



Neutral Citation: 2007 ONFSCDRS 36

FSCO A05-000094

BETWEEN:

JANARTHANAN THARMARATNAM

Applicant

and

CAA INSURANCE COMPANY (ONTARIO)

Insurer

REASONS FOR DECISION

Before: Robert A. Kominar

Heard: November 23, 2005, August 16, 2006, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mr. Tharmaratnam represented himself
Mauro D'Agostino for CAA Insurance Company (Ontario)

Issues:

The Applicant, Janarthanan Tharmaratnam, was injured in a motor vehicle accident on January 13, 2003. He applied for statutory accident benefits from CAA Insurance Company (Ontario) ("CAA"), payable under the *Schedule*.¹ CAA denied entitlement to

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

weekly income replacement benefits on August 27, 2003. The parties were unable to resolve their disputes through mediation, and Mr. Tharmaratnam applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.1.8, as amended.

The issues in this hearing are:

1. Is Mr. Tharmaratnam entitled to receive a weekly income replacement benefit from January 20 to July 31, 2003, claimed pursuant to section 4 of the *Schedule*?
2. Is CAA liable to pay a special award pursuant to subsection 282(10) of the *Insurance Act* because it unreasonably withheld or delayed payments to Mr. Tharmaratnam?
3. Is CAA liable to pay Mr. Tharmaratnam's expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. 1.8?
4. Is Mr. Tharmaratnam liable to pay CAA's expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. 1.8?
5. Is Mr. Tharmaratnam entitled to interest for the overdue payment of benefits pursuant to subsection 46(2) of the *Schedule*?

Result:

1. Mr. Tharmaratnam's claims for weekly income replacement benefits, interest, a special award and expenses are dismissed.
2. CAA is entitled to its expenses in this arbitration fixed in the amount of \$2,451.76 inclusive of GST.

EVIDENCE AND ANALYSIS:

Mr. Tharmaratnam originally commenced this arbitration through legal counsel. At some point in time the relationship ended with his lawyer and thereafter he was unrepresented. The first pre-hearing in this matter was held on September 21, 2005. I understand that Mr. Tharmaratnam did not attend that pre-hearing but a date for a hearing was set by the pre-hearing arbitrator, being November 23, 2005. Mr. Tharmaratnam did attend on that date before Arbitrator Rogers. He advised the arbitrator that he had only recently received notice of the hearing and that he wished to

have additional time to retain new legal counsel. He advised that he wanted to proceed with his claims. His estimate was that he would be represented in approximately one week's time. After confirming Mr. Tharmaratnam's current address and telephone number, Arbitrator Rogers adjourned the arbitration for a new pre-hearing at the request of the parties. The assumption was that this time Mr. Tharmaratnam would participate.

The second scheduled pre-hearing was to take place on August 16, 2006. I note again that Mr. Tharmaratnam personally agreed to this date for the pre-hearing. On August 16, 2006, I convened the pre-hearing. Mr. D'Agostino and Ms. Pia participated on behalf of CAA. Neither Mr. Tharmaratnam nor anyone representing him attended. I personally attempted to contact Mr. Tharmaratnam at the telephone number he gave to Arbitrator Rogers. The number had been disconnected. Mr. D'Agostino advised that neither he nor CAA had heard from Mr. Tharmaratnam, or anyone representing him, since his attendance at the Commission on November 23, 2005.

Mr. D'Agostino requested that Mr. Tharmaratnam's application for arbitration be dismissed and that CAA be awarded its expenses in the matter. The basis for CAA's request was the claim that the application was both frivolous and vexatious.

I considered Mr. D'Agostino's submissions and determined that prior to dismissing the application on either of the above grounds Mr. Tharmaratnam should be contacted one more time. I sent correspondence outlining what had happened at the pre-hearing, and the request which the Insurer was making to have the application dismissed, to Mr. Tharmaratnam on August 16, 2006. The correspondence was sent to him by courier, at the address he provided to Arbitrator Rogers, and was ultimately returned to the Commission on August 24, 2006, with the annotation that Mr. Tharmaratnam did not live at that address.

I checked with the case administrator on the file and was advised that Mr. Tharmaratnam had not contacted her either by telephone or in writing. There is no record that Mr. Tharmaratnam notified the Commission of a change of address or telephone number. I made one more telephone call to the number on file and it was still announced as having been disconnected.

In my letter of August 16, 2006, I notified the Applicant that I was considering dismissing the application pursuant to Rule 68.2 of the *Dispute Resolution Practice Code* (Fourth Edition - Updated October 2003). I further notified him that if he wished to make submissions on the matter he should contact the Commission no later than September 8, 2006. No response has ever been received.

As I noted to Mr. D'Agostino during the pre-hearing, I have no evidence before me that Mr. Tharmaratnam's claims are frivolous. They may in fact be well founded. However, I am satisfied that Mr. Tharmaratnam's conduct of this arbitration is vexatious, in that it can only reasonably be described as being troublesome, annoying and irritating to the insurer. I find specifically, that Mr. Tharmaratnam's request to adjourn the hearing coupled with his complete failure to communicate either with CAA or the Commission afterwards is action that in fact is nothing more than irritating and therefore vexatious.

Mr. Tharmaratnam's claims for income replacement benefits, interest, a special award and expenses are dismissed.

EXPENSES:

CAA requests that it be awarded its expenses as a result of Mr. Tharmaratnam's claims being dismissed as being vexatious. I have considered the statutory criteria for awarding expenses as set out in the *Expense Regulation*² I am satisfied that Mr. Tharmaratnam was completely unsuccessful in this proceeding; there are no written offers to settle to which I have been directed; there are no novel issues involved; Mr. Tharmaratnam caused unnecessary delay by requesting an adjournment to participate and then failing to do so; and finally that the overall context of these claims are vexatious.

On the basis of these findings I find that CAA is entitled to its reasonable expenses in the arbitration.

² Ontario Regulation 275/03

Mr. D'Agostino submitted a detailed Bill of Costs on behalf of CAA. He claims a total of 37.7 hours for preparation and attendances in the arbitration. Although, I understand that the Insurer was required to treat this application seriously, I don't believe that the amount of preparation, compared to actual attendance time, which is being claimed, is reasonable in the circumstances. I am prepared to allow Mr. D'Agostino 25 hours at the Tier 2 Legal Aid rate of \$83.10, totalling \$2,077.50, plus GST of \$124.65 for legal fees.

Mr. D'Agostino requested disbursements of \$235.48 plus GST of \$14.13. I find these to be reasonable and normal disbursements and I allow them as submitted.

Finally CAA requests that Mr. Tharmaratnam refund CAA's arbitration assessment of \$3,000.00.

The *Expense Regulation* now allows an arbitrator to make such an award in certain circumstances. Section 7 of that *Regulation* provides:

7. There may be awarded to an insurer the total of all amounts in respect of a claim by an insured person that are included under section 4 of Ontario Regulation 11/01 (Assessment of Expenses and Expenditures) made under the *Financial Services Commission of Ontario Actj 1997 in determining the amount of the insurer's* total assessment for arbitrations under section 282 of the Act, total assessment for appeals under section 283 of the Act or total assessment for applications under section 284 of the Act, if the insured person, on or after March 1, 2006,
 - 1.(a) refused or failed to submit to an examination relating to the claim under section 42 of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996) made under the Act; or
 - (b) refused or failed to provide any material relating to the claim that was required to be provided by subsection 42 (10) of that regulation.

I have no evidence that Mr. Tharmaratnam either refused to submit to an examination or failed to provide any required information and therefore, I decline to award CAA a return of its assessment fee.

In conclusion I award CAA \$2,202.15 on account of fees and GST as well as \$249.61 for disbursements and GST. In total Mr. Tharmaratnam shall pay to CAA \$2,451.76.

Robert A. Kominar
Arbitrator

March 1, 2007
Date



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BETWEEN:

JANARTHANAN THARMARATNAM

Applicant

and

CAA INSURANCE COMPANY (ONTARIO)

Insurer

ARBITRATION ORDER

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

1. Mr. Tharmaratnam's claims for weekly income replacement benefits, interest, a special award and expenses are dismissed.
2. CAA is entitled to its expenses in this arbitration fixed in the amount of \$2,451.76, inclusive of GST.

Robert A. Kominar
Arbitrator

March 1, 2007
Date