

1994 CarswellOnt 4953  
Ontario Insurance Commission

Cahill v. Western Assurance Co.

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**Thomas C. Cahill, Applicant and Western Assurance Company, Insurer**

Palmer Arb.

Heard: November 2, 1994  
Judgment: December 12, 1994  
Docket: A-009112

Counsel: Nestor E. Kostyniuk, for Insurer

Subject: Insurance

**Palmer Arb.:**

**Issues:**

1 The Applicant, Thomas C. Cahill, was injured in a motor vehicle accident on October 5, 1993. He applied for and received statutory accident benefits from the Insurer, payable under Ontario Regulation 672<sup>1</sup>. The parties were able to resolve all their disputes except for two matters relating to supplementary medical and rehabilitation expenses. After an unsuccessful attempt at mediation, the Applicant applied for arbitration under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

2 The issues in this hearing are:

1. Is Mr. Cahill entitled to the moving expenses which he is claiming under section 6(1)(f) of the *Schedule*?
2. Is Mr. Cahill entitled to the snowclearing expense which he is claiming under section 6(1)(f) of the *Schedule*?
3. At the hearing, the Applicant sought to include a claim for a special award under section 282(10) of the *Insurance Act*.
4. The Applicant also claims interest on any outstanding amounts owing, and his expenses incurred in the hearing.

**Result:**

3

1. The Applicant is entitled to moving expenses as set out in the decision.
2. The Applicant is entitled to \$70 for snowclearing expenses.
3. The Applicant is not entitled to a special award under section 282(10) of the *Insurance Act*.
4. The Applicant is entitled to his expenses incurred in respect to the arbitration.

**Hearing:**

4 The hearing was held in Kingston on November 2, 1994, before me, K. Julaine Palmer, arbitrator.

5 Present at the Hearing:

Applicant:	Thomas C. Cahill
Applicant's	Sharon Cahill
Spouse:	
Insurer's	Nestor E. Kostyniuk
Representative:	Barrister and Solicitor

6 The proceedings were recorded by Nina Chamailard, certified court reporter.

7 The parties filed 12 exhibits at the hearing. The filing of two of the exhibits was protested by the Insurer. I allow both Exhibit 8 and Exhibit 11 to be included as part of the record in this matter, because the Applicant, who represented himself, wished to include them as part of his presentation. However, because of the nature of the documents, I have placed no weight on their contents in my consideration of this matter.

### **Evidence and Findings:**

#### **Background**

8 Thomas C. Cahill, 38, and his wife, Sharon Cahill, were vacationing in Reno, Nevada, when they suffered injuries in a motor vehicle accident on October 5, 1993.

9 Previously, in the summer of 1993, the Cahills had contracted with a builder to construct a new home for them on a lot which they owned in Bath, Ontario. In December 1993, they moved from their home in Kingston to the new house in Bath. One of the issues in this hearing is how much of the cost of that move the Insurer should pay as an expense for "other goods and services, whether medical or non-medical in nature, which the insured person requires because of the accident", as set out in section 6(1)(f) of the *Schedule*. Mr. and Mrs. Cahill allege that they would have completed the move on their own, had they not been injured in the accident.

10 Only Mr. Cahill testified at the hearing. Mrs. Cahill was present but did not testify. The Insurer cross-examined Mr. Cahill and offered argument, but called no witnesses.

#### **Snow clearing**

11 Mr. Cahill submitted an account for \$70 for seven instances of snowclearing service at his new home, provided by K. Fairfax of Bath, during the winter of 1993-1994. Mr. Cahill testified that he telephoned several snow removal contractors in order to obtain the lowest possible price for snow clearing. He testified that during that winter, he and his wife were physically unable to shovel the driveway, which he put at a length of 20 feet. On the basis of his testimony, the medical documentation and other documents filed, I find that this \$70 snowclearing expense was reasonable and was a service which Mr. Cahill required because of the accident.

#### **Moving expense**

12 Mr. Cahill testified that he and his wife have moved residence several times in past years. He freely admitted that when the move was dictated by a change in his employment, they were content to accept a full service move, paid for by the employer. However, he also testified that he and his wife had moved residence for reasons of their own personal preference. On those occasions, they had rented a truck, some other equipment, and performed the entire move themselves. In support of this claim, Mr. Cahill filed documents relating to a move in 1990, between two homes in Kingston.

13 Mr. Cahill testified about the effects of the accident of October 5, 1993 on his physical condition and that of his wife, Sharon Cahill. Mrs. Cahill was away from work for three weeks after the accident. Mr. Cahill was away from work until January 4, 1994, three months after the accident. The Cahills suffered soft tissue injuries to their necks and backs when they were rear-ended.

14 In anticipation of their move, Mr. and Mrs. Cahill wrote to their Insurer, through its adjuster, on November 17, 1993. In that letter, they requested two assistants to help them move their furniture and pack and unpack their personal effects. They stated that they would provide the moving vehicle. They also requested labour to clean their current home, after they vacated it, and to clean their new home. They indicated that they were prepared to assume all the material costs with respect to the cleaning.

15 The Cahills received no written response to this request. However, Mrs. Cahill did speak on the telephone with the adjuster. They next provided an estimate for the move from "Frank the Mover", dated November 23, 1993. Again, they requested that the Insurer assume the labour costs for the packing and moving, some \$560 for the packing, and \$600 for labour.

16 Mr. Cahill presented a letter from Frank Spindler of "Frank the Mover", dated November 8, 1994. That letter outlined the cost of the move, which totalled \$1,675.66. At the time of the hearing, \$1,516.73 had been paid, and \$159.93 was still outstanding. The letter from Mr. Spindler also outlined in detail the labour requirements for the packing and moving of the contents of the home.

17 In my view, given the serious soft tissue injuries which Mr. and Mrs. Cahill suffered in the motor vehicle accident of October 5, 1993, they required help with the physical task of moving the contents of their home. I accept the evidence of Thomas Cahill that, previously, he and his wife had moved the contents of their home, and that they fully intended to conduct this move themselves, with minimal aid of friends or neighbours, and without incurring substantial expense for the labour of others.

18 In my view, the Cahills proceeded in a reasonable manner by alerting the Insurer of their impending move and their need for assistance. I consider that the Insurer's response, which was to allow a payment of \$240 towards the move, to be inadequate. The Insurer called no evidence which would indicate the basis for this allowance. The only information I have comes from the Assessment of Claim form which stated "Moving costs unreasonable. We allowed the costs of two men at \$15 per hour for eight hours to avoid lifting."

19 In all of the circumstances of this case, I think it would be reasonable to allow for  $\frac{2}{3}$  of the cost of the packing of the Cahill's belongings, exclusive of material costs. Accordingly, I allow the sum of \$373.33 for that item. In my view, Mrs. Cahill's condition, at a point four weeks after the accident, was such that she could have been expected to contribute substantially to the packing of such items as dishes, and other small items, and it is for this reason that I do not allow the full cost of packing their belongings.

20 With respect to the labour for moving the boxes and furniture, the claim is for \$600, plus a further \$78.75 for moving appliances. I allow these claims in full, as the actual cost incurred by Mr. and Mrs. Cahill for the labour in moving their household effects. In addition, G.S.T. must be included with respect to both the packing and the labour for the move. In summary, I allow the sum of \$1,052.08, plus G.S.T. of \$73.64 for a total of \$1,125.73.

### **Deductions**

21 Any amounts previously paid by the Insurer should be deducted from the \$1,125.73. In addition, the Cahills would have incurred some expense to carry out the move themselves.

22 Their move within Kingston in 1990 cost \$111.81 for truck rental, including mileage. In my view, it is appropriate to deduct \$250 from the final amount to be paid by the Insurer to reflect that cost for rental of a truck and ancillary expenses, which would have been incurred by the Cahills in any event.

23 At the hearing, Mr. Cahill requested a special award under the provisions of section 282(10) of the *Insurance Act*, R.S.O. 1990, c. I.8., as amended, which reads as follows:

(10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

24 I find that the Insurer assessed the claim and provided an allowance which it felt was reasonable in regard to the circumstances. It appears to me that the Insurer and the Applicant had an honest difference of opinion as to how much of the moving expense should be seen as a "good and service" that the Insureds reasonably required because of the accident. Accordingly, I do not feel that this is a circumstance in which a special award is warranted.

**Expenses:**

25 The Applicant seeks an award of the expenses he has incurred in this arbitration. An award for expenses may be made under section 282(11) of the *Insurance Act*, which provides as follows:

The arbitrator may award to the insured person such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations to the maximum set out in the regulations.

26 The prescribed expenses and amounts are set out in Schedule 1 of the Dispute Resolution Practice Code and in Ontario Regulation 664, R.R.O. 1990, Dispute Resolution Expenses.

27 In *Ralph McCormick and Economical Mutual Insurance Company*, October 2, 1991, OIC File No. A-000139, Arbitrator Susan Naylor made the following comments about expenses, with which I agree:

The discretion to award expenses should be exercised, having regard to the intent and purpose of the legislative scheme. The arbitration process has been established under the Insurance Act, as amended, in order to facilitate applicants' access to relatively inexpensive, speedy and informal adjudication of disputes regarding no-fault benefits. The discretion to award expenses should be exercised in accordance with this objective, having regard to the individual circumstances of each case.

Accordingly, it is appropriate to award an applicant his or her expenses, unless, in the circumstances of the particular case, it is determined that the application for appointment of an arbitrator was manifestly frivolous or vexatious, or that the applicant's conduct unreasonably prolonged the proceedings.

28 The Director of Arbitrations approved this statement of the principles guiding an award of expenses in the appeal decision in *Vito Luigi Calogero and The Co-Operators General Insurance Company*, February 13, 1992, OIC File No. P-000251.

29 The Applicant is entitled to his expenses as set out in Schedule 1 of the Dispute Resolution Practice Code. In the event that the parties cannot agree as to the total amount of expenses, I remain seized of this matter and a party may apply for assessment of the expenses before me.

**Order**

30

1. The Applicant is entitled to moving expenses as set out in the decision.
2. The Applicant is entitled to \$70 for snowclearing expenses.
3. The Applicant is not entitled to a special award under section 282(10) of the *Insurance Act*.
4. The Applicant is entitled to his expenses incurred in respect to the arbitration.

#### Footnotes

- 1 Prior to January 1, 1994, Ontario Regulation 672 was called the *No-Fault Benefits Schedule*. After that date it became the *Statutory Accident Benefits Schedule - Accidents Before January 1, 1994*. In this decision, the term "*Schedule*" will be used to refer to Regulation 672.

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