

BETWEEN:

VAN THANH TRUONG

Applicant

and

LUMBERMENS MUTUAL CASUALTY COMPANY / KEMPER CANADA

Insurer

DECISION ON EXPENSES

Before: William J. Renahan

Heard: By telephone conference call on August 3, 2004.

Appearances: Harvey S. Consky for Mr. Truong
Derek E. Wilson for Lumbermens Mutual Casualty Company/Kemper Canada

Issues:

The Applicant, Van Thanh Truong, was injured in a motor vehicle accident on August 12, 1999. In a decision dated January 24, 2003, I dealt with his claims for statutory accident benefits under the *Schedule*.¹ I dismissed the application for arbitration, while reserving on the issue of expenses.

The issue in this further hearing is:

1. Is either party entitled to expenses incurred in respect of this arbitration hearing and, if so, in what amount?

¹ The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98, 114/00 and 482/01.

Result:

1. Mr. Truong shall pay Lumbermens \$12,112.66 as expenses of the arbitration proceeding.

EVIDENCE AND ANALYSIS:

The criteria for determining entitlement to expenses of the arbitration proceeding are set out in Ontario Regulation 664, R.R.O. 1990, as amended by Ontario Regulation 275/03.²

I set out each criteria with my comments.

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

Mr. Truong claimed ongoing income replacement benefits and medical expenses for chiropractic treatment, psychological treatment and services provided by an oral surgeon. He also claimed housekeeping expenses and the costs of several examinations. Lumbermens was completely successful in defending each claim.

2. Any written offers to settle made in accordance with subsection (3).

Lumbermens made an offer to settle all Mr. Truong's claims under the policy. Since such an offer went beyond the issues in dispute in the hearing, it is impossible to determine whether it is fair. It is therefore irrelevant.

3. Whether novel issues are raised in the proceeding.

The parties agreed that novel issues were not raised.

²In *Pembroke Insurance Company and Howden*, (FSCO P02-00031, May 17, 2004), Director Draper held that the changes in costs and expense provisions are procedural and, in general, have retrospective application.

- 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 parties agreed that this criterion was not relevant in this proceeding.

- 5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.**

Mr. Consky argued that the proceeding was not frivolous.

Having regard to these criteria, Lumbermens is entitled to its expenses of the arbitration proceeding.

Amount of expenses:

The amount of expenses and disbursements are determined by the criteria set out in the Schedule to Ontario Regulation 664. Legal fees are covered by section 3.

3. (1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
1. For all services performed before an arbitration, appeal, variation or revocation hearing.
 2. For the preparation for an arbitration, appeal, variation or revocation hearing.
 3. For attendance at an arbitration, appeal, variation or revocation hearing.
 4. For services subsequent to an arbitration, appeal, variation or revocation hearing.
- (2) The number of hours for which legal fees may be awarded shall be determined by the arbitrator, having regard to the criteria set out in subsection 12 (2) of this Regulation.

- (3) The maximum amount that may be awarded for legal fees is the amount calculated using the hourly rates set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission or Financial Services Commission of Ontario, as it may be amended from time to time.

Mr. Wilson claimed 30 hours at \$79.14 per hour for services performed before the arbitration and 40 hours for preparation. Mr. Consky claimed 32 hours for both. Mr. Wilson did not give particulars to justify 30 hours for services performed before the arbitration. For drafting the Response, preparing for and attendance at a pre-hearing and obtaining productions, I allow 15 hours.

The parties agreed that the hearing took 21.0 hours. I find that this was a reasonable length of time and that, having regard to the complexity of the proceeding and the nature of the evidence, a ratio of 2:1 is reasonable for preparation time. I therefore allow 21 hours for hearing time and the 40 hours claimed for preparation time.

I also allow two hours claimed for services subsequent to the arbitration.

I therefore allow 78 total hours on account of fee. At \$79.14 per hour, the total fee with 7% GST is \$6,605.02.

Mr. Consky agreed that total disbursements of \$5,507.64 were reasonable and so do I.

Total fee and disbursements are allowed at \$12,112.66.

William J. Renahan
Arbitrator

August 11, 2004

Date

FSCO A01-001455

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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. Van Thanh Truong shall pay Lumbermens Mutual Casualty Company/Kemper Canada \$12,112.66 pursuant to subsection 282(11) of the *Insurance Act*.

William J. Renahan
Arbitrator

August 11, 2004

Date