



FSCO A15-009166

BETWEEN:

HERBY GRAVELINE

Applicant

and

INTACT INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

**Calculation error on page 8 and Order corrected on December 17, 2018 in accordance with the Dispute Resolution Practice Code and section 21.1 of the Statutory Powers Procedure Act.*

Before: Anne Sone

Heard: By written submissions and teleconference calls. Final written submissions were received on May 1, 2018.

Appearances: Mr. Graveline representing himself
Sabina Arulampalam for Intact Insurance Company

Issues:

The Applicant, Herby Graveline, was injured in a motor vehicle accident on November 11, 2009. In a decision dated July 24, 2017, Arbitrator King dealt with his claims for statutory accident benefits under the *Schedule*.¹ She made the following orders, while reserving on the issue of expenses:

1. Mr. Graveline is not entitled to receive a non-earner benefit, in the amount of \$185.00, from May 11, 2009 to date and ongoing.

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

2. Intact is not liable to pay a special award as it did not unreasonably withhold or delay payments to Mr. Graveline.
3. Intact is not liable to pay Mr. Graveline's expenses in respect of the arbitration.
4. Mr. Graveline is not entitled to interest as there is no overdue payment of benefits.

The issue in this further hearing is:

1. Is Intact Insurance Company entitled to expenses incurred in respect of this arbitration hearing, and if so, in what amount?

Result:

1. Intact Insurance Company is entitled to its expenses incurred in respect of this arbitration in the amount of \$14,362.90, inclusive of fees, disbursements and H.S.T.

EVIDENCE AND ANALYSIS:

Entitlement to Expenses:

Pursuant to subsection 282(11) of the *Insurance Act*:

The Arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer all or part of such expenses incurred in respect of an Arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.

The criteria an adjudicator shall consider when deciding whether to award expenses are found in *Ontario Regulation 664*, in Rule 75.2 and Section F of the *Dispute Resolution Practice Code* (Fourth Edition — Updated January 2014). I will discuss each of these criteria in order.

(a) Each party's degree of success in the outcome of the proceeding:

Intact Insurance Company (Intact) was entirely successful in the arbitration. In his submissions regarding this expense hearing, Mr. Graveline set out reasons why he disagreed with Arbitrator King's decision in this matter. As Arbitrator King's decision was rendered on July 24, 2017, and was not appealed, I do not have jurisdiction to deal with these submissions.

(b) Any written offers to settle made in accordance with Rule 76:

On July 15, 2016, Intact made a written Offer to Settle, in the amount of \$15,000. On August 3, 2016, Mr. Graveline wholly rejected Intact's Offer to Settle.

(c) Whether novel issues are raised in the proceeding:

Non-earner benefits were the only substantive claim in this case. There were no novel issues raised in this proceeding.

(d) The conduct of a party or party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders:

The hearing was originally scheduled for August 23 and 24, 2016 in Sudbury. Mr. Graveline testified for these two days. As a result, Intact was forced to cancel the attendance of its two expert witnesses, on short notice; it incurred expenses for these cancellations.

On the afternoon of August 24, 2016, given that the parties had travelled to Sudbury, Arbitrator King requested both parties attend again on August 25, 2016. This would allow Intact to conduct the cross-examination of Mr. Graveline, and Arbitrator King to hear Intact's submissions and expert witnesses, as well as the closing statements of both parties.

Although the hearing had not been scheduled for a third day, Intact made arrangements to attend, and to have its two expert witnesses attend on August 25, 2016 for the last day of the hearing.

On August 25, 2016 both parties attended for the continuation of the hearing. Mr. Graveline again proceeded to testify all day. As a result, Intact was again forced to cancel the attendance of its two expert witnesses; and again incurred expenses for this.

On April 4, 5 and 6, 2017, both parties attended another time in Sudbury for the continued hearing.

On April 5, 2017, Arbitrator King advised both parties that, after having heard Mr. Graveline's evidence for a total of five days, she would not require the testimony of Intact's expert witnesses to render her decision. She then invited Intact to present brief submissions, and heard the closing statements of both parties on April 6, 2017.

Intact submits that Mr. Graveline's conduct obstructed, hindered and prolonged the hearing process. Intact says that a hearing that was initially scheduled for two days based on one substantive issue in dispute ultimately resulted in Mr. Graveline providing five days of testimony with no relevant documents, medical opinions, or lay witnesses to support his claim for non-earner benefits.

(e) Whether any aspect of the proceeding was improper, vexatious or unnecessary:

Intact did not make any submissions on this point. In his written submissions, Mr. Graveline set out reasons why he disagreed with Arbitrator King's decision. As set out above, I do not have jurisdiction to deal with these submissions.

(f) Whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act or refused or failed to provide any material required to be provided by subsection 42(10) of that regulation.

Not applicable to this proceeding.

(g) Whether the insured person refused or failed to submit to an examination as required under section 44 of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act, or refused or failed to provide any material required to be provided under subsection 44 (9) of that regulation.

Not applicable to this proceeding.

Based on the above analysis, and especially on the outcome where Intact was entirely successful in the preliminary issue hearing, I find that Intact is entitled to its expenses of this proceeding. I also note that Mr. Graveline's conduct substantially prolonged the hearing, and that he turned down a written Offer to Settle in accordance with Rule 76 that exceeded his outcome.

Amount of Expenses:

Statutory Framework:

The amount of expenses I may award is set out in section 3 of the Schedule to the Expense Regulation (Dispute Resolution Expenses) pursuant to subsection 282(11) of the *Insurance Act*. It states as follows:

- 3(1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
 1. For all services performed before an arbitration, appeal, variation or revocation hearing.
 2. For the preparation for an arbitration, appeal, variation or revocation hearing.
 3. For attendance at an arbitration, appeal, variation or revocation hearing.
 4. For services subsequent to an arbitration, appeal, variation or revocation hearing.
- (2) The number of hours for which legal fees may be awarded shall be determined by the arbitrator, having regard to the criteria set out in subsection 12(2) of this Regulation.
- (3) The maximum amount that may be awarded for legal fees is the amount calculated using the hourly rates set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission or the Financial Services Commission of Ontario, as it may be amended from time to time.

Insurer's Claim for Expenses:

In a Bill of Costs dated February 8, 2018, Intact claimed \$34,326.91, including H.S.T., for fees and \$8,270.18, including H.S.T., for disbursements.

Analysis and Findings:

The overriding consideration in fixing arbitration expenses for legal fees is reasonableness.

Mr. Graveline did not provide any submissions directly relating to Intact's Bill of Costs, except to allege it was fraud. He did not provide any evidence to support this allegation. Accordingly, I give this allegation no weight.

Fees:

In terms of the hearing time, Arbitrator Makepeace confirmed in *Henri and Allstate Insurance Company of Canada*,² that "a line-by-line assessment of the expenses claimed is not appropriate. Rather, the Arbitrator should make a global assessment of reasonable expenses."

As a rule of thumb, Arbitrators have allowed expenses for preparation for hearing time to the actual hearing time on a ratio of between 1:1 and 4:1.

As mentioned previously, this hearing only dealt with the issue of non-earner benefits. It was originally scheduled for two days. Mr. Graveline's testimony was not completed within the two days. As a result, three additional days were scheduled. Mr. Graveline also testified during these three days. As noted above, Mr. Graveline's conduct considerably lengthened the hearing.

The court reporter's records show that Intact's counsel spent 25.82 hours at the hearing. I am prepared to allow a ratio of 2 hours for preparation for every hour of hearing time. This was not an extremely complicated case. But more time was required, as Mr. Graveline was unrepresented. This would allow Intact to have compensation for a total of 77.46 hours.

² (OIC A-007954, August 8, 1997).

Ms. Sabina Arulampalam prepared the majority of the case, and attended at the pre-hearing, settlement conference and hearing. Accordingly, in connection with its legal fees, I allow Intact 77.46 hours of Ms. Arulampalam's time at her Legal Aid rate of \$122.78 per hour. This comes to \$9,510.54. I also allow H.S.T. in the amount of \$1,236.37. This totals \$10,746.90 for fees, including H.S.T.

Disbursements:

Intact prepared and called two experts, Dr. Veluri and Dr. Cisa. It claimed \$5,932.50, including H.S.T., it had incurred for this disbursement.

Under subsection 5(3) of the *Dispute Resolution Expenses Regulation*³, the maximum amount that may be awarded for the attendance of an expert witness is \$200 per hour of attendance up to a maximum of \$1,600 per day.

Under subsection 5(4) of the same Regulation, \$500 is the maximum amount that may be awarded for preparation of an expert witness at which the witness testifies.

After Mr. Graveline testified for five days, Arbitrator King advised Intact that she would not require its experts to testify at the hearing in order to render her decision; however, Intact was forced to incur expenses for cancelling their attendance on short notice on two occasions.

I am prepared to order \$800 for each day Dr. Veluri and Dr. Cisa were available to testify, but were unable to do so, due to Mr. Graveline's prolonging the hearing. This comes to \$3,200 plus H.S.T. of \$416 for a total of \$3,616.

Since these witnesses did not actually testify, I am not ordering their preparation costs.

I find that the remaining disbursements totaling \$2,337.68, including H.S.T., are in accordance with the *Expense Regulation*, and therefore payable.

³ Schedule to R.R.O. 1990, Reg. 664, made under section 282 (11) of the *Insurance Act*, as amended.

Conclusion:

For the reasons set out above, I order Mr. Graveline to pay Intact its expenses in respect of this arbitration proceeding, fixed at \$16,700.58, inclusive of fees, disbursements and H.S.T.

November 27, 2018

Anne Sone
Arbitrator

Date

**Financial Services
Commission
of Ontario**

**Commission des
services financiers
de l'Ontario**



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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. Mr. Graveline pay Intact its expenses in the amount of \$16,700.58, inclusive of fees, disbursements and H.S.T.

Anne Sone
Arbitrator

November 27, 2018

Date