Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A98–001232

BETWEEN:

RIMMA DOBKINA

Applicant

and

COMMERCIAL UNION ASSURANCE COMPANY

Insurer

ASSESSMENT OF EXPENSES

Before: William J. Renahan

Heard: By written submissions received up to September 27, 2000

Appearances: Jadranka Cavrak for Mrs. Dobkina
Darrell P. March for Commercial Union Assurance Company

Issues:

The Applicant, Rimma Dobkina, was injured in a motor vehicle accident on June 12, 1997. In a decision dated March 6, 2000, I dealt with her claims for statutory accident benefits under the *Schedul,*[1] while reserving on the issue of expenses:

[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96 and 303/98.

The parties could not agree on the issue of entitlement to expenses of the arbitration proceeding and in a decision dated July 25, 2000, I granted expenses of the arbitration proceeding to the Applicant. The parties could not agree on the amount of those expenses and applied for me to assess the Applicant's expenses of the arbitration proceeding.

Result:

1. The Applicant's expenses of the arbitration proceeding are assessed at $4,680.18.

EVIDENCE AND ANALYSIS:

The relevant portions of the expense regulation[2] as amended by Ontario Regulation 464/96 are as follows:

> 3. (1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
>
> 1. For all services performed before an arbitration, appeal, variation or revocation hearing.
>
> 2. For the preparation for an arbitration, appeal, variation or revocation hearing.
>
> 3. For attendance at an arbitration, appeal, variation or revocation hearing.
>
> 4. For services subsequent to an arbitration, appeal, variation or revocation hearing.
>
> (2) The number of hours for which legal fees may be awarded shall be determined by the arbitrator, having regard to the criteria set out in subsection 12 (2) of this Regulation.

[2]Ontario Regulation 664 of R.R.O. 1990

The criteria set out in subsection 12(2) are also used for determining entitlement to expenses of the arbitration proceeding. They are as follows:

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.

A criterion, which may justify an award of expenses in favour of a party, may also justify a reduction in the assessment. For example, although the ultimate success of an applicant might justify an award of expenses in his or her favour, minimal success might justify a reduction in the amount of the assessment.

The hearing in this case took place over three days and involved relatively straightforward legal and factual issues, relatively small amounts of money and no ongoing claims. Mrs. Dobkina did not miss any time from her work as a teacher as a result of injuries she suffered in the motor

vehicle collision. In the arbitration she claimed a total of $16,877 together with interest. The claim comprised 104 weeks of housekeeping at a maximum allowed rate of $100 per week for a total of $10,400, $4,502 in chiropractic, massage and exercise expenses, $125 for a medical certificate, and, $1,850 for a medical assessment. I dismissed the housekeeping and treatment claims and awarded the cost of the medical certificate and one-half of the cost of the medical assessment for a total award of $1,050 together with interest.

Ms. Cavrak, counsel for the Applicant, submitted to Commercial Union an account for $9,901.23, which comprised $5,762.10 for legal fees and $4,022.50 for disbursements.[3] The account is not broken down along the lines of section 3 of the expense regulation set out above. It includes as a disbursement an hourly rate of $300 for an expert witness when the expense regulation allows a maximum hourly rate of $200. The account appears to be in the form of an account which a lawyer would submit to his client, a solicitor and client account, rather than in the form of an account an opposing party is ordered to pay, a party and party account. An award of expenses is intended to facilitate access to the arbitration process by indemnifying against some of the reasonable costs; it is not intended to fully indemnify a client for her account with her lawyer. My role is to assess a party and party account, not a solicitor and client account, and I make no comment on the reasonableness of this account as a solicitor and client account.

Although Mrs. Dobkina succeeded at the hearing in recovering $1,050, Commercial Union successfully defended her larger claims for housekeeping and supplementary medical expenses. Although Mrs. Dobkina's ultimate success was a factor I considered in her favour in awarding her expenses of the arbitration proceeding, the minor degree of her success is a factor in favour of reducing expenses Commercial Union must pay.

---

[3]The total fee and disbursements when added correctly amounts to $9,784.60.

The Applicant argued that her case was argued in a timely and efficient manner and that all evidence submitted was relevant to the issues. I do not agree. For example, the test for entitlement to housekeeping services is a functional test based on whether the insured suffered a substantial inability to perform the housekeeping services she normally performed before the accident. I heard very little evidence on the crucial issue of what Mrs. Dobkina normally did before the accident. She testified that she cleaned three to five hours per week before the accident. After the accident she hired a housekeeper who worked 19 hours per week for two months and seven hours per week thereafter. I heard irrelevant evidence about what the housekeeper did and little evidence on what Mrs. Dobkina used to do and could no longer do.

Commercial Union did not call any witnesses. Mrs. Dobkina and her lay witnesses were not persuasive and two of her expert witnesses gave opinions based on incorrect information. Notwithstanding, Mrs. Dobkina succeeded on a small portion of her claim.

I now look at fees under the headings set out in the expense regulation.

Services performed before the arbitration:

The Application for Arbitration was filed on September 15, 1998. Recoverable arbitration expenses begin with preparation of the application for arbitration, including any interviews required for that specific purpose. Ms. Cavrak's account does not indicate what services were performed before the arbitration. She supplied Mr. March with her dockets but was unable to locate the dockets of the lawyer who prepared the application for arbitration. She did not provide me with any dockets. The proposition that the Legal Aid Tariff is one relevant consideration and can be used as a guide to determine what a solicitor charges a client of modest means was accepted by me in *Kasap and Allstate Insurance Company of Canada*, (OIC A-012020,

January 15, 1997) letter decision. This proposition was not disturbed on appeal.[4] For institution of a civil proceeding before a quasi-judicial commission, the 2000-2001 Legal Aid Tariff allows a maximum of 2.5 hours. In the absence of any dockets or other evidence, I find this reasonable in this case and allow 2.5 hours for services performed before the arbitration.

For preparation of the arbitration hearing:

Ms. Cavrak claims a total of 83.5 hours for counsel time. She does not distinguish between preparation time for the hearing and attendance at the hearing.

In *The Law of Costs*[5] the author states at paragraph 705.7:

> It has been said that only in exceptional cases should the amount allowed for preparation exceed the counsel fee at trial.[6]
>
> In a simple case with no unusual fact situations or difficult points of law, one and one-half days of preparation for each day of trial was considered reasonable.[7]

These quotations appear to be contradictory but still provide a very rough guideline.

Arbitrators have generally allowed one to four hours of preparation time for each hour of reasonable attendance time at the hearing.

---

[4](P96-00071, March 13, 1998)

[5]Mark M. Orkin, 1995, Canada Law Book Inc., Aurora, Ontario

[6]*Canadian Express Ltd. v. Blair* (1992), 91 D.L.R. (4th) 559, (Ont. Ct. (Gen. Div.))

[7]*Hiscox v. A.E. LePage Real Estate Services Ltd.* (1987), 3 A.C.W.S. (3d) 3 (Ont. Assessment Officer)

Mr. March claims that his dockets indicate that attendance time at the hearing was 18.3 hours. Ms. Cavrak presented no evidence to the contrary and 18.3 hours accords with my recollection and I accept it. Having regard to the criteria and findings I have referred to, I agree with Mr. March's submission that one hour of preparation time for each hour of attendance at the hearing is reasonable in this case.

I therefore allow 18.3 hours preparation time at Ms. Cavrak's rate.

Attendance at the hearing:

I allow 18.3 hours for attendance at Ms. Cavrak's rate.

Total counsel fee:

Total counsel fee for Ms. Cavrak at 39.1 hours at the agreed rate of $67 per hour is $2,619.70. Mr. March argued that I should reduce the assessment by 75 per cent to account for the fact that Commercial Union was largely successful. Although Mrs. Dobkina failed to prove most of her claim, she did succeed in recovering $1,050 which she would not have recovered had she not proceeded with this arbitration. The Insurer can avoid such a result by making a settlement offer to resolve the issues of the arbitration. In this case, Commercial Union made an offer of $2,500, but it was to settle all claims arising out of the policy, not just the claims of the arbitration. I took Mrs. Dobkina's degree of success into account in allowing one hour of preparation time for each hour of hearing and do not feel that a reduction is warranted.

Mr. March also argued that the Applicant's demand for expenses was unreasonable and that a party forced to prepare extensive submissions to unreasonable expense demands should be indemnified for their time and effort.

The expense regulation allows legal fees for "services subsequent to an arbitration." Although the expense award was made in favour of the Applicant, the criteria I should consider in assessing the amount of expenses include "Any other matter related to the proceeding that the arbitrator considers relevant to the issue of whether an award of expenses is justified." I believe that this criterion authorizes me to take into account a party's conduct in the expense assessment portion of the hearing. The Applicant's demand for $5,762.10 in counsel fees was unreasonable for a hearing which took 18.3 hours, which dealt with relatively straightforward issues and small amounts of money, which did not require a great deal of preparation and which I reduced by more than one-half. I therefore reduce the Applicant's counsel fee to reflect the time spent by Mr. March in responding to an unreasonable account. Mr. March claimed 2.7 hours at $75.38 per hour plus $12.50 in photocopy charges plus GST for a total of $231.15. I reduce the Applicant's counsel fees by $231.15 to $2,388.55.

Disbursements:

Dr. Alpert

Dr. Brian Alpert is an orthopaedic surgeon who saw Mrs. Dobkina at her request. He found the physical therapy at issue reasonable and necessary. I did not find his opinion helpful because he did not have a full understanding of the treatment at issue. For example, he mistakenly thought Mrs. Dobkina participated in aqua therapy, progressive weight training and cardiovascular exercise. He did not realize that the most significant treatment in terms of time and effect, was massage. I placed little weight on his opinion.

He submitted an account of $1,337.50 for a report and $1,050 for 3.5 hours attendance at the arbitration at $300 per hour.

In considering the reasonableness of these expenses I consider them as expenses of the arbitration proceeding, incurred for the purpose of advancing the applicant's claim at the hearing. I distinguish these arbitration expenses from such other expenses as assessments to determine treatment or other assessments for the purposes of the *Schedule*.

The reasonableness of the expense should not be judged solely with the benefit of hindsight.[8] In my view, having regard to the issues and the amount of money involved in this case, it was unreasonable to incur both a report and witness expenses for this hearing.

Although the reasonableness of a fee charged by an expert should be considered in light of the time, care and expertise that went into the conduct of the assessment, and the preparation of the report, I do not believe these are the only criteria to consider for the expense of an expert's opinion at an arbitration proceeding. One consideration for an arbitration expense is whether the expert understands the issue in dispute and addresses the specific issue in dispute.

Another consideration is whether the expert's opinion is merely an expression of his or her assessment of the credibility of the applicant without any demonstrated medical or scientific basis for that assessment. Such an assessment is usually not that helpful to me whether it is the same as my assessment or not. My assessment of credibility is based on broader considerations which include hearing the applicant testify for usually more than the time taken in a medical interview, hearing the applicant testify under cross-examination and comparing the applicant's testimony to that of other lay witnesses who also have been subject to cross-examination.

---

[8] *Salvaggio and Simcoe and Erie General Insurance Company,* (FSCO P97-00062, January 21, 1999)

In my view, parties should be prudent in incurring expenses for expert evidence at an arbitration proceeding which is merely the expression of the expert's assessment on the credibility of the applicant without medical or scientific basis.

In this case, Dr. Alpert did not have a full understanding of the treatment he was expressing an opinion about. As well, much of his opinion that Mrs. Dobkina was limited to light housekeeping was based on the fact that he believed Mrs. Dobkina when she said she had tender muscles and restricted range of motion which limited her to light housekeeping. Having heard Mrs. Dobkina testify over the course of a day, I expect that if Dr. Alpert knew what housekeeping Mrs. Dobkina did before the accident and if he knew what treatment she underwent he could have come to an opinion on her ability to do housework and the reasonableness of her treatment and written a report in about two hours. I allow $500 for his assessment and report. His testimony on the relevant issues should not have taken more than two hours. I allow two hours for attendance at $200 per hour for a total of $900.

Monica Lee

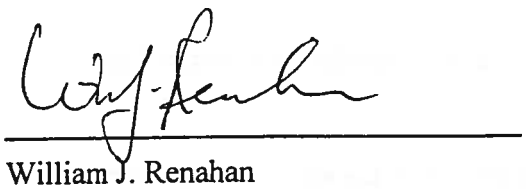
Ms. Lee is an occupational therapist who was retained one month before the hearing to assess Mrs. Dobkina. She submitted an account for $950 for her report and $360 for attendance at the hearing. She recommended housekeeping but expressed little knowledge of what housekeeping services Mrs. Dobkina provided before the accident. She ticked off boxes on a chart which indicated that Mrs. Dobkina was independent in performing certain housekeeping activities before the accident. She did not quantify those activities in any way. I placed little weight on her opinions. She was scheduled to start testifying at 10:00 a.m. but arrived late. She testified for 32 minutes. In her testimony she did not say anything that was not in her report. I do not know how she arrived at an account of $360 for attendance. In these circumstances, I allow nothing for attendance. Although her report was not helpful, I have no evidence or suggestion that the

duration of the assessment, or the amount charged for it, was out-of-line with similar assessments. I therefore allow $950 for the report.

Commercial Union made no submissions on the other disbursements for photocopies, fax, postage, courier and preparation of clinical notes. I allow these miscellaneous disbursements as claimed in the total amount of $441.63.

Total disbursements are $2,291.63.

I assess total fees and disbursements at $4,680.18.



William J. Renahan
Arbitrator

October 31, 2000
Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Ontario

FSCO A98–001232

BETWEEN:

RIMMA DOBKINA

Applicant

and

COMMERCIAL UNION ASSURANCE 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. Commercial Union shall pay Mrs. Dobkina's expenses of the arbitration proceeding assessed at $4,680.18.

William J. Renahan
Arbitrator

October 31, 2000
Date