties agreed to adopt the British Columbia Supreme Court Rules in the arbitration proceeding.

2. Ultimately there was a hearing for two hours on March 12, 2019, followed by written submissions. By the time of the hearing, the only remaining issues were the deductibility under the Insurance (Vehicle) Regulation section 1-48.1(1)(i) of two sums, namely, a life and accident death benefit and mortgage insurance.

3. In a decision dated April 30, 2019 I concluded that neither sum was a deductible amount.

4. It is not disputed that in the result the Claimants are entitled to costs. Disbursements have been agreed to. The issue is how are costs for legal fees to be calculated. There are two possibilities. The Claimants assert their fees must be assessed at $8,000 under Supreme Court Rules 14-1(1)(f)(ii), 15-1(1)(b) and 15-1(15)(a) (the "Fast Track Rule"). The Respondent disputes that the Fast Track Rule applies.

5. Alternatively, the Claimants' costs are to be determined under Supreme Court Rules Appendix B. The Claimants have submitted a draft Bill of Costs for fees of $10,450 plus taxes. The Respondent challenges a number of units claimed and submits that a proper assessment should be approximately $4,500 plus taxes.

DOES THE FAST TRACK RULE APPLY?

6. The applicable rules are set out below.

7. Rule 14-1(1)(f)(ii) provides as follows:

> "(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist: …
>
> (f) subject to subrule (10) of this rule,
>
> (ii) the trial of the action was completed within 3 days or less,
>
> in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise."

8. Rule 15-1(1)(b) provides as follows:

> "(1) Subject to sub-rule (4) and unless the court otherwise orders, this rule applies to an action if …
>
> (b) the trial of the action can be completed within 3 days,"

9. Rule 15-1(15)(a) provides as follows:

> "(15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1(10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
>
> (a) if the time spent on the hearing of the trial is one day or less, $8,000 …"

10. The Claimants say that the initial agreement to have the Supreme Court Rules apply to the arbitration incorporates the Fast Track Rule. The hearing lasted three days or less, actually about a half day excluding written submissions. Based on caselaw it is mandatory to apply the Fast Track Rule where their requisite requirements are met, even though neither party ever took steps to have the Fast Track Rule apply during the

arbitration proceeding. (*Affleck v. Palmer* (2011) BCSC 1366 at paragraphs 6 – 9; *Axten v. Johnson* (2011) BCSC 1005 at paragraph 27).

11. The Respondent agrees that the Fast Track Rule can apply, even though neither party takes the requisite steps to designate the action as a fast track action, where the "trial" was completed in three days or less. The basis on which the Respondent asserts that the Fast Track Rule does not apply is that there was no "trial". Rather the ultimate hearing was in the nature of a hearing of proceeding, special case, proceeding on a point of law, stated case or any other analogous proceeding, which is a separate fee item in Appendix B (Item 27). Because Rule 14-1(1)(f)(ii) and Rule 15-1(1)(b) require a trial of the action, and there was no trial, the fast track provisions are not applicable.

DISCUSSION AND ANALYSIS

12. It is novel to have the Supreme Court Fast Track Rule apply to an arbitration, but where the parties agree to adopt the Supreme Court Rules and use them to govern issues surrounding examinations for discovery, independent medical examinations, the form and service and admissibility of expert reports, I see no principled basis on which the Fast Track Rule, and other Supreme Court costs rules, should not also apply.

13. The narrow issue then is whether the "hearing" on March 12, 2019 was a "trial". Neither the Supreme Court Act, section 1 - Definitions, nor the Supreme Court Rules, Rule 1-1- Interpretation, nor Rule 14-1 nor Rule 15-1 nor the Interpretation Act, RSBC 1996, chapter 238, section 1 - Definitions, nor section 29 – Expressions defined contains a definition of "trial".

14. The quantification of a claim for UMP compensation is determined in accordance with the Insurance (Vehicle) Regulation, section 148.1(5) whereby the liability of the insurer is not to exceed the total amount of damages awarded in respect of the accident minus the sum of the applicable deductible amounts. With the settlement of the underlying tort claims of KP and NP for $1.1 million, and considering that JP's owner's certificate provided $2 million of UMP protection coverage, the UMP claims of KP and NP were quantified at $1.1 million less applicable deductible amounts. The sole issue then from

the outset of the arbitration proceeding was what where the proper deductible amounts. The onus of proof on this issue was on the Respondent. Accordingly pleadings in the arbitration were exchanged commencing with the pleading of the Respondent with a response delivered by the Claimants. The initial pleading of the Respondent listed ten specific sums alleged to be deductible amounts. As noted, by the time of the hearing, the contested deductible items were payments of life insurance and mortgage insurance.

15. At a conference call on July 9, 2018 four days were reserved for the hearing. The dates were February 25 – 28, 2019 and alternatively March 11 – 14, 2019. The February 2019 dates had to be abandoned and the hearing proceeded on March 12, 2019. During the course of arbitration the parties exchanged documents and made demand for and obtained additional documents. An examination for discovery of KP was arranged, but did not proceed as initially scheduled due to the unavailability of requested documents. Ultimately no discovery of KP took place because the parties were able to agree upon an Agreed Statement of Facts. The initial draft of the Agreed Statement of Facts was prepared by the Respondent's counsel on February 23, 2019 and the document was finalized after changes on Friday, March 8, 2019. As noted, the hearing proceeded on March 12, 2019. One expert report of Columbia Pacific Consulting Ltd. dated November 30, 2018 was admitted into evidence by agreement (Exhibit 2).

16. The Agreed Statement of Facts made it unnecessary for any witnesses to be called at the hearing. The hearing proceeded with the admission of three exhibits and legal submissions.

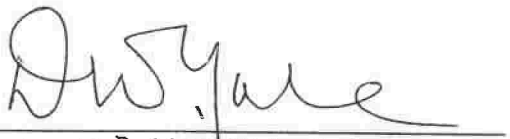
17. The Supreme Court Rules do contain specific rules for hearing of a Special Case (Rule 9-3), proceedings on a Point of Law (Rule 9-4) and Stated Cases (Rule 18-2). No agreement was made with respect to those specific Rules during the arbitration nor was their format ever adopted. As noted above, the case proceeded in the usual manner towards what was initially reserved as a multi-day hearing with witnesses until on the eve of the hearing the parties were able to come to an agreement upon an Agreed Statement of Facts obviating the need to call witnesses and reducing to a half day the time required for hearing.

18. In my view the hearing that took place on March 12, 2019 was nonetheless a trial, notwithstanding the fact that no witnesses were called. Rule 9-7, the "Summary Trial" Rule (emphasis added) contemplates a trial without witnesses, albeit there is provision for cross-examination of a deponent before the court. Had the Agreed Statement of Facts been negotiated at an earlier date, it might have been possible to set the dispute up as a special case or determination on a point of law but the fact is this was never done. The parties ought not to be penalized in costs for taking reasonable steps to expedite the trial process by reaching agreements that reduce, or in this case, eliminate the necessity for calling *viva voce* evidence.

19. Accordingly, I conclude that the Fast Track Rule applies in this case and that the Claimants are entitled to recover legal costs for fees of $8,000 plus applicable taxes. In view of my decision on this issue I need not consider what costs might be appropriate under Appendix B.

20. The Claimants are also entitled to recover as an additional disbursement the Arbitrator's account for this further decision.

21. As the Claimants were required to bring this application in order to determine their recoverable costs, they are also entitled under Appendix B, Items 29 and 30 to a total of 3 units at $110 per unit plus applicable taxes.



Arbitrator: Donald W. Yule, Q.C.