

Most Negative Treatment: Check subsequent history and related treatments.

2011 CarswellOnt 1066

Financial Services Commission of Ontario (Arbitration Decision)

Ahmed v. Royal & SunAlliance Insurance Co. of Canada

2011 CarswellOnt 1066

**Raheel Ahmed, Applicant and Royal & Sunalliance
Insurance Company of Canada, Insurer**

Anne Sone Member

Judgment: January 13, 2011

Docket: FSCO A08-002038

Proceedings: additional reasons to *Ahmed v. Royal & SunAlliance Insurance Co. of Canada* (2009), 2009 CarswellOnt 7566 (F.S.C.O. Arb.)

Counsel: Alexander Mazin, for Mr. Ahmed

Nestor E. Kostyniuk, for Royal & SunAlliance Insurance Company of Canada

Subject: Insurance; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Insurance

X Actions on policies

X.2 Practice and procedure

X.2.e Costs

X.2.e.viii Miscellaneous

Insurance

XII Automobile insurance

XII.5 No-fault benefits

XII.5.i Practice and procedure on claim for benefits

XII.5.i.ix Miscellaneous

Headnote

Insurance --- Actions on policies — Practice and procedure — Costs — General principles

Table of Authorities

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

s. 282 — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Automobile Insurance, R.R.O. 1990, Reg. 664

Generally — referred to

s. 3(1) — referred to

s. 3(2) — referred to

s. 3(3) — referred to

s. 4 — referred to

s. 4(1) — referred to

s. 12(2) — referred to

Sched., s. 3(1) — referred to

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

Anne Sone Member:

Issues:

1 The Applicant, Raheel Ahmed, was injured in a motor vehicle accident on February 8, 2007. In a decision dated November 4, 2009, I dealt with his claims for statutory accident benefits under the *Schedule*.¹ I made the following orders, while reserving on the issue of the amount of expenses payable to Royal & SunAlliance Insurance Company of Canada (Royal):

1. Royal & SunAlliance Insurance Company of Canada does not have a duty to adjust a claim based on a Liability Certificate put forward by a fraudster in this case.
2. Royal & SunAlliance Insurance Company of Canada is not obliged to respond to Mr. Ahmed's Application for Accident Benefits.

2 In that hearing, I exercised my discretion to award Royal its expenses incurred in the preliminary issue hearing. The parties could not agree on an amount, and Royal requested that the issue of expenses be dealt with in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

3 The issue in this further hearing is:

1. What is the amount of the expenses that Royal is entitled to in respect of the preliminary issue hearing?

Result:

4

1. Royal is entitled to \$3,456.23 in expenses in respect of the preliminary issue hearing.

Analysis:

Legal Fees and Disbursements

5 As I have already ordered that Mr. Ahmed is liable to pay Royal's expenses, I will only look at what an insurer is potentially entitled to receive.

6 Pursuant to subsection 3(1) of the Schedule to the *Expense Regulation*² (which pertains to Dispute Resolution Expenses), legal fees may be awarded for the following matters:

1. For all services performed before an arbitration hearing.
2. For the preparation for an arbitration hearing.
3. For attendance at an arbitration hearing.
4. For services subsequent to an arbitration hearing.

7 According to subsection 3(2) of this Schedule, 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.

8 In addition, under subsection 3(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 Financial Services Commission of Ontario.³

9 Further, under section 4 of this Schedule, the amount of the following disbursements made by or on behalf of the insurer may be awarded:

1. For long distance telephone, facsimile and other telecommunication charges.
2. For typing, printing and reproducing copies of documents.
3. For the delivery, by mail or courier, of items relating to the arbitration hearing.
4. For other out-of pocket expenses incurred in furtherance of the arbitration hearing.
5. Any applicable taxes paid in respect of the expenses referred to in this section.

Royal's Claim for Legal Fees

10 In its Cost Outline, Royal claimed the following for fees:

- Nestor Kostyniuk for 23.4 hours at the rate of \$150 per hour, totalling \$3,510.
- Dana Spadafina for 8 hours at a rate of \$77.56 per hour, totalling \$620.48.

11 This came to a subtotal of \$4,130.48, to which it added GST.

12 Mr. Ahmed proposed the following as being reasonable for fees in this matter:

- 10 hours of lawyers' time at the statutory rate of \$96.95 per hour (\$77.45 per hour plus 25% for experience) plus GST (because the preparation time of Royal was excessive).

13 Royal claimed for 31.4 hours of total time for a two day hearing. Although this was not broken down, I accept that over the course of the two days the hearing took 12 hours.

14 The general approach with respect to fees is to take a "pragmatic, broad-strokes approach, with a view to fixing an amount that is reasonable."⁴ This means taking into account the length of the proceeding and the complexity of the issues, and frequently involves applying a ratio of pre-hearing preparation time to hearing time in the range of 1:1 to 4:1.⁵

15 This was a complex case, where the insurer was obliged to prove fraud. Under these circumstances, I find that a ratio of less than 2:1 (19.4 hours pre-hearing preparation to 12 hours at the hearing) for pre-hearing preparation time to hearing time is reasonable.

16 Mr. Ahmed also questioned whether Royal was entitled to the maximum hourly rate of \$150 per hour claimed by Royal for Mr. Kostyniuk

17 Rule 78 of the *Dispute Resolution Practice Code*, deals with the maximum expenses that may be awarded to representatives and states as follows:

78.1 The maximum amount that may be awarded to an insured person or an insurer for legal fees is an amount calculated using:

(a) the hourly rates established under the *Legal Aid Services Act, 1998* for professional services in civil matters before the Ontario superior Court of Justice; or

(b) the hourly rate referred to in **Rule 78.1(a)** adjusted to include, where appropriate, the experience allowance established under the *Legal Aid Services Act, 1998*;

Where an adjudicator is satisfied that a higher amount for legal fees to an insured person is justified, an hourly rate of up to **\$150** may be awarded. [My underlining.]

18 As a result, Rule 78 only allows counsel for insurers to obtain the Legal Aid rate (subject to the experience allowance).⁶ The current maximum legal aid rate is \$96.95 per hour.⁷

19 Mr. Ahmed did not object to the hourly rate of \$77.56 claimed for Ms. Dana Spadafina, and I find that this hourly rate for her services is reasonable.

Royal's Claim for Disbursements

20 In its Cost Outline, Royal claimed \$4,523.30, including GST, for disbursements. Mr. Ahmed sought a breakdown of these disbursements, which was later provided.

21 Royal sought disbursements in the amount of \$44.62 for postage, photocopying and facsimile transmission charges. These charges fall under subsections 1 to 3 of section 3(1) of the Schedule to the *Expense Regulation*. As these charges involve relatively small amounts, and are specifically referred to under the Schedule to the *Expense Regulation*, I find that they are reasonable.

22 Royal has also claimed, as a disbursement, legal research charges totalling \$346.95 (\$285.69 + \$61.26). Under subsection 4(1) of this Schedule, disbursements may be awarded that pertain to other out-of-pocket expenses incurred in furtherance of the arbitration hearing. In my view, legal research charges may fall under that category. As this was somewhat of an unusual case, legal research was justified. I find that the amount of \$346.95 was reasonable under the circumstances. In addition, if Royal's counsel had undertaken the legal research, at his own hourly rate, it would have been reimbursable under the heading of fees, and it may well have cost more.

23 In addition, Royal claimed the assessment fee of \$3,000 it paid, as a disbursement. In my view, this payment does not fall under the headings set out above under section 3(1) of the Schedule to the *Expense Regulation*, and is therefore, not allowed.

Total Amount of Expenses Ordered

24 Royal is entitled to fees, including GST, of \$3,043.77 (\$2,278.35 for Mr. Kostyniuk and \$620.48 for Ms. Spadafina, plus GST of 5% at \$144.94), as well as disbursements, including GST, of \$412.46 (disbursements of \$392.82, plus GST at 5% of \$19.64). Therefore, Royal is entitled to \$ 3,456.23 for its expenses of the preliminary issue hearing.

Anne Sone Member:

25 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Mr. Raheel Ahmed shall pay Royal & SunAlliance Insurance Company of Canada its expenses of the preliminary issue hearing in the amount of \$3,456.23.

Footnotes

- 1 *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*
- 2 R.R.O. 1990 Regulation 664, made under the *Insurance Act*, as amended to O. Reg 276/03.
- 3 As it may be amended from time to time.
- 4 *Ragulan and Security National Insurance Co./Monnex Insurance Management Inc.*, (FSCO A05-002940, July 16, 2008). See also, *Henri and Allstate Insurance Company of Canada*, (OIC A-007954, August 8, 1997) and *West and Aviva Canada Inc.*, (FSCO A08-000170, March 15, 2010).
- 5 See, for example, *Soobrian and Belair Insurance Company Inc.*, (FSCO A04-000422, February 7, 2006).
- 6 *Medina and State Farm Mutual Automobile Insurance Company* (FSCO P09-00017, November 18, 2009) at page 2.
- 7 Royal's counsel later conceded that \$96.95 was the maximum legal aid rate for a lawyer with his level of experience.