

Henry v. Personal Insurance Co. of Canada, [2015] O.F.S.C.D. No. 290

Ontario Financial Services Commission Insurance Decisions

Ontario Financial Services Commission

Panel: Harvey Savage, Arbitrator

Heard: July 2, 2015 by written submissions.

Decision: October 19, 2015.

FSCO No. A13-010654

[2015] O.F.S.C.D. No. 290

Between Shirley Henry, Applicant, and Personal Insurance Company of Canada, Insurer

(29 paras.)

Appearances

Mr. Jacek Maludzinski for Ms. Shirley Henry.

Mr. John P. Desjardins for Personal Insurance Company of Canada.

DECISION ON EXPENSES

Issues:

1 The Applicant, Ms. Shirley Henry, claimed to be injured in a motor vehicle accident on December 2, 2010 and sought accident benefits from Personal Insurance Company of Canada ("Personal"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and the Applicant, through her representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act, R.S.O. 1990, c. 1.8*, as amended.

2 I conducted a Preliminary Issue Hearing on February 4, 2015. The purpose of this Hearing was to determine if the Applicant was involved in an "accident" on December 2, 2010 and whether the Applicant was thereby entitled to claim accident benefits as a result of the alleged accident.

3 On April 15, 2015, I issued my written decision. I found that the Applicant was not involved in an "accident" within the meaning of the *Schedule*. I also stated in my Order that if the parties were unable to agree on the amount of the expenses, they were invited speak to me in accordance with Rule 79 of the *Dispute Resolution Practice Code* ("the Code").

4 Counsel for Personal requested an Expense Hearing as the parties were unable to resolve the issue of expenses.

5 Both parties agreed to the proposal that my Order be conducted through written submissions and timetables were set. These were complied with.

6 The issue in this Expense Hearing is:

1. Is the Applicant required to pay Personal its expenses of the Arbitration proceedings, and if so, in what amount?

Result:

7

1. The Applicant is required to pay Personal its expenses in respect of the Arbitration proceedings, fixed in the amount of \$12,777.85 (inclusive of fees, disbursements and any applicable taxes).

EVIDENCE AND ANALYSIS:

8 Personal is seeking expenses in the total amount of \$17,207.75 (inclusive of HST), comprising of \$11,443.65 in fees and \$5,764.10 in disbursements.

9 Personal supports its claim for expenses on Rule 75.2 of the *Code* and more specifically, on clauses (a), (b) and (c) of that Rule. It references Section 3 of the *Expense Regulation* under Regulation 664 which states that legal fees may be awarded for all services performed before *inter alia* an Arbitration; for preparation toward same; for attendance at same; and for services subsequent to an Arbitration Hearing (but related thereto).

10 Personal asserts two points in particular: that it was completely successful on all matters at issue in the outcome of the proceeding; and that, pursuant to Rule 75.2(e), the Arbitrator should find that the Applicant pursued an improper, vexatious and unnecessary proceeding.

11 The Applicant submits the following points: the Hearing on the merits was neither novel nor complex; the Insurer only called one witness to the three provided by the Applicant; although accepting that a 3:1 ratio of hearing time could be appropriate, the ratio should have been based on the 8 hours of actual hearing time; the Insurer is not entitled to recovery of its Arbitration fee nor is it entitled to the disbursements for a Network Reporting & Media Official Examiner or recovery of fees for a court reporter from ASAP Reporting Services.

Entitlement to Expenses

12 Subsection 282(11) of the *Insurance Act* provides as follows:

Expenses

- (11) 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. 1996, c.21, s. 38(4).

13 Regulation 664, R.R.O. 1990, in turn, provides:

12 (1) The expenses set out in the Schedule are prescribed for the purpose of subsection 282(11) of the Act. [R.R.O. 1990, Reg. 664, s.12.](#)

(2) An arbitrator shall, under subsection 282(11) of the Act, consider only the following criteria for the purposes of awarding all or part of the expenses incurred

in respect of an arbitration proceeding: (emphasis added)

1. Each party's degree of success in the outcome of the proceeding.
2. Any written offers to settle made in accordance with subsection (3).
3. Whether novel issues are raised in the proceeding.
4. 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.
5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.
6. 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 refused or failed to provide any material required to be provided by subsection 42(10) of that regulation.
7. Whether the insured person refused or failed to submit to an examination or failed to provide any material required to be provided under subsection 44(9) of that regulation. O.Reg. 275/03 , s.4; O.Reg. 548/05, s.1; O. Reg. 36/10, s.2.

Determinative Issues

14 The determinative issues in this Expense Hearing are the degree of success, whether any aspect of the proceeding was improper, vexatious or unnecessary, and whether the Insurer should receive reimbursement of its filing fees and court recording and transcription costs.

Degree of Success

15 The Applicant does not dispute that the Insurer was completely successful as submitted by the Insurer. The dispute is over the quantum to be awarded. The Applicant states that the actual Hearing was eight hours. In fact, the entire Hearing took place within the space of one day. She submits further that the Hearing was not overly complex as evidenced both by the limited hearing time duration and the calling of a single witness by the Insurer.

16 The Applicant therefore submits that a more appropriate breakdown should reflect that only the two lawyers from the Insurer's Counsel's firm were present at the Hearing for the Insurer - Mr. Desjardins and Ms. Rajae. Thus, assessed on the basis of their combined hearing time, which on a 3:1 ratio proposed by the Applicant, would allow them \$3,770.88 and \$3,016.64, respectively. When one adds the time for Magdalena Fish and the law clerk in the amount of \$291.42, the total equates to \$7,078.94 for fees on the accepted adjusted basis of the legal aid rates contained in the *Schedule*.

17 In contrast, the Insurer submits that the Hearing was made complex by the fraudulent claim made by the Applicant thus requiring the need for extensive preparation, and further, that the requested written submissions on expenses should be added on to hearing time instead of preparation since they extended the Hearing.

18 I accept the Insurer's submission that preparation for written submissions be considered as hearing time. If the submissions had been made orally they would have been considered part of the hearing time, and the effect of being required to make the submissions in writing extended the hearing time. Therefore, I accept Personal's calculations that encompass the written submissions within the hearing time, although I will only calculate this on the basis of the two lawyers who were present at the main Hearing

Frivolous and Vexatious

19 I am prepared to accept that the Applicant's claim was shown to be frivolous and vexatious given that I made adverse findings of credibility against the Applicant and her witnesses on material parts of the claim. In accepting

this, I also accept that because of my finding that the Applicant had not been credible, the Hearing and therefore preparation required by the Insurer was more complex and made more difficult. I have therefore awarded a fees quantum on a ratio of 4:1.

Disbursements

20 I decline to award reimbursement to the Insurer of its filing fee. Counsel for the Insurer alleges that fraud committed by the Applicant justifies that I consider departing from the practice of not awarding this kind of fee to the Insurer.

21 Section 282(11) states that an Arbitrator can award expenses incurred in respect of an Arbitration proceeding "as may be prescribed in the regulations." Section 1 of the *Expense Regulation* under Regulation 664 states that the filing fees paid by the insured person may be awarded to the insured person and Section 2 states that the filing fees paid by the insured person or the Insurer when appealing the Order of an Arbitrator or applying to vary or revoke an order may be awarded.

22 There is no reference to the Insurer being entitled to reimbursement of its \$3,000 filing fee.

23 Arbitrator Eban Bayefsky dealt with this in *Evelyn Silva and York Fire & Casualty Insurance Company*² when he said as follows: "In my view, the repeal of section 282(11.2) and the exclusion of mediation and arbitration filing fees from the relevant provisions of the regulation, confirm that I have no jurisdiction to award York Fire expenses in respect of those fees."

24 Referring to the claim of reimbursement of the Insurer's filing fee, the Arbitrator in *Bershteyn and Allstate Insurance Company of Canada* said, "Patently, I have no justification to award a repayment of the fee in the manner claimed."³

25 A recent amendment to the *Expense Regulation* of the *Insurance Act*, Ontario Regulation 664, R.R.O. 1990 (i.e., the addition of Section 7 to the Schedule of that Regulation) now allows the Insurer to seek reimbursement of the filing fee in limited circumstances, i.e. failure to attend an Independent Examination.

26 It is clear from this amendment that the limited circumstance of allowing expenses to an Insurer in respect of the filing fee does not include the circumstances in this case, nor is there any authority for me to reimburse the filing fee as a disbursement cost.

27 The same reasoning applies to my lack of authority to reimburse costs to the Insurer for court reporters or transcriptions of the Hearing proceedings. In addition, these are expenses which were optionally incurred. There is no legislative requirement for the Insurer to have incurred these.

EXPENSES:

28 For the reasons listed above, the Applicant shall be ordered to pay to the Insurer its expenses in respect of this Arbitration proceeding, fixed in the amount of \$12,777.85 (inclusive of fees, disbursements and any applicable taxes).

October 19, 2015

Date

Harvey Savage

Arbitrator

ARBITRATION ORDER

29 Under section 282 of the *Insurance Act, R.S.O. 1990, c.l.8*, as amended, it is ordered that:

1. The Applicant is required to pay Personal its expenses in respect of the Arbitration proceedings, fixed in the amount of \$12,777.85 (inclusive of fees, disbursements and any applicable taxes).

October 19, 2015

Date

Harvey Savage

Arbitrator

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- 1 *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.
 - 2 *Silva and York Fire & Casualty Insurance Company*, FSCO A04-00177 (February 28, 2006).
 - 3 *Bershteyn and Allstate Insurance Company of Canada*, FSCO A01-000858 (March 8, 2005).

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