Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2016 ONFSCDRS 149

FSCO A12-001230

BETWEEN:

IVETA CERVENAKOVA

Applicant

and

TD GENERAL INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Jessica Kowalski

Heard: By written submissions completed October 14, 2015

Appearances: Gary Mazin for Mrs. Cervenakova
A. Sandy Williams and Thomas Hudak for TD General Insurance Company

Issues:

In a decision dated June 30, 2015, I dealt with Ms. Cervenakova's claims for statutory accident benefits under the *Schedule*[1] arising from a motor vehicle accident on May 11, 2010. I dismissed the application for arbitration on the basis that the applicant's oral evidence was completely inconsistent with the medical and documentary evidence filed, that her testimony lacked credibility, and that her expert medical evidence was unreliable because of her failure to disclose her significant pre-accident medical history to her many assessors, instead attributing all of her long-standing complaints to the accident.

[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

The Insurer, TD General Insurance Company ("TD General") seeks an order for its expenses and disbursements totalling $166,613.39[2] against the applicant and/or her lawyer personally.

Result:

1. Mrs. Cervenakova shall pay to TD General expenses totalling $49,190.13. This amount represents fees of $30,256.80[3] plus disbursements of $18,933.33 inclusive of HST.

2. Mr. Mazin shall pay TD General the balance of its expenses of this arbitration fixed in the amount of $6,051.36.

EVIDENCE AND ANALYSIS:

TD argues that the expenses should be paid by the applicant and/or her lawyer, Mr. Gary Mazin, personally, because of the conduct of the applicant and her counsel before and during the hearing which it says tended to prolong the proceeding; the fact that the applicant maintained unmeritorious claims beyond the start of the hearing; the need for extensive written submissions; and the length of the hearing.

Section 282(11) of the *Insurance Act* allows an arbitrator to award all or part of such expenses to the maximum set out in the regulations.[4] Subsection 282(11.2)(c) of the *Insurance Act* provides that an arbitrator may make an order requiring a representative to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or conduct.

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[2] Fees of $105,568.17 plus disbursements of $41,877.31 plus HST.

[3] This amount reflects a deduction of the expenses payable by her counsel personally ($36,308.16-$8,068.-$6,051.36= $30,256.80).

[4] *Insurance Act*, R.S.O. 1990 c.I.8, as it read immediately before being amended by Schedule 3 to *the Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Regulation 664, R.R.O. 1990, as amended.

In making an award of expenses, an arbitrator shall consider only the criteria set out in the Expense Regulation.[5] Those criteria are:

(a) each party's degree of success in the outcome of the proceeding;
(b) any written offers to settle made in accordance with Rule 76;
(c) whether novel issues are raised in the proceeding;
(d) the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;
(e) whether any aspect of the proceeding was improper, vexatious or unnecessary;
(f) whether the insured person refused or failed to submit to an examination as required under section 42 of the *Schedule* or refused or failed to provide any material required to be provided by subsection 42(10); and,
(g) whether the insured person refused or failed to submit to an examination as required under section 44 of the *Schedule*, or refused or failed to provide any material required to be provided under subsection 44(9).

The only criteria relevant to this arbitration are the insurer's degree of success, pre-arbitration offers to settle, as well as the conduct of the applicant's representative that tended to prolong, obstruct or hinder the proceeding and whether any aspect of the proceeding was improper, vexatious or unnecessary.

The insurer was wholly successful in all issues of the arbitration.

The insurer attempted to resolve the matter without a hearing and served offers in accordance with Rule 76 to settle that were far more favourable to the applicant than the outcome of the arbitration. In the month before the hearing, the insurer made two offers that went unanswered. The applicant's failure to respond to the insurer's offers forced the insurer (and indeed the

[5] Rule 75 of the *Dispute Resolution Practice Code* states that the adjudicator will only consider the criteria referred to in the Expense Regulation found in Section F of the *Code*.

applicant) to prepare for arbitration which, until days before the start of hearing, included issues that were ultimately withdrawn. The failure by the applicant and/or her counsel to respond to the insurer's offers suggests that there was little preparation undertaken before the arbitration hearing. Some meaningful preparation before the hearing would have gone a long way to at least narrowing the issues for arbitration and condensing the documents the parties attempted to file, if not resolving the matter entirely. The apparent lack of preparation and focus affected the hearing itself, causing delays over missing and inconsistent files and in the examination of witnesses.

It is the responsibility of the applicant to clearly set out her claims in dispute, and she had ample time to do so in the many months before the hearing. By the conclusion of the hearing, only the claim for non-earner benefits remained in its original form, the others having been withdrawn or substantially narrowed by the start of, and during, the hearing itself.

There were two pre-hearing discussions in this case in the two years before the hearing (one on June 26, 2012 and another on July 22, 2013), designed in part to identify the issues in dispute. At the pre-hearing on June 26, 2012, the applicant undertook to provide particulars of what was then a bulk claim for $23,932.58 in medical benefits. Up to one week before the arbitration hearing, the applicant maintained claims for:

i. medical benefits in the amount of $19,044.09 for treatment from Osler Rehabilitation, still without particulars;
ii. non-earner benefits;
iii. housekeeping and home-maintenance benefits beyond 104 weeks post-accident;
iv. attendant care benefits beyond 104 weeks post-accident;
v. costs of examinations for a rebuttal for orthopaedic assessment from Assessment Direct in the amount of $900.00;
vi. ambulance costs;
vii. interest for overdue payments to Assessment Direct totalling $488.22;
viii. a special award, interest and expenses.

Despite her undertaking from two years before to clarify her claim for medical benefits, it was not until five days before the hearing,[6] that the applicant reduced the claim from what was, at

[6] By letter dated September 25, 2013.

that point, $19,044.09 in treatment, to $1,444.13 which TD General gratuitously resolved with the service provider.

On the first day of the hearing, the applicant reduced her claims for housekeeping and attendant care benefits to the two-year statutory limit.

On the sixth day of hearing, after her testimony during cross-examination that she did not take an ambulance to the hospital after the accident, the applicant's counsel withdrew the claim for ambulance services.

The result of this lack of focus and attention to the claim before the hearing was unnecessary preparation on extraneous issues, and an attempt by the parties to file approximately 18 large (3-inch) binders of documents between them on the first day of the hearing that had to be deconstructed with each exhibit being admitted one by one with the result that many documents were duplicated, irrelevant and/or related to issues that were ultimately withdrawn.

I find that there were multiple instances during the hearing that the applicant and her counsel conducted themselves so as to prolong the hearing, resulting in unnecessary expenses. Throughout her own examination, the applicant remained evasive on even simple matters. She steadfastly denied her pre-accident medical history even in the face of contradictory documentary evidence, necessitating multiple documents be put to her many times and went to great effort to attribute limitations in her function to the accident that long pre-dated it. In the circumstances, however, I find it is unfair to place the blame for delays in the hearing solely at the feet of the applicant, and that her counsel should bear responsibility to compensate the insurer for a portion of TD's expenses for the conduct of the matter leading up to and during the hearing itself.

While the applicant had the right, without question, to bring her application to a hearing, it was incumbent on her counsel, as it is on any counsel, to conduct the file in a matter that is as efficient and professional as possible. Part of that efficiency is achieved through adequate pre-hearing preparation, which in this case was lacking.

Some examples of the delay brought on by the conduct of the applicant's counsel include, but are not limited to, the following;

i. failure, as noted, to give meaningful consideration to the issues in dispute until the day of, and, in the case of the ambulance costs, well into the hearing. Preparation would have served to narrow the issues in a timely way, saving both parties preparation and attendance time. Preparation would also have avoided time spent at the hearing deconstructing the overwhelming number of extraneous, duplicative documents;
ii. repeatedly asking leading questions on contentious issues after multiple objections and warnings; questioning on documents that were not organized or numbered consistently with exhibits and therefore confusing to witnesses and, in the case of the cross-examination of the adjuster, attending without a copy of the log notes on which he intended to cross-examine;
iii. scattered examinations necessitating warnings to come prepared to question in a more focused manner;
iv. attempting to declare an applicant's witness (the family doctor) a hostile witness without support or foundation when answers to questions were undesirable or unfavourable to the applicant's case;
v. failing to put the Commission on notice that audio visual equipment would be required;
vi. wasting time for recesses to photocopy documents that ought to have been copied before the hearing.

Perhaps most avoidable was the delay associated with the manner in which applicant's counsel treated an occupational therapist whom the applicant summonsed to attend over two days of cross-examination for the purpose of impeaching her evidence because of her disciplinary history.[7] The witness attended under very difficult personal circumstances each day with one of her two severely disabled children whom she could not leave unattended. Mr. Mazin was

[7] The witness had completed an in-home assessment of the applicant. She had, in the past, admitted to misconduct before her regulatory body when her employer altered her résumé without her knowledge to include a certification that she had not yet completed. She had completed an in-home assessment of the applicant.

initially unwilling to ask questions of the witness with her son present (in a wheelchair beside her) and required lengthy recesses to consider whether he wanted to cross-examine her and to prepare himself to do so under the circumstances. When he decided to go ahead, he initially stood with his back to the witness and her son. His conduct in making multiple attempts to shield her son from his view delayed the start of her cross-examination, disrupted her cross-examination and required her to attend for a second day, an attendance which was wholly avoidable.

What is the appropriate quantum?

In determining the appropriate quantum of expenses, the objective is to fix an amount that is fair and reasonable given the number of issues, their complexity and the amounts in dispute. In so doing, a pragmatic, broad-stroke approach (rather than a line-by-line assessment) is frequently favoured using a ratio in the range of 1:1 to 4:1 for pre-hearing preparation time to hearing time. I see no reason to depart from that approach in this case and, for the reasons that follow, I find a ratio of 2:1 is appropriate and takes into account the substantial number of issues that were not resolved until the morning of the first day of hearing or later.

I find the number of hours claimed for expenses relating to the arbitration to be excessive. Even before most were withdrawn or narrowed, the issues in this case were straightforward. TD General was represented by two counsel at the hearing (Mr. Hudak, senior counsel, and Mr. Williams, junior counsel), and seeks its expenses for both.[8] While there is nothing inappropriate or unusual about having two representatives, I am not satisfied that the concurrent involvement of two counsel was necessary in this case or something that the applicant should be required to pay for. I agree that although the issues were not properly narrowed or identified (which caused delays and unnecessary preparation), they were nevertheless neither complex nor novel. I am not prepared to award fees for two counsel.

[8] Plus time for work and research completed before the hearing by other counsel in their office and support staff.

The hearing took place during three weeks over the course of five months. In total, there were 12 days of hearing. I estimate about 96 hours of hearing time[9]. At a ratio of 2:1, I award a total of 288 hours for fees.

TD claims the maximum legal aid rate of $150.00. Rule 78 of the *Dispute Resolution Practice Code* (the "*Code"*) allows an adjudicator, where justified, to award a higher amount for legal fees up to a rate of $150.00 per hour to an insured person only. I am prepared to award the Tier 3 Legal Aid rate for Mr. Hudak's year of call[10] to all 288 hours. Because the rates change annually; because the pre-hearing work in this case took place over three years; and, in keeping with a broad strokes approach, I have calculated the average Tier 3 rate for 2012, 2013 and 2014[11] and applied it to all 288 hours. The result is fees of $36,308.16 (based on an average hourly rate of $126.07).

From this amount, I find it appropriate to deduct two days' worth of time, which I find in the aggregate fairly represents the time wasted by the conduct and delays of applicant's counsel. At a ratio of 2:1, the result is $6,051.36, which represents the portion of TD's fees that I find applicant's counsel should pay.

The total fees payable by the applicant are $30,256.80. The total fees payable by applicant's counsel personally are $6,051.36. These sums shall be inclusive of HST.

Disbursements

Permissible disbursements and maximum amounts are provided for in the Schedule to the *Expense Regulation*.

TD General claims disbursements of $41,877.31 plus HST.

[9] Based on an eight hour hearing day.
[10] 2001.
[11] Legal Aid lawyer rate Tier 3 for 2012 ($117.85), 2013 ($123.94) and 2014 ($136.43).

Of the amount claimed for disbursements, $3,000.00 represents TD General's filing fee, and $5,839.84 represents its costs of having a court reporter attend at the hearing.[12] These disbursements are not recoverable. While the filing fee may be awarded where an applicant has refused or failed to provide material required for an insurer's examination,[13] there is no evidence that that applies here. As for reimbursement of court reporter fees, this is not provided for in the Schedule, and it is an item that has been consistently refused.[14] I refuse it in this case as well.

I have also refused or reduced the following disbursements as not in compliance with the Schedule to the Expense Regulation (the "Schedule"):

i. $334.89 for a car rental (for the first week of hearing) refused. There is no provision for this disbursement in the Schedule (to the Expense Regulation);
ii. $138.00 for parking refused. The Schedule does not provide for these items for a local hearing;
iii. $14,831.25 for Dr. Gallimore's account reduced to $2,100.00 ($1,600.00 attendance plus $500.00 for preparation). The maximum amount that may be awarded for the attendance of an expert witness is $200.00 per hour of attendance, up to a maximum of $1,600.00 per day. The amount of the expenses paid by or on behalf of the insured person or the insurer to an expert witness for preparation for a hearing at which the witness testifies may be awarded, to a maximum of $500.00. I have only allowed the maximum for one day of attendance and preparation, although two were claimed (one day having been cancelled);
iv. $6,000.00 for Dr. Bereznick's account reduced to $2,100.00 for the same reason as Dr. Gallimore's account.

[12] TD General's Schedule "B" of disbursements lists two invoices for $664.44 (invoice #31237 and invoice # 33309. Of the attached invoices, #33309 is for $517.54, which is the amount reflected in my calculation. All other court reporter's invoices are for $517.54 each.

[13] Section 7 of the Schedule to the *Expense Regulation.*

[14] See, for example, *Ananthamoorthy and TD home and Auto Insurance Company* (A06-B 001533, March 21, 2007); *Tyrell and RBC General Insurance Company* (FSCO A05-002463, February 19, 2008); *Masroor and State Farm Mutual Automobile Insurance Company* (FSCO A07-002725, March 9, 2010); and, *Kingsway General Insurance Company and Pereira* (FSCO Appeal P-05-00031, September 17, 2007)

The applicant has not disputed the disbursements, and, except for the items noted above, I otherwise allow the disbursements claimed. I therefore fix disbursements at $18,933.33.

Jessica Kowalski Arbitrator	May 20, 2016 Date

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BETWEEN:

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TD GENERAL INSURANCE COMPANY

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Regulation 664, as amended, it is ordered that:

1. Mrs. Cervenakova shall forthwith pay to TD General Insurance Company a portion of its expenses of this arbitration proceeding fixed in the amount of $49,190.13 (inclusive of disbursments and applicable taxes).
2. Mr. Mazin shall forthwith pay to TD General Insurance Company a portion of its expenses fixed in the amount of $6,051.36.

Jessica Kowalski
Arbitrator

May 20, 2016
Date