

IN THE MATTER OF AN ARBITRATION PURSUANT TO

***Section 148, 148.1, 148.2(1) of the
Revised Regulations to the Insurance (Vehicle) Act***

AND

Arbitration Act, SBC 2020, c. 2

BETWEEN:

MC

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

AWARD

Counsel for the claimant	Mark Belanger
Counsel for the respondent	Mary Helen-Wright
Arbitrator	Mark Tweedy, C. Med., C. Arb.
Hearing dates	May 30 and September 9, 2024
Award date	October 18, 2024

1. Introduction

1. This is a claim for underinsured motorist (“UMP”) coverage pursuant to the *Insurance (Vehicle) Regulation*, BC Reg. 447/83 (the “Regulation”).

2. The parties agreed that given recent amendments to the Regulation a preliminary issue was whether the claimant was entitled to claim UMP at all. The claimant says that she is entitled to make an UMP claim, and the respondent says that she is not.

3. The evidence before me consisted of an “Agreed Statement of Facts on the Issue of Entitlement to UMP” (the “Agreed Statement of Facts”), and the reports and viva voce evidence of two experts on the law of Washington State, Mr. Kevin Winters on behalf of the claimant, and Mr. Mark Scheer on behalf of the respondent.

4. Although not formally in evidence, the claimant also referred in her submissions to a document titled "ICBC Autoplan insurance", apparently issued by the respondent. No objection was taken to it being before me. I will say more about that document later in this award.

5. After considering all the evidence, and the submissions of counsel, I am of the view that the claimant is not entitled to bring an UMP claim. My reasons for this decision are set out below.

2. Agreed Statement of Facts

6. The Agreed Statement of Facts establishes the following:

(a) The claimant was in a motor vehicle accident on July 29, 2022, in Chehalis, Washington. She was a passenger in a vehicle driven by her husband when it was rear ended by Ms. B. Ms. B's liability for that accident is not disputed;

(b) Ms. B was insured by National Insurance. The claimant accepted the US \$25,000 limits of Ms. B's policy;

(c) On September 11, 2023, following the tender of Ms. B's insurance limits, counsel for the claimant wrote to the respondent and requested its consent to proceed with an UMP claim pursuant to section 148.2 of the Regulation;

(d) On November 1, 2023 the respondent advised counsel for the claimant that "there is no longer a right of recover [sic] where the insured is entitled to Enhanced Accident Benefits";

(e) By email correspondence dated November 7, 2023, counsel for the claimant stated that he disagreed with that position; and,

(f) The claimant was entitled to, applied for, and received Enhanced Accident Benefits for treatments for the injuries caused by the July 29, 2022 accident.

3. Expert evidence

7. Mr. Kevin Winters on behalf of the claimant and Mr. Mark Scheer on behalf of the respondent provided written reports and gave evidence at the hearing. Mr. Scheer and Mr. Winters are both senior lawyers, and are both very experienced in the law of Washington State regarding motor vehicle insurance. They agreed that the UMP coverage was not mandatory in Washington State.

4. Analysis

8. The respondent relies on section 148.1(3)(e) of the Regulation which provides:

148.1(3) No coverage is provided under underinsured motorist protection to an insured who is

...

(e) subject to section (3.1), an individual who is entitled to benefits under Part 10 of the Act arising out of the same accident.

9. Section (3.1) provides:

Section (3.1) Subsection (3)(d) and (e) does not apply with respect to a certificate issued before May 1, 2021 for so long as the certificate remains in effect, and the definition of “deductible amount” is to be read as including an amount paid or payable under Part 10 of the Act [the *Insurance (Vehicle) Act*, RSBC 1996, c. 231] in respect of this kind of certificate.

10. The certificate of insurance issued to the claimant is attached to the Agreed Statement of Facts, and is on its face effective May 17, 2022. There was no suggestion in the evidence or in the submissions of counsel that there was in force a certificate issued before May 1, 2021 that was still in effect on July 29, 2022, being the date of the accident.

11. Section 118 of Part 10 of the Act is the section pursuant to which the claimant received the Enhanced Accident Benefits previously referred to.

12. The respondent therefore says that the claimant is precluded from making an UMP claim.

13. The claimant’s position is summarised in the first paragraph of the written submissions provided on her behalf, where it is stated:

On the issue as to whether underinsured motorist protection *exists* [emphasis in the original] (not whether a third party is underinsured) for Claimants injured in Washington State, the law of British Columbia does not apply. Instead, the law of Washington State must be applied to determine said entitlement. Washington State Law guarantees underinsured motorist protection coverage be afforded to all those who have such insurance.

14. The claimant says that section 148.2(6)(a) of the Regulation dictates the analysis as to whether the claimant is entitled to claim UMP for an accident occurring in Washington State. That section provides:

Subject to subsection (1), if an accident for which a claim is made under section 148.1 occurs in another jurisdiction,

(a) the law of the place where the insured suffered the injury for which the claim is made must, whether or not death results from that injury, be applied

(i) to determine if the insured is legally entitled to recover damages and, if so, the degree to which the insured is entitled, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation as to whether the insured is legally entitled to recover damages or the degree to which the insured is entitled, and

(b) the law of the Province must be applied

(i) to determine the measure of any damages recoverable by the insured to assess the amount of compensation payable to the insured, and

(ii) in any arbitration proceedings arising out of a difference between the insured and the corporation respecting the measure of damages or the amount of compensation.

15. The claimant further says that Washington State Law requires the respondent to provide UMP coverage, and that I should apply that law in determining whether she is entitled to coverage.

16. Given the evidence of Mr. Scheer and Mr. Winters, the claimant's argument cannot succeed, as Washington State does not require the respondent to provide UMP coverage.

17. The claimant's further submission is that the two sections of the Regulation relied on by the parties are inconsistent, and that her claim for UMP coverage has not therefore been eliminated. More specifically, the claimant says in her written submissions that if the legislature intended for there to be no UMP coverage pursuant to section 148.1(3)(e), it would not have provided a framework for "how to analyze out of Province claims" in section 148.2(6)(a).

18 I cannot agree with this submission as there is UMP coverage for claims where an insured is not eligible to receive Enhanced Accident Benefits. See section 148.1(3)(e).

19. This finding is consistent with the "ICBC Autoplan insurance" document which states: "Basic Insurance also includes Underinsured Motorist Protection for rare situations where you or members of your household are not eligible for Enhanced Accident Benefits and are injured in a crash where the responsible driver lacks sufficient coverage to pay damages awarded in a claim."

5. Conclusion

20. For the reasons set out above, I dismiss this proceeding.

21. Unless there is something that I am not aware of, costs are awarded to the respondent on a party and party basis.

Mark Tweedy

Mark Tweedy, C. Arb., C. Med.