Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2017 ONFSCDRS 166

FSCO A16-001196

BETWEEN:

KHAI-TUONG HOANG

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

REASONS FOR DECISION

Before:	Arbitrator Benjamin Drory
Heard:	In person at ADR Chambers on June 2, 2017
Appearances:	Mr. Eric Heath for Mr. Khai-Tuong Hoang Mr. Mauro D'Agostino for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Mr. Khai-Tuong Hoang, was injured in a motor vehicle accident ("MVA") on October 18, 2009. He sought accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and the Applicant, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

[1] *The Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996,* Ontario Regulation 403/96, as amended.

The issues in this Hearing are:

1. Is the Applicant entitled to receive a medical benefit in the amount of $3,350.00 for physiotherapy provided by Pain Rehab Clinic, Treatment Plan dated July 16, 2014?
2. Is the Applicant entitled to interest on overdue benefits?
3. Is either party entitled to its expenses of the Arbitration?

Result:

1. The Applicant is not entitled to a medical benefit in the amount of $3,350.00 for physiotherapy provided by Pain Rehab Clinic, Treatment Plan dated July 16, 2014.
2. The Applicant is not entitled to interest on overdue benefits.
3. Wawanesa is entitled to its expenses of the Arbitration in the amount of $6,000.00.

EVIDENCE AND ANALYSIS:

Adjournment Request

Prior to the commencement of the Hearing, Mr. Heath, counsel for the Applicant, sought an adjournment of the Hearing. The Applicant was in jail and couldn't attend the proceeding. He advised that there was a Hearing in his criminal proceeding scheduled in June at which time, there would be a bail application, and the Applicant might be out of jail by the end of the month. Mr. Heath couldn't speak to the nature of the criminal charges against his client. An adjournment request in the matter had also been made to the Pre-Hearing Arbitrator two weeks prior to the Hearing, which had been rejected.

Mr. D'Agostino advised that he had information on the nature of the charges against Mr. Hoang, which was obtained by a search of publicly-available information. Mr. Hoang had previously been in jail from December 2010 to May 2013 for involvement in a criminal organization. He was one of 38 people arrested in a sting operation that spanned Mississauga to Belleville. In

February 2017, the Applicant was arrested as a part of a multi-jurisdictional police operation ("Project Silkstone"), which was "much more serious" than the earlier conviction, including charges of drug trafficking and money laundering.

Mr. D'Agostino vigorously objected to the adjournment request. Wawanesa was prepared to proceed with its case, and had spent significant sums defending the matters and related matters (including at the LAT) arising from the 2009 accident. There was also only $3,350.00 in dispute, and if the Hearing was adjourned, the additional costs to the Insurer would be disproportionate to the value of the claim. Wawanesa noted the Applicant had also regularly failed to provide instructions to his counsel, and to advise the Insurer and/or the Tribunal of his whereabouts.

I declined to grant the adjournment. It could not be assumed that the Applicant might be released from jail soon, and was only speculative. It also was not technically necessary for the Applicant to be present in order to present his case. I agreed that to adjourn the matter would have created additional costs to the parties disproportionate to the claim in dispute. Even to grant interim costs would have been unacceptably high for what was disputed in the proceeding.

Evidence

Mr. Heath advised that there was no evidence he could call. Not only did he have no documentation available, but he couldn't give oral evidence—the Applicant was the one who received the treatment, and was the only one who could comment on it.

Mr. D'Agostino submitted that it would have been helpful for the Applicant to be present, but there was no documentation or reports to support his claims for benefits, no witnesses called for the Hearing, and the obvious conclusion was that the Applicant did not meet the onus to prove his case and it should be dismissed with costs.

I agreed that the onus is on an Applicant to substantiate its claims on the basis of evidence, and as the Applicant submitted no evidence, he failed to meet this onus. I orally dismissed the claim.

EXPENSES:

Following my dismissal of the case, I asked the parties to make any submissions respecting entitlement to expenses for the Arbitration, in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code* ("*Code*").

Submissions

Wawanesa submitted that that the Applicant failed to attend an Insurer Examination to address the Treatment Plan in issue, for which no reason was given. The Applicant hadn't complied with production requirements from the Pre-Hearing, and failed to advise counsel or the Tribunal of his whereabouts. This conduct led to prolonging, obstructing, and delaying the matter, and led to the Applicant's representative making two adjournment requests.

Wawanesa requested expenses in the amount of $13,929.03—comprised of $9,517.00 for legal fees (at Legal Aid Rates), $1,237.34 in HST thereupon, $173.70 for disbursements, and $3,000.00 respecting the filing fee for the Arbitration. Wawanesa submitted it was entirely successful in the proceeding, and there were also novel issues at play, given allegations against the Applicant regarding his conduct at the time of the accident, his subsequent charges and incarceration, and the fact he continued to participate in criminal activity. Wawanesa submitted that it had incurred significant expenses defending matters against the Applicant, and while it didn't expect it would likely receive any money awarded, the Applicant should pay appropriate expenses before he could attempt to start any new claims against it.

Mr. Heath submitted that $14,000.00 was a lot of money, even in circumstances like this. There was only a single issue in dispute, and $14,000.00 was disproportional to it; he felt that the dismissal of the case was sufficient punishment against the Applicant.

Analysis

The criteria I am bound to consider are set out in Rules 75 and 76 of the *Code*. Those criteria include:

(a) each party's degree of success in the outcome of the proceeding;
(b) any written offers to settle 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.

I am satisfied, per criteria (a), that Wawanesa was completely successful in this proceeding.

I am not satisfied that novel issues were raised in the Hearing. I accept that there might have been had the issues in the case been thoroughly canvassed, but that is not what happened—the case was dismissed on the basis of no evidence being presented at all on the Applicant's behalf.

It is clear that Wawanesa invested meaningful effort into preparing for the Hearing, including unusual research not typically necessary. However, the Hearing was very brief, and I agree with Mr. Heath's submission that the $14,000.00 claimed is entirely disproportional to the $3,500.00 that was in dispute. I was also not provided with evidence why the $3,000.00 Arbitration filing fee ought to be reimbursable—in fact; Section 1 of the Schedule to Section F of the *Code* suggests filing fees can only be awarded to a successful Applicant, not to an Insurer.

In the totality of the circumstances, I find it appropriate to award Wawanesa expenses in the amount of $6,000.00. I agree with Wawanesa's submission that the Applicant should not be able to commence any new claims against Wawanesa before paying it this amount.

June 12, 2017

Benjamin Drory
Arbitrator

Date

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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 Ontario *Regulation 664*, as amended, it is ordered that:

1. The Applicant is not entitled to a medical benefit in the amount of $3,350.00 for physiotherapy provided by Pain Rehab Clinic, Treatment Plan dated July 16, 2014.
2. The Applicant is not entitled to interest on overdue benefits.
3. Wawanesa is entitled to its expenses of the Arbitration in the amount of $6,000.00.

June 12, 2017

Benjamin Drory
Arbitrator

Date