

2018 CarswellOnt 4711
Financial Services Commission of Ontario (Arbitration Decision)

Shaw and TD General Insurance Co., Re

2018 CarswellOnt 4711

BRIAN SHAW (Applicant) and TD GENERAL INSURANCE COMPANY (Insurer)

Lynda Tanaka Member

Judgment: March 13, 2018

Docket: FSCO A15-007706

Counsel: Gary Mazin, for Applicant

Terry J. Tustin, for Insurer

Lynda Tanaka Member:

Issues:

1 The Applicant, Brian Shaw ("Applicant"), was injured in a motor vehicle accident on June 10, 2014 and sought accident benefits from TD General Insurance Company ("TD"), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and the Applicant, 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 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.

2 The decision in this Arbitration was issued on November 30, 2017 ("Arbitration Order").

3 The issues in this Expense Hearing are:

1. Is TD liable for the expenses incurred by the Applicant with respect to the Arbitration?
2. If so, what is the quantum of the expenses including disbursements for which TD is liable?
3. Is either party entitled to its expenses of the Expense Hearing?

Result:

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1. TD is liable for the expenses incurred by the Applicant with respect to the Arbitration.
2. The quantum of the total expenses including disbursements and HST for which TD is liable to the Applicant is \$40,499.14.
3. Neither party is entitled to receive its expenses of the Expense Hearing.

EVIDENCE AND ANALYSIS:

5 At the Arbitration Hearing, the Applicant was found to have sustained a catastrophic impairment and was entitled to attendant care benefits in the amount of \$8,708.50, over and above what had already been paid by TD. In addition, the Applicant was

entitled to medical benefits in the amount of \$5,204.19, \$168.36 for prescription medications and \$1,289.51 for transportation expenses, as well as interest on overdue payment of benefits.

6 The Arbitration Order provided as follows with respect to expenses:

If the parties are unable to agree on the entitlement to, or quantum of, the expenses of this matter, the parties may request an appointment with me for determination of same in accordance with Rules 75 to 79 of the *Dispute Resolution Practice Code*, with the following revised timetable. The party requesting expenses shall submit the request including supporting material to ADR Chambers, served on the opposing party, within 15 days of the date of this decision. The responding party shall serve and file its response within 7 days of receipt of the request for expenses. Reply material shall be served and filed within 5 days of receipt of the response.

7 The Applicant's submissions with respect to expenses were dated December 20, 2017. TD responded with its submissions dated December 27, 2017. The Applicant replied with further submissions dated January 2, 2018.

Preliminary Issue

8 TD requested that the Applicant's request for expenses be dismissed because it was served late, not within 15 days of the date of my decision. There is discretion in an arbitrator to waive strict compliance with procedural time limits under Rule 81.1 which permits setting aside any time limit set out in the Rules. Also, s. 23(1) of the *Statutory Powers Procedure Act*² provides that a tribunal may make such orders "as it considers proper to prevent abuse of its processes."

9 TD relied on a decision of Director's Delegate Blackman, *Rocheleau v. Allstate Insurance Co. of Canada* [2013 CarswellOnt 13680 (F.S.C.O. App.)],³ in which Delegate Blackman refused an extension of time for the filing of a request for expenses. In that case there were two requests for expense, one of which was 31 months late and the other was seven months late. The criteria that Delegate Blackman used to make the determination as to whether or not he should exercise his discretion under Rule 81.1 of the *Dispute Resolution Practice Code* ("DRPC") were the following:

- a) the nature of the breach and whether the breach was inadvertent;
- b) the strength of the claim for legal expenses;
- c) the respective prejudice to the parties;
- d) the length of delay;
- e) the explanation for the delay; and
- f) the justice of the case, i.e. was this an adjudicative setting of the time period or not, and would the granting of the extension bring the administration of justice into disrepute and violate the principle of finality.

10 TD argued that since I had varied the time limit for the submission of a request for expenses in the Arbitration Order, that time limit for expense submissions was an adjudicative order and therefore the time limit should not be extended. To do so would bring the administration of justice into disrepute and violate the principle of finality. TD also argued that the Applicant's material contained no request to extend the time for the submission and, absent such a request, I should not exercise my discretion.

11 I have reviewed the submissions on this request and the criteria set out by Delegate Blackman and I find that it is appropriate to exercise my discretion to extend the time for the filing of the request.

12 First, Rule 81.1 speaks only of time limits in the Rules, not adjudicative orders as to time limits. However, in this case, the time limit is set out in my own order, made with the consent of the parties and with an effort to secure an expeditious resolution of the matter. Second, the Applicant argues that there is ambiguity in the Arbitration Order in that I may have meant 15 business days for filing, in which case the request is on time. Such ambiguity should be resolved in favour of the Applicant,

given his success on the merits of his Application for Arbitration. Third, while the counsel who signed the request for expenses is a senior counsel, the counsel who had carriage of the file through most of the matter and who did appear on the Hearing is a 2016 call to the bar.

13 Fourth, the delay here is 5 days, not some months, and the filing still falls within the 30 days provided under the *DRPC*. Therefore, extending the time still meets the policy objective of expeditious processing of claims. There is little prejudice to TD as compared to the case relied on by TD. In *Rocheleau* the insurer would have gone through at least one full fiscal year without knowing the quantum of the claim and might arguably have lost documents or witnesses required to respond to the request. That is not the case here. In my view the delay here is minimal and there is no risk that my extending the time limit will undermine the principle of finality or bring the administration of justice into disrepute. To deny the extension would bar the Applicant from recovering his expenses when he has had success. In the circumstances of the brief delay, to bar the Applicant would be an abuse of our processes. Therefore I dismiss the request by TD.

Entitlement to Expenses and Quantum

14 The Applicant requests an order awarding it \$38,198.64 in expenses and disbursements in the amount of \$36,681.47, both including HST.

15 The Hearing was held on six days as required to meet the schedule of witnesses, with oral submissions heard September 14, 2017. At the close of submissions, the Applicant requested and TD agreed that the parties would make additional submissions in writing on one issue. The Applicant called as witnesses his family physician, an occupational therapist, a treating chronic pain specialist and three medical doctors testifying as experts (a fourth attended to testify but his schedule would not mesh with the arbitration timetable and he did not testify). The TD adjuster responsible for the file testified under summons.

16 I have considered the various relevant criteria from the *DRPC* as set out below. The two criteria related to attendances for examinations under either section 42 or section 44 of the *Schedule* were not relied on by TD and are not relevant.

Criteria 1: Each party's degree of success in the outcome of the proceeding

17 It is not disputed that the Applicant was successful on his claims. TD argues that the amount of the expenses claimed is not proportionate to the success and the disbursements are not properly supported. TD argues that the Arbitration Order results in benefits in the amount of \$15,370.56 and that it could not reasonably have anticipated expenses of the magnitude claimed. I reject this argument. The case was substantially about whether or not the Applicant had sustained a catastrophic impairment which, if he were successful, opens the potential for claims for benefits to the maximum available under the policy. Also, TD is a sophisticated party and should have been able to anticipate that the claim for expenses would be substantial.

Criteria 2: Any written offers to settle that were made in accordance with the rules of practice and procedure applicable to the proceeding after the conclusion of Mediation and before the conclusion of the Arbitration

18 The parties agree that there were no offers made in accordance with the *DRPC*.

Criteria 3: Whether any novel issues are raised in the proceeding

19 There were no novel issues raised.

Criteria 4: The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including the failure to comply with undertakings and orders.

20 The Applicant alleges that TD's conduct in its late July 2017 service of over 3,000 pages of unbound documents (its complete accident benefits file) prolonged, obstructed and hindered the proceeding. TD's failure to limit service to only relevant documents forced the Applicant's counsel to spend more time than otherwise would have been the case in reviewing the documents and in preparing cross-examination of all witnesses.

21 TD denies the allegation that its conduct prolonged, obstructed and hindered the proceeding. It submits that the Hearing was in fact shorter than it would have been, because it did not call its expert witnesses. It was denied the right to call its witnesses because of its failure to comply with the production order of the Pre-Hearing Arbitrator. TD submits that:

It [TD] must cast a very wide net in terms of service of documentation in advance of arbitration as it cannot be expected to know exactly which documents will be relied on at the hearing until the hearing, when the evidence of the Applicant is called. It is unfair to require the Insurer to identify the exact documents...⁴

22 In this submission, TD confuses the obligations of production which are to be completed before or not less than 60 days after the Pre-Hearing, and the obligations to prepare an arbitration brief containing the relevant documents for the Hearing. TD served the entire accident benefits file on July 28, only five weeks prior to the commencement of the Hearing, thereby satisfying its production obligations, albeit late, but I am mystified that TD would not know at that point in time, what documents it regarded as relevant for its case at the Hearing. If TD does not know at that stage, no one else can.

23 TD's failure to comply with the production rules in accordance with the directions of the Pre-Hearing Arbitrator gave rise to a preliminary motion that prolonged the Hearing. Further, its choice of service of documents in that form, unindexed and unlisted, necessarily increased the time that the Applicant's counsel had to spend to prepare and that is something that TD should have been able to anticipate.

24 The Applicant also argues that the manner in which TD responded to the treatment plans also prolonged the proceeding, as well as being improper, vexatious or unnecessary. He submits that TD should have known that the injuries and impairments met the threshold for catastrophic impairment. This argument is not persuasive, as TD had its own expert assessment which found that the Applicant did not suffer a catastrophic impairment. TD cannot be faulted as prolonging the proceeding by relying on those reports and defending its position.

Criteria 5: Whether any aspect of the proceeding was improper, vexatious or unnecessary

25 The Applicant says that the failure of TD to respond to the submission of OCF-6s concerning attendant care and documents to support those claims was improper. He submits that it was not until the Hearing that TD provided any response to the filing of the OCF-6s and the reason given by TD was that the policy limit of \$50,000 was reached. Similarly, the Applicant complains of TD's handling of the claim for transportation expenses in that TD was unable to explain why the payments for transportation expenses stopped. Further, the Applicant complains that TD had a discretion to make payments.

26 The TD adjuster, Ms. Williams, testified under summons for about 75 minutes on the afternoon of September 13. On the issue of the transportation expenses and also the issue of the prescription expenses she was unable to explain why TD gave no response to these requests for payment of benefits. She also testified that the invoice for the hearing aids was rejected because it was not submitted through a specified electronic portal even though an insurer has discretion to pay the invoice in any event. Further, it appears that TD's position was that if medical reports are sent to TD counsel, they do not fall within the obligation of the adjuster to review the reports to properly adjust the claim. The testimony of Ms. Williams was completely unnecessary, except to provide the factual basis of TD's conduct in handling the claim. An agreed statement of facts, which would include the admissions made by Ms. Williams under affirmation, should have been agreed to.

27 Therefore I find that portions of this Hearing were unnecessary but for the conduct of TD.

28 Considering the criteria above, I find that TD is liable for the expenses incurred by the Applicant with respect to the Arbitration.

Issue 2 What is the quantum of the expenses including disbursements for which TD is liable?

29 TD challenged the expenses for legal fees and, as a result, the Applicant substantially revised his claim. The claim is \$38,198.64⁵ but the Applicant has not provided a breakdown as to how that number is calculated. There is a summary of time

spent on the Hearing and the calculation of the hours at the Legal Aid hourly rates is \$15,559.60.⁶ It is not clear how the Applicant arrived at the claim number which is substantially more than the total of the figures on the last page of the dockets. It is also not clear whether or not the claim figure includes HST. The dockets in Schedule A of the Reply Submissions include time spent by articling students and law clerks but their time is not included on page 9 in the summary which appears to focus on the Hearing itself.

30 It is not the arbitrator's task to go through the dockets line by line or to work out the claim calculation. Absent the details, I have applied a ratio of Hearing time and preparation time of 4:1 at the Legal Aid rate of Ms. Ahsan for the 40 hours of Hearing time and added to that the time spent by Mr. Mazin as senior counsel listed on page 9. The expenses under this calculation is therefore \$22,277.44 plus HST of \$2,896.07 for a total of \$25,173.51.

31 The ratio is the highest that is usually used by arbitrators. In choosing this ratio I am reflecting the complexity of the matter and well as TD's conduct in prolonging the Hearing and causing unnecessary time to be spent.

32 I decline to simply give the Applicant the figure he has claimed, given the lack of calculation information and because the ratio of that claim to the Hearing is well beyond the usual 4:1 ratio.

33 TD also raised issues concerning the disbursements as not complying with the Expense Regulation. I have reviewed the disbursement information and find that the majority of them are properly supported and calculated.

34 TD objected to the disbursements for medical records and for the OHIP summary. Such an objection is clearly without any foundation in this case. As the Applicant submitted, these medical records were an important part of the production of relevant information and, in my experience, insurers are quick to point out the failure to obtain any portion of medical records that might be relevant. These disbursements are approved.

35 There are also postage expenses from November 2016 to August 2017. This expense is of the type recognized by the Expense Regulation but the details would normally not be reflected in invoices per se. These costs are normally tracked on a computer system so I accept the accuracy of the total. The details of who was sent what are not likely readily available. Since the amount is modest and further detail not easily obtained, I approve this disbursement. The same applies to the photocopying claim for paper use of \$1,282.80. Again this disbursement is likely tracked by computer but the rationale for each copy event may not be kept. I accept the disbursement as reasonable, given the nature of the issues and the volume of materials that were filed as exhibits. This disbursement is approved.

36 TD disputes the disbursements for witness attendance fees of \$707.00 and also invoices for Reliance Legal Services for \$944.55 which are charges for service of the various summonses. There is no documentation of the \$707.00 but the details are set out in paragraph 13 of the Reply Submissions. These disbursements are properly supported, reflecting service of summons for witnesses, and fall within the Expense Regulation. These claims are approved.

37 There are however some disbursements which do not meet the requirements of the Expense Regulation. I note that the Applicant divided the disbursement claims into two sections in Schedule B of its Reply Submissions on the basis of HST but the claims are not properly segregated. The following sets out those disbursements that are not approved or are approved only in part and my reasons:

a) The claim by the family doctor for \$200 for the locum to cover her practice while she was away testifying cannot be paid. The family doctor is not an expert witness (though there is no challenge to her expertise) because of the family doctor/patient relationship with the Applicant and the requirement that an expert be independent and impartial. She is only entitled to the witness fee plus appropriate travel expense for travelling from her residence to the Hearing.

b) TD disputed the claim by Dr. Ko for a fee for testifying as well as attending. Dr. Ko prepared one of the reports for the assessment of catastrophic impairment and he is therefore entitled to the \$1,500.00 permitted under the Expense Regulation for his report. He also attended to testify but was not called and therefore he is entitled to be paid the preparation fee of \$500. The Expense Regulation is specific in clause 5(1) (2) that the attendance fee is to be paid

for a witness who gives opinion evidence at the arbitration or whose attendance is necessary. Since the Applicant's case went forward without his testimony, it cannot be said that his testimony, as differentiated from his report, was necessary. Dr. Ko did attend to testify and could not because of the time taken by argument of motions and other witnesses, but the Expense Regulation does not permit the payment of this fee. In any event, Dr. Ko's fee contained in his invoice of July 25, 2017⁷ is far in excess of what could be permitted under the Expense Regulation. Therefore the disbursement for Dr. Ko is limited to \$2,000.00 and is not subject to HST.

c) TD disputes the disbursement claim for expert witness fees for Dr. Shulman, whose charges are set out in two invoices, one for \$660.00 for arbitration preparation and attendance⁸ and one in Tab F dated December 7, 2016 for file review in the amount of \$200.⁹ Dr. Shulman provided chronic pain treatment to the Applicant and the evidence he gave related to that treatment and the reports he made on the success of it. Therefore, he is not an expert witness within the requirements of the Expense Regulation. The disbursement of \$860 (the total of the two invoices) for Dr. Shulman is not approved.

d) TD disputes the claim for Dixon Commercial — Bell City Cab account in the amount of \$1,307.56 as being the same amounts as were submitted as a medical benefit claim in the arbitration. The Applicant provided no further detail in reply to indicate that the claim is over and above what was approved at the arbitration. Therefore the claim for reimbursement of transportation costs for Bell City Cabs for medical appointments is not properly an expense of the arbitration and must be sought as part of the benefits claim. Therefore the disbursement is not approved.

e) TD disputes the claim for hotel accommodation which totals \$1,704.04. The Applicant is entitled under the Expense Regulation to a maximum payment of \$150 per day for such accommodation, inclusive of HST. The Applicant stayed at the hotels and paid the hotel bills. The Hearing was held on September 5, 6, 8, 11, 13 and 14. Given the distance he had to travel, his age and the medical issues he faced, I find that he should be awarded the cost of five nights (nights of September 5/6, 7/8, September 10/11, 12/13, 13/14). The amount recoverable is therefore \$750.00.

f) The claim for disbursements by Omega Medical Associates ("Omega") totals \$16,050.00 including HST as set out in Schedule B to the Applicant's Reply Submissions and is listed as Invoices 12797 and 12188. Included in that total is an invoice from Dr. Dale Robinson number 1036. The claim is for the work of the experts for the Hearing on the catastrophic impairment claim. TD submits that the total claim for Omega cannot exceed \$5100.00. I have reviewed the exhibits and note that Dr. Robinson and Dr. Harold Becker (with Dr. Lisa Becker) prepared rebuttal reports which were filed at the Hearing as one exhibit. Therefore the Applicant is entitled to \$3,000.00 for the two rebuttal reports. I have reviewed my notes of the testimony of the Omega witnesses. Each is entitled to the \$500 for witness preparation and \$200 per hour for Hearing attendance. Dr. Robinson testified for 1.5 hours by telephone. Dr. Harold Becker testified for 2 hours in person. Dr. Lisa Becker testified for three-quarters of an hour and Dr. Getahun for half an hour. The total owing for witness testimony is therefore 4.75 hours at \$200.00 per hour or \$950.00. Therefore the Applicant is entitled to recover for disbursements for Omega \$3,000.00 for the rebuttal reports, \$2,000.00 for the preparation time of four witnesses, and \$950.00 for witness testimony. The total for the Omega disbursement is therefore \$5,950.00. These disbursements are not subject to HST.

g) There is a claim for parking expenses in the amount of \$146.77. I do not have any supporting information for those parking expenses. I therefore will not allow them because there are probably parking receipts available and they have not been provided.

h) TD disputes the invoices for Rapid City Transportation. The invoices are dated December 31, 2014 (Brantford/Branson Hospital, Toronto), April 2016 (Brantford/North York and Brantford/Mississauga), August 2017 (Brantford/North York) and September 2017 (Novotel/Hearing location). One invoice is included twice. There are only three charges that can clearly be identified as related to the Arbitration Hearing, one for August 23, 2017 to August 31, 2017 which refers to 5 Park Home Ave, the address of the Applicant's counsel, and two for September 2 to September 5, 2017 which refer to the Novotel Hotel and the Hearing location. The total of these invoices is \$290.00. These amounts

are approved together with HST in the amount of \$37.70 for a total of \$327.70. I reject the claim for a disbursement for travel costs for attendance at Omega as this should be a benefit claim, rather than a Hearing disbursement.

38 The approved amount of disbursements is therefore calculated as follows. Under those listed as HST exempt in Schedule B to the Reply Submissions, I do not approve the invoices of Dr. Carol Gideon of \$280.00, Dr. David Shulman of \$660.000, or Iman Ahsan of \$146.77. The other expenses are approved as claimed. The total approved amount under this heading is therefore \$2,907.68.

39 Under the heading "Other disbursements" the Applicant has claimed certain amounts which are HST exempt including the witness disbursements of Dr. Ko, Dr. Robinson and Omega. The disbursements under this title are totaled to \$28,926.57. I approve \$12,267.95 inclusive of HST as appropriate for the other disbursements, as follows:

Metro Ontario Inc.	\$120.00
Maxabiliation Inc	\$100.50
2 Primafact CDs	\$40.00
Omega Associates	\$5,950.00
County of Brant	\$160.92
The Printing House	\$403.32
Dr. Gordon Ko	\$2,000.00
Edward Village	\$750.00
Envoy express	\$338.16
Rapid City Transportation	\$327.70
Reliance Legal Services	\$944.55
Paper use	\$1,282.80
Total including HST	12,417.95

40 The total disbursements recoverable are therefore approved in the amount of \$15,325.63.

41 The total expenses and disbursements including HST for which TD is liable to the Applicant is therefore \$40,499.14.

EXPENSES:

42 Neither party has requested its expenses of this Expense Hearing and, in view of the mixed success, it would not be appropriate to make such an award.

Lynda Tanaka Member:

43 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. TD is liable for the expenses incurred by the Applicant with respect to the Arbitration.
2. The quantum of the total expenses including disbursements and HST for which TD is liable to the Applicant is \$40,499.14.
3. Neither party is entitled to its expenses of the Expense Hearing.

Footnotes

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

2 R.S.O. 1990 c. S.22.

- 3 Appeal P11-00017, September 30, 2013.
- 4 Paragraph 53, Insurer's Submissions Regarding Expenses ("TD Submission").
- 5 Paragraph 27, Applicant's Reply Submissions ("Reply Submission").
- 6 *Ibid.*, Page 9, Schedule A.
- 7 Schedule B, Reply Submissions.
- 8 Tab C, Reply Submissions.
- 9 *Ibid.*, Tab F.