

2018 CarswellOnt 1616
Financial Services Commission of Ontario (Arbitration Decision)

Akeelah and Belair Insurance Co., Re

2018 CarswellOnt 1616

**DAWOOD AKEELAH (Applicant) and BELAIR
INSURANCE COMPANY INC. (Insurer)**

Anne Morris Member

Judgment: January 17, 2018

Docket: FSCO A16-0009

Proceedings: additional reasons to *Akeelah and Belair Insurance Co., Re* (2017), 2017 CarswellOnt 12889, Anne Morris Member (F.S.C.O. Arb.)

Counsel: Mr. Gary Mazin, for Applicant
Ms Jason Goodman, Ms Nicole Dowling, for Insurer

Anne Morris Member:

Issues:

1 The Applicant, Mr. Akeelah, was injured in a motor vehicle accident on November 18, 2013 and sought accident benefits from Belair Insurance Company Inc. ("Belair"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Akeelah, 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.

2 An Arbitration Hearing was held further to which I issued a decision dated July 31, 2017. The parties were unable to agree on the issue of expenses further to that decision.

3 The issues in this Expense Hearing therefore are:

1. Is either party entitled to its expenses of the Arbitration, and if so, in what amount?

Result:

4

1. The Applicant is entitled to his expenses of the Hearing in the amount of \$41,309.34 inclusive of disbursements and applicable taxes.

EVIDENCE AND ANALYSIS:

Background

5 At the Arbitration Hearing, I found that the Applicant was catastrophically impaired, that he was entitled to a special award and that he was entitled to attendant care benefits in the amount of \$802.86 incurred to date. The Applicant had sought \$6,000.00 per month in attendant care benefits, in large part because of a claim for entitlement to 24-hour supervisory care. I found that this claim was not supported by the evidence and I also made adverse findings as to whether or not services provided

by family members were "incurred" expenses within the meaning of the *Schedule*. While the Applicant was successful on the catastrophic impairment issue, he was not successful on the significant issue of quantum of attendant care benefits.

6 As regards the quantum of the special award, and some medical benefits which were also at issue in the Arbitration, I made the following observation:

...I note that the amounts of special awards are tied to benefits. There are a number of medical benefits in dispute in this Hearing besides catastrophic determination, attendant care and a special award. The parties, however, made virtually no submissions with respect to the other medical benefits in dispute, as to whether they were reasonable or not reasonable, or even why they were denied. I find myself confronted with a vast amount of evidence and documentation in this Hearing. Without further submissions from the parties I am unable to pick out the evidence with respect to the medical benefits to try to infer with any degree of confidence what was denied and when and why.

7 The following was therefore part of my order:

6. If the parties are unable to agree on the amount of the special award, or on the medical and cost of examination benefits payable in light of the other findings in this decision, they are to make submissions on the same within 30 days of this decision.

8 The parties were subsequently able to reach an agreement on these matters but not expenses.

Authority to Award Expenses

9 Rule 75.1 of the *Dispute Resolution Practice Code* ("the *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. The items and amounts which may be awarded are in Rule 78 and the Schedule to the Expense Regulation found in Section F of the *Code*.

10 Rule 75.2 of the *Code*, which sets out the criteria to be considered in awarding expenses, states the following:

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 proceedings;
- d. The conduct of a party or 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 - 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.

Degree of Success

11 The applicable factor in this Expense Hearing is each party's degree of success. The Applicant submitted that he was entitled to his expenses given his degree of success, noting that he had been found to be catastrophically impaired, that he had been found entitled to a special award, and that he had been awarded attendant care benefits. The Insurer submitted that given its degree of success on the significant issue of quantum of attendant care benefits, that both sides should be ordered to bear their own expenses.

12 I acknowledge that the quantum of attendant care benefits was a significant issue on which the Insurer was largely successful. The more significant issue, however, was that of catastrophic impairment. The special award, the quantum of which was not decided by me, would have been related to the quantum of the attendant care benefits found to be payable (\$802.86), and to the other, relatively minor, medical benefits. The quantum of the special award was likely not very significant.

13 In the circumstances I will award the Applicant his reasonable expenses but reduce them by one third to acknowledge the Insurer's success on the significant issue of quantum of attendant care benefits.

Quantum of Expenses

14 The Applicant claims fees in the amount of \$36,631.27 and disbursements in the amount of \$61,669.47.

15 It is established case law that in determining the appropriate quantum of expenses, the objective is to fix an amount that is fair and reasonable given the number of issues, their complexity and the amounts in dispute. A broad-stroke approach rather than a line-by-line assessment is frequently chosen by adjudicators using a ratio in the range of 1:1 to 4:1 for pre-hearing preparation time to hearing time.

Legal Fees

16 The Hearing took place over seven days and while some days were shorter than others I will allow seven days of hearing at seven hours per day, or 49 hours. The Applicant had a number of representatives at the Hearing led by Mr. Mazin who attended the Hearing most, but not all of the time. I will allow 49 hours of hearing time for Mr. Mazin and also 49 hours for one other representative. In the circumstances of this case, I think a ratio of 3:1 for pre-hearing preparation time to hearing time is appropriate. That is 147 hours for pre-hearing preparation.

17 Rule 78 of the *Code* provides as follows with respect to expenses for 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.

18 I will allow 49 hours of hearing time for Mr. Mazin at the legal aid rate for his year of call to the bar of \$136.43, for a total of \$6,685.07. The other representatives are either 2015 or 2016 calls to the bar. I will therefore allow 49 hours at \$109.14 for hearing attendance by another representative or \$5,347.86. I see from the Applicant's submissions that the majority of pre-hearing preparation was done by an associate. I will allow 147 hours at \$109.14 for pre-hearing preparation or \$16,043.58. I

estimate the total reasonable amount for legal fees therefore to be \$28,076.51. In reducing that amount by one third to reflect the degree of success, I allow \$18,811.26 for legal fees plus HST of 13% or \$2,445.46 for a total allowable for legal fees of \$21,256.72.

Disbursements

19 The Applicant seeks disbursements in the amount of \$61,669.47 including HST, as follows:

DISBURSEMENTS - ACCIDENT BENEFITS

HST exempt

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Dr. W. Heidary - clinical notes and records	225.00
Dr. A. Movsesyan - clinical notes and records	275.00
Hamilton General Hospital - clinical notes and records	155.25
Joseph Brant Hospital - clinical notes and records	55.00
Greater Niagara Medical Imaging	300.00
Hamilton Health Sciences - clinical notes and records	499.50
Dr. Samim Yousif Hanna - clinical notes and records	348.82
Minister of Finance, OHIP Summary	370.00
East Region Mental Health - clinical notes and records	30.00
Stoney Creek Medical Walk-in Clinic - clinical notes and records	100.00
St. Joseph's Healthcare - clinical notes and records	207.00
Minister of Finance - Application for Arbitration	100.00
Work-to Fit - clinical notes and records	150.00
Queenston Pharmacy - Prescription Summary	50.00
Halton Healthcare - clinical notes and records	30.00
Dr. Dina Savelli - clinical notes and records	500.00
Dr. Mehdi Shahideh - clinical notes and records	200.00
Summons to Witness Fees	583.00
Parking and mileage expenses for Arbitration	213.12
Postage expense from July 2016 to July 2017	227.57
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	Total
	4,619.26

Other disbursements

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Harvev Katz PC - Disbursements Account	16.50
Victoria Community - clinical notes and records	35.50
Dr. Samim Hanna - clinical notes and records	28.83
Dr. Dina Savelli - clinical notes and records	100.00
Rapid City Transportation - Invoice 360536, 457490, 457796	1,464.00
MVA Interpreting Services - Invoice 209407	196.00
Able Transport Ltd - Invoices 409117, 413704	441.22
Lifemark - clinical notes and records	75.00
Limeridge Physiotherapy - clinical notes and records	32.25
Limeridge Medical Pharmacy - Prescription Summary	32.25
CPM Centres - clinical notes and records	31.25
ABI Counselling and Consultation - medical file	53.06
Ross Rehabilitation - clinical notes and records	105.00
Dr. M. Rathbone - clinical notes and records	170.00
Okell Rehabilitation - Invoice 222	720.00
Dr. Chantal Vaidvanath - Invoice 2017-42	5,530.75
Dr. Chantal Vaidvanath - Invoice 2017-116	4,750.00
Dr. Dale Robinson - Invoice 873	1,800.00
Dr. Jeremy Frank - Invoice 0010271	2,250.00
Novotel Hotel - Invoice dated April 6, 2017	537.00
Belair Direct - airfare invoice	622.05

5 Primafact CDs with medicals to Omega, Adapt-Able Design, with productions to AB defence, to Dr. Rathbone		100.00
Queenston Pharmacy - Prescription Summary		100.00
Sunlife Financial - Disability File		150.00
Omega Medical Associates - Invoice 11904		2,500.00
Omega Medical Associates - Invoice 12122		13,000.00
Omega Medical Associates - Invoice 12311		16,425.00
Pancare Consulting Inc - medical records		327.00
Manulife Financial - Extended Health Benefits File		200.00
Rapid City Transportation - Invoice 536548		203.44
The Printing House - Invoice 099088763		1,358.88
Paper use 5,624 pages at \$0.30 per page		1,687.20
Other disbursements (paper, copies, office supplies, postage, etc.)		591.14
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Total	Before tax:	55,633.32
	HST	1,416.89
	After HST:	57,050.21
Total Disbursements		61,669.47

20 I agree with the Insurer that the onus is on the person claiming expenses to show those expenses. In this case, the Applicant has submitted a list of disbursements and, in Schedule B, to his submissions, he has submitted some receipts related to some of the expenses claimed. There is otherwise no explanation for the numerous disbursements or submissions as to where the disbursements fit within the Expense Regulation. The items and amounts which may be awarded as expenses are governed by the Schedule to the Expense Regulation found in Section F of the *Code*.

21 Many if not most of the disbursements listed by the Applicant are for clinical notes and records. No receipts have been provided for any of these claims for the cost of clinical notes and records. No explanation has been provided as to how a claim for clinical notes and records is recoverable under the Schedule. The claim does not seem to fit into the section 5 (5) of the Schedule to the Expense Regulation which states as follows:

The amount of the expenses paid by or on behalf of the insured person or the insurer to an expert for the preparation of a report may be awarded, to a maximum of \$1,500.

22 The only other category which might apply is section 4 which states as follows:

4. The amount of the following disbursements made by or on behalf of the insured person or the insurer may be awarded:

1. For long distance telephone, facsimile and other telecommunication charges.
2. For typing, printing and reproducing copies of documents.
3. For the delivery, by mail or courier, of items relating to the arbitration, appeal, variation or revocation hearing.
4. For other out-of-pocket expenses incurred in furtherance of the arbitration, appeal, variation or revocation hearing.
5. Any applicable taxes paid in respect of the expenses referred to in this section.

23 It may be that expenses for clinical notes and records fit into this section. There are no receipts provided, however, and no indication as to the purpose for which the clinical notes and records were obtained, or whether reimbursement for these expenses was sought or received from this Insurer or another insurer as is often the case. On the other hand, I note that clinical notes and records from various sources were used at the Hearing. The Insurer estimates that the total amount claimed for these expenses

is \$4,885.71. Included in this category is the cost of prescription summaries, and the cost of obtaining the Sunlife Financial disability file, the Pancare Consulting Inc. medical records, and the Manulife Financial Extended Health Benefits File. In the absence of receipts or explanation, I will allow one half of this amount or *\$2,442.85*.

24 I will allow *\$100.00* to the Minister of Finance for the filing fee for arbitration as this is a usual expense. I will allow *\$583.00* for summons to witnesses even though details have not been provided as this expense is allowed under the Expense Regulation and the amount seems reasonable.

25 No details or information have been provided for the claim for parking and mileage in the amount of \$213.12 and it is not clear in what way these expenses fit within the parameters of section 6 of the Schedule to the Expense Regulation dealing with travel and accommodation expenses. The Applicant has not proven this expense and it is not allowed. No details or information have been provided with respect to the \$16.50 claimed for "Harvey Katz PC" and it is not allowed.

26 The Applicant provided a receipt in the amount of \$203.44 for Rapid City Transportation. This appears to be for transportation from Hamilton to the Hearing in Toronto. The Expense Regulation does not provide for this type of transportation expense and the travel amount allowed is limited to 30 cents per kilometre. The easily ascertainable distance is 92 kilometres one way. I will allow 184 kilometres (2 ways) at 30 cents per kilometre or *\$55.20*. The Applicant also provided a receipt for 3 nights stay at a hotel at the time of the Hearing. The 7-day Hearing did not take place in the municipality in which the Applicant resides, and I will allow the 3 nights in a hotel, noting the difficulty which the Applicant likely had in travelling to and from the Hearing. The amount is limited by the Expense Regulation to \$150.00 per night or *\$450.00*.

27 The Applicant also provided receipts for Rapid City Transportation for trips in 2015 and 2016 from his home in Hamilton to addresses in Toronto. He claims \$1,464.00 for these trips. It is not clear what the purpose of the trips was and the expenses, in the absence of explanation, are in any event not allowable under the Expense Regulation. Similarly, the Applicant provided receipts from Able Transport Ltd. for trips from Hamilton to medical facilities in Toronto in 2016. It is not clear what the purpose of these trips was. No explanation was provided as to how these expenses fit the Expense Regulation. Those expenses are not allowed.

28 The Applicant claimed \$196.00 for interpreting services by MVA Interpreting Services. This seems, from the invoice, to relate to interpreting services for a medical examination. In the absence of further explanation, I do not allow this as an expense under the Expense Regulation.

29 As regards experts, Okell Rehabilitation provided an invoice in the amount of \$720.00 for the preparation for and attendance by an occupational therapist at the Hearing. The witness charged a total of \$180.00 for preparation which falls within the parameters of section 5 of the Schedule to the Expense Regulation. She charged \$480.00 for attendance which included three hours of waiting time. I will allow all four hours as it is difficult to schedule witnesses precisely and waiting time is often involved. This invoice is allowed in the total amount of *\$660.00*.

30 Dr. Vaidyanath's invoice in the total amount of \$5,530.75 for preparation for and attendance at the Arbitration is limited to *\$500.00* and *\$1,600.00* respectively in accordance with the Expense Regulation. Dr. Vaidyanath's invoice in the amount of \$4,750.00 for an expert report is limited to *\$1,500.00* in accordance with the Expense Regulation as is Dr. Robinson's report. His claim for \$1,800.00 is limited to *\$1,500.00*. Dr. Frank provided an invoice in the amount of \$2,250.00. He did not testify and this amount is not allowed.

31 The Applicant provided an invoice from Omega Medical Associates in the amount of \$16,425.00 which relates to amounts charged for preparation for and attendance by four experts. The amount claimed for an occupational therapist is *\$1,575.00*, which is within the parameters of the Expense Regulation and is allowed. Preparation for the other three experts is limited to \$500.00 each or *\$1,500.00*. Attendance for the other three experts is limited to \$1,600.00 each or *\$5,400.00*.

32 The Insurer submitted with respect to testimony that the experts should be limited to the two or three hours which the Insurer submitted they testified (limited to \$200.00 per hour and not \$1600.00 per day), even though it is not clear from the invoices how many hours were spent in testimony. I did not keep track of the length of each doctor's testimony. I do not know how long each doctor waited. Given the vagaries of a hearing and the inability to slot witnesses efficiently into neat time slots,

and given the absence of evidence by way of invoices as to time actually spent testifying, and given the amounts charged in the invoices, I am reluctant to limit these invoices any further than I have already done. In my view, the amounts I have allowed are reasonable.

33 The Applicant claimed other expenses for invoices from Omega Medical Associates, in the amount of \$2,500.00 and \$13,000.00 specifically but did not provide receipts. The Insurer indicated that these were for catastrophic determination reports, the \$2,500.00 for a rebuttal report and a further \$13,000.00 for a second set of catastrophic determination reports. The Insurer submitted that the rebuttal report should be limited to \$1,500.00 in accordance with the Expense Regulation and I agree. The Insurer submitted with respect to the second set of catastrophic determination reports that it had already paid for the first catastrophic determination reports and should not be required to pay for a further set. However, I found all of the reports useful in arriving at my decision. I agree with the Insurer, however, that the expenses for these four catastrophic determination reports should be limited to \$1,500.00 each or \$6,000.00 total.

34 I will allow the airfare for one of the witnesses who came from Ottawa, in the amount of \$622.05 as this falls within the parameters of the Expense Regulation. I will allow \$100.00 for the Primafact CDs as this falls within the parameters of section 4 of the Expense Regulation and seems reasonable. The Applicant provided a receipt from the Printing House in the amount of \$1,358.88 and I will allow this under section 4.

35 The Applicant also claimed "Paper use (5,624 pages at \$0.30/pg)" in the amount of \$1,687.20 and a further \$591.14 for other office supplies. He also claimed \$227.57 for postage. I think a total of \$300.00 for all these headings of day to day business expenses is reasonable in the absence of further details or explanation.

36 I have found reasonable disbursements to total \$26,246.98. I will reduce these expenses by one third or \$8,740.24 to reflect the degree of success by both parties and allow the Applicant \$17,506.74 for disbursements plus HST of \$2,275.88 for a total of \$19,782.62.

37 I have therefore allowed, inclusive of HST, legal fees of \$21,256.72 and disbursements of \$19,782.62 for a total payable by the Insurer to the Applicant of \$41,039.34.

Anne Morris Member:

38 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 of the Hearing in the amount of \$41,039.34 inclusive of disbursements and applicable taxes.

Footnotes

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