



FSCO A16-003705

BETWEEN:

HUA LI PAN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON EXPENSES

Before: Arbitrator Anne Morris

Heard: By written submissions completed on March 15, 2018

Appearances: Ms. Simmy Yu and Mr. Frank Grande for Hua Li Pan
Ms. Lisa Armstrong for Allstate Insurance Company of Canada

Issues:

The Applicant, Ms. Hua Li Pan (“Ms. Pan” or the “Applicant”), was injured in a motor vehicle accident on August 28, 2014, (the “accident”), and sought accident benefits from Allstate Insurance Company of Canada (“Allstate” or the “Insurer”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Ms. Pan, through her representative, applied for arbitration at the Financial Services Commission of Ontario (“FSCO”) under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

The issue in this Expense Hearing is:

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

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

Result:

1. The Applicant is entitled to her expenses of the arbitration (including the Expense Hearing) in the amount of \$12,711.18 inclusive of fees, disbursements and HST.

EVIDENCE AND ANALYSIS:

The Arbitration Hearing was held before Arbitrator Alan G. Smith for one day on December 4, 2017 with written submissions completed on December 22, 2017. The subsequent decision was as follows:

1. Ms. Pan is entitled to receive a weekly income replacement benefit from one-week post-accident to February 28, 2016, in an amount to be determined.
2. Subject to an offset for Canada Pension Plan Disability Benefits, Ms. Pan is entitled to receive a weekly income replacement benefit from February 29, 2016, on-going in an amount to be determined.
3. Ms. Pan is entitled to interest for the overdue payment of benefits. If the parties cannot come to an agreement on the quantum of the amount owing pursuant to the directions in my decision, they may deliver written submissions to ADR Chambers of no more than 5 pages each, the Applicant's submissions to be delivered within 30 days of the date of this decision and the Respondent's submissions to be delivered within 14 days thereafter.
4. Allstate is not liable to pay a special award because it unreasonably withheld or delayed payments to Ms. Pan.
5. Expenses shall be payable. If the parties cannot come to an agreement on the matter of expenses, either party may request in writing an appointment before an ADR Chambers arbitrator to determine expenses, provided the request is made within 30 days from the date of this decision.

The parties were unable to resolve the issue of expenses and since Arbitrator Smith is no longer available, the Expense Hearing by way of written submissions was scheduled before me.

Authority to Award Expenses

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*.

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.

Criteria

In my view, the only important criteria in assessing expenses in this case are degree of success and novel issue. The Applicant submitted that the Insurer's conduct in forcing the Applicant to a Hearing on the income replacement benefit ("IRB") despite having had an examination under oath and adequate documentation, was conduct which tended to prolong the proceeding. It does not appear, however, that the Applicant made an offer to settle, and the Arbitrator did not impose a special award for unreasonable delay. The Applicant also alluded to late production of adjuster log notes and late attempts by the Insurer to introduce new evidence. I note, however, that the Hearing, with submissions to follow, lasted one day, which is not unduly long.

On the issue of success, the Insurer had been making "good faith" IRB payments of \$200.00 per week but that is not the same as ceding an obligation to pay and clearly the Insurer resisted any obligation to pay, insisting that the Applicant prove her case, which she did. The quantum of IRB found to be owing was almost double the amount being paid by the Insurer in good faith.

The Insurer claims success noting its success with respect to the reduction of the IRB for notional CPP benefits not applied for by the Applicant. The Insurer submitted that this was a novel issue in that this was the only FSCO case to expand on an Insurer's right to deduct collateral benefits not applied for. The Applicant indicated that the Insurer raised this issue at the last minute.

I am not going to deprive the Applicant of her costs because of the Insurer's success on the CPP issue. If it was a novel issue, it was not unreasonable for the Applicant to resist it. Even with the CPP deduction, the Insurer still has the obligation, unrecognized before the Hearing, to pay either slightly less or slightly more than the \$200.00 per week good faith payment, depending on the

amount ultimately agreed on for CPP. In addition, the Applicant was awarded 77 weeks of unreduced IRB benefits of almost \$400.00 per week. The Applicant was successful and is entitled to her expenses.

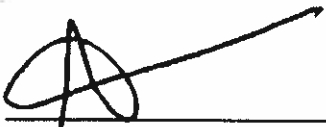
Quantum of Expenses

The Applicant claims \$14,992.75 inclusive of HST for 119.5 hours for three lawyers. I note that two lawyers, called to the Bar in 2014, handled most of the claim and the Hearing but only six hours are allocated to the senior third lawyer. Although the Hearing was only one day, there was also an examination under oath to prepare for and attend. In addition, the parties provided written submissions. The matter appears reasonably complex, including with respect to the novel issue of reduction of IRBs for collateral benefits not applied for. Overall, I consider the amount submitted for legal fees to be reasonable and in accordance with the legal aid tariff. It is less than the Bill of costs of \$19,689.91 submitted by the Insurer. I also note that submissions with respect to expenses were required and are not included in the Bill of Costs. I will reduce the amount claimed by the Applicant inclusive of HST to \$12,000.00 to recognize the Insurer's success on the novel issue. The amount allowed includes costs associated with the Expense Hearing. The amount claimed for disbursements of \$711.18 is reasonable on its face and is allowed.

The total allowed for all fees, disbursements, and HST therefore is \$12,711.18.

EXPENSES:

The expenses associated with the Expense Hearing are included in the total expense award.



Anne Morris
Arbitrator

April 26, 2018

Date

**Financial Services
Commission
of Ontario**

**Commission des
services financiers
de l'Ontario**



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HUA LI PAN

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ARBITRATION ORDER

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 her expenses of the arbitration (including the Expense Hearing) in the amount of \$12,711.18 inclusive of fees, disbursements and HST.

A handwritten signature in black ink, appearing to be "Anne Morris", written over a horizontal line.

**Anne Morris
Arbitrator**

April 26, 2018

Date