Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A09-001538

BETWEEN:

PARALOGANATHAN NADESU

Applicant

and

ZURICH INSURANCE COMPANY LTD.(COMMERCIAL BUSINESS)

Insurer

DECISION ON INTEREST and EXPENSES

Before: Arbitrator Jeffrey Rogers

Heard: By Written submissions, completed on October 30, 2015

Appearances: Mr. David S. Wilson, solicitor for Mr. Nadesu
Mr. William M. Sproull, solicitor for Zurich Insurance Company Ltd.(Commercial Business)

Issues:

The Applicant, Paraloganathan Nadesu, was injured in a motor vehicle accident on September 7, 2003. I dealt with his claims for statutory accident benefits under the *Schedule*[1] in a decision dated May 27, 2015. I reserved my decision on two issues: how much interest was payable and entitlement to expenses of the arbitration. The parties requested a further hearing to resolve those issues.

The issues in this further hearing are:

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

1. What is the date from which interest accrues on the attendant care benefits (ACBs) ordered to be paid to Mr. Nadesu?
2. What is the amount of the expenses to which Mr. Nadesu is entitled in respect of the arbitration hearing?
3. Is either party entitled to expenses of this further hearing, and if so, in what amount?

Result:

1. Interest accrues on the ACBs ordered to be paid to Mr. Nadesu from March 16, 2010, being 10 business days from the date Mr. Nadesu delivered an Assessment of Attendant Care Needs.
2. Zurich shall pay Mr. Nadesu expenses of the arbitration in the amount of $73,515.94.
3. The parties shall bear their own expenses of this further hearing.

EVIDENCE AND ANALYSIS:

Mr. Nadesu's Delivery of an Assessment of Attendant Care Needs Triggers Accrual of Interest

Mr. Nadesu's claim for ACBs was added to the arbitration shortly before the hearing started in June 2010. That was about 7 years after the accident of September 2003. He claimed ACBs in various amounts from the date of the accident forward. In my decision of May 27, 2015, I found that he was entitled to payment of ACBs from April 2006, to present an ongoing. He claims interest from April 2006.

Section 46 of the *Schedule* requires insurers to pay interest if payment of a benefit is overdue. Mr. Nadesu's entitlement to interest on ACBs therefore turns on the question of when payment became "overdue". That question is answered by determining when Mr. Nadesu applied for ACBs.

Section 39 of the *Schedule* establishes the procedure for applying for ACBs. Section 39(1) requires that an application for ACBs "must be in the form of an assessment of attendant care

needs". Section 39(4) directs the insurer to begin payment of ACBs "within 10 business days after receiving the assessment of attendant care needs".

Mr. Nadesu did not make an application for ACBs in the prescribed form until March, 2010. Mr. Nadesu submits that he should be deemed to have applied earlier because Zurich should have been aware of his need for ACBs. Zurich argues that delivery of the Assessment is critical to making the application.

In my view, the decision of the Divisional Court in *Grigoroff v. Wawanesa Mutual Insurance Company* [2] precludes the approach Mr. Nadesu suggests. In that case the insurer paid ACBs pursuant to an Assessment the plaintiff delivered shortly after the accident. About 7 years later, the plaintiff delivered a retroactive Assessment, claiming further ACBs. The insurer did not pay pursuant to the retroactive Assessment. At trial, the plaintiff was found to be entitled to further payment from a date preceding delivery of the retroactive Assessment and the trial Judge ordered payment of interest from the date of entitlement.

The Divisional Court reversed the trial Judge's decision. The Court concluded that delivery of the Assessment is critical to entitlement to interest. The Court noted that: "pursuant to s. 39(1), a claim for attendant care benefits **must be** (emphasis added) in the prescribed form of an assessment of attendant care needs..."[3]

The Court reasoned as follows:

> In the case at bar, an insurer is not required to pay a claim for attendant care needs until 10 business days after it receives an assessment of attendant care needs. In the case of the disputed benefits, that did not happen until February of 2009, when a revised assessment of attendant care needs was filed for the period from January 20, 2002 to August 1, 2003. Under s. 46(1) of the SABS, a payment is not overdue unless "the insurer fails to pay the benefit within the time required" under s. 39, which is 10 business days after the receipt of an assessment of attendant care needs. Further, s. 39(3) specifically provides that an insurer is not required to pay attendant care benefits before "an assessment of attendant care needs that complies with subsection (1) is submitted to the insurer".[4]

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[2] 2015 ONSC 3585
[3] At paragraph 16
[4] At paragraph 25

I find that, in enforcing the strict terms of section 39(1), the Divisional Court left no room for distinguishing this case on the facts and ruled out the "deemed application" approach the Arbitrator took in the decision in *TN and Personal Insurance Company of Canada*[5].

In *TN* the Arbitrator found that the insured person was deemed to have applied for ACBs without having delivered an Assessment. The Arbitrator found that delivery of an Assessment was not critical because the insurer knew of the likelihood of a claim from early on and anticipated that the insured person might seek ACBs. The Arbitrator ordered payment of ACBs, plus interest from the date of entitlement. *TN* was decided before *Grigoroff*. In my view, the *TN* approach cannot be reconciled with the ruling in *Grigoroff* that the application for ACBs **must be** in the prescribed form.

The facts in *Grigoroff* illustrate this conclusion. Remember that the insured person had in fact delivered Assessments shortly after the accident and the Insurer had paid all invoices submitted. Therefore the insurer undoubtedly knew of the potential need for ACBs. The insured person then delivered a retroactive Assessment seeking increased amounts. The decision of the Court must be seen to require delivery of an Assessment which puts the insurer upon notice of the amount the insured person is claiming. The *TN* approach regarding interest puts an insured person who has not delivered an Assessment in a more favourable position than the insured person in *Grigoroff* who delivered an Assessment and later claimed a higher amount.

Also instructive is the decision of the Director's Delegate in *Economical Mutual Insurance Company* and *Ms. M.G*[6]. In that case, the issue was the effect of the provision in section 39(3) which allows an insurer to decline to pay ACBs until the insured person delivers an Assessment. The Delegate ruled that section 39(3) does not preclude payment of the benefit during the period before delivery of the Assessment, but it allows the insurer to delay payment. If section 39(3) permits delay, payment cannot be overdue.

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[5] FSCO A06-000399, July 26, 2012 and November 20, 2014.
[6] FSCO P13-00001, July 21, 2014

I further note that, even if the "deemed application" approach were available, the facts as I have found do not support Mr. Nadesu's submission that Zurich should have known of his likely entitlement to ACBs. In my earlier decision I found as follows: "Mr. Nadesu did not tell Zurich that he required attendant care until February 2010. Until then, it had been widely reported that he was independent with regard to self-care[7]."

To summarize, I accept Zurich's position on the issue of interest and I reject Mr. Nadesu's. I find that interest accrues on the ACBs ordered to be paid to Mr. Nadesu from March 16, 2010, being 10 business days from the date Mr. Nadesu delivered an Assessment of Attendant Care Needs.

Expenses of the Hearing

Overview

Mr. Nadesu claims expenses of the arbitration in the amount of $78,005.55, comprised of $55,095.98 for fees and HST and $22,909.57 for disbursements and HST. Zurich concedes that Mr. Nadesu is entitled to expenses of the arbitration because of his success, but argues that the amount he claims should be reduced for the following reasons:

- Duplication of services when Mr. Nadesu's two lawyers consulted with each other[8] during the hearing and they both billed;
- Entitlement to housekeeping and home maintenance benefits was settled on the eve of the hearing, but the Bill shows no deduction for work related to this issue;
- Additional time was expended because the Arbitrator who first heard this matter failed to deliver a decision through no fault of Zurich's;
- Mr. Nadesu was only partially successful; and
- Some claimed disbursements are not recoverable.

Zurich concedes that fees should be awarded at $150 per hour as claimed, the maximum hourly rate permissible under Rule 78 of the *Dispute Resolution Practice Code.* It submits that I should review the Bill by first determining the maximum recoverable and then decide on a deduction for

[7] At page 18
[8] Mr. Voudouris was Mr. Nadesu's counsel at the hearing. Mr. Wilson is his principal counsel.

partial success, as I did in my decision in *Subramaniam and Wawanesa Mutual Insurance Company* [9].

In a nutshell, Mr. Nadesu's position is as follows: The overriding consideration in assessing expenses is reasonableness and, since the amount claimed for fees is low given the nature of the case, there should be no further debate.

I agree with Mr. Nadesu that the time expended after the conclusion of the hearing before the first Arbitrator should not be included in calculating the ratio of preparation to hearing time. I agree that the ratio is modest when the calculation is made in this way. I agree that, in light of the ratio, the overall amount claimed for fees is not unreasonable. I agree that reasonableness is the overriding consideration in assessing expenses. But reasonableness does not exist in a vacuum. The award must be reasonable, bearing in mind the criteria that section 12 of the *Expense Regulation* directs an Arbitrator to consider. The following is my analysis of how the criteria affect Mr. Nadesu's entitlement. I will then consider the issue of a reduction based on partial success, as I did in *Subramaniam.*

Fees

Because the overall amount claimed is reasonable, I decline to deduct any amount for duplication of billing when Mr. Nadesu's two lawyers consulted during the hearing.

I do not accept that a deduction is warranted for time expended in pursuing a decision, after the conclusion of the hearing before the first Arbitrator. Zurich provided no authority for its suggested approach. Neither party was at fault for the failure of the first Arbitrator to render a decision. Both parties were forced to incur additional expenses as a result of this unforeseen turn of events. I view the circumstances to be analogous to a situation in which parties incur additional expense due to lack of institutional resources. For instance, where an adjournment where is necessary because an adjudicator is unavailable to hear a case in which the parties have attended and are ready to proceed. Although a common occurrence, I know of no instance where this fact was considered in awarding expenses.

[9] FSCO A09-002594, April 8, 2013.

I accept Zurich's submission that it should not be required to pay expenses related to the issue of housekeeping and home maintenance benefits, when that issue was settled without reserving the issue of expenses to be determined by the hearing Arbitrator. I do not accept Zurich's submission that one sixth of the time claimed before the settlement should be deducted because there were six issues in dispute. The issues were not equally complex. I find it reasonable to deduct 4 hours of the 35.95 hours billed before the settlement. The resulting deduction is $678, calculated as follows: $150 x 4 = $600 plus $78 HST=$678. Therefore, the maximum recoverable for fees is $54,417.98 ($55,095.98-$678).

Disbursements

Zurich seeks a reduction of $261.11 which Mr. Nadesu claims as conduct money and process serving fees for two expert witnesses who testified on Zurich's behalf. I agree that this amount should be deducted. Mr. Nadesu did not propose to call these experts as his witnesses. If he wanted to ensure their attendance for cross-examination he only needed to notify Zurich pursuant to *Rule* 41.1. Zurich would then have been required to produce the witnesses.

Zurich seeks a reduction of $500, claimed for preparation of Dr. Miller who testified as an expert witness for Mr. Nadesu. Section 5(4) of the *Expense Regulation* authorizes recovery of a maximum of $500 for payment to "an expert witness for preparation for a hearing at which the witness testifies". The *Regulation* cannot be interpreted to authorize payment of an additional $500 because Dr. Miller attended on two days, as Mr. Nadesu submitted. His claim for disbursements is therefore reduced by $500.

Zurich seeks a reduction of $362 claimed for parking and mileage. The *Expense Regulation* does not authorize recovery of mileage where the hearing takes place in the municipality in which the insured person resides, as occurred here. Although the amount incurred for parking is potentially recoverable, the Bill does not allow me to determine that amount. Mr. Nadesu's claim for disbursements is therefore reduced by $362.

The total reduction for disbursements is $261.11 + $500 + 362 = $1,123.11 + $146 HST = $1,269.11.

Therefore the maximum recoverable for expenses is $76,058.44: $78,005.55 - $678 (reduction of fees) -$1,269.11 (reduction of disbursements).

Degree of success

Zurich seeks a reduction of the Bill for fees by 30% and a reduction of the Bill for disbursements by 10% based on its submission that the parties enjoyed divided success in the arbitration. Zurich estimates that the hearing would have been 50% shorter, but for the issues on which Mr. Nadesu was not successful or was marginally successful. It concedes that this estimate is not exact and that degree of success cannot be directly applied to disbursements, which explains its request for reduction rates that are less than 50%.

Section 12 of the *Expense Regulation* sets out 7 criteria for an Arbitrator to consider when awarding all or part of the expenses of an arbitration. I find "degree of success"[10] to be the only relevant criterion. I see no point in considering whether Zurich's conduct "tended to prolong... the proceeding",[11] as Mr. Nadesu suggested. Zurich concedes Mr. Nadesu's entitlement to expenses and seeks a reduction only for time spent on issues on which he was not successful.

I reject Mr. Nadesu's submission that the gap between what his lawyers actually charge and the maximum recoverable rate of $150 per hour, should inform the determination of how much is recoverable from Zurich. As I noted in *Subramaniam,* this approach would amount to arbitral amendment of Rule 78. The Rule was not designed to allow for full recovery. It is up to the Legislature, not Arbitrators, to cure any inequity that might result.

The issues that were the subject of the hearing in this arbitration were catastrophic impairment, attendant care, entitlement to Botox injections as a medical/rehabilitation benefit, entitlement to a special award, interest and expenses.

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[10] *Expense Reg.* section 12(2)(1)
[11] *Expense Reg.* section 12(2)(4)

Mr. Nadesu was successful on the issue of catastrophic impairment which was the most significant issue in the arbitration, both in terms of its importance to the parties and the amount of time devoted.

Mr. Nadesu was not awarded all that he claimed for attendant care, but there is no suggestion that Zurich was prepared to pay anything for attendant care, without being ordered to do so. Thus a hearing was required, regardless of Mr. Nadesu's degree of success. In these circumstances, I find that no deduction relating to this issue is warranted.

Mr. Nadesu did not succeed in his claims for Botox injections and a special award. These were discrete claims which Mr. Nadesu could have chosen not to pursue. Had he done so, the time devoted to those issues would have been saved. I find a deduction to be warranted in these circumstances. These issues played a fairly minor role in the arbitration, consuming a small percentage of the hearing time and submissions. I find a deduction of 15 hours of fees to be appropriate. ($150x 15 = $2,250 + $292.50 HST = $2,542.50)

I decline to make any reduction in disbursements, based on degree of success. Zurich correctly points out that few disbursements can be directly attributed to issues on which Mr. Nadesu was not successful, but it suggests that I should disallow payment for the report of the expert whose opinion I rejected on the issue of Mr. Nadesu's entitlement to ACBs. However, as I noted above, the report was a necessary component of the process for making an application for ACBs under section 39. I therefore find the cost to be recoverable.

The amount recoverable for expenses of the earlier hearing is $73, 515.94, summarized as follows:

Fees and Disbursements claimed	$78,005.55
Reduction of Fees	-678.00
Reduction of Disbursements	-1,269.11
Reduction re Success	-2,542.50
Total Award	$73,515.94

Expenses of this further hearing

The issues that are the subject of this hearing were not addressed at the earlier hearing. Mr. Nadesu's Bill that I considered earlier did not include any work related to the issues addressed in this further hearing.

I find that "degree of success" is the only relevant criterion in determining entitlement to expenses of this further hearing. Zurich was successful on the issue of interest. Mr. Nadesu was largely successful on the issue of expenses. In these circumstances, I find that the parties should bear their own expenses of this further hearing.

January 22, 2016

Jeffrey Rogers
Arbitrator

Date

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FSCO A09-001538

BETWEEN:

PARALOGANATHAN NADESU

Applicant

and

ZURICH INSURANCE COMPANY LTD.(COMMERCIAL BUSINESS)

Insurer

ARBITRATION ORDER

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

1. Interest accrues on the ACBs ordered to be paid to Mr. Nadesu from March 16, 2010, being 10 business days from the date Mr. Nadesu delivered an Assessment of Attendant Care Needs.
2. Zurich shall pay Mr. Nadesu expenses of the arbitration in the amount of $73, 515.94.
3. The parties shall bear their own expenses of this further hearing.

January 22, 2016

Jeffrey Rogers
Arbitrator

Date