



Appeal P07-00028

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALEXANDER MAZIN

Appellant

and

PERSONAL INSURANCE COMPANY OF CANADA AND ROMAN LUSKIN

Respondents

BEFORE: Delegate Lawrence Blackman

REPRESENTATIVES: Mr. Owen Elliot for Mr. Alexander Mazin
Ms. Heather L. Kawaguchi for Personal Insurance Company of Canada
No one appearing for Mr. Roman Luskin

HEARING DATE: December 4, 2008, by telephone conference call

**APPEAL EXPENSES
ORDER**

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

1. Mr. Alexander Mazin shall pay Personal Insurance Company of Canada its legal expenses of this appeal proceeding fixed in the amount of \$3,075.11, inclusive of GST.

Lawrence Blackman
Director's Delegate

December 8, 2008

Date

REASONS FOR DECISION

I. BACKGROUND

Mr. Roman Luskin was injured in a July 13, 2005 motor vehicle accident. He applied to his first-party automobile insurer, Personal Insurance Company of Canada (“Personal”), for statutory accident benefits payable pursuant to the *Schedule*.¹ In his October 1, 2007 decision, Arbitrator Wilson (the “Arbitrator”) dismissed Mr. Luskin’s Application for Arbitration and awarded Personal \$1,751.83 in legal expenses, payable by both Mr. Luskin and his then counsel, Mr. Alexander Mazin (the “Appellant”), in addition to \$800 previously ordered paid jointly and severally payable by Mr. Luskin and Mr. Mazin in the Arbitrator’s May 25, 2007 decision.

Mr. Mazin appealed the Arbitrator’s expense awards in his personal capacity. In an interim April 25, 2008 decision, I permitted Mr. Mazin and his law firm, Mesrrs. Mazin Rooz Mazin, to withdraw as Mr. Luskin’s representative. In addition, I found that Mr. Mazin had standing as a party in this appeal. The legal expenses of this interim motion were deferred to the conclusion of this appeal proceeding.

My subsequent September 8, 2008 decision confirmed the Arbitrator’s May 25 and October 1, 2007 decisions and dismissed this appeal. The parties were unable to agree on the further questions of entitlement to and the quantum of the legal expenses of this appeal proceeding.

Personal claimed a total of 35.2 hours, consisting of 31.6 hours for counsel at \$96.95 per hour and 3.6 hours for a student-at-law at \$46 an hour, totaling \$3,229.22 in legal expenses. At the expense hearing, Personal further sought its disbursements of \$249.37, as well as GST. Personal submits that it significantly discounted its actual legal bill, which consisted of 48.1 hours for counsel and 14.6 hours for a student-at-law, for a total of 62.7 hours.

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

The Appellant submitted a Bill of Costs of \$1,822.50, consisting of a total of 28 hours, 20 hours at \$50 an hour, six hours at \$75 an hour and two hours at \$150 an hour. This account appears to relate solely to the preliminary issue hearing of the Appellant's standing.

Upon inquiry, both sides sought a further 3.0 hours for preparation for and participation at the expense hearing.

Although notice was given to Mr. Luskin throughout these proceedings, including this expense hearing, he has not participated in this appeal other than his mother attending part of the February 27, 2008 motion. Mr. Luskin did not file a Response to Appeal or any written submissions to any of the preliminary, main or expense issues in dispute, nor did he attend the main appeal hearing. No one answered Mr. Luskin's home telephone number when he was called for this expense hearing, which was held by teleconference.

Mr. Luskin phoned after the hearing concluded, in response to the message left at his home number. He stated that he had not received notice of this expense hearing, although he confirmed the Commission had his correct mailing address.

I find, pursuant to Rule 5.7 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "Code"), that the Commission gave the requisite notice of this hearing by regular mail of the Notice of Expense Hearing to the last known address of a party and that, pursuant to subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, where a party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

Regarding entitlement to the legal expenses of this appeal, Personal submitted that it was entirely successful on the ultimate outcome of this appeal.

As to the Appellant's Bill of Costs, Personal submits it should not be liable for the Appellant's motion to be removed as solicitor of record that was heard at the same time as the question of Mr. Mazin's standing. Personal submits that an hourly rate of \$150 is neither warranted in this case nor allowable, as a rate above the legal aid rate is available only to insured persons, and the

Appellant was acting in this appeal not as a representative of an insured but on his own behalf.

Personal further submits that it should not be liable for any expenses regarding the issue of the Appellant's standing as it was the Appellant's obligation to prove same. Rather, it should receive its legal expenses of its motion as (1) it was a novel issue which required clarification and (2) the appeal was ultimately found to have no merit. As this appeal should never have been brought and was, thus, improper, vexatious and unnecessary, Personal should not have to bear the expense of any associated proceeding. Further, the Appellant should not be rewarded for fighting to obtain standing for an appeal that that was found to have no substance.

The Appellant submits that there has been divided success in this appeal and each party should bear its own costs, as the costs incurred in respect of the issue of standing "will either completely or substantially offset any costs [Personal] may be entitled to in respect of the balance of the appeal hearing." In the alternative, the Appellant submits that Personal should be limited to the Bill of Costs it initially submitted and no costs should be awarded for the issue of standing, on which the Appellant was successful.

II. ENTITLEMENT TO LEGAL EXPENSES

The Expense Regulation found in *Regulation 664*, R.R.O. 1990, made under the *Insurance Act* and noted in Rule 7.2 of the *Code* sets out the following criteria for awarding legal expenses:

(a) Each party's degree of success in the outcome of the proceeding

My September 8, 2008 decision dismissing this appeal found that there was no substance to this appeal. Personal was unsuccessful in its preliminary issue that the Appellant, as a representative, had no standing in this proceeding. The Appellant's motion to be removed as solicitor of record was unopposed.

(b) Any written offers to settle made in accordance with the Schedule

The parties agree that no written offers to settle were exchanged regarding the interim or the

main hearing. The parties advised as to settlement offers made regarding this expense hearing. The varying, unsubstantiated versions provided prevent me from taking this into consideration.

(c) Whether novel issues were raised in the proceeding

I find that the issue of the Appellant's standing in this proceeding was novel.

(d) 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 did not raise this as a criterion.

(e) Whether any aspect of the proceeding was improper, vexatious or unnecessary

As stated, I found that there was no substance to this appeal. I found that the Arbitrator's cost award personally against the Appellant as counsel "did not conflict with counsel's fundamental duties but was forthcoming due to his neglect of such duties."

(f) Whether the insured person refused or failed to submit to an examination required under section 42 of the Schedule or refused or failed to provide any material required to be provided by subsection 42(10) of the Schedule

This criterion is not relevant.

I find, overall, that the Respondent, Personal, is entitled to its reasonable legal expenses of this appeal, as the appeal was ultimately dismissed as being without substance. Notwithstanding that Personal was unsuccessful on the preliminary issue that the Appellant had no standing to bring his appeal, I find that this was a novel and important issue, and that the Appellant and Personal should each bear their own expenses regarding same.

Mr. Luskin has been minimally involved in this appeal. He did not seek his legal expenses, nor

were any sought against him. I find it appropriate that no expenses be awarded to him or against him.

III. QUANTUM OF LEGAL EXPENSES

The Appellant does not dispute the hours claimed by Personal or the hourly rate submitted. I allow the rates requested as in accordance with the *Code*.

I allow Personal 3.0 hours for preparation for and attendance at this expense hearing. I exercised the same discretion in *Halim and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO P07-00035, November 21, 2008) in amending the Bill of Costs submitted. In any event, Personal had served an earlier Bill of Costs that anticipated 3.0 hours for the expense hearing itself. In addition, I do not think inadvertence in initially failing to claim GST should be punished. Both of these items are fairly obvious, and I am not persuaded that there is any prejudice to the Appellant, other than having to pay these amounts.

I am not allowing the \$249.37 in disbursements claimed by Personal, as Personal was unable to advise which of these disbursements pertained to the issue of standing and which did not.

Regarding the hours claimed, Personal estimated that counsel spent 9.0 hours on the issue of standing, but that it had already discounted her hours from 48.1 to 31.6, plus 3.0 hours for the expense hearing. The student-at-law spent 10.3 hours on the issue of standing, but only 3.6 hours of the total of 14.6 hours incurred by her was claimed. Accordingly, Personal submitted that there should be no deduction for the standing issue due to the significant deduction already made. There was not, however, any submission that the reduced hours claimed related solely to the issue of standing.

I am persuaded that the student's full claim of 3.6 hours should be allowed. Regarding counsel's hours, I am persuaded that a proportional deduction should be made. The 9.0 hours regarding the standing issue, in relation to counsel's total of 51.1 hours now submitted to have been incurred, is equivalent to 6.1 hours for the 34.6 hours of counsel's time actually submitted. Accordingly, I allow 28.5 hours for counsel (being the 34.6 hours claimed minus 6.1 hours) as appropriate and

reasonable.

Accordingly, I allow Personal the following legal expenses for this appeal proceeding, payable by the Appellant:

| | |
|--|------------|
| For counsel: 28.5 hours @ \$96.95 an hour | \$2,763.08 |
| For a student at law: 3.6 hours @ \$46 an hour | \$ 165.60 |
| 5% GST on counsel fee: | \$ 146.43 |
| | _____ |
| Total | \$3,075.11 |

Lawrence Blackman
Director's Delegate

December 8, 2008

Date