Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2007 ONFSCDRS 260

FSCO A06-001588

BETWEEN:

LISA FAIZ

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Maggy Murray

Heard: By telephone conference call on October 26, 2007

Appearances: Jack Parsekhian for Ms. Faiz
Neil Colville-Reeves for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Lisa Faiz, was injured in a motor vehicle accident on July 10, 2003. In a decision dated August 31, 2007, I dealt with her claims for statutory accident benefits under the *Schedule*.[1] I made the following orders, while reserving on the issue of expenses:

1. The medical examination requested by Wawanesa under s.42 (1) of the *Schedule* is not reasonably necessary.

2. I have no jurisdiction to Order that Ms. Faiz attend a medical examination.

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

3. This arbitration hearing is not stayed.

The issue in this further hearing is:

1. Is Ms. Faiz entitled to her expenses incurred in respect of this arbitration hearing?

Result:

1. Ms. Faiz is entitled to her expenses of the motion assessed in the amount of $2,998.61.

EVIDENCE AND ANALYSIS:

Subsection 282(11) of the *Insurance Act*, R.S.O. 1990, c. I.8 (as amended), states:

> 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 for determining entitlement to expenses of the arbitration proceeding are set out in s.12 of Ontario Regulation 664, R.R.O. 1990, as amended ("the Expense Regulation"). According to *Pinto and General Accident Assurance Co. of Canada*,[2] the Expense Regulation that applies is the regulation in effect at the time the Application for Arbitration was commenced. On July 31, 2006 (i.e., the date the Application for Arbitration was commenced), s.12 of the Expense Regulation read as follows:

> 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:
>
> 1. Each party's degree of success in the outcome of the proceeding.
>
> 2. Any written offers to settle made in accordance with subsection

[2]at 9 (FSCO, P97-00031, November 26, 1997) Appeal

(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 or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation.

I consider each of the six criteria in order.

1. Each party's degree of success in the outcome of the proceeding.

The motion concerned Wawanesa's request for an order: (a) that a medical examination of Ms. Faiz was reasonably necessary; (b) that Ms. Faiz attend a medical examination; and (c) staying the arbitration hearing pending Ms. Faiz's attendance at the medical examination. Ms. Faiz was completely successful. Wawanesa was completely unsuccessful.

2. Any written offers to settle made in accordance with subsection (3).

Neither party made any written offer to settle.

3. Whether novel issues are raised in the proceeding.

Neither party raised novel issues.

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.

The Applicant submitted that although this motion did not prolong, obstruct or hinder the proceeding, it was an additional procedural matter that the Applicant was required to respond to.

Wawanesa submitted that it did nothing to prolong, obstruct or hinder the proceeding. However, Wawanesa did not receive the Applicant's responding material until the day before the motion which Wawanesa claimed hindered the proceeding because it "did not know what the Applicant's position was and had no idea what the Applicant was going to do."

I disagree with Wawanesa's submission that it did not know the Applicant's position and had "no idea what the Applicant was going to do." By letter dated April 11, 2007, the Applicant indicated that she would not attend a s.42 insurer's examination. Indeed, the whole reason Wawanesa brought this motion was because the Applicant did not consent to attending a s.42 insurer's examination.

Wawanesa filed its motion material with FSCO on May 9, 2007. Rule 67.5 of the *Dispute Resolution Practice Code – Fourth Edition* provides that within 10 days of receiving motion materials, the responding party shall serve and file a written response and documents that it will rely upon. However, counsel for Wawanesa consented to proceed with the motion notwithstanding the late service of documents.

I find that neither party prolonged, obstructed or hindered the progress of the proceeding.

5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.

The Applicant submitted that Wawanesa requested this examination to bolster its case. Consequently, this led to extra expense for the Applicant and was unnecessary. I agree with that submission

Wawanesa submitted that this motion was not improper, vexatious or unnecessary because the Applicant had not undergone a s.42 assessment.

No aspect of the proceeding was vexatious.

I find that this motion was unnecessary because it had little merit.

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 or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation.

This criteria is not applicable to this case.

Having regard to the above criteria, I order Wawanesa to pay Ms. Faiz her expenses of this motion.

AMOUNT OF EXPENSES:

The amount of expenses and disbursements which I may award are described in s.3 of the Schedule - Dispute Resolution Expenses to Ontario Regulation 664 which states:

> 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.

Mr. Parsekhian was called to the bar in 2002. Ms. Faiz claimed a total of 30.7 hours[3] of Mr. Parsekhian's time which was supported by time dockets that included reviewing Wawanesa's motion material, reviewing Wawanesa's file, researching case law on s.42 assessments, drafting and revising an affidavit, discussions with Ted Charney,[4] putting the motion together, preparing to send the motion out, attendance on the motion,[5] preparation of a Bill of Costs, drafting letters, and the time spent for the assessment of expense hearing. There was an additional one hour of time spent by Mr. Charney, who was called to the bar in 1987.

Wawanesa submitted that the time spent by the Applicant's counsel was excessive. According to counsel for Wawanesa, his office spent a total of 19.1 hours preparing for and attending on the motion.[6] Of the 19.1 hours, 9.1 hours was spent by Mr. Colville-Reeves, who was called to the bar in 1994 and 10 hours was spent by Miguel Maruszki who was called to the bar in 2005.

[3] Excluding one hour of Mr. Charney's time and one and a half hours for the expense hearing.

[4] Solicitor of record.

[5] For which Mr. Parsekhian only billed four hours as opposed to the five hours billed by Mr. Colville-Reeves.

[6] Which did not include one hour of time for the expense hearing. In addition, Wawanesa did not prepare or submit a Bill of Costs.

Wawanesa further submitted that "it takes less time" to prepare a response to a proceeding. I find that there is no basis for that submission, which is "no more than an attack in the air."[7]

Mr. Parsekhian's submissions were supported by time dockets based upon *Andersen v. St. Jude Medical, Inc*.[8] Although Wawanesa's submissions were not supported by time dockets, I accept that Wawanesa spent 19.1 hours of time on this motion, which did not include one hour for the expense hearing.

Wawanses submitted that *Andersen* was inapplicable to this case because it dealt with a class action. The Applicant submitted that despite requesting Wawanesa's time dockets earlier in the week, Wawanesa did not provide them. According to Wawanesa, "it would take some time … to address the issues of what time (it) spent." Wawanesa was also concerned about solicitor-client privilege if it produced its docket entries. I find little merit in that submission because matters relating to solicitor-client privilege could be redacted. Although the unsuccessful party is not required to provide docket entries, if it chooses not to do so, it may hinder its ability to make meaningful submissions on an expense hearing.[9]

Wawanesa relied upon *Vellipuram and State Farm Mutual Automobile Insurance Company*[10] and submitted that it was a guide to determining the amount of costs, if any, payable to the Applicant. That case is distinguishable from this one because the Applicant's counsel in *Vellipuram* was called to the bar in 1972, 30 years prior to Mr. Parsekhian. In addition, counsel for the insurer in *Vellipuram*, who was called to the bar in 2002, advised that she spent “no less

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[7] *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135, 32 C.P.C. (5th) 304 (S.C.J.) as cited in *Andersen v. St. Jude Medical, Inc.* QL at 6, para. 25, [2006] O.J. No. 508 (Ont. Div. Ct) ("*Andersen*")

[8] QL at 6-7, para.'s 24-27 [2006] O.J. No. 508 (Ont. Div. Ct)

[9] *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660 (S.C.J.) as cited in *Andersen*, QL at 7, para. 26, [2006] O.J. No. 508 (Ont. Div. Ct); *Hutchinson and Security National Insurance Co./Monnex Insurance Mgmt. Inc.* (FSCO A03-001712 and A05-000327, November 26, 2007)

[10] QL at para. 10 (FSCO A05–002629, June 15, 2006) in which a total of $1,653.60 was awarded to the Applicant for a similar motion.

than 20 hours" preparing the *Vellipuram* motion materials. Consequently, I find that Wawanesa's reliance on *Vellipuram* does not assist it in this case.

The Affidavit prepared by Mr. Parsekhian was very well written. I allow Ms. Faiz 30.7 hours of Mr. Parsekhian's time at the legal aid hourly rate of $87.26 per hour, which includes one hour for the expense hearing. It excludes one hour for putting together and preparing to send the motion out because this is work that is appropriately done by support staff, not a lawyer. I allow Ms. Faiz a further one hour of Mr. Charney's time at the maximum hourly rate of $150.

Ms. Faiz did not claim any disbursements.

The total allowable expenses of the arbitration proceeding are $2,998.61 ($2,678.88 + $150 + GST at 6%).

December 28, 2007

Maggy Murray
Arbitrator

Date

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WAWANESA MUTUAL INSURANCE COMPANY

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ARBITRATION ORDER

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

1. Wawanesa shall pay Ms. Faiz $2,998.61 forthwith as expenses for the motion.

December 28, 2007

Maggy Murray
Arbitrator

Date