

**BETWEEN:**

**MOHAMED GARAD**

**Applicant**

**and**

**TRADERS GENERAL INSURANCE COMPANY**

**Insurer**

**DECISION ON EXPENSES**

**Before:** Shari Novick

**Heard:** February 23, 2001, at the offices of the Financial Services Commission of Ontario in Toronto.

**Appearances:** Louis Mostyn for Mr. Garad  
David Zarek for Traders General Insurance Company

**Issues:**

The Applicant, Mohamed Garad, was injured in a motor vehicle accident on October 5, 1996. In a decision dated September 29, 2000, I dealt with his claims for statutory accident benefits under the *Schedule*.<sup>1</sup> I determined that Mr. Garad was not entitled to other disability benefits (“ODBs”), and encouraged the parties to resolve the issue of expenses on their own.

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<sup>1</sup>The *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*, Ontario Regulation 776/93, as amended by Ontario Regulations 635/94, 781/94, 463/96 and 304/98.

The parties subsequently advised that they were unable to resolve the issue of Mr. Garad's entitlement to expenses, and requested that the hearing be reconvened for this purpose.

The issue in this further hearing is:

1. Is Mr. Garad entitled to his expenses incurred in respect of this arbitration hearing?

**Result:**

1. Mr. Garad is entitled to one-half of his expenses of the arbitration.

**EVIDENCE AND ANALYSIS:**

Two accounts were filed by the Applicant — one from Louis Mostyn of the law firm Mostyn & Mostyn, his counsel at the hearing, and one from Castro & Castro, personal injury consultants. The Mostyn account is for \$12,490 in legal fees and \$4,883.42 in disbursements. The Castro account claims fees of \$6,947.50 and disbursements of \$1,697. All of these amounts are exclusive of GST.

Traders General Insurance Company ("Traders") disputes the Applicant's entitlement to expenses on two grounds. Counsel for Traders noted that I generally did not accept Mr. Garad's evidence and found that he was not a credible witness. He noted that I also found that he had withheld important information from various medical assessors and treatment providers, including in some cases, the fact that he had been involved in a second accident. He submitted that in light of this conduct, Mr. Garad should not be awarded his expenses.

Counsel for Traders also submitted that the Applicant had indicated throughout the proceeding that he was seeking ongoing benefits, but changed his position and advised for the first time at the outset of the hearing that he was restricting his claim for ODBs to 104 weeks post-accident. Counsel advised that

the Insurer had been forced to incur significant costs defending the anticipated post-104-week part of the claim for no reason. He submitted that it was appropriate to penalize the Applicant for this last minute “flip-flop” by denying him his expenses.

Counsel for the Insurer also advised that in the event that I found that Mr. Garad was entitled to his expenses, Traders takes issue with various amounts claimed for both fees and disbursements.

The Insurer did not seek payment of its expenses.

**Applicant’s entitlement to expenses:**

An arbitrator may award expenses to an insured person, or an insurer, under subsection 282(11) of the *Insurance Act*, if the arbitrator is satisfied that such an award is justified, having regard to the following criteria:

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 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 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.<sup>2</sup>

Having regard to the above criteria, I find that the Applicant is entitled to one-half of his expenses of the arbitration. The reasons for my finding will be explained below. The actual amounts owing will be set out in the next section, entitled “assessment of expenses.”

In my decision on the merits of this case, I outlined various reasons why I did not find Mr. Garad to be a credible witness. He was a poor historian. His oral evidence at the hearing was inconsistent with what he had reported at various other times, to a variety of people. Most importantly, his insistence that he had fundamentally recovered from a previous accident was in direct contrast to the various medical records and reports that were filed. In short, his evidence was not believable, and as a result, his claim did not succeed. I would not go as far as to say that his evidence was fraudulent, but it was clear that Mr. Garad was not as forthcoming as he ought to have been.

While I found that Mr. Garad did not prove that he was entitled to the benefits claimed, his case was not entirely without merit. The Insurer had refused his application for benefits from the outset, despite the fact that he had suffered some injuries as a result of the accident in question. In my view, he did not take any positions that were manifestly unfounded, frivolous or vexatious, as set out in paragraph 3 above.

The changes to the *Schedule* brought about in November 1996 extended the authority of arbitrators to award expenses to insurers, as well as to insured persons. Some have argued that this change signalled a shift towards a results-based system, similar to that in the civil courts. Arbitrators and Directors’ Delegates at the Commission, however, have generally accepted that the fact that an applicant is not successful at a hearing does not in itself result in he or she not being awarded their expenses of the

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<sup>2</sup> Subsection 12(2) of Ontario Regulation 664, as amended by Ont. Reg. 464/96. These criteria have been incorporated into Rule 73.2 of the *Dispute Resolution Practice Code - Third edition (April 15, 1997)*.

hearing. Most have accepted the general principle set out by Arbitrator Alves in her expense decision in *Gray and Zurich Insurance Company*,<sup>3</sup> upheld on appeal, that arbitrators must balance the applicant's need for access to relatively inexpensive, speedy and informal adjudication of disputes involving no-fault benefits with a "relatively mild deterrent to undeserving claims or undesirable behaviour." I also agree with this view.

I am persuaded in this case that the Applicant's "flip-flop" regarding the period for which he was claiming benefits caused the Insurer to incur significant needless expenses. While I do not agree with the Insurer's contention that this constitutes an abuse of process, I find that it should be taken into account when considering an expense award. I was advised that as a result of the Applicant's initial position that he was entitled to ongoing benefits, the Insurer conducted surveillance on Mr. Garad on various occasions beyond 104 weeks post-accident. I was also advised that the matter was originally scheduled for hearing in August 1999, but that the Insurer sought and received an adjournment because the Applicant had filed a psychiatric report three weeks prior to the scheduled commencement of the hearing, raising this issue for the first time.

This report, by Dr. Adrian Hanick, outlined the results of a psychiatric assessment conducted on Mr. Garad on June 11, 1999, more than six months beyond the 104-week point. As a result of the report, Traders required Mr. Garad to attend a psychiatric Insurer's Examination with Dr. Margulies. Traders also requested Mr. Garad's attendance at a disability assessment with Dr. David Goldstein in late November 1999. It then forwarded the surveillance and medical reports it received from the Applicant, all postdating the 104-week point, to Dr. Goldstein for his review. The amount paid out for these additional medical reports, which all addressed the post-104-week aspect of the claim, approached \$5,000. This figure does not include the cost of the post-104-week surveillance conducted.

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<sup>3</sup>(FSCO A97-001660, January 29, 1999), upheld on appeal (FSCO P98-00047, June 11, 1999)

Despite the adjournment and the subsequent flurry of reports, Applicant's counsel advised at the outset of the hearing in January 2000 that he would not be pursuing a claim for benefits beyond the 104-week point. This came as a surprise to the Insurer, who had clearly prepared to challenge Mr. Garad's entitlement to benefits beyond 104 weeks. Counsel for the Applicant objected to the surveillance and medical reports mentioned above being admitted into evidence, and they were not admitted. The transcript of the preliminary discussions held at the outset of the hearing indicate that Mr. Mostyn insisted that he had never intended to claim beyond the two-year period. He repeated this view at the expense hearing.

My close review of the chronology of this matter leads me to conclude that the Insurer is correct on this point. The fact that the Applicant advised a few weeks prior to the initially scheduled hearing date that he intended to rely on a medical report dated June 11, 1999, based on an assessment of that same date, clearly indicates an intention to claim benefits beyond the two-year point, which was October 1998. The Insurer's decision to conduct surveillance and have Mr. Garad reassessed by various medical experts, which resulted in significant expenses being incurred, were reasonable in that context. In light of the Applicant's subsequent decision not to claim benefits beyond the two years, the costs borne by the Insurer in defending this part of the claim were wasted. This change in position also resulted in much time being expended by various people, for no reason.

Counsel for the Applicant stated frankly that he had chosen not to pursue benefits for Mr. Garad beyond the two-year point because it was clear to him that he would not be able to meet the strict "complete inability" test. This was the correct decision to make. However, counsel should have turned his mind to this earlier in the process, and proceeded accordingly. I understand that Mr. Mostyn was retained midway through the proceeding, and may not have been responsible for the approach taken in this regard. However, the fault for this must clearly lie with the Applicant. I would characterize the

Applicant's conduct in this regard as tending to "prolong, obstruct or hinder the proceeding," as set out in paragraph 2 of the regulation set out above.

Given the above, as well as Mr. Garad's lack of success at the hearing and the aforementioned problems with his evidence, I find that an order awarding him one-half of his arbitration expenses is appropriate.

**Offer to Settle:**

I was advised by counsel for the Applicant during the course of his submissions that an offer to settle had been forwarded by the Insurer prior to the commencement of the hearing, that was refused by Mr. Garad. Counsel for the Insurer did not appear to be aware of the offer. After arranging for someone at his office to conduct a physical search of the file, Mr. Zarek advised that documentation had been found confirming that an offer to settle the matter for \$10,000, all inclusive, had been communicated to Mr. Garad.

The offer was made on August 11, 1999, during a pre-hearing discussion that followed the parties' arguments regarding the adjournment. Correspondence from counsel for the Insurer sent later that day confirmed that Mr. Castro, the Applicant's representative at that time, had accepted the offer on Mr. Garad's behalf. Traders forwarded a release and advised that a cheque had been requisitioned. Another letter from Insurer's counsel on August 13, 1999 confirms a telephone conversation in which Mr. Castro apparently advised that Mr. Garad had changed his mind and was not prepared to accept the offer. Counsel advised in that letter that the Insurer's settlement offer would expire at 5 p.m. that day. A subsequent letter from Mr. Castro on August 16, 1999 confirms once again that Mr. Garad had rejected the offer.

Rule 75.2 of the *Practice Code* requires that the Insurer must file any offer it would like considered in connection with an expense award within five days of a decision being issued. It did not do so in this case, nor did it indicate at any point that it intended to rely on the offer made. I also note that Rule 74.1 provides that I give “particular consideration” to an offer that is served after the pre-hearing discussion and up to five days before the commencement of the hearing. It is not clear whether a settlement offer that is withdrawn well before the start of the hearing ought to be given the same weight. While the \$10,000 offered is far in excess of what Mr. Garad was found to be entitled to (nothing), I note that the Full and Final Release he was requested to sign provides that he give up his right to claim benefits under the *Schedule* beyond those that were the subject of this arbitration. In the circumstances, I find that this settlement offer does not fit within paragraph 5 of the criteria enunciated above, and will therefore have no bearing on the expense award.

**Assessment of expenses:**

***Legal fees:***

The Applicant’s claim for legal fees is comprised of the following — payment for 50.9 hours of Louis Mostyn’s time at \$150 per hour, 106.6 hours worked by Michael Mostyn (articling student) at the rate of \$50 per hour, as well as for 72.3 hours claimed by Mr. Castro, a paralegal. Mr. Castro’s claim for fees totals \$6,947.50, calculated at the rate of \$100 per hour for his time and \$50 per hour for time spent on the matter by his assistant, Nicole Zoltan.

The Insurer does not dispute the hourly rates claimed by either Louis Mostyn or Michael Mostyn, but questions the amount of time claimed for preparation and attendance at the hearing. Counsel specifically disputed the time claimed for counsel corresponding with or reviewing reports from Drs. Hanick, Margulies and Goldstein, given that these doctors were not called as witnesses and their reports dealt exclusively with Mr. Garad’s entitlement to benefits beyond 104 weeks

(which Mr. Mostyn claimed he had never intended to pursue). Counsel for the Insurer also submitted that the issue in dispute was not complex and questioned the necessity of having an articling student attend all five days of the hearing.

I agree that the amount claimed for fees is somewhat excessive. The only issue in dispute at the hearing was Mr. Garad's entitlement to ODBs for 104 weeks. The Applicant also raised two preliminary issues that I found to be without merit. I would not characterize the legal issues raised as being at all complex, although the facts were somewhat complicated in light of Mr. Garad's involvement in an earlier accident and the fact that he had collected weekly benefits from another insurer.

I agree that the Applicant should not be entitled to claim fees for time spent addressing the post- 104 week part of the claim, in keeping with my comments above. I also do not think this case merited the attendance of an articling student on all five days of hearing. On the other hand, it was certainly more cost efficient to have the student, whose hourly rate is one-third that of Mr. Mostyn, do the bulk of the hearing preparation. The account filed indicates that the student spent over 18 hours preparing the closing argument. I find this to be excessive. As opposed to embarking on a line-by-line review of the dockets submitted, I prefer to take a general approach. For the reasons set out above, I would reduce the fees claimed by Mostyn & Mostyn to \$10,000. As I have determined that the Applicant is only entitled to one-half of his expenses, the fees payable to Mostyn & Mostyn amount to \$5,000 (exclusive of GST).

Mr. Zarek questioned the necessity of Mr. Castro's and Ms. Zoltan's attendance at the hearing, and disputed the hourly rate of \$100 charged by Mr. Castro, a paralegal. He also noted that the account submitted calculates much of Mr. Castro's time at the rate of \$150 per hour. Mr. Mostyn made no submissions regarding the Castro & Castro account.

It appears that Mr. Castro was the Applicant's sole representative up until the parties' appearance at the Commission in August 1999, when the matter was adjourned. He should be entitled to

compensation for any time spent on this matter up to that point. I note, however, that there is a large amount of duplication or overlap in the services he provided after that date, with those performed by Mr. Mostyn. Again, this was not a complex case, and involved a fairly narrow issue. The best result Mr. Garad could have achieved would have been an order entitling him to two years' worth of ODBs at \$185 per week, which amounts to under \$20,000. I agree with the Insurer's submission that Mr. Castro's attendance at the hearing was not required, nor was that of his assistant. Accordingly, I find that Mr. Castro is entitled to be compensated for the hours claimed in his account excluding those during which he and Ms. Zoltan attended the hearing. By my calculations, this amounts to 19.9 hours.

I do not think it appropriate for Mr. Castro's time to be compensated at the rate of \$100 per hour. Rule 76.2 of the *Dispute Resolution Practice Code* states that the maximum amount that may be awarded for agent's fees is the amount calculated using the hourly rates established under the *Legal Aid Act* for law clerks, articling students and investigators. That amount is \$23 per hour. Multiplying that rate by 19.9 hours yields an amount of \$457.70. Given my finding that the Applicant is only entitled to one-half of his expenses, the amount payable by the Insurer towards Mr. Castro's fees would be \$228.85.

Accordingly, the total fees that the Insurer is liable to pay is \$5,228.85, exclusive of GST.

***Disbursements:***

The Insurer takes issue with some of the disbursements claimed in both Mr. Mostyn's and Mr. Castro's accounts. Counsel disputes the amounts claimed by Mr. Mostyn for the medical reports of Drs. Hanick, Marciniak and Ihasz. The Applicant advised that he was prepared to withdraw the amount claimed for Dr. Ihasz' report, as it had never been served on the Insurer. The remaining two reports address Mr. Garad's condition beyond the two-year point, and in keeping with my earlier comments, I

find that their cost is not recoverable. As a result, the disbursements owing in regard to the Mostyn account are \$903.42, plus GST of \$63.23 for a total of \$966.66. One-half of that amount equals \$483.33.

The Insurer also challenged the amounts claimed for several disbursements by Mr. Castro. Many of the amounts claimed appear to be round figures, such as \$500 for photocopying charges, and \$575 for facsimile transmissions. These amounts are far in excess of those charged by Mostyn & Mostyn for the same services. There is also a \$180 claim for taxi trips, which is not recoverable. I find that a more appropriate figure for total disbursements for the Castro account would be \$735. GST on that amount would be \$51.45, and one-half of the total equals \$393.25.

In summary, the amounts owing are —

|                                  |             |                    |
|----------------------------------|-------------|--------------------|
| Legal fees (Mostyn & Mostyn)     | \$ 5,000.00 |                    |
| GST                              | 350.00      |                    |
|                                  |             | \$ 5,350.00        |
| Agent's fees (Castro & Castro)   | \$ 228.85   |                    |
| GST                              | 16.02       |                    |
|                                  |             | \$ 244.87          |
| Disbursements (inclusive of GST) |             |                    |
| Mostyn                           |             | \$ 483.33          |
| Castro                           |             | <u>\$ 393.25</u>   |
| <b>Total</b>                     |             | <b>\$ 6,471.45</b> |

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May 4, 2001

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Shari L. Novick  
Arbitrator

Date

FSCO A98-000336

**BETWEEN:**

**MOHAMED GARAD**

**Applicant**

**and**

**TRADERS GENERAL 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. Traders General Insurance Company shall pay Mohamed Garad one-half of his assessed expenses of the arbitration in the amount of \$ 6,471.45.

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Shari L. Novick  
Arbitrator

May 4, 2001

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Date