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March 2, 1999

Mr. David A. Morin
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Mr. David Zarek
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Barrister & Solicitor
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DECISION ON EXPENSES

Dear Mr. Morin and Mr. Zarek:

Re: Mrs. Barbara Marchildon and State Farm Mutual Automobile Insurance Company
MVA: October 16, 1992
Commission File No: FSCO A97–000643–MSZ

By decision dated November 3, 1998, I dismissed Mrs. Marchildon's claims for ongoing weekly benefits after the three year mark, as well as her claims for housekeeping expenses. A small amount for babysitting expenses was awarded. The parties subsequently made written submissions with respect to expenses.

I exercise my discretion to award Mrs. Marchildon her expenses of the arbitration proceeding.

As Mrs. Marchildon's application for arbitration was filed after November 1, 1996, the criteria for awarding expenses set out in Ontario Regulation 464/96, reiterated in Section F of the *Dispute Resolution Practice Code*, are applicable to these proceedings.

Although Mrs. Marchildon was largely unsuccessful in establishing her claims for benefits, I did find that Mrs. Marchildon continued to suffer pain and limitations as a result of the motor vehicle

accident. However, I was not satisfied that those limitations continuously prevented her from engaging in substantially all of the activities in which she would normally engage, the test she was required to meet under section 13(8)(b) of the *Schedule*.

I found that Mrs. Marchildon had a genuine belief in her limitations and sincerely believed that her level of pain justified entitlement under the *Schedule.* While Mrs. Marchildon's view of the merits of her case was perhaps unrealistic, it was not unreasonable.

The surveillance evidence, which I found to be a significant factor in these proceedings, should have caused the Applicant to consider making or accepting a realistic settlement offer. However, the Applicant's counsel asserted, and this fact was not disputed by the Insurer, that the surveillance evidence was not provided to the Applicant until 12 days prior to the hearing. While this complies with the strict requirements of the *Dispute Resolution Code*, it was not sufficient time for the Applicant to fully appreciate and digest the effect it could have on her claim.

Neither party made realistic settlement offers. Mrs. Marchildon's offers of settlement prior to the hearing consisted essentially of the full payment of her claims, without any discounting for the risks of litigation. However, the only written offer of settlement from the Insurer was for the sum of $7,500, delivered on the evening of the day prior to the hearing. This left little time for the Applicant to realistically assess the offer. Further, the settlement offer required the Applicant to forego any and all further entitlement that she may have to accident benefits, and was not limited to the issues in dispute in the arbitration. The Insurer's offer to settle, delivered so little, so late, that I place little weight on it in considering the reasonableness of the Applicant's decision to proceed to hearing.

The Insurer argued that Mrs. Marchildon proceeded to arbitration as a trial run for her tort claim. There was no evidence before me to support that assertion. I find it highly unlikely that an Applicant would use the arbitration process as a trial run for a tort claim. The test to obtain non-earner benefits after 156 weeks is much more stringent than the test for pain and suffering in a tort claim. Mrs. Marchildon's lack of success in this proceeding sheds little light on her likelihood of success at trial. I do not find that Mrs. Marchildon abused the arbitration process to test her tort claim.

In all the circumstances, bearing in mind that the arbitration process has been established "...in order to facilitate Applicants' access to relatively inexpensive, speedy and informal adjudication for disputes regarding no-fault benefits..,.[1] I find it appropriate to award Mrs. Marchildon her expenses of the arbitration.

I offer the following comments to assist the parties to come to their own resolution with respect to the amount of expenses.

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[1] *McCormick and Economical Mutual Insurance Company,* (OIC A-000139, October 2, 1991).

*the hourly rate to be paid to a lawyer is the rate set out in the Legal Aid Tariff.
*the Legal Aid Tariff, while it may serve as a guideline, does not limit the maximum number of hours which may be awarded.
*the overriding consideration in fixing arbitration expenses is reasonableness.

In this case, the issues included entitlement to non-earner benefits post 156 weeks, housekeeping expenses and babysitting expenses. These are not complex issues. No novel medical or legal issue were raised.

The preliminary issue which took up much of the first day was largely due to the Applicant's failure to attend an independent medical examination at the request of the Insurer and the Applicant counsel's subsequent submission of medical reports which addressed for the first time the test under section 13(8)(b).

The Applicant withdrew some aspects of her claim during the course of the proceeding. Time spent in preparing for those issues would not likely be allowed.

The fact that some of the work done for the arbitration may assist the Applicant in a parallel tort action, does not necessarily disentitle the Applicant to those expenses. However, some of the exhibits filed were clearly relevant to the tort action and only tangentially useful in the arbitration proceedings. Those documents and the time spent in obtaining them are unlikely to be accepted as arbitration expenses. Further, I would likely scrutinize the time claimed for the arbitration proceeding closely, to ensure that the Applicant was not using the arbitration process to subsidize the preparation of her tort claim.

Although time spent by a law clerk in preparing the file may be compensated, it did not appear to me to be necessary to have a law clerk attend the entire proceedings.

In closing, I direct your attention to Rule 77 of the *Dispute Resolution Code* governing the assessment of expenses and strongly urge you to resolve the amount of expenses.

M. Kaye Joachim
Arbitrator

Copies to:
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