



Civil Resolution Tribunal

Date Issued: September 26, 2022

File: VI-2021-002207

Type: Motor Vehicle Injury

Civil Resolution Tribunal

Indexed as: *Masyana v. Kumar*, 2022 BCCRT 1055

BETWEEN:

KAMALJIT MASYANA

APPLICANT

AND:

AMIT KUMAR

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Andrea Ritchie, Vice Chair

INTRODUCTION

1. This dispute is about a motor vehicle accident that took place on April 14, 2019 in Surrey, British Columbia, between the applicant, Kamaljit Masyana, and the respondent, Amit Kumar. The respondent has admitted liability for the accident.

2. The applicant says she was injured as a result of the accident and seeks \$50,000 in total for non-pecuniary (pain and suffering) damages and past income loss. The respondent says the applicant's injuries are not as severe as she claims, and that some of them are from her work, not from the accident. The respondent argues the applicant is only entitled to \$25,000 for non-pecuniary damages. The respondent further says the applicant did not miss any work, so is not entitled to any compensation for past income loss.
3. The applicant is self-represented. The respondent is represented by their insurer, Insurance Corporation of British Columbia (ICBC).

JURISDICTION AND PROCEDURE

4. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over motor vehicle injury disputes, or "accident claims", brought under section 133 of the *Civil Resolution Tribunal Act* (CRTA). Section 133(1)(b) of the CRTA gives the CRT exclusive jurisdiction over the determination of whether an injury is a "minor injury" under the *Insurance (Vehicle) Act* (IVA). Section 133(1)(c) of the CRTA and section 7 of the *Accident Claims Regulation* (ACR) give the CRT jurisdiction over the determination of liability and damages claims, up to \$50,000.
5. At the time the applicant filed her CRT dispute, there was an ongoing legal challenge about whether sections 133(1)(b) and (c) of the CRTA were constitutional. The British Columbia Supreme Court (BCSC) had ordered that those sections were unconstitutional and no longer in effect. The British Columbia Court of Appeal (BCCA) then granted a partial stay of the BCSC decision, which allowed the CRT to continue resolving claims under these CRTA sections while the challenge was heard at the BCCA.
6. On May 12, 2022, the BCCA overturned the BCSC's decision. This means that the CRT retains jurisdiction to resolve claims under section 133(1)(c) of the CRTA, and exclusive jurisdiction to resolve claims under section 133(1)(b). However, given the

applicant already consented to continuing her dispute at the CRT, nothing turns on the BCCA's decision.

7. Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
8. Section 39 of the CRTA says that the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. The credibility of interested witnesses, particularly where there is conflict, cannot be determined solely by the test of whose personal demeanour in a courtroom or tribunal proceeding appears to be the most truthful. The assessment of what is the most likely account depends on its harmony with the rest of the evidence. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice. I also note that in *Yas v. Pope*, 2018 BCSC 282, at paragraphs 32 to 38, the British Columbia Supreme Court recognized the CRT's process and found that oral hearings are not necessarily required where credibility is an issue.
9. Section 42 of the CRTA says that the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. During the CRT's tribunal decision process, on the respondent's behalf ICBC advised CRT staff that it intended to claim a deduction from the applicant's damages award under the IVA. The IVA prohibits a party from telling the tribunal member details about any deduction until after the tribunal member has assessed damages. CRT staff

informed me that the respondent intended to claim a deduction, but not the type of deduction or the amount.

11. After reviewing the evidence and submissions about damages, I advised the parties through CRT staff of my damages assessment and asked for evidence and submissions about the claimed deductions and the basis for those deductions, which were provided. My decision about deductions is discussed below.

ISSUE

12. The issue in this dispute is whether the applicant is entitled to \$50,000, or some other amount, as compensation for non-pecuniary damages and past income loss.

BACKGROUND, EVIDENCE AND ANALYSIS

13. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities, meaning “more likely than not”. While I have read all of the parties’ evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
14. As noted, it is undisputed that the respondent is 100% responsible for the April 14, 2019 accident. There is also no dispute that the applicant suffered at least some injuries as a result of the accident. The dispute is whether some of the applicant’s injuries were a result of the accident or were pre-existing injuries, the duration of her accident-related injuries, as well as whether she suffered any income loss.
15. In an agreed statement of facts, the parties agreed that the applicant’s injuries do not fall within the definition of a “minor injury” set out in section 101 of the IVA. Given this, the “cap” for minor injuries under the IVA does not apply.
16. Although liability is not disputed, I will first briefly discuss the accident, the details of which are also not disputed. The applicant was in a parking lot, waiting to turn onto 122nd Street. The respondent was directly in front of the applicant, also stopped. A

vehicle attempted to turn left in front of the respondent, so the respondent reversed their vehicle, striking the applicant's vehicle at a low speed.

Non-pecuniary damages

17. The applicant is 51 years old and was 48 at the time of the accident. She is married with children and has worked various jobs in the hospitality industry. She admittedly lives a sedentary lifestyle. As noted, the applicant argues she suffered injuries to her neck, shoulders, right arm and hand, and low back as a result of the accident, which she says are ongoing today. The respondent says the low back injury was pre-existing, and that the right arm and hand injuries are unrelated to the accident. The respondent further says the applicant's neck and shoulder injuries resolved in approximately 8 to 12 months, with some minor lingering pain.
18. The parties provided clinical records and reports from the applicant's general practitioner (Dr. Amarjit Hair), neurologist (Dr. Gurwant Singh), physiotherapist (Pulse Physiotherapy), and chiropractor (Dr. Parminder Khaira), as well as pre-accident records from WorkSafeBC.
19. Although the applicant had an appointment with Dr. Hair on April 15, 2019, the day after the accident, she did not mention the accident at that appointment. On April 16, 2019, the applicant saw Dr. Hair again and advised him about the accident. In his clinical records Dr. Hair noted complaints of neck pain and pain in both shoulders. Dr. Hair further noted painful range of motion in her neck and shoulders. The applicant continued to complain of ongoing pain in her neck and shoulders through 2021. By September 11, 2019, the applicant also started to complain of hand pain including numbness and tingling on the right side, and months later, the left side.
20. Dr. Hair provided 3 GP Reassessment Medical Reports to ICBC, on March 9, 2020, February 5, 2021, and March 21, 2022. The initial assessment report is not in evidence. In the reassessment reports, Dr. Hair noted the applicant's complaints of neck and bilateral shoulder pain, with normal range of motion in both, but with some discomfort. The 2021 report also noted radiating pain to her arms and low back pain.

21. In the most recent report, March 21, 2022, Dr. Hair wrote that the applicant was still complaining of right side neck pain, right shoulder pain with numbness in the arm and right hand, left arm pain, and low back pain. Dr. Hair diagnosed the applicant with right shoulder tendinitis and carpal tunnel syndrome and recommended restrictions on regular work duties.
22. Although the applicant argues her pre-existing back pain was “stable” and “not giving [her] much problems” before the accident, I disagree. Dr. Hair’s pre-accident clinical records show that the applicant complained of ongoing significant low back pain with pain radiating to her legs from at least January 2017, the farthest back Dr. Hair’s records in evidence go. The applicant consistently and regularly attended Dr. Hair’s office with low back and leg complaints, up to the date of the accident. I find her low back pain was a significant issue in the years and months before the April 14, 2019 accident. I find the applicant’s low back pain was pre-existing and will address the effect of that below.
23. The applicant was referred to Dr. Gurwant Singh, a neurologist, to investigate the numbness and tingling she was experiencing in her hands. Dr. Singh performed nerve testing and studies on several occasions, all of which were normal. Dr. Singh diagnosed the applicant with mild right and minimal left median neuropathy at the wrist (also known as carpal tunnel syndrome). Dr. Singh also suspected the applicant may have thoracic outlet syndrome (a disorder that can cause shoulder, neck pain, and numbness in the hands).
24. The applicant attended physiotherapy for her accident-related injuries from May 13, 2019 to February 7, 2020. She stopped attending due to COVID-19 restrictions. The applicant was initially diagnosed with a cervical and thoracic spine strain, and later a grade 2 whiplash associated disorder. The physiotherapist noted the applicant continued to work during treatment. Similar to Dr. Hair’s records, the physiotherapist did not note any complaints about the applicant’s hands until September 16, 2019, after not attending physiotherapy for nearly 2.5 months due to a medical issue unrelated to the accident.

25. The applicant also attended chiropractic treatment with Dr. Khaira for her injuries, starting in July 2020. In a July 22, 2020 Chiropractic Initial Report to ICBC, Dr. Khaira noted the applicant complained of right shoulder and arm pain causing numbness into her fingers, all of which increased after she was laid off due to COVID-19. Dr. Khaira also noted the applicant complained of low back pain radiating into the right leg with numbness into the right foot.
26. In a later May 12, 2021 treatment plan, Dr. Khaira noted that the applicant's current restrictions were due to numbness and tingling in her right arm and hand. In a May 22, 2022 letter, Dr. Khaira noted that, at that time, the applicant's main complaint was neck, right shoulder and arm and hand pain. Without further explanation, Dr. Khaira said that she believed the injuries were a result of the April 14, 2019 accident. In the records, Dr. Khaira noted the applicant had difficulty with household chores like laundry, cooking, cleaning bathrooms, and mopping.
27. There are also voluminous WorkSafeBC records in evidence, the majority of which I find are irrelevant. However, the respondent argues that the records show that the applicant was suffering from low back pain radiating into her right leg for years before the April 14, 2019. I agree with the respondent given the applicant argued to WorkSafeBC as recently as April 2018 that her low back and leg pain that she attributed to a 2014 work incident was still debilitating. There is also mention in the WorkSafeBC medical records of a 2008 right arm, neck and shoulder injury resulting in a thoracic outlet syndrome diagnosis. The applicant does not address this though the respondent raised it.
28. Taking all of the above into consideration, I make the following findings. First, I find the applicant's low back and right leg pain is unrelated to the accident. I say this given her extensive pre-existing symptoms and her general lack of complaint about low back symptoms for some time after the accident. If the applicant had experienced an aggravation of her pre-existing low back pain, I would have expected her to mention it to Dr. Hair as she had done consistently before the accident.

29. Second, I find the applicant has not proven the pain in her right arm, wrist, and hand is related to the April 14, 2019 accident. I say this because there has been no reliable opinion about its cause, which Dr. Singh says may be thoracic outlet syndrome, a potentially pre-existing condition. Additionally, the applicant did not make any complaints about her arms, wrists, or hands until at least September 2019, 5 months after the accident occurred and shortly after she was hospitalized and underwent surgery for a heart condition.
30. I put little weight on Dr. Khaira's opinion that all the applicant's complaints are related to the accident. First, because Dr. Khaira did not explain that opinion in any way. Second, because it is unclear whether Dr. Khaira was aware of the applicant's pre-existing injuries or past diagnoses. I also note that no other medical professional provided such an opinion.
31. So, I find that the injury the applicant suffered as a result of the subject accident was a moderate whiplash injury to her neck and right shoulder, which is not significantly disputed. I also find the applicant's pain has been ongoing for over 3 years, though her range of motion is full with some discomfort.
32. The applicant says she struggles to work and perform household chores due to her neck and back pain. She says she has to use pain medication regularly and that makes her feel unwell. The applicant further says her ongoing pain causes her to be irritable with her family, and she socializes less with her friends. The applicant seeks non-pecuniary damages in the range of \$43,000 to \$45,000.
33. The respondent submits the applicant should be awarded \$25,000 for non-pecuniary damages. Although they admit the applicant's injuries are not "minor injuries", they say the accident was minor in nature and the applicant's claimed injuries exceed what would be expected from such an accident. In support of their position, the respondent refers to the decision *Ryan v. Klakowich*, 2011 BCSC 835. In *Ryan*, the plaintiff was injured in a motor vehicle accident, suffering moderate soft tissue injuries to her neck and shoulder. The court found that the plaintiff was a poor historian about her pre-existing injuries and at times minimized her significant medical history. The court

found the plaintiff exaggerated the extent of her accident injuries. She was awarded \$25,000 in non-pecuniary damages (\$31,895 in 2022 dollars)¹. Here, I find the applicant similarly minimized her pre-accident medical history at times. However, I do not find the applicant is exaggerating the impact her overall injuries have on her life, whether from the accident or pre-existing. I accept that it is likely difficult for the applicant to separate those injuries and their effect on her.

34. In *Stone v. Avila*, 2022 BCSC 319, the 45-year-old plaintiff was involved in a minor rear-end collision. The court found he suffered mild to moderate neck and upper back soft tissue injuries, and a later shoulder sprain during rehabilitation. By approximately 2 years later, the court found the plaintiff had good range of motion with some mild pain, and that he would continue to have some mild pain with strenuous activity. The court further found that the plaintiff's accident injuries did not impact his ability to work and had minimal impact on his recreational and social activities. He was awarded \$30,000 in non-pecuniary damages.

35. I find \$30,000 is an appropriate non-pecuniary award given the applicant's accident injuries, their duration, and their impact on the applicant's life.

Income loss

36. At the time of the accident the applicant was not employed. However, she was set to start a new job as a housekeeper at the Ramada Inn on April 18, 2019, 4 days after the accident. The applicant says she worked as a housekeeper from then until March 2020 when she was laid off due to COVID-19 closures. She started at \$13 per hour and increased to \$14.35.

37. The applicant says although she continued to work at the Ramada Inn after the accident, she was unable to work full time due to her accident injuries. She estimates losing between \$5,000 to \$7,000 between April 14, 2019 and March 2020.

¹ <https://www.bankofcanada.ca/rates/related/inflation-calculator/>

38. The problem for the applicant is that there is insufficient evidence showing she lost any income as a result of her accident injuries. Although she says she was unable to work full time, a letter from her employer at the Ramada Inn said her hours were not set and instead fluctuated between 20 and 40 hours per week. Additionally, the applicant was off work from June 28, 2019 to the end of September 2019 due to a heart issue not related to the motor vehicle accident.
39. The applicant has not explained how she alleges she sustained the \$5,000 to \$7,000 loss, such as days she missed work or times she worked part time when full time work was available. To the extent the applicant alleges she is entitled to compensation for missed work while she was on leave due to her heart surgery, I disagree and do not award any income loss damages for that time period. On balance, I find the applicant has not proven any income loss from her time at the Ramada Inn.
40. Next, the applicant worked as a breakfast server with Best Western from July to December 2021. She says she left this position because it increased her neck, shoulder, and right arm pain. However, the applicant did not specifically claim any income loss resulting from this job, or any subsequent jobs. Additionally, Dr. Khaira says the applicant's ongoing limitations relate mostly to her right arm and hand, which I have found are unrelated to the April 14, 2019 accident.
41. In summary, I find the applicant has not proven any income loss, so I dismiss this aspect of her claim.

Deductions

42. On January 26, 2021, on the respondent's behalf ICBC paid the applicant \$5,500 towards her damages claim. The respondent asks that this amount be deducted from the applicant's award for non-pecuniary damages. The respondent did not provide any submissions on what legal basis the \$5,500 should be deducted.
43. The applicant admits already receiving \$5,500 for general damages, but says her injuries are significant and her award should not be reduced. She also says the

\$5,500 should go towards offsetting her “time and expense in preparing this file”. I address the applicant’s claim about “time spent” below.

44. There are limited circumstances in which I can deduct from my award for damages, I find none of those circumstances apply here.
45. First, to the extent ICBC argues the \$5,500 should be deducted as a pre-litigation payment under Part 9 of the IVA, I disagree. Section 108 of the IVA allows ICBC to offer pre-litigation payments, but the offer must be made in writing and contain a statement that the offer is made under Part 9 of the IVA. ICBC has not provided any evidence that it complied with section 108. So, I find the \$5,500 was not a pre-litigation payment which could be deducted from the applicant’s award of damages under section 112 of the IVA.
46. Second, to the extent ICBC argues the \$5,500 should be deducted under section 83 of the IVA, I also disagree. I find the payment does not meet the definition of a “benefit” under section 83(1).
47. As noted, despite my request for submissions about the applicable deductions, ICBC did not provide any submissions on what legal basis the amount should be deducted. ICBC is a sophisticated litigant and should know what is required under the IVA, including what is required to justify any claimed deductions. Here, I find it has not proven the respondent is entitled to any deductions. So, I make no order for deductions.

SUMMARY

48. I award the applicant \$30,000 for non-pecuniary damages. I dismiss the applicant’s claim for past income loss.
49. Pre-judgment interest and reimbursement for tribunal fees and dispute-related expenses are also payable to the applicant, as discussed below.

FEES, EXPENSES AND INTEREST

50. Further to section 2 of the *Court Order Interest Act*, pre-judgment interest must not be awarded on non-pecuniary damages resulting from personal injury, or on costs (CRT fees and dispute-related expenses). So, I make no award for pre-judgment interest.
51. Under section 49 of the CRTA, and the CRT rules, a successful party is generally entitled to the recovery of their tribunal fees and dispute-related expenses. As the applicant was successful, she is entitled to reimbursement of her paid tribunal fees, totaling \$175. I dismiss the respondent's claim for tribunal fees.
52. The applicant also claimed dispute-related expenses for "getting reports, mileage to doctor's appointments, and the cost of preparing this claim". First, mileage would be considered special damages (out-of-pocket expenses) which is a substantive claim for damages, not a dispute-related expense. In any event, the applicant provided no evidence or submissions in support of such a claim. Further, the applicant did not specify what amount she was claiming for any records she produced, or for her "cost of preparing this claim", nor did she provide any receipts or invoices in support. So, I dismiss her claim for dispute-related expenses.

ORDERS

53. Within 30 days of the date of this decision, I order the respondent, Amit Kumar, to pay the applicant, Kamaljit Masyana, a total of \$30,175, broken down as follows:
- a. \$30,000 in damages, and
 - b. \$175 in tribunal fees.
54. The applicant is also entitled to post-judgment interest under the *Court Order Interest Act*.

55. Under section 57 and 58 of the CRTA, a validated copy of the CRT's order can be enforced through the Supreme Court of British Columbia or the Provincial Court of British Columbia if it is under \$35,000. Once filed, a CRT order has the same force and effect as an order of the court that it is filed in.

Andrea Ritchie, Vice Chair