



FSCO A08-001796

**BETWEEN:**

**HAMID MOHAMMED**

**Applicant**

**and**

**ECONOMICAL MUTUAL INSURANCE COMPANY**

**Insurer**

## **DECISION ON EXPENSES**

**Before:** Lloyd Richards

**Heard:** Written submissions received by July 12, 2010 and by telephone conference call on July 16, 2010.

**Appearances:** Eric Boschetti for Mr. Mohammed  
Heather Kawaguchi for Economical Mutual Insurance Company

**Issues:**

The Applicant, Hamid Mohammed, was injured in a motor vehicle accident on February 8, 2007. In a decision dated March 19, 2010, I dealt with his claims for statutory accident benefits under the *Schedule*.<sup>1</sup> I made the following orders, while reserving on the issue of expenses:

1. Pursuant to section 22 of the *Schedule*, Mr. Mohammed is not entitled to receive payments for housekeeping and home maintenance services from February 8, 2007 to February 8, 2009 at the rate of \$100.00 per week.

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

2. Pursuant to section 24 of the *Schedule*, Mr. Mohammed is not entitled to the cost of examinations in the amount of \$771.54 for a follow-up in-home assessment performed by Century Diagnostic and Assessment Centre, dated November 6, 2007.

The issue in this further hearing is:

1. Is either party entitled to its expenses incurred in respect of this arbitration hearing? If so, what is the amount of expenses to which each party is entitled?

**Result:**

1. Economical is entitled to expenses totalling \$11,212.43 and disbursements totalling \$1,458.30.

**EVIDENCE AND ANALYSIS:**

**(i) General Entitlement to Expenses**

I conducted this expense hearing by telephone conference call on July 16, 2010. I also considered written materials submitted by Economical, dated July 12, 2010 and by Mr. Mohammed, dated July 14, 2010.

The relevant criteria that I have considered when making my decision are contained in the Expense Regulation under the *Insurance Act* as set out below:

- 12(1) The expenses set out in the Schedule are prescribed for the purpose of subsection 282(11) of the Act.
- 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.
6. Whether the insured person refused or failed to submit to an examination as required under section 42 of Ontario Regulation 403/96 (*Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*) made under the Act or refused or failed to provide any material required to be provided by subsection 42 (10) of that regulation.

Economical's position is that it was completely successful in the hearing and is therefore entitled to its expenses. Mr. Mohammed is of the opinion, as articulated in *Shreet and RBC General Insurance Company*<sup>2</sup>, that although Economical was wholly successful, a party's success at arbitration is not the only criterion that an arbitrator should consider when awarding expenses.

I agree with Mr. Mohammed and find that although Economical was wholly successful, a party's success at arbitration is not the only criterion that I should consider when awarding expenses. As Arbitrator Killoran articulated in *Shreet*:<sup>3</sup>

The statute and its regulations must be interpreted in a purposive fashion which gives meaning to the remedial nature of the legislation. In this context, the Expense Regulation must be interpreted in such a way as to uphold both the protective and remedial nature of the legislation from which it flows. While changes to the Expense Regulation have moved toward a *more* results based approach to expenses, the approach cannot be entirely results based or the legislative purpose of the *Insurance Act* could be undermined.

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<sup>2</sup>(FSCO A05-002602, January 11, 2008)

<sup>3</sup>Ibid., at p. 4

At the expense hearing, Economical sought to demonstrate that it had made an offer to settle before the hearing that Mr. Mohammed should have accepted. In support of this position, Economical produced a letter dated November 19, 2009, which references an offer made to Mr. Mohammed by correspondence dated November 11, 2009, urging him to accept a dismissal of the arbitration without costs. According to the November 19, 2009 letter, Mr. Mohammed did not accept this offer, but instead offered to withdraw the issues in arbitration in exchange for \$3000.00. Economical did not accept Mr. Mohammed's counter-offer. Mr. Mohammed's position is that he would have been unwise in accepting Economical's settlement offer before the hearing because on the first day of the hearing, Economical paid to settle his medical benefits that were to be adjudicated. Mr. Mohammed states that had he accepted the offer, he would never have received the medical payment.

I agree with Mr. Mohammed that he was prudent in not accepting Economical's offer to settle. However, I believe that Economical's offer was reasonable. I find that Economical paid for Mr. Mohammed's medical benefits at the beginning of the hearing in an attempt to narrow the issues at the hearing. Economical assessed its position and conceded on an issue in which it might have not been successful. I note that Economical was successful on all the other issues that advanced to the hearing.

Neither Mr. Mohammed nor Economical claimed that there were any novel issues in the hearing, and so I am not compelled to consider this criterion.

Economical argues that Mr. Mohammed obstructed the proceeding and failed to comply with orders. Economical states that Mr. Mohammed claimed attendant care benefits and a special award, which claims were withdrawn well into the first day of the hearing. Economical notes that Mr. Mohammed had undertaken to provide particulars of the special award 60 days prior to the first day of the hearing. Mr. Mohammed did not provide the particulars and, in fact, withdrew the special award at the hearing, which compelled Economical to proceed blindly. In this regard, Economical contends that Mr. Mohammed acted in bad faith. Economical further notes that Mr. Mohammed was ordered by Arbitrator Kowalski, by pre-hearing letter dated March 19, 2009, to

produce information from his employment file for the period February 8, 2007 to February 8, 2009. At the arbitration hearing, Mr. Mohammed gave evidence that, despite the order, his lawyer instructed him not to produce the employment file. Mr. Mohammed noted that it was not Mr. Boschetti who gave him this instruction, but another lawyer at Mr. Boschetti's firm who was previously responsible for the file.

Mr. Mohammed's position is that insurers should always be prepared to defend against a special award and that his withdrawal of the special award did not prejudice Economical. He relies on Arbitrator Blackman's decision in *Lopez and State Farm Automobile Insurance Company*.<sup>4</sup> Mr. Mohammed is also of the view that Economical's payment of the medical expenses on the morning of the first day of the hearing prolonged the proceeding and affected witness scheduling. Mr. Mohammed further states that the non-production of his employment file had no bearing on the hearing because the employment file was not relevant.

I agree with Economical and find that Mr. Mohammed obstructed the proceeding and failed to comply with orders and his own undertaking. I do not find that Economical's decision to pay Mr. Mohammed's medical expenses on the first day of the hearing either prolonged the proceeding or affected witness scheduling. In fact, the medical expense payment narrowed the issues that were to be adjudicated. In contrast, Mr. Mohammed's failure to comply with his own undertaking to provide particulars of his special award claim, and his withdrawal of the claim, compelled Economical to proceed blindly and to prepare to address an issue at the hearing that Mr. Mohammed did not intend to pursue. Mr. Mohammed stated that as an insurer, Economical should have been prepared in any case to deal with a special award claim. The facts in *Lopez*, which Mr. Mohammed cites in support of his position, are quite different from the facts in this case. In *Lopez*, Arbitrator Blackman notes that, while the special award claim was raised at the hearing, the precise grounds for the claim were provided prior to any evidence being heard or submissions given. In this case, Mr. Mohammed undertook, well before the hearing, to provide particulars of the special award claim. He ultimately provided no grounds for the claim and did not comply with his own undertaking. His actions led to costs thrown away for Economical.

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<sup>4</sup>(OIC A97-000378, June 16, 1998)

Mr. Mohammed's claim that he did not comply with Arbitrator Kowalski's order because of his counsel's advice does not excuse the fact that he deliberately ignored an arbitrator's order. It was not for Mr. Mohammed to determine whether the employment file was relevant to the issues in dispute. Mr. Mohammed's explanation is an after the fact justification for a blatant disregard of this tribunal's procedures. Such action, whether through Mr. Mohammed's obduracy or his counsel's negligence, will lead to costs consequences.

Economical's position is that Mr. Mohammed's failure to comply with his own undertakings and an arbitrator's order was improper and vexatious. I agree.

There were no issues in this hearing concerning a failure to submit to an insurer's examination, and so I am not compelled to address this issue.

In all of the circumstances, I find that Economical has established full entitlement to expenses, (subject to some of the specific items claimed, as discussed below).

## **(ii) Quantum of Legal Fees**

Pursuant to section 3(1) of the Schedule to the Expense Regulation, legal fees may be awarded for "all services performed before an arbitration", "the preparation for an arbitration", "attendance at an arbitration" and "services subsequent to an arbitration". Pursuant to section 3(2) of the Schedule to the Expense Regulation, the "number of hours for which legal fees may be awarded shall be determined...having regard to the criteria set out in subsection 12(2)" of the Expense Regulation.

Arbitrators have established a general guideline in determining the amount of legal work to be compensated for an arbitration proceeding, being a ratio of between one and four hours of preparation time for every hour of hearing time.

Mr. Mohammed argues that any costs associated with ProAct should not be allowed as the ProAct account was not a part of this arbitration. Economical argues that it reviewed the ProAct accounts to prepare to address the special award claim. I have already noted that Mr. Mohammed abandoned the special award claim at the hearing and did not abide by his own undertaking to provide particulars of the special award claim prior to the hearing. Under the circumstances, I agree with Economical and I have factored the ProAct account into the final expense award. Mr. Mohammed argues that Economical's claim for review of the Paralegal Code of Conduct did not relate to this proceeding. I agree and so I have subtracted that claim from my calculation. I have reduced Economical's claim for its clerk's preparation and completion of briefs on October 28 and 29, 2009 from 11.70 hours to 6.70 hours as the amount appeared excessive. I have deleted Heather Kawaguchi's claim for correspondence to the court reporter, as the court reporter is retained at the parties' discretion and expense. Heather Kawaguchi is listed as responsible for preparing a detailed bill of costs, yet there is also a claim for 6 hours for the clerk doing the same. I have subtracted the clerk's claim.

I have allotted approximately 4 hours of preparation time for each hour of this hearing. Heather Kawaguchi's hours total 113.1. I have subtracted .20, leaving her hours at 112.9, which includes 18.7 hours hearing time. 18.7 times 4 is 74.8 preparation hours. Actual hearing time of 18.7 plus 74.8 hours of preparation time leaves Ms. Kawaguchi with 93.5 hours. The clerk's time is reduced from 38.5 hours to 27.5. I have allowed the expenses of the student and other counsel who assisted Ms. Kawaguchi.

Total Legal fees for Economical are \$11,212.43 (\$10,678.50 plus \$533.93 GST).

### **(iii) Disbursements**

Mr. Mohammed's position is that payments for the OHIP summary as well as clinical notes and records are not recoverable. I find no authority for this position and I have included these amounts under disbursements. Mr. Mohammed also argues that expenses for meeting with

witnesses and clients are also not payable. Again, I find no authority for this position and therefore I included these in my final calculation.

I have not reduced Economical's claim for disbursements. The total is \$1,458.30 (\$1,393.25 plus \$66.05 GST).

## **CONCLUSION**

Economical is entitled to expenses totalling \$10,920.97 and disbursements totalling \$1,458.30.

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Lloyd (J.R.) Richards  
Arbitrator

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September 30, 2010

Date





**FSCO A08-001796**

**BETWEEN:**

**HAMID MOHAMMED**

**Applicant**

**and**

**ECONOMICAL MUTUAL 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. Economical is entitled to expenses totalling \$11,212.43 and disbursements totalling \$1,458.30.

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Lloyd (J.R.) Richards  
Arbitrator

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September 30, 2010

Date