Appeal P09-00005

OFFICE OF THE DIRECTOR OF ARBITRATIONS

SONIA BAINS

Appellant

and

RBC GENERAL INSURANCE COMPANY

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Hassan Fancy for the Appellant, Mrs. Sonia Bains Mr. Robert Robinson for the Respondent, RBC General Insurance Company
HEARING DATE:	By written submissions, and by oral hearing held August 11, 2010

APPEAL EXPENSES ORDER

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

1. RBC General Insurance Company shall pay Mrs. Sonia Bains her legal expenses of this appeal, fixed in the amount of $21,403.31, inclusive of HST.

Lawrence Blackman
Director's Delegate

September 8, 2010
Date

REASONS FOR DECISION

I. BACKGROUND

The Appellant, Mrs. Sonia Bains, was injured in a May 12, 2004 motor vehicle accident. Arbitrator Murray, in her January 16, 2009 decision, determined that the Appellant had not, within the meaning of clauses 2(1.2)(f) or (g) of the *Schedule*,[1] sustained a catastrophic impairment as a result of this accident.

The Appellant appealed the arbitration decision. My April 15, 2009 decision accepted the appeal from a preliminary order, exercising my discretion under Rule 50.2 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "*Code*"). Pursuant to subsection 283(6) of the *Insurance Act*, R.S.O. 1990, c. I.8, I stayed the arbitration expense hearing.

My June 3, 2010 decision allowed the appeal, rescinded the Arbitrator's order and returned the issue of catastrophic impairment to a new arbitration hearing. Both parties now seek their legal expenses of this appeal. The quantum of legal expenses is also in dispute. My decision regarding entitlement to and the quantum of appeal legal expenses follows.

II. ENTITLEMENT TO LEGAL EXPENSES

The Relevant Legislation

Subsection 282(11) of the *Insurance Act* states that:

> (11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations.

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

Subsection 283(7) of the *Insurance Act* provides, in part, that subsection 282(11) applies, with necessary modifications, to appeals before the Director. Under subsection 6(4) of the *Insurance Act*, the Director appointed me to hold this appeal hearing and to exercise the powers and duties relating to such hearing.

Subsection 12(2) of R.R.O. 1990, Reg. 664 (the "*Expense Regulation*"), provides that:

> (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:
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> 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.

The Appellant's Claim for Appeal Legal Expenses

The Appellant seeks $64,003.46 in legal expenses, including $10,153.31 in disbursements.

The Appellant submits that she was completely successful on the preliminary issues appeal decision and, while not completely successful in all of her arguments at the main appeal hearing, did succeed on novel issues of general importance in a complex area of law.

The Appellant argues that the criterion of success in the *Expense Regulation* concerns not the arguments submitted to and accepted by the adjudicator, but rather the result achieved. The Appellant notes *DesRoches and Economical Mutual Insurance Company*, (FSCO A97-000312 and A97-000814, June 3, 2005), where the applicant, although not completely successful at arbitration, was awarded his expenses based, in part, on his success on a main issue.

The Appellant further argues that this legislation is remedial, governed by the first-party insurance principle of *uberrima fides* (utmost good faith) and by ensuring access to justice. The Appellant cites, in part, Delegate Makepeace in *Truong and Lumbermens Mutual Casualty Company / Kemper Group*, (FSCO P03-00007, March 31, 2005) that:

> 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.

The Appellant submits that the Respondent prolonged this appeal, including opposing the appeal being accepted on the basis that it was premature, insisting on proceeding with its $81,132.37 claim for its arbitration legal expenses and refusing to concede any error in law by the Arbitrator.

The Respondent, RBC General Insurance Company, responds that the appeal was determined primarily based on *Aviva Canada Inc. and Wry et al.*, (FSCO P09-00016 and P09-00016C, March 12, 2010), released after the appeal hearing, and on other reasons not advanced by the Appellant. The Respondent denies that any issue in appeal was particularly novel or complex.

The Respondent's Claim for Appeal Legal Expenses

The Respondent sought, at a $150 hourly rate, excluding HST, $13,490.30 in appeal legal expenses, or in the alternative, at the legal aid rate, $9,210.18, as well as disbursements of $365.30. In oral submissions, however, the Respondent conceded that under Rule 78.1 of the *Code*, the $150 hourly rate is not applicable to insurers' counsel.

The Respondent submits that the Appellant made serious, unnecessary, frivolous and vexatious allegations against the Respondent, its experts and the Arbitrator that warrant sanction. The Respondent cites Rules 4.01(1) and (2)(k) and (m) of the Law Society of Upper Canada's *Rules of Professional Conduct* that an advocate shall treat the tribunal with courtesy and respect, not needlessly harass a witness, and be courteous, civil and act in good faith with all persons with whom counsel has dealings.

The Respondent argues that the Appellant's materials, while unnecessarily voluminous, repetitive and largely irrelevant, nonetheless required a thorough review, resulting in unwarranted, increased expenses and an unnecessarily prolonged hearing. The Respondent submits that its conduct, in contrast, avoided delay of this appeal.

The Respondent cites Director Draper in *Gray and Zurich Insurance Company*, (FSCO P98-00047, June 11, 1999) that while adjudicators are obliged to consider the legislated criteria, including the result, the criteria do not reflect a move to the results-based approach used by the courts. Rather, success is only one criterion to be weighed.

The Respondent notes the decision in *Knechtel and Royal & SunAlliance Insurance Company of Canada*, (FSCO A07-000011, January 18, 2010), where Arbitrator Sampliner, in determining entitlement to legal expenses, took into consideration the hindering and prolonging of a hearing, voluminous, unnecessary and duplicative documentation, and over-lengthy submissions.

The Appellant responds that the Respondent's Bill of Costs "would delight even the most frugal insurer." She argues that the Respondent is implicitly seeking costs personally against her counsel, not for bad faith, but for fearless advocacy. In oral submissions, the Respondent clarified that legal expenses were not being sought personally against counsel. The Appellant submits that the Respondent has ignored the complexity of this appeal, its novelty, its importance to the Appellant and the Respondent's failure on all of its primary defences.

Result

I find the Appellant entitled to her reasonable expenses of this appeal, for the following reasons:

1. The Appellant was entirely successful in the April 15, 2009 preliminary decision to accept this appeal and to stay the arbitration expense hearing. Both the Respondent's initial argument that the appeal be rejected as premature and its subsequent argument that the appeal be addressed only after arbitration legal expenses had been determined, were rejected.

2. The Appellant was successful in the ultimate outcome of the appeal. The appeal was allowed, the Arbitrator's decision was rescinded and the issue of catastrophic impairment returned to arbitration for a new hearing. The reasonableness of the 476 hours the Appellant claims is appropriately addressed in determining the quantum of legal expenses.

3. This appeal raised novel, important and broadly applicable issues as to the timing of catastrophic assessment ratings in the context of subsection 2(2.1) of the *Schedule*, and the assessing of chronic pain, as well as arousal and sleep disorders, under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 (the "*Guides*"). The Respondent does raise legitimate concerns, however, regarding the tenor of certain of the Appellant's submissions. These concerns are addressed in determining the appropriate quantum of legal expenses.

4. In a leading case on expenses, Arbitrator Makepeace, in *Henri and Allstate Insurance Company of Canada*, (OIC A-007954, August 8, 1997), states that "[t]he overriding consideration in fixing arbitration expenses is reasonableness." Subsection 2(2) of the *Expense Regulation* provides that only the enumerated criteria are to be considered in awarding all or part of the incurred expenses. "Reasonableness" does not appear in this provision. Neither does fairness. proportionality or justice. Notwithstanding their explicit absence, it is questionable that the Legislature of Ontario has barred all of these concepts from any consideration in the award of expenses.

5. Rather, as stated by the Director in *Gray*, the enumerated criteria in the *Expense Regulation* leave room for concerns about access to this dispute resolution system, especially "that insured persons should have a reasonable opportunity to raise novel issues of interpretation, particularly those of general importance." As I stated in *Halim and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO P07-00035, November 21, 2008):

> ... these expense criteria do not exist in a vacuum, segregated from the overall legislative intent. Rather, the criteria are defined by, and help define the broader, overarching legislative intentions, including consumer protection, as set out by the Supreme Court of Canada in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, which encompasses a fair and reasonable measure of access to justice.

The novel issues noted above merited a fair and reasonable access to this appeal process, that would be deterred if the Appellant's reasonable legal expenses were denied, or, more so, if expenses were awarded against the Appellant notwithstanding her degree of success on appeal.

6. I am not advised that there is any offer to settle to consider, nor is it argued that clause 12(2)(6) of the *Expense Regulation* is relevant.

III. QUANTUM OF LEGAL EXPENSES

The Appellant seeks 476 hours of legal work, provided by two counsel, an articling student and a law clerk, totaling $53,850.15, including HST. The disbursements of $10,153.31 include transcripts of the fifteen-day arbitration hearing and Quick Law research.

I was not provided with any relevant appeal legal expenses awards. My own review of appeal expense orders from the last six years are set out below.[2] The twenty cases indicate an average appeal expenses award of $3,389.11 - $4,733.58 where insureds were successful, $2,812.91 where the award was to insurers. The modest differential in absolute terms may be due, in part,

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[2] Appeal expenses awarded to applicants:

$3,835.95 *Zurich North America Canada and Stelzer*, (FSCO P02-00035, June 10, 2004);
$2,000.00 *Wawanesa Mutual Insurance Company and Amato*, (FSCO P04-00002, May 24, 2006);
$7,500.00 *Farmers' Mutual Insurance Company and Crossey*, (FSCO P05-00028, September 19, 2007);
$7,514.52 *State Farm Mutual Automobile Insurance Co. and Ramalingam*, (FSCO P05-00026, February 15, 2008);
$5,000.00 *Certas Direct Insurance Company and Kwatemaa*, (FSCO P06-00022, July 8, 2008);
$2,550.99 *Halim and Security National Insurance Company/Monnex*, (FSCO P07-00035, November 21, 2008).

Appeal expenses awarded to insurers:

$2,500.00 *Cruz and Royal and SunAlliance Insurance Company of Canada*, (FSCO P01-00032, April 15, 2004);
$2,000.00 *Aboufarah and Allstate Insurance Company of Canada*, (FSCO P03-00038, February 1, 2006);
$5,731.16 *Citadel General Insurance Company and Olszewski*, (FSCO P04-00040, January 8, 2007);
$1,500.00 *Jama and Dominion of Canada General Insurance Company*, (FSCO P05-00033, July 5, 2007);
$1,000.00 *Kingsway General Insurance Company and Pereira*, (FSCO P05-00031, September 17, 2007);
$3,037.33 *McLellan and Aviva Canada Inc.*, (FSCO P06-00041, February 22, 2008);
$4,318.79 *Stephenson and Economical Mutual Insurance Company*, (FSCO P07-00001, April 22, 2008);
$3,300.00 *McCormack and Aviva Canada Inc. et. al*, (FSCO P06-00024, September 23, 2008);
$3,075.11 *Mazin and Personal Insurance Company of Canada et al.*, (FSCO P07-00028, December 2, 2008);
$3,285.15 *Sarpong and Owusu and TD Home and Auto Insurance Co.*, (FSCO P08-00003 and P08-00004, June 19, 2009);
$1,548.19 *Mr. C and Kingsway General Insurance Company*, (FSCO P08-00025, September 18, 2009);
$2,246.60 *Rooz and Certas Direct Insurance Company et al.*, (FSCO P07-00017, November 18, 2009);
$4,338.44 *Jadavji and Security National Insurance Company/Monnex* (FSCO P08-00033, January 20, 2010);
$1,500.00 *Abbas and Security National Insurance Company/Monnex*, (FSCO P08-00034, February 5, 2010).

to the higher maximum hourly rate of $150 under Rule 78 of the *Code* allowed applicants' representatives, rather than the legal aid maximum applicable to insurers' representatives.

The legal expenses awarded in all twenty precedents noted total $67,782.23. The Appellant seeks $64,003.46 for this one appeal.

The Respondent submits that the Appellant's claimed expenses are excessive, unwarranted and offend all principles of proportionality. The Respondent requested production of the Appellant's dockets. The Appellant responded that her Bill of Costs was based on estimated hours and that legal expenses may be allowed in full despite the absence of dockets, the latter being only one component of assessing fees.

Rule 1.1 of the *Code* mandates that this alternative dispute process is intended to be most just, quickest and not merely inexpensive, but the "least expensive" means of resolving a dispute. "Least expensive" does not mean that an insured whose claim is successful, meritorious and/or novel, sees their reimbursement of out-of-pocket expenses or partial compensation for income loss disappear into their solicitor/client account. Equally, "just" does not mean that professional, competent legal representation is paid so little on the dollar, that such representation is effectively discouraged.

This is consistent with the consumer protection basis of this statutory alternative dispute resolution system that the Legislature has dedicated solely to first-party insurance claims, that by statute only insured persons are allowed to access, by providing not a hypothetical but a real, meaningful litigation option where the parties are unable to mediate a consent resolution.

On the other hand, as I stated in *Sarpong and Owusu and TD Home and Auto Insurance Company*, (FSCO P08-00003 and FSCO P08-00004, June 19, 2009):

> Legal costs are an important regulator of litigation within the context of fair and reasonable access to justice. I do not see that the legislation views legal costs as red lights impeding meritorious claims or defenses raised in good faith. Nor do I see the legislation viewing legal costs as a green light to claims or defenses of dubious merit, bad faith or poor choice.

> Legal costs, in this first party dispute resolution system, are an aid to the advancement of justice and a caution against abuse or excesses.

Subsection 283(1) of the *Insurance Act* restricts a party to an arbitration to appealing the order of the arbitrator only on a question of law.

The Supreme Court of Canada, in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, held that "an appeal is not a retrial of a case," cited with approval *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), that:

> The appellate court must not retry a case and must not substitute its view for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

However, as stated in my June 3, 2010 decision, the Appellant's primary requested relief was that the appellate officer "make new findings of fact, including assessments of credibility and the necessary impairment ratings under the *Guides* to support a finding of catastrophic impairment."

The Appellant cites *702535 Ontario Inc. et al. v. Non-Marine Underwriters, Lloyd's of London et al.*, 184 D.L.R. (4th) 687 (Ont. C.A.), that states that "[t]he duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim."

Adjudicators at this Commission are "creatures of statute." The principle of good faith does not imbue adjudicators with powers the legislation does not provide. I was not persuaded that the appellate power under subsection 283(5) of the *Insurance Act* to vary the order appealed from or to substitute one's order for that of the arbitrator gave an appellate officer the right to hold a quasi *trial de novo*.

The Appellant's counsel may have exhaustively reviewed the arbitration transcripts, as well as the documentary evidence, under the guise of an exhaustive search for alleged bias on the part of the arbitrator, to advance such a fresh hearing before me. The Appellant argued that the hours claimed were warranted as she had to look for some legal foundation for the claims for relief

being made. I am not persuaded that it is reasonable that the legal expenses for this portion of the Appellant's endeavours be borne by the Respondent.

I am also concerned that the Appellant did not produce any dockets notwithstanding her submitting a detailed Bill of Costs. Arbitrator Alves, in *Frumusa and General Accident Assurance Co. of Canada*, (OIC A96-000192, February 12, 1998), cited Orkin, in *The Law of Costs*, 2nd ed., Canada Law Book Inc. (Toronto: 1995), that:

> The importance of keeping dockets as a reliable record of the services performed by the solicitor has been stressed, although the absence of dockets does not mean the solicitor should not be compensated. Since time is only one factor to consider in determining the reasonableness of the bill, the fee may be allowed in full even though not all time is docketed. On the other hand, fees have been reduced on assessment when dockets were skimpy or non-existent.
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> While the failure to keep dockets is not necessarily fatal, counsel place themselves at some risk that they may not be adequately compensated in relation to the efforts they expend on a file. Counsel for the Insurer suggested that I should consider what might be reasonable in the circumstances of this case.

Arbitrator Ashby, in *Jadavji and Security National Insurance Co./Monnex Insurance Mgmt. Inc.*, (FSCO A06-002228, July 15, 2008), agreeing with Arbitrator Alves in *Frumusa*, held that "the overarching consideration in the awarding of expenses is reasonableness." Notwithstanding that the word "reasonable" does not explicitly appear in the *Expense Regulation*, I agree with Arbitrator Ashby. The question, therefore, is what legal expenses are reasonable in this appeal?

As opposed to the Appellant's submitted 476 hours for this appeal, the Respondent claimed 88.2 hours. The Respondent's overall submissions were more focused on the pertinent issues of law properly before me. The Respondent is correct that certain of its hours, nonetheless, did pertain to reviewing submissions unnecessarily provided by the Appellant. On the other hand, one can expect the moving party, having the onus, to require more hours in preparation.

Accordingly, I find the 88.2 hours claimed by the Respondent to be a better approximation of reasonable hours for the Appellant.

Arbitrator Palmer in *Tustin and Canadian General Insurance Group*, (FSCO A97-001209, February 21, 2000), stated that:

> In order to award the $150 hourly rate an adjudicator need only be "satisfied" that a higher amount for legal fees is "justified." In my view, the $150 hourly rate can be awarded equally in circumstances where the claim is complex and requires superior skills of representation or in circumstances where an experienced advocate has attended on a hearing, leaving a sizeable gap between his or her fees per hour and the hourly rates accorded under the *Legal Aid Act*. This provision facilitates access to justice for all applicants and their access to experienced counsel.

This appeal involved a complex interplay between the *Insurance Act*, the *Schedule* and the *Guides*. The Appellant's main counsel has 18 years experience and is certified as a specialist in civil litigation. I am persuaded that this counsel did the bulk of the work in this appeal. On the other hand, often unnecessary and, at times, as particularized in the materials before me, injudicious submissions on behalf of the Appellant must also be taken into account. I am not persuaded that odium is a compensable component of advocacy, fearless or otherwise.

The Respondent's claimed 88.2 hours, at $150 an hour, with HST, equal $14,949.90. I reduce the Appellant's undocketed $53,850.15 claim to $11,250, inclusive of HST, as reasonable, balanced and proportionate.

The award recognizes the importance, novelty and technical complexity of issues in dispute legitimately requiring greater preparation and the potential significance of a catastrophic impairment finding. On the other hand, the award respects the purpose and statutory limitations of appeals from an arbitrator's order, and is a caution against excess, poor choices in the range of appellate remedies sought and the absence of dockets.

The Respondent does not take issue with the Appellant's $10,153.31 disbursements claim. I am persuaded that these disbursements should be allowed, in accordance with the Schedule to the *Expense Regulation*, as being incurred in furtherance of the appeal hearing.

IV. RESULT

The Appellant is entitled to her legal expenses of this appeal, fixed in the amount of $21,403.31, inclusive of HST.

Lawrence Blackman
Director's Delegate

September 8, 2010
Date