FSCO A97–000928

BETWEEN:

B.M.

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Deena Baltman

Heard: By telephone conference call on August 23, 1999. Written submissions were provided in advance.

Appearances: Domenic A. Romeo for Ms. M.
Michael P. Taylor for State Farm Mutual Automobile Insurance Company

Issue:

The Applicant, B.M., was injured in a motor vehicle accident on January 29, 1996. In a decision dated March 30, 1999, I dealt with her claims for statutory accident benefits under the *Schedule*.[1]

[1]The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

I made the following orders:

1. Ms. M.'s claim for weekly income replacement benefits is dismissed.
2. Ms. M.'s claim for payment of medical and rehabilitation benefits is allowed.

The parties were unable to agree whether the Applicant should be awarded her expenses. The issue in this further hearing is:

1. Is Ms. M. entitled to her expenses incurred in respect of this arbitration proceeding?

Result:

1. Ms. M. is entitled to 80 percent of her legal fees and 100 percent of her assessable expenses.

REASONS:

As Ms. M.'s application for arbitration was filed after November 1, 1996, the criteria for awarding expenses set out in Regulation 464/96 apply to these proceedings. They are:

1. Each party's degree of success in the outcome of the proceeding.
2. Conduct of the insurer or the insured person that tended to shorten or facilitate the proceeding or that tended to prolong, obstruct or hinder the proceeding, including failure to comply with undertakings or orders.
3. Whether the proceeding or any position taken by the insurer or the insured person during the proceeding was manifestly unfounded, frivolous, vexatious, fraudulent or an abuse of process.

4. The degree of complexity, novelty or significance of the factual or legal issues raised in the proceeding.

5. If the insurer or the insured person requests, any written offers to settle made after the conclusion of mediation and before the conclusion of the arbitration in accordance with the rules of practice and procedure applicable to the proceeding, including the terms of the offers, the timing of the offers and the responses to the offers, having regard to the result of the proceeding.

6. Any other matter related to the proceeding that the arbitrator considers relevant to the issue of whether an award of expenses is justified.

State Farm argues that Ms. M. should not be awarded her expenses because she was largely unsuccessful at arbitration. I agree with State Farm that the primary issue at the hearing was whether Ms. M. was entitled to further income replacement benefits (IRBs). Although Ms. M. recovered the cost of her outstanding medical and rehabilitation expenses, which totalled $4,457.74, the bulk of the evidence and hearing time was devoted to the recovery of IRBs.

At the same time, each party's degree of success is only one of the criteria in the expenses regulation. I agree with Arbitrator Alves' comment in *Gray and Zurich Insurance Company*[2] that "the statutory scheme continues to be one 'designed to facilitate applicants' access to a speedy adjudication of disputes." Her approach was approved on appeal; Director's Delegate Draper noted that although the expense amendment signalled a change, it did not require a move to the results-based approach used in the courts:

> Success is only one criterion in an open-ended list and, therefore, must be weighed against the other relevant considerations. I also agree with the arbitrator that the criteria, specifically clause 6, leave room for concerns about the access to the dispute resolution system. One aspect of accessibility is that insured persons should

[2](FSCO A97-001660, January 29, 1999).

> have a reasonable opportunity to raise novel issues of interpretation, particularly those of general importance.

State Farm also submitted that it was inappropriate to award Ms. M. expenses, given my finding that she was poorly motivated to return to work. It argued that the second criterion in the regulation, referring to "conduct" of the parties, was intended for such a case. I disagree; the reference to "conduct" in paragraph 2 of the regulation is confined to "conduct...that tended to shorten or facilitate the proceeding or that tended to prolong, obstruct or hinder the proceeding, including failure to comply with undertakings or orders." Ms. M. did not conduct her case in a manner that unduly prolonged or hindered the proceeding. Ironically, State Farm did. As I noted in my decision, counsel for the Insurer questioned numerous doctors about Ms. M.'s failure to reveal a pre-accident over-dose. Counsel conceded at the hearing that this medical history was not relevant to Ms. M.'s health (the over-dose occurred over ten years ago and left no disability) but argued that her failure to disclose proved she lacked credibility. If that was all counsel sought to establish, I fail to see why he needed to question several doctors about this matter, particularly when Ms. M., the first witness to testify, had already admitted the non-disclosure. This persistent questioning not only wasted time but was unnecessarily embarrassing. In my view, this is the sort of "conduct" that falls within the second criterion of the regulation, and should bear on the assessment in this case.

I further note that although Ms. M. failed to recover IRBs, I found that she was impaired as a result of the accident. She also adduced extensive medical evidence that she was unable to return to work. That I ultimately was not persuaded by the evidence does not detract from the legitimacy of her claim.

Considering all these factors, I find it appropriate to award Ms. M. 80 percent of her legal fees and 100 percent of her assessable expenses.

Although the parties will attempt to resolve the amount of expenses on their own, they requested guidance on whether Ms. M.'s counsel is entitled to recover expenses for work done after the arbitration hearing concluded, including the preparation for and participation in this expense assessment. Subsection 3(1)4 of the Expenses Schedule provides that these services are recoverable:

> 3. (1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
>
> . . .
>
> 4. **For services subsequent to an arbitration**, appeal, variation or revocation hearing. [emphasis added]

September 21, 1999

Deena Baltman
Arbitrator

Date

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BETWEEN:

B. M.

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Ms. M. is entitled to 80 percent of her legal fees and 100 percent of her assessable expenses.

September 21, 1999

Deena Baltman
Arbitrator

Date