



FSCO A07-002110

BETWEEN:

DAOUD SEYED

Applicant

and

FEDERATION INSURANCE COMPANY OF CANADA

Insurer

and

GARY MAZIN

DECISION ON EXPENSES

Before: Richard Feldman

Heard: Written submissions received by September 30, 2009

Appearances: Gary Mazin for Daoud Seyed
Nicholaus de Koning for Federation Insurance Company of Canada
Alon Rooz for Gary Mazin

Issues:

The Applicant, Daoud Seyed, claimed that he was injured in a motor vehicle accident on February 12, 2006. In a decision dated June 8, 2009, I dealt with his claims for statutory accident benefits under the *Schedule*.¹ I dismissed his application in its entirety, while reserving on the issue of expenses.

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

On July 27, 2009, the Financial Services Commission of Ontario (the “Commission”) received a request from counsel for Federation Insurance Company of Canada (“Federation”) requesting a hearing on the issue of expenses. Mr. de Koning indicated that Federation would be seeking an order for its expenses as against both Mr. Seyed and his solicitor, Gary Mazin.

I directed the parties to file any material they wished me to consider as it was my intention, to the extent practicable, to deal with the issue of expenses by way of a written hearing. Federation filed its written material by August 21, 2009 and indicated that there was no evidence upon which it intended to rely other than the submissions that it had provided to me and the substance of my decision of June 8, 2009. Mr. Rooz, on behalf of Gary Mazin, filed responding material by September 1, 2009 but, before Mr. Seyed was put to the expense of retaining new counsel and before Mr. Mazin was forced to disclose privileged solicitor-client information in order to defend himself, Mr. Rooz requested (by way of a motion for summary judgment) that I determine whether there really was any case for Mr. Mazin to meet.

By interim order dated September 10, 2009, I granted Mr. Mazin’s motion and summarily dismissed the Insurer’s claim for expenses as against Mr. Mazin personally. I then provided time for all parties to file any additional material they wished me to consider with respect to the expenses of this arbitration proceeding. I received submissions on behalf of Mr. Seyed in response to the claim for expenses as against him. I also received submissions and a Bill of Costs claiming compensation for Gary Mazin’s expenses of defending the claim the Insurer made against him personally. I received no further material from the Insurer.

The issues in this further hearing are:

1. Is Mr. Seyed liable to pay Federation’s expenses in respect of the arbitration under subsection 282(11) of the *Insurance Act*?
2. Is Federation liable to pay Gary Mazin’s expenses in respect of defending the claim for expenses Federation made against him personally?

Result:

1. Mr. Seyed shall pay to Federation its expenses in respect of the arbitration proceeding, fixed in the amount of \$7,000.00 (inclusive of fees, disbursements and GST).
2. Federation shall pay to Gary Mazin his expenses in respect of defending the claim for expenses Federation made against him personally, fixed in the amount of \$1,000.00 (inclusive of fees, disbursements and GST).

EVIDENCE AND ANALYSIS:

Claim for Expenses Against Mr. Seyed

The Application for Arbitration was filed on September 24, 2007. The Insurer's Response was filed approximately one month later. The first pre-hearing discussion took place on February 25, 2008. At the pre-hearing discussion, the issues were identified and a four-day hearing was scheduled for November 24 - 27, 2008. In late July 2008, the Applicant sought to amend his Application and to add new issues (such as a claim for income replacement benefits). The pre-hearing discussion was resumed in October 2008 and, on consent of the parties, the issues to be decided at the hearing were amended and/or further clarified and the commencement of the hearing was adjourned until March 23, 2009. The Insurer then filed an Amended Response.

The hearing proceeded on March 23, 24 and 25, 2009. The parties attended for about 7 hours on March 23, 6 hours on March 24 and for about 3 hours on March 25. In other words, the total hearing time (not including travel and preparation) was approximately 16 hours.

Federation has claimed fees of \$8,809.39 (inclusive of GST) and disbursements of \$2,361.00 (inclusive of GST), both of which are further particularized in the Insurer's Bill of Costs.

The fees are based upon about 130 hours of work, approximately two-thirds of that time being attributed to the work of Mr. de Koning. He is claiming compensation at an hourly rate of \$87.26 for all work other than travel (approximately 70 hours) and an hourly rate of \$48.38 for his travel time (approximately 18 hours).² Lesser hourly rates are claimed for others at the firm who worked on this file.

With respect to Mr. de Koning's travel, I see no reason why an applicant (even an unsuccessful one) should have to pay a greater amount because the insurer has chosen to retain counsel who lives outside the area where the proceedings are being held. While the *Expense Regulation* permits an insurer to claim for its counsel's travel expenses (i.e., disbursements for mileage and other out-of-pocket expenses³), there is no similar provision with respect to legal fees during travel and Federation has filed no cases in support of this part of its claim.⁴

There were no novel issues brought forward by the Applicant for which he should be given credit. The hearing itself was not unduly prolonged. I did not find that the application was frivolous or vexatious. There is no evidence that the Applicant failed to attend an examination required under section 42 of the *Schedule*.

I find that, of the six criteria I am required to consider (under the *Expense Regulation*), the determining factor in this case is the complete success of the Insurer. This was based largely upon the Insurer's success in proving that the Applicant and his spouse lacked credibility, that many of the documents the Applicant relied upon could not be trusted and that the Applicant had failed to disclose or misrepresented important facts to the Insurer both before and after the accident in question.

²Mr. de Koning's office is located in Waterloo and the proceedings that took place in person were held at the Commission's office in Toronto.

³*Expense Regulation*, section 6.

⁴I was able to find several cases, however, in which similar claims were dismissed: *Abdala-Amin et al. and Guarantee Company of North America* (FSCO A03-000395, May 25, 2005); *Mohamed and Yusuf and Guarantee Company of North America* (FSCO A04-000020, September 7, 2005); *Khawaja and ING Insurance Company of Canada* (FSCO A03-000974, June 24, 2004); and *Cisneros and State Farm Mutual Automobile Insurance Company* (FSCO A02-000630, January 8, 2003).

With respect to any offers to settle, it is alleged in the submissions filed on behalf of the Applicant that he made an offer to settle on September 6, 2007 (i.e., after the conclusion of mediation and shortly before the filing of the Application for Arbitration);⁵ there is no actual *evidence* to support this assertion and no copy of the offer has been filed so I am unable to confirm its exact terms or determine whether it complied with the requirements of Rule 76 of the *Dispute Resolution Practice Code*. In any event, given that the Insurer was able to prove at the hearing that the Applicant had made unfounded claims and that he had misrepresented facts to the Insurer and given that the Insurer was completely successful at the hearing, I find that the Insurer was justified in rejecting this offer. Thus, even if there were evidence that this offer complied with Rule 76, I would not consider it to be a significant mitigating factor.

With respect to disbursements, the Applicant does not specifically challenge any of the amounts claimed by Federation.

I have considered the nature of this case, the time spent in hearing, the amount of time that ought reasonably to have been spent in preparation and the hourly rate that is permitted for Mr. de Koning and others at his firm who worked on this matter. Although the Insurer was successful, I have disallowed the claim for Mr. de Koning's travel time. I find that a reasonable total number of hours to have spent on this matter would have been approximately 50 hours.⁶ This is a good example of where a line-by-line analysis of the Bill of Costs is neither warranted nor particularly helpful.⁷ I hereby fix Federation's expenses at \$7,000.00, inclusive of fees, disbursements and applicable GST.

Mr. Mazin's Claim for Expenses Against Federation

Submissions were filed on behalf of Mr. Mazin to defend against the claim for expenses as against him personally and to bring a motion for summary judgment. On behalf of Mr. Mazin,

⁵It is alleged that the Applicant offered to accept \$18,000.00 in settlement of past and future claims for treatment, rehabilitation, housekeeping benefits, income replacement benefits and costs.

⁶Based on a ratio of approximately two hours of preparation for every hour spent in hearing.

⁷See *Henri and Allstate Insurance Company of Canada* (OIC A-007954, August 8, 1997).

Alon Rooz wrote a couple of letters with respect to this matter and then filed (on September 1, 2009) a 16-page written response and motion. This motion for summary judgment was granted.

By written submissions dated September 17, 2009, Mr. Mazin is seeking his expenses related to the claim as against him personally in the amount of \$8,195.25 (inclusive of GST). This amount was calculated by multiplying 22.3 hours of work by Mr. Rooz by his fee of \$350.00 per hour (and adding GST). It is being argued that the usual hourly “caps” set out in the *Expense Regulation* do not apply in this case. Alternatively, Mr. Mazin is seeking expenses of \$3,512.25 (inclusive of GST) calculated by multiplying 22.3 hours of work by Mr. Rooz by \$150.00 per hour (the maximum rate permitted under the *Expense Regulation* for an applicant’s counsel) and then adding GST.

Subsection 282(11) of the *Insurance Act* grants an arbitrator the authority to award, according to the criteria prescribed in the *Expense Regulation*, to an insured person or an insurer all or part of their expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations. Subsection 282(11.2) permits, in certain circumstances, a party’s representative to be held personally responsible for expenses. None of these provisions deal with a claim for expenses by a third party (i.e., someone other than an insured person or insurer). Thus, there appears to be no jurisdiction under section 282 of the *Insurance Act* to award the expenses being claimed by Mr. Mazin.

The authority to make such an award, however, may come from section 17.1 of the *Statutory Powers Procedure Act* (“*SPPA*”) which permits a tribunal to order a party to pay all or part of another party’s costs in a proceeding. Note that this provision applies to any “party”, not just to an insured person or insurer. For the purposes of this expense hearing, I have made Gary Mazin a party to the proceedings.

Subsection 17.1(2) of the *SPPA* goes on to state, however, that a tribunal shall not make an order to pay costs under this section unless the conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith and the tribunal has made rules concerning costs in accordance with subsection 17.1(4) of the *SPPA*.

The Commission has created rules concerning costs.⁸ Rule 75.1 of the *Dispute Resolution Practice Code* provides that 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. Rule 75.1 also states that the amounts which may be awarded are found in Rule 78 (which sets out the maximum hourly rates that can be awarded to an insured person or an insurer for legal fees). Rule 78 does not expressly deal with legal fees incurred by a party other than an insured person or insurer.

Thus, it appears that, if I find that the conduct of Federation in seeking expenses as against Gary Mazin was unreasonable, pursuant to section 17.1 of the *SPPA* and Rule 75 of the *Dispute Resolution Practice Code*, I can award to Gary Mazin all or part of his costs.

I agree that parties should be discouraged from making claims for expenses against opposing counsel unless such a claim is based upon real evidence of inappropriate conduct on the part of such counsel, not just speculation. In this case, Federation offered no evidence⁹ in support of its claim against Gary Mazin and, as such, its conduct was not reasonable. I therefore find that Federation should have to pay to Gary Mazin at least some of his legal expenses.

Nevertheless, the amount of expenses awarded should, in my view, be proportionate to the time reasonably spent on the matter and to other expense awards issued by the Commission. I also see no reason why counsel for a third party should be entitled to a higher hourly rate than counsel for either the insured person or the insurer. In my view, both the number of hours and the hourly rate being claimed are excessive and, once again, I find that a line-by-line analysis of the Bill of Costs is not warranted.

⁸ Although, in accordance with the *Insurance Act*, the term used at the Commission is “expenses” rather than “costs”.

⁹ No affidavit was filed by the Insurer with respect to this issue and no request was made to introduce any other type of evidence.

Having considered the nature of this claim and the time reasonably spent in preparing written submissions, I hereby fix Mr. Mazin's expenses at \$1,000.00 (inclusive of fees, disbursements and applicable GST).

Richard Feldman
Arbitrator

November 23, 2009

Date



FSCO A07-002110

BETWEEN:

DAOUD SEYED

Applicant

and

FEDERATION INSURANCE COMPANY OF CANADA

Insurer

and

GARY MAZIN

ARBITRATION ORDER

It is ordered that:

1. Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, the Applicant shall pay to the Insurer its expenses in respect of the arbitration proceeding, fixed in the amount of \$7,000.00 (inclusive of fees, disbursements and GST).
2. Under section 17.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 and Rule 75 of the *Dispute Resolution Practice Code*, the Insurer shall pay to Gary Mazin his expenses in respect of defending the claim for expenses the Insurer made against him personally, fixed in the amount of \$1,000.00 (inclusive of fees, disbursements and GST).

Richard Feldman
Arbitrator

November 23, 2009

Date