

BETWEEN:

Shawn P. Lunn

Applicant

and

State Farm Mutual Automobile Insurance Company

Insurer

Assessment of Expenses

Issues:

The Applicant, Shawn P. Lunn, was injured in a motor vehicle accident on December 25, 1993. He applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672.¹ The parties were unable to resolve their disputes through mediation and the Applicant applied for arbitration under the *Insurance Act, R.S.O. 1990, c.I.8*, as amended.

On August 18, 1995, I made an Order in that proceeding on the issues before me. The Order stated in part:

¹ Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

Mr. Lunn is entitled to his expenses incurred in respect to the arbitration.²

In this proceeding, Mr. Pasternak seeks an Order assessing his expenses with respect to the preparation and presentation of Mr. Lunn's case.

Result:

1. State Farm shall pay Mr. Lunn's legal fees in accordance clause #1 of Mr. Pasternak's Summary of Expenses filed in this proceeding.
2. One half-hour of Mr. Pasternak's legal fees of February 21, 1995 together with the applicable GST shall be adjusted to reflect the rate of \$43.00 per hour and not the rate of \$83.00 per hour actually charged.
3. State Farm shall pay Mr. Lunn's further expenses reflected in the Summary of Expenses at clause 2 entitled "Medical Reports" and at clause 3 entitled "Other."
4. The expenses addressed in this Order shall be paid forthwith upon receipt of this Order.
5. The issue of assessment of further expenses incurred from September 15, 1995 shall remain open. I may be approached in this regard after the parties have followed the

²*Shawn P. Lunn and State Farm Mutual Automobile Insurance Company*, August 18, 1995, OIC A-013860 page 17.

“Assessment of Expenses” policy maintained by the Commission.

Hearing:

An assessment of expense hearing was conducted at North York, Ontario, by teleconference on February 8, 1996, before me, Fern Kirsch, Arbitrator.

Present at the hearing were:

Applicant's Representative:	Stanley Pasternak Barrister and Solicitor
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Insurer's Representative	David Zarek Barrister and Solicitor
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Documents before the arbitrator:

Summary of Account of Stanley Pasternak with appended dockets.

Submissions and Findings:

Mr. Pasternak submitted that his expenses should be paid forthwith on the basis that my Order of August 18, 1995 granted Mr. Lunn his expenses of the arbitration proceeding. Mr. Pasternak submitted that his expenses are reasonable in the circumstances and ought to be allowed in full.

Mr. Zarek submitted that State Farm Mutual Automobile Insurance Company (“State Farm”)

should not be required to pay Mr. Lunn's expenses at this time despite the existence of my Order. He advised me that an Appeal is pending before the Director of Arbitrations where State Farm is seeking an Order for repayment from Mr. Lunn. Mr. Zarek also stated that an excess sum was paid to Mr. Lunn that need not have been paid.

State Farm argued that it is entitled to "set-off" any expenses owed Mr. Lunn against any amount that Mr. Lunn might owe it, and that this issue should be dealt with in the Appeal in order to avoid a duplication of proceedings.³

In the alternative, State Farm Submitted that if I were to consider Mr. Lunn's request for an assessment of expenses at this hearing, portions of Mr. Pasternak's "legal fees"⁴ were not reasonable and ought not be allowed.

During the course of this hearing for the "assessment of expenses," I ruled as follows:

Ruling:

My Order of August 18, 1995 continues in full force and effect. Part of that Order is that Sean Lunn is entitled to his expenses as set out in Schedule 1 of the Dispute Resolution Practice Code.

I have received submissions with respect to the reasonableness of the expenses requested. The parties shall be advised in writing as to my decision with respect to the reasonableness of the expenses.

These expenses shall be paid by the Insurance Company forthwith after receipt of these reasons."

³He relies on the decision of *Melinda J. Upper and Canadian General Insurance Company*, June 3, 1994, OIC File No A-002855.

⁴Item 1 of Mr. Pasternak's Summary of Expenses filed in this proceeding.

These are my reasons for that ruling.

Section 283(6) of the *Insurance Act* states as follows:

- 283.** (1) A party to an arbitration may appeal the order of the arbitrator to the Director.
.....
- (5) Upon hearing an appeal, the Director may confirm, vary or **rescind** the order appealed from or substitute his or her order for that of the arbitrator.
- (6) An appeal does not stay the order of the arbitrator unless the Director decides otherwise. *Insurance Act, R.S.O. 1990, c. I.8, s. 283 (1-6).*

At the hearing, counsel confirmed that State Farm had not requested a stay of my Order of August 18, 1995 as part of the Appeal. I was advised by him that to date the Appeal of this matter has not been heard. Accordingly, the Director has not made a decision regarding my Order under section 283(6) of the *Insurance Act*.

In the case of *Vincenzo Scavuzzo and Canadian Home Assurance Company*⁵ the Director's Delegate M.P. Richardson considered whether the arbitrator's order should be stayed. She considered the import of section 283(6) of the *Insurance Act* and stated at page 3:

I conclude, from the wording of section 283(6) of the *Insurance Act*, and from the fact that the provision departs from the situation normally applicable pending the disposition

⁵March 31, 1992, OIC Appeal File No. A-000626

of an appeal, that the decision of an Arbitrator is intended to be binding pending an appeal. It is also clear that the person seeking a stay bears the burden of establishing why the situation should be otherwise.

Mr. Zarek confirmed that he did not apply for a stay of my Order of August 18, 1995 in his Appeal pending the hearing of State Farm's appeal. I have no jurisdiction to entertain Mr. Zarek's request to stay my own Order. Accordingly, I find that my Order of August 18, 1995 remains in full force and effect. Expenses are therefore due forthwith following this assessment.

Mr. Pasternak has set out details of Mr. Lunn's expenses in his Summary of Expenses ("summary") filed. I understand that the "legal fees" noted in clause #1 of the summary are the only expenses in issue. State Farm has agreed that the balance of the expenses claimed on Mr. Pasternak's summary are reasonable.

The award of expenses of the arbitration proceeding is considered in section 282(11) of the *Insurance Act*, and states as follows:

The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

Section 2 of the Revised Regulations of Ontario, Regulation 664 states as follows:

(1) the legal fees payable by the insured person for the following matters may be awarded:

1. For all services performed before a hearing.
2. For the preparation for an arbitration, an appeal or variation hearing.
3. For attendance at an arbitration, an appeal or a variation hearing.

I heard no submissions from either counsel as to the test that ought to be applied in determining whether I should allow the legal fees claimed. Counsel for State Farm submitted that the 50.75 hours claimed by Mr. Pasternak on legal work on the file was unreasonable. He submitted that I should find that a part of the legal fees in clause 1 of the summary ought not be allowed. Counsel did not suggest what a reasonable amount of time should be. Instead, he submitted that Mr. Pasternak spent an inordinate amount of time on the file on June 21, June 27 and June 30 through until July 3, 1995. Mr. Pasternak submitted that his legal fees were reasonable given the complexity of the matters before me.

Few cases at the Commission have dealt with the issue of the reasonableness of legal fees. In reviewing this issue, the courts have traditionally considered such factors as the complexity of the proceeding, the importance of the issues, the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding, and whether any steps in the proceeding were improper, vexatious or unnecessary.⁶

Arbitration proceedings are very different than court , and accordingly, I do not rely strictly upon the principles enunciated by the courts. Moreover, the individual who performs an

⁶Rules of Civil Procedure, Rule 57.01(1).

assessment of expenses in a court proceeding, does not necessarily have the benefit of hearing the case in full, nor is that individual fully informed as to what transpired during the course of the proceeding, as I am here.

I find that an arbitrator need not conduct a detailed line-by-line assessment to closely consider the docketed time spent by a particular lawyer, on particular dates, in the exercise of discretion to award expenses and fix the amount.

Recoverable arbitration expenses including legal fees claimed, begin with the preparation of the Application for Arbitration, including any interviews required for this purpose. Once the starting point is ascertained the principal criterion in assessing the validity of the legal fees is that of reasonableness. The question becomes whether the expenses incurred were reasonably necessary for the proper preparation and presentation of the case, based on the submissions of counsel and the arbitrator's judgment and experience.

I have reviewed Mr. Pasternak's dockets and find that the contents fall within the parameters of section 2.⁷ I must therefore consider whether the expenses incurred were reasonably necessary for the proper preparation and presentation of the arbitration hearing.

In this case, the arbitration hearing lasted two and one-half days. The case itself involved complex questions of law and fact. According to the summary of expenses, Mr. Pasternak performed 50.75 hours of legal work. Mr. Zarek confirmed that he had spent 28 hours on preparing the Insurer's file (including arbitration time). The number of hours spent on this file by Insurer's counsel show that the file was quite complex. However, the burden of proof in

⁷R.R.O., Regulation 664.

the arbitration proceeding was on the Applicant. In addition, I found in this particular case that the Applicant, Mr. Lunn, was an unsophisticated individual. Accordingly, I find it reasonable that counsel for the Applicant might have to spend more time on the preparation of his case than did the Insurer's counsel.

I am satisfied that the hours claimed in respect of Mr. Pasternak, taken globally, are reasonable, given the complexity and importance of the issues involved, the character of the applicant, and the duration of the hearing. Accordingly, I find Mr. Pasternak's legal fees reasonable under these circumstances.

In addition, the parties agreed that a half-hour of Mr. Pasternak's legal fees of February 21, 1995 is to be adjusted to reflect the rate of \$43.00 per hour and not the rate of \$83.00 per hour actually charged.⁸ The appropriate adjustment shall be made to Mr. Pasternak's legal fees on this date together with the appropriate GST adjustment related to this charge.

The Insurer has also agreed that expenses under the heading "medical reports" in clause # 2 and under "other" in clause #3 of Mr. Pasternak's summary are reasonable.

Mr. Lunn's expenses pursuant to the Summary of Expenses filed by Mr. Pasternak in this proceeding shall be paid forthwith upon receipt of this decision by the Insurer.

⁸In accordance with Regulation made under the *Legal Aid Act*, R.R.O. 1990 Regulation 710 as am., Schedule 3, Part IV, section 20.1.

Mr. Pasternak also claims his expenses incurred from September 15, 1995 up to and including the proceeding of February 8, 1996. Mr. Zarek had not been provided with details of Mr. Pasternak's dockets. The issue of the assessment of these further expenses shall remain open, and I may be approached in this regard, only after the parties have followed the "Assessment of Expenses" policy maintained by the Commission.⁹

Order:

1. State Farm shall pay Mr. Lunn's legal fees in accordance clause #1 of Mr. Pasternak's Summary of Expenses filed in this proceeding.
2. One half-hour of Mr. Pasternak's legal fees of February 21, 1995 together with the applicable GST shall be to be adjusted to reflect the rate of \$43.00 per hour and not the rate of \$83.00 per hour actually charged.
3. State Farm shall pay Mr. Lunn's further expenses reflected in the Summary of Expenses at clause 2 entitled "Medical Reports" and at clause 3 entitled "Other."
4. The expenses addressed in this Order shall be paid forthwith upon receipt of this Order.

⁹Schedule "A".

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5. The issue of assessment of further expenses incurred from September 15, 1995 shall remain open. I may be approached in this regard after the parties have followed the “Assessment of Expenses” policy maintained by the Commission.

Fern Kirsch
Arbitrator

March 15, 1996
Date

SCHEDULE "A"

ARBITRATION UNIT PROCEDURE

ASSESSMENT OF EXPENSES

If an applicant is awarded arbitration expenses, and the parties cannot agree on the amount, either of the parties may apply to have the amount of expenses fixed by an arbitrator. The amount of the expenses will be assessed in accordance with *Ontario Regulation 664*, as amended. The following procedure applies:

1. The applicant will first submit a written account to the insurer, with a description of the services performed and expenses incurred.
2. The insurer will provide a written response to the claim for expenses, outlining the items that it disputes and the grounds for the dispute.
3. The applicant will provide the insurer with copies of available documentation in support of the disputed items, such as invoices, receipts, computerized dockets, etc.
4. If a dispute remains, the parties will file the above material with the Registrar's Office, together with a request for an assessment of expenses. They must indicate whether the assessment is requested on the basis of written material, by telephone conference call or by personal appearance. The form of the assessment is in the discretion of the assessing arbitrator. Where the assessment is by telephone conference call or by personal appearance, the Registrar's Office will notify the parties of the date, time, and, as necessary, the location of the assessment.

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