



FSCO A10-003528

BETWEEN:

ANANTHANADARAJH THAYALAN

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Alec Fadel

Heard: By way of written submissions, the last submission received being May 17, 2012.

Appearances: Neritan Ciraku for Mr. Thayalan
Michael Kennedy for Wawanesa Mutual Insurance Company

Issues:

In a decision dated February 28, 2012, I dealt with Mr. Thayalan's claims for statutory accident benefits under the *Schedule*.¹ In the main hearing the applicant was seeking entitlement to an income replacement benefit from February 29, 2008 to date and ongoing. His claim for housekeeping benefits was for \$100.00 per week from February 29, 2008 to October 7, 2009.

In my decision, I made the following orders, 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.

1. Mr. Thayalan is entitled to an income replacement benefit from February 29, 2008 to April 18, 2008 pursuant to section 4 of the *Schedule*, plus applicable interest.
2. Mr. Thayalan is entitled to further housekeeping and home maintenance benefits in the amount of \$122.50 pursuant to section 22 of the *Schedule*, plus applicable interest.
3. Mr. Thayalan is not entitled to a special award.

Following the release of my decision, I received a request from the applicant to hold a hearing to deal with the issue of expenses. The hearing proceeded by way of written submissions. In his submission, the applicant is seeking \$13,842.50 in legal fees and \$3,194.55 in disbursements for a total claim of \$17,037.05. In its submissions, Wawanesa is seeking its expenses in the amount of \$12,685.93 in legal fees and \$2,761.60 in disbursements for a total claim of \$15,447.53.

The issue in this further hearing is:

1. Is Mr. Thayalan entitled to his expenses incurred in respect of this arbitration hearing?
2. Is Wawanesa entitled to its expenses incurred in respect of this arbitration hearing?

Result:

1. Each party shall bear their own expenses incurred in respect of this arbitration hearing.

EVIDENCE AND ANALYSIS:

Subsection 282(11) of the *Insurance Act* provides that:

The arbitrator **may** award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations. (emphasis added)

In my decision of February 28, 2012, I found that the insurer relied on a report, which I found I could not rely upon, to support their stoppage of both the income replacement and housekeeping benefits. In fact, the applicant was awarded benefits for a short duration until, in my view, there was clear evidence of a decrease in reported pain to pre-accident levels and no longer support for the claimed benefits. This finding, coupled with the applicant's success albeit limited, leads me to conclude that the insurer is not entitled to its expenses.

Though he had limited success, I do not find that the applicant is entitled to his expenses. In my earlier decision, I found that the applicant was not a credible witness, noting several inconsistencies with his evidence and finding that he manufactured evidence to support his claim for housekeeping.

In my view, based on section 282 of the *Insurance Act*, it is at the arbitrator's discretion whether or not to award expenses to a party. In this case, I do not feel that an expenses award is warranted.

In addition, the criteria to consider "for the purposes of awarding **all or part** of the expenses incurred in respect of an arbitration proceeding" are enumerated in section 12(2) of Ontario Regulation 664, R.R.O. 1990, as amended (emphasis added). The criteria are:

1. Each party's degree of success in the outcome of the proceeding.
2. Any written offers to settle made in accordance with subsection (3).
3. Whether novel issues are raised in the proceeding.
4. The conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders.

5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.
6. 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.
7. 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 Schedule — 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.

Based on the enunciated criteria in section 12 of Ontario Regulation 664, I would also decline to award either party its expenses of the hearing. I find that the relevant parts of the criteria from regulation 664 are 1 and 4.

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

The applicant had very limited success in this arbitration. He failed to prove on a balance of probabilities that the accident made a material contribution to his knee symptoms, which he testified was his main problem at the time of the hearing, and was awarded benefits for a limited duration from the insurer's stoppage.

The insurer ultimately had greater success in this arbitration, however it did not successfully defend its stoppage of both the income replacement and housekeeping benefits. In my decision, I stated that the opinion of its assessing doctor, the one on which it relied upon for the stoppage, was equivocal and benefits were therefore awarded for a short duration until there was clear evidence supporting the stoppages.

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

The hearing of this matter took place over 2 days without a need for the third scheduled day. In my view, counsel conducted themselves in a professional manner in order to facilitate an efficient hearing. There were a few instances where applicant's counsel made an objection without providing submissions supporting same and he introduced a witness not in keeping with the *DRPC*. However, I find that these instances were minimal and did not prolong the hearing.

CONCLUSION

Given my findings in my decision of February 28, 2012, I have decided to exercise my discretion under s. 282 (11) of the *Insurance Act* and not make an award for expenses in this hearing. As well, based on the criteria listed in the *Expense Regulation* I find that each party must bear their own expenses.

Alec Fadel
Arbitrator

June 21, 2012
Date



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BETWEEN:

ANANTHANADARAJH THAYALAN

Applicant

and

WAWANESA MUTUAL INSURANCE 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. Each party shall bear their own expenses incurred in respect of this arbitration hearing.

Alec Fadel
Arbitrator

June 21, 2012
Date
