Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A04–000384

BETWEEN:

BRADLEY MICHAEL MULHALL

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Jeffrey Rogers

Heard: May 12, 2006, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: David Zarek, solicitor for Mr. Mulhall
Ian D. Kirby, solicitor for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Bradley Michael Mulhall, was injured in a motor vehicle accident on March 18, 2001. In a decision dated December 16, 2005, I dealt with his claim for a non-earner benefit under the *Schedule*.[1] I made the following orders while reserving on the issue of expenses:

1. Wawanesa shall pay Mr. Mulhall a non-earner benefit of $185 per week, from September 18, 2001 to August 31, 2002.

[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

2. Wawanesa shall pay Mr. Mulhall interest for the overdue payment of the above benefits pursuant to section 46(2) of the *Schedule*.

The issue in this further hearing is:

1. Is either party entitled to expenses incurred in respect of this arbitration hearing?

Result:

1. The parties shall bear their own expenses of the hearing.

EVIDENCE AND ANALYSIS:

The Criteria

The criteria to be considered by an arbitrator in awarding expenses are prescribed by section 12 (2) of O. Reg. 664, which provides as follows:

> An arbitrator shall, under subsection 282(11) of the Act, consider only the following criteria for the purposes of awarding all or part of the expenses incurred in respect of an arbitration proceeding:
>
> 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.

Both parties claimed entitlement to expenses. Mr. Mulhall sought his expenses throughout. Wawanesa conceded Mr. Mulhall's entitlement to the date of its Offer to Settle, but sought its expenses after that. Wawanesa made an Offer on October 19, 2005. That was six days before the hearing started, calculating the time as prescribed by Rule 8.1 of the *Dispute Resolution Practice Code.* But it was only three business days before the hearing started.

Wawanesa offered to pay Mr. Mulhall, non-earner benefits from September 16, 2001 for 52 weeks, plus interest and expenses to the date of the Offer. The Offer remained open until one minute after the hearing started. I ordered payment of non-earner benefits to August 31, 2002, or about 3 weeks less than was offered.

Applying the Criteria

I find that degree of success and the Offer to Settle are the only relevant factors in applying the prescribed criteria. I repeat the oral ruling I made at the hearing that, if relevant to entitlement to expenses, Mr. Mulhall's allegations that Wawanesa failed to comply with the DAC process and unreasonably failed to pay any benefits before the hearing, could have and should have been raised at the hearing. It would be procedurally unfair to entertain such allegations when they were raised at the expense hearing, with no prior notice. I also repeat my oral ruling that allegations by Mr. Mulhall that Wawanesa did not comply with my order of December 16, 2005 are irrelevant to entitlement to expenses.

The only issue in this case was entitlement to a non-earner benefit. Because Mr. Mulhall was a child when he was injured, his age had to be considered in assessing entitlement. I do not accept Mr. Mulhall's submission that this was a novel issue. The Court of Appeal gave clear guidance on that issue in *Walker v. Ritchie*.[2] I also do not accept Mr. Mulhall's submission that I should consider the quantum of his non-recoverable disbursements, in determining entitlement to expenses. My discretion is limited to considering only the prescribed criteria of section 12(2) of O. Reg. 664.

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[2] [2003] O.J. No. 18

At the hearing on entitlement to benefits, Mr. Mulhall relied on a medical report by Dr. Cancelliere and called him as a witness. Mr. Mulhall served the report of Dr. Cancelliere a week before the hearing, in breach of the 30 day requirement of Rule 39.1. Mr. Mulhall also served his list of witnesses 2 weeks before the hearing and revised it the day before the hearing, in breach of the 30 day requirement of Rule 41.1. Wawanesa did not seek an adjournment or object to admitting the report, indicating that it would pursue the issue when addressing expenses. I find that, although Mr. Mulhall's conduct had the potential to prolong or hinder the proceeding, it did not. I do not accept Wawanesa's submission that I should award expenses simply to penalize Mr. Mulhall for breaching the Rules.

I find that Wawanesa's decision not to call all of the witnesses it listed, did not prolong the hearing or cause Mr. Mulhall to incur unnecessary expense. I accept Wawanesa's submission that the witnesses not called were properly identified as potential witnesses, whose testimony became unnecessary because of the way in which the case unfolded. Rather than prolong the hearing, the decision not to call some of the listed witnesses led to a shorter and more efficient presentation of Wawanesa's case.

I find that the parties had mixed success. Mr. Mulhall sought ongoing non-earner benefits and recovered benefits for about 50 weeks. Wawanesa opposed payment of any benefits.

I find that the Offer Wawanesa made was in technical compliance with the provisions of Rule 76.1(b), because it was served 6 days before the hearing, while the Rule provides that particular consideration should be given to Offers served up to 5 days before the commencement of the hearing. Because of the intervening weekend between service of the Offer and the start of the hearing, the Offer was served only 3 business days before the hearing. I do not accept Mr. Mulhall's submission that provisions in the *Rules of Civil Procedure* that exclude weekends when counting periods of 7 days or less, can be applied. Arbitrators have used the *Rules of Civil Procedure* as a guide in exercising discretion on matters on which the *Dispute Resolution Practice Code* is silent. But I find that the silence of the *Dispute Resolution Practice Code* on excluding weekends, means that there is no discretion to do so.

Although the Regulation requires me to consider the Offer, neither the Regulation nor the *Rules* prescribes what weight it should be given or what factors are to be considered in assigning weight. One obvious factor is the parties' success compared to the Offer. That factor must be considered because parties should be rewarded for conduct that would have avoided a hearing and penalized for conduct that unreasonably caused the other party to incur the expense of a hearing. Since Mr. Mulhall could have achieved a slightly better result by accepting the Offer, it is arguable that he should be penalized for not doing so.

However, I find that, because it was delivered so close to the start of the hearing, Mr. Mulhall's failure to accept the Offer was not unreasonable in the circumstances of this case and I give it no weight. The timing of delivery of the Offer gave Mr. Mulhall very little opportunity to discuss the matter with his solicitor and make a dispassionate decision. Having been engaged in the dispute for years, and having invested almost everything required to proceed with a complicated hearing, Mr. Mulhall was given just a few days to contemplate the possibility of partial success, an unusual result in a claim for a non-earner benefit. Although Wawanesa made the Offer right after receipt of Dr. Cancelliere's report, I do not accept the submission that the report triggered the Offer. I see no parallel between the terms of the Offer and the content of the report and I find no evidence that the report significantly enhanced Wawanesa's ability to measure its chances of success at the hearing.

Because of their mixed success, I find that the appropriate result, consistent with the criteria is that the parties should bear their own expenses.

______________________________	June 16, 2006
Jeffrey Rogers Arbitrator	Date

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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The parties shall bear their own expenses of the hearing.

Jeffrey Rogers
Arbitrator

June 16, 2006
Date