



Appeal P03-00007

OFFICE OF THE DIRECTOR OF ARBITRATIONS

VAN THANH TRUONG

Appellant

and

LUMBERMENS MUTUAL CASUALTY COMPANY / KEMPER CANADA

Respondent

BEFORE: Nancy Makepeace
REPRESENTATIVES: Harvey S. Consky for Mr. Truong
Derek E. Wilson for Lumbermens
HEARING DATE: March 11, 2005

**APPEAL ORDER AND
APPEAL EXPENSES
DECISION**

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that:**

1. Mr. Truong's appeal of the arbitration order, dated August 11, 2004, is dismissed.
2. Mr. Truong shall pay Lumbermens' appeal expenses in the amount of \$4,183.18.

Nancy Makepeace
Director's Delegate

March 31, 2005

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

On January 24, 2003, the Arbitrator dismissed Mr. Truong's application for arbitration, deferring the issue of arbitration expenses. I heard Mr. Truong's appeal from that order on November 5, 2003 and issued my decision dismissing the appeal on March 9, 2004. On August 3, 2004, the Arbitrator heard the parties' submissions on arbitration expenses, and on August 11, 2004, he ordered Mr. Truong to pay Lumbermens' expenses in the amount of \$12,112.66. Mr. Truong appeals that order. I am not persuaded the Arbitrator erred.

Each party seeks its expenses of the appeal. Though the appeal was not frivolous, it stood little chance of success because it challenged the Arbitrator's assessment of the evidence; appeals are restricted to questions of law. Mr. Truong shall pay Lumbermens' appeal expenses totaling \$4,183.18.

II. ANALYSIS

The parties agreed that I should hear and decide the appeal of the Arbitrator's expenses order together with their submissions on appeal expenses.

Mr. Truong does not dispute the Arbitrator's assessment of Lumbermens' arbitration expenses, but submits that expenses should have been ordered in his favour because his application for arbitration, though unsuccessful, had merit. He submits that the Arbitrator's expenses order will cause financial hardship, adding to the financial burden of the medical costs for which the Arbitrator denied entitlement. For the same reasons, he contends that he should be awarded his appeal expenses in the amount of \$8,282.82.

Lumbermens relies on the Arbitrator's reasons for awarding the Insurer its arbitration expenses. It claims its appeal expenses in the amount of \$4,183.18. Lumbermens submits that its complete success in responding to the appeal entitles it to an expenses award, there being no other criterion suggesting a different order.

In making his expenses order, the Arbitrator relied on the amended expenses regulation that took effect on October 1, 2003. The retrospective application of the amended regulation was an issue in Mr. Truong's appeal of the Arbitrator's expenses order and in the parties' appeal expenses dispute.

Before the amendment, the expenses regulation (a section of Ontario Regulation 664) read as follows:

- 12.(2) An arbitrator may award expenses to an insurer or insured person under subsection 282(11) of the Act if the arbitrator is satisfied that the 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 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 the 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 the 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.

Ontario Regulation 275/03, effective October 1, 2003, revoked s. 12(2), and replaced it with the following:

12. (2) 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.

Apart from the use of clearer language, the two important changes are the deletion of the former paragraph 6 and the addition of the word "only" in the new regulation. There is no question the new criteria are more restrictive.

The Arbitrator considered the new criteria. The first criterion – each party's degree of success in the outcome of the proceeding – was determinative: the Arbitrator noted that Lumbermens was completely successful in defending Mr. Truong's claims. Though Lumbermens had made an offer to settle, the Arbitrator found it irrelevant to the second criterion because the offer went beyond the issues in dispute in the arbitration. The parties agreed that the third and fourth criteria (novel issues, party or representative conduct) were irrelevant. On the fifth, the Arbitrator stated only, "Mr. Consky argued that the proceeding was not frivolous." He concluded, "having regard to these criteria, Lumbermens is entitled to its expenses of the arbitration proceeding."¹

¹ Arbitration decision, p. 3.

On appeal, Mr. Truong submits that the Arbitrator erred in having regard to the amended regulation, which did not take effect until after the arbitration was heard and decided, but before the arbitration expenses dispute was heard and decided. He submits the Arbitrator should have considered the merits of the claim, in particular the supportive evidence Mr. Truong relied on, under “any other matter” – the sixth criterion under the old regulation.

Like the Arbitrator, Lumbermens relies on *Howden and Pembridge Insurance Company (Pafco Ins. Co.)*, (FSCO P02-00031, May 17, 2004), in which Director Draper held that the amended regulation applies retrospectively.

The *Howden* appeal was heard in July 2003, before the new regulation took effect, and the appeal decision was released in November 2003, two months after the amendment. Ms. Howden submitted that her expenses claim was governed by the pre-amendment version of the regulation. Director Draper disagreed. He relied on the reasoning of the Ontario Court of Appeal in *CBC Pension Plan*, which held that the January 1, 2002 changes to the costs provisions under the *Rules of Civil Procedure* were procedural, and therefore applied retrospectively despite the absence of any specific language to that effect in the amending provisions.² He found there was no basis for adopting a different analysis in respect of the new FSCO expenses rules: the changes were procedural and had retrospective effect. Director Draper also noted that the Court of Appeal “left the door open to apply the old rules in ‘rare cases’,”³ and held that FSCO adjudicators enjoy the same residual discretion. However, he was not persuaded the *Howden* appeal fell into the “rare” category.

Director Draper expressed some discomfort with the Court of Appeal’s approach:

With respect, there is something odd about saying that costs are procedural because they are used to control the process, and then, on that basis, applying new cost rules to actions taken at a time when different rules were in effect.⁴

² *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.*, [2002] O.J. No. 4313.

³ At p. 11.

⁴ At p. 10.

I agree. Director Draper considered a “possible distinction” – “that the changes to the expense provisions affected the parties’ entitlement to expenses, while the changes to the cost provisions only affected the amount.” However, he concluded the court decisions “stand for the proposition that provisions dealing with costs, not just the calculation of costs, are procedural.” I am inclined to read the court decisions more narrowly. Though the changes to the judicial costs regime were significant, they did not restrict the authority to award costs in s. 131 of the *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*.

In addition, I am uncertain whether the court decisions are directly applicable in the arbitration context because rules about costs or expenses are specific to the particular forum. The dispute resolution scheme at FSCO was intended, amongst other remedial purposes, to provide a more accessible alternative to the courts. This remains its mandate, despite the amendments to the 1990 version of the expenses regulation that have progressively tilted expenses towards the successful party.

Mr. Truong submits, in the alternative, that his is one of the rare cases that justifies an exception to the rule. If the court decisions apply in the context of FSCO proceedings, I agree with Director Draper that FSCO adjudicators have discretion to apply the old expenses regulation in rare cases where it would be unjust to apply the new regulation.⁵

The Arbitrator released his decision, dismissing Mr. Truong’s claims and deferring his expenses decision, on January 24, 2003. He invited the parties to contact him within 45 days if they could not agree on expenses. It appears that Lumbermens’ counsel contacted FSCO in early February to request an expenses hearing, and that Mr. Truong’s counsel responded by stating that the matter should be deferred pending the outcome of the appeal. It appears there was no response from FSCO. When Lumbermens’ counsel followed up in April 2004, shortly after release of my appeal decision, the Arbitrator refused on the basis that the request was out of time. He stated, “an appeal does not

⁵ *Howden*, at p. 11.

automatically stay an arbitration order.” After further follow-up, the expenses hearing was scheduled for August 2004.

Nothing in the *Dispute Resolution Practice Code* prevents the parties from disposing of an arbitration expenses dispute immediately after release of the arbitration decision, but many parties prefer to defer the issue pending appeal. In any event, the parties in this case contacted FSCO within 45 days of the arbitration decision. They should not now be prejudiced because of FSCO’s delays in responding.⁶

Therefore, I find that this case is governed by the expenses regulation as it read prior to the November 1, 2003 amendments. My decision does not turn on this, though, because I find that consideration of the reasons for the outcome is inherent in both versions of the regulation and does not rely on the “any other matter” criterion.

Though the Arbitrator’s expenses order undoubtedly creates a hardship for Mr. Truong, I am not persuaded there is any reason to interfere with it. I do not think it would have made a difference if the Arbitrator had considered the “any other matter” criterion because his order was consistent with his thorough rejection of Mr. Truong’s claims.

Though I dismissed his appeal, Mr. Truong submits he should be awarded his appeal expenses based on certain comments I made about the arbitration decision. With respect to income replacement benefits, he notes that I recognized the conflicting evidence considered by the Arbitrator. He submits that five doctors, including Dr. Pierre Kirwin, a physiatrist, found him disabled and refused to clear him to return to work. He particularly relies on my comment about the nature of the dispute before the Arbitrator:

⁶ Judicial delay was the main reason for applying the old costs rules in *Hodgson v. Canadian Newspapers Company Ltd. et. Al.* (2003), 228 D.L.R. (4th) 732, and *Waxman v. Waxman*, [2003] O.J. No. 87, both referred to in the *Howden* appeal expenses decision.

Stepping back from the details, the Arbitrator was faced with a problem that is not unusual in chronic pain cases. The three experts had strongly differing views about the nature and treatment of chronic pain, and about the legitimacy of Mr. Truong's disability claim.⁷

However, it was the Arbitrator's role to weigh the conflicting evidence, and I found no error of law in his disability analysis. I concluded:

The Arbitrator considered the conflicting expert opinions, and gave reasonable, coherent explanations for rejecting the opinions of Mr. Truong's experts.⁸

As noted by Mr. Truong, I recognized there was evidence supporting Mr. Truong's medical and rehabilitation benefit claims, and found the Arbitrator's reasons "rather dismissive." However, I was not persuaded to interfere because I found that his decision was "based on clear factual findings," including his finding that Mr. Truong was not credible.⁹ Though I expressed concern about the danger of overreliance on credibility findings, I was not persuaded the Arbitrator erred in law in his assessment of the evidence:

Decisions that rest so strongly on an adverse credibility finding run the risk of appearing overly dismissive of supportive evidence. This is a danger because an insured person who exaggerates symptoms (unconsciously or consciously) may nonetheless be disabled from working and entitled to benefits. Further, an insured person may be entitled to medical and rehabilitation benefits, though not entitled to weekly income benefits. This is the concern underlying Mr. Truong's appeal. It is a legitimate concern, but I am satisfied the Arbitrator made his decision after considering all the evidence, and that his conclusion was supportable on the evidence.¹⁰

In general, Mr. Truong submits that his appeal was unsuccessful because appeals are restricted to questions of law under s. 283(1) of the Act, not because the appeal had no merit. However, that restriction, in place since November 1996, would have been familiar to Mr. Truong's counsel, who is

⁷ At p. 14.

⁸ At p. 15.

⁹ At p. 17.

¹⁰ At p. 16.

experienced in FSCO proceedings. The arbitration decision was highly dependent on the Arbitrator's credibility findings and preference for Lumbermens' experts over Mr. Truong's experts. Though not frivolous, the appeal stood little chance of success. Indeed, I cautioned Mr. Truong about the question of law requirement in my letter acknowledging the appeal:

Although s. 283(1) of the *Insurance Act* restricts appeals to questions of law, the Arbitrator's factual findings appear to be the main focus of Mr. Truong's appeal. . . However, I am reluctant to reject the appeal at this early stage because of the limited materials available to me. I will defer this question to my final decision in the appeal, when I will have the benefit of the parties' full appeal submissions. Whether an appeal raised a question of law is one of the factors to be considered in deciding whether to award appeal expenses, and if so, to whom.

In the end, I found that the Arbitrator's findings were supportable on the evidence and not based on any error of law.

The expenses provisions are intended to discourage unmeritorious cases and ensure that meritorious cases are heard. In this case, I can find no reason to award Mr. Truong his appeal expenses or deny them to Lumbermens. Mr. Consky did not dispute Mr. Wilson's bill of \$4,183.18, and it will be so ordered.

Nancy Makepeace
Director's Delegate

March 31, 2005

Date