



Neutral Citation: 2018 ONFSCDRS 77

FSCO A16-000631

**BETWEEN:**

**ZI FENG ZHANG**

**Applicant**

**and**

**PEMBRIDGE INSURANCE COMPANY**

**Insurer**

**DECISION ON EXPENSES**

**Before:** Arbitrator Janette Mills

**Heard:** Written Submissions completed on February 22, 2018

**Appearances:** Mr. Pavlos Achlioptas participated for Mr. Zi Feng Zhang  
Mr. Ryan Kirshenblatt participated for Pembridge Insurance Company

**Background:**

The Applicant, Mr. Zi Feng Zhang (the “Applicant”), was injured in a motor vehicle accident on August 12, 2014 and sought accident benefits from Personal Insurance Company (“Pembridge”), payable under the *Schedule*.<sup>1</sup> 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. The

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<sup>1</sup> *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

Arbitration Hearing concluded with written submissions on October 20, 2018. Subsequently, the Applicant applied for an Expense Hearing.

**The Issue:**

1. Is the Applicant entitled to his expenses and, if so, in what amount?

**The Result:**

1. The Applicant is entitled to his expenses in the amount of \$17,023.43 inclusive of HST and disbursements.

**Analysis:**

**1. Applications for expenses**

The criteria for awarding an expense claim is outlined in Rule 75 of the *Dispute Resolution Code* (“*DRPC*”) as follows:

75.1 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in **Rule 75.2**. The items and amounts which may be awarded are found in **Rule 78** and the **Schedule** to the **Expense Regulation** found in **Section F** of the **Code**.

75.2 The adjudicator will consider only the criteria referred to in the Expense Regulation found in Section F of the Code. These criteria are:

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

The issues in dispute were income replacement benefits, medical expenses, cost of examinations and a special award. The Applicant was successful at the Hearing on the substantive issues and in part on the special award claim. No offer to settle was made in accordance with Rule 76. No novel issues were raised in the proceeding. There was no evidence to suggest that any aspect of the proceeding was improper, vexatious or unnecessary, nor was there any suggestion that the Applicant failed to attend at an examination as required under Section 44 of the *Schedule*.

The Applicant submits that the Insurer's conduct prolonged the proceeding by withholding payment of the Applicant's income replacement benefits prior to the stoppage date, requiring the matter to be litigated. I do not agree with the Applicant's position in this regard and find that there is no evidence to support a finding that the Insurer's conduct during the Hearing prolonged it, within the meaning of Rule 75.1.

However, having regard to the above, and the Applicant's success at the Arbitration Hearing, I find that he is entitled to his expenses.

## 2. The Quantum to be awarded to the Applicant

Section 78.1 of the *DRPC* outlines the amount that may be awarded for counsel fees as follows:

### Expenses of representatives

78.1 The maximum amount that may be awarded to an insured person or an insurer for legal fees, is an amount calculated using:

(a) the hourly rates established under the *Legal Aid Services Act, 1998* for professional services in civil matters before the Ontario Superior Court of Justice; or

(b) the hourly rate referred to in **Rule 78.1(a)** adjusted to include, where appropriate, the experience allowance established under the *Legal Aid Services Act, 1998*. Where an adjudicator is satisfied that a higher amount for legal fees to an insured person is justified, an hourly rate of up to **\$150** may be awarded.

78.2 The maximum amount that may be awarded to an insured person or an insurer for agent's fees is an amount calculated using the hourly rates established under the *Legal Aid Services Act, 1998* for law clerks, articling students and investigators.

The overriding consideration in determining quantum is reasonableness.<sup>2</sup> The appropriate approach is to look at the ratio of preparation time to the attendance at a hearing.<sup>3</sup> A line by line assessment of the expenses claimed is not required.<sup>4</sup> Arbitrators typically apply a ratio of 1:1 to 4:1 preparation to hearing time.<sup>5</sup>

The Applicant submitted a Bill of Costs for services of his counsel, Mr. Achlioptas, and two paralegals, Mr. Yeung and Ms. Wang, as well as disbursement expenses. The Insurer submits that the Applicant's expenses should be awarded on a 1:1 or 1.5:1 ratio, given that there were no novel issues raised and the matter was not complex. Further, there should be no expenses awarded for Mr. Yeung as his involvement in the case was minimal, or if they are awarded they should be awarded at the paralegal rate (as opposed to the amount submitted, which is the rate for a lawyer). Regarding Ms. Wang's expenses, the Insurer submits that her presence at the Hearing was unnecessary given the simplicity of the issues to be argued and her expenses should not be paid for this purpose.

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<sup>2</sup> *Henri and Allstate Insurance Company of Canada* (August 8, 1997) FSCO A-007954 at pp. 3-4.

<sup>3</sup> *Soobrian and Belair Insurance Company Ltd.* (February 7, 2006) FSCO A04-000422 at p. 4.

<sup>4</sup> *Federico and State Farm Mutual Automobile Insurance Company* (June 29, 2015) FSCO A12-005384 at p. 5.

<sup>5</sup> *Abulibdeh and RBC* (December 21, 2005) FSCO A05-001249.

Having regard to the principles enunciated above, I find that the Applicant is entitled to his expenses on a 4:1 ratio, calculated based on two full days of hearing time and two half days of hearing time (21 hours in total) and a further 3.5 hours for written submissions, for a total of 98 hours. There were three discrete issues to be argued and a special award, and given the Applicant's success at the Hearing, I see no reason why the ratio should be less. As stated, there were no novel issues to be argued and the matter was not complicated or difficult and I find that payment at the legal aid rate of \$109.14 is appropriate. For these reasons, the Applicant is awarded a total amount of \$10,695.72 plus HST, for counsel fees.

I also find that, in part, the Applicant is entitled to paralegal expenses as outlined in the Bill of Costs. However, because this was not a complicated or difficult file, I do not think it reasonable to include the cost of Ms. Wang's and Mr. Yeung's attendance at the Hearing (billed at 21.5 and 1.5 hours, respectively) and this expense is not awarded. For paralegal services of Ms. Wang, she shall be paid for 44.2 hours for preparation as outlined in the Bill of Costs at the legal aid rate of \$32.37. For the paralegal services of Mr. Yeung, he shall be paid for 13.5 hours at the legal aid rate of \$32.37. This results in a total amount payable of \$1,867.74 plus HST.

Regarding disbursements, I do not agree with the Insurer's submission that it was unnecessary for the Applicant to summons Ms. Patel and that this disbursement should not be paid. It is prudent to issue a summons and by not doing so the Applicant runs the risk of having failed to exercise due diligence. Further, I find the fees of the expert witnesses to be appropriate and in keeping with the *DRPC*. In my view, the amounts claimed for all the disbursements are reasonable. They are supported by receipts and the amounts are in keeping with the *DRPC* and shall be paid accordingly. For these reasons, the Applicant's disbursements shall be paid in the amount of \$2,826.73 inclusive of HST.

For the foregoing reasons, the Applicant is entitled to his expenses in the amount of \$17,023.43 inclusive of HST and disbursements.

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Janette Mills  
Arbitrator

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April 17, 2018  
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 entitled to his expenses in the amount of \$17,023.43 inclusive of HST and disbursements.

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Janette Mills  
Arbitrator

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April 17, 2018  
Date