



DRS A15-005751

BETWEEN:

CINDEE MILAN

Applicant

and

AVIVA CANADA INC.

Insurer

DECISION ON EXPENSES

Before: David Evans
Heard: Written submissions received by April 16, 2019
Appearances: Randy Knight for Ms. Cindee Milan
Derek Greenside for Aviva Canada Inc.

Issues:

The Applicant, Cindee Milan, was injured in a motor vehicle accident on May 17, 2011. In a decision dated January 4, 2018, Arbitrator Matheson dealt with her claims for statutory accident benefits under the *Schedule*.¹ He denied the majority of her claims, in particular a claim for income replacement benefits, but he awarded interest on less than \$4,000 in medical and rehabilitation benefits at 2 percent compounded monthly.

The matter of arbitration expenses was then referred to Arbitrator Anne Morris, as Arbitrator Matheson was no longer available at ADR Chambers. Arbitrator Morris released her Decision on Expenses on May 2, 2018, awarding Aviva Canada Inc. \$5,000.00 inclusive of HST.

¹The Statutory Accident Benefits Schedule — Effective September 1, 2010, Ontario Regulation 34/10, as amended.

Meanwhile, Ms. Milan appealed the main decision of Arbitrator Matheson regarding the benefits, and Aviva cross-appealed the two percent award of interest.

I allowed the cross-appeal, as both parties agreed that the Arbitrator erred in law, in light of the Divisional Court decision in *State Farm Automobile Insurance Co. v. Kulaveerasingam*, 2017 ONSC 6278.

As to the main appeal, I upheld almost all of Arbitrator Matheson's decision, save and except for his conclusion that Ms. Milan was not entitled to \$1100 for orthotics in a treatment plan dated July 25, 2013.

I also rescinded the expenses order to deal with the question of whether the \$5,000 awarded to Aviva Canada should be amended in light of Ms. Milan's success on appeal.

The parties then agreed that I should make the determination of arbitration expenses. It was also agreed that there would be no further expenses regarding the appeals.

The issue in this further hearing is:

1. Should the \$5,000 in expenses awarded to Aviva Canada Inc. be amended to take into account Ms. Milan's success on appeal?

Result:

1. Aviva Canada Inc. is entitled to its expenses of the Arbitration (including the Expense Hearings) in the amount of \$5,000.00 inclusive of fees, disbursements and HST.

EVIDENCE AND ANALYSIS:

The only issue is whether the \$5,000 awarded against Ms. Milan should be amended in light of her success regarding the \$1,100 orthotics issue.

However, I find that the amount awarded should not be amended because Ms. Milan's success was very minor in the context of the entire claim and Aviva's success in the cross-appeal more than balanced out Ms. Milan's success.

On the first point, the biggest element of Ms. Milan's claim was for income replacement benefits. She claimed a weekly IRB in the amount of \$325.00 from July 3, 2013 to the date of the hearing and on-going. In his decision dated January 4, 2018, Arbitrator Matheson denied that claim. July 3, 2013 to January 4, 2018 is approximately 235 weeks, so at \$325 a week that represents a claim of over \$76,000.

Ms. Milan's total claim including IRBs was approximately \$86,000. Her initial award of just under \$4,000 represented less than 5 percent of the total claim. The appeal added \$1100 to her award, increasing it by a little more than 1 percent. The vast majority of her claim was nonetheless still denied. Ms. Milan's success on appeal was thus minor at best.

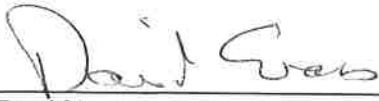
As to the second point, Aviva was successful in reducing the interest owed from 2 percent to 1 percent. My own rough calculation suggests that the amount Aviva saved thereby was over \$2,000, but at the very least it easily matched the amount Ms. Milan gained with her success.

In her expenses decision, Arbitrator Morris stated:

In all of the circumstances, and noting the Insurer's degree of success, I find that the Insurer is entitled to its expenses but in an amount reduced to also reflect the degree of success of the Applicant and to reflect principles of reasonableness, consumer protection and access to justice.

I find that Ms. Milan's success on appeal does not change the equation set out by Arbitrator Morris. Both parties had at least some success on appeal, and the amounts – whether awarded to Ms. Milan or saved by Aviva – were roughly equivalent. Overall, Aviva still had the far greater success. Accordingly, I find no reason to amend the \$5,000 awarded against Ms. Milan.

Consequently, Aviva Canada Inc. is entitled to \$5,000 all inclusive for the arbitration expenses, including this further hearing.



David Evans
Director's Delegate

August 16, 2019

Date



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CINDEE MILAN

Applicant

and

AVIVA CANADA INC.

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Regulation 664, as amended, it is ordered that:

1. Aviva Canada Inc. is entitled to its expenses of the Arbitration (including the Expense Hearings) in the amount of \$5,000.00 inclusive of fees, disbursements and HST.

A handwritten signature in cursive script that reads "David Evans".

David Evans
Arbitrator

August 16, 2019

Date