

2015 CarswellOnt 16935  
Financial Services Commission of Ontario (Arbitration Decision)

Heinecke v. TD General Insurance Co.

2015 CarswellOnt 16935

**Christopher Heinecke, Applicant and TD General Insurance Company, Insurer**

Janet Davies Member

Judgment: October 26, 2015

Docket: FSCO A14-007751

Counsel: Mr. Ralf R. Jarchow, for Mr. Christopher Heinecke  
Mr. Nestor E. Kostyniuk, for TD General Insurance Company

Subject: Insurance

**Related Abridgment Classifications**

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

**Insurance**

**XII** Automobile insurance

**XII.5** No-fault benefits

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

**XII.5.i.vi** Costs and expenses

**Headnote**

**Insurance --- Automobile insurance — No-fault benefits — Practice and procedure on claim for benefits — Costs and expenses**

**Table of Authorities**

**Cases considered by Janet Davies Member:**

*Ramchandar v. Certas Direct Insurance Co.* (2015), 2015 CarswellOnt 1790 (F.S.C.O. Arb.) — referred to

*Singh v. State Farm Mutual Automobile Insurance Co.* (2015), 2015 CarswellOnt 1088 (F.S.C.O. Arb.) — referred to

*Sufi v. Aviva Canada Inc.* (2008), 2008 CarswellOnt 8701 (F.S.C.O. Arb.) — referred to

**Statutes considered:**

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

Generally — referred to

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

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

Generally — referred to

s. 30(1)(a) — considered

s. 42 — considered

s. 42(10) — considered

***Janet Davies Member:***

**Issues:**

1 The Applicant, Mr. Christopher Heinecke, was injured in a motor vehicle accident on July 6, 2006 and sought accident benefits from TD General Insurance Company ("TD"), payable under the *Schedule*.<sup>1</sup> The parties were unable to resolve their disputes through mediation, and Mr. Heinecke, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

2 The issue in this Expense Hearing is:

1. Is Mr. Heinecke liable to pay TD's expenses in respect of this Application for Arbitration, and if so, in what amount?

**Result:**

3

1. TD's request for expenses is denied.

**Evidence and Analysis:**

***Background***

4 An Application for Arbitration was filed on September 29, 2014, for a Non-Earner Benefit for the period from January 6, 2007 to date and ongoing. During the Pre-Hearing, which took place on June 12, 2015, Counsel for the Applicant advised that his client wished to withdraw his Application for Arbitration on a without cost basis. Counsel for the Insurer advised that TD would not consent to the withdrawal on a without cost basis and would be seeking its expenses.

5 Having considered the submissions by the parties, the Arbitrator permitted the withdrawal of the Application for Arbitration and scheduled an Expense Hearing to be held in writing. Timelines were set and complied with.

***Insurer's Submissions***

6 In summary, TD claims that Mr. Heinecke was not entitled to claim a Non-Earner Benefit given that the vehicle, which he owned and was operating at the time of the motor vehicle accident, was not insured, which is a breach of section 30(1)(a) of the *Schedule*. As a result, Mr. Heinecke was not entitled to claim a Non-Earner Benefit.

7 TD submits that Mr. Heinecke conceded he was not entitled to a Non-Earner Benefit in that he withdrew his Application for Arbitration.

8 TD's position is that it is entitled to its expenses in that it has incurred unnecessary expenses in preparing for the Arbitration proceedings. TD referred to the following jurisprudence from the Commission on the subject of expenses:

*Singh v. State Farm Mutual Automobile Insurance Co.* [2015 CarswellOnt 1088 (F.S.C.O. Arb.)] (FSCO A13-006260, January 9, 2015).

*Ramchandar v. Certas Direct Insurance Co.* [2015 CarswellOnt 1790 (F.S.C.O. Arb.)] (FSCO A13-000906, January 29, 2015).

*Sufi v. Aviva Canada Inc.* [2008 CarswellOnt 8701 (F.S.C.O. Arb.)] (FSCO A07-002237, October 29, 2008).

9 TD is seeking its expenses in the amount of \$8,288.40, comprising \$4,680.00 in fees, the assessment of \$3,000.00 and \$608.40 for HST.

#### ***Applicant's Submissions***

10 In summary, Mr. Heinecke submits that as the motor vehicle accident occurred in 2006, time limits were running and it was reasonable to apply for Arbitration regarding the Non-Earner Benefit given the uncertainty with respect to the insurance coverage issue. At the time the application for the Non-Earner Benefit was advanced, it was unclear as to who the Insurer was because of a priority dispute. The initial Insurer to respond to his claim for benefits was Intact Insurance. Following mediation TD took over the claim. Subsequently, an Application for Arbitration was submitted to TD on September 29, 2014.

11 Mr. Heinecke submits that TD's initial response to his Application for Arbitration was that the Non-Earner Benefit was denied because of the timeliness of the Application for Arbitration and that he did not suffer a complete inability to carry on a normal life as a result of and within 104 weeks of his accident. The Insurer subsequently advised him that its position had changed, and it now believes the Applicant was driving while uninsured.

12 In closing, Mr. Heinecke submits that the Insurer did not advise him he could have had accident benefits from the 2006 accident. He is of the opinion that 60 hours of time between Mr. Kostyniuk and a student to prepare a response to the Application is excessive. It is his position that there should be no costs awarded in this matter, including the \$3,000.00 fee, as he will be filing an application for a determination of catastrophic impairment and that the Insurer could have saved itself the fee if it had agreed to add that issue to this Application for Arbitration. The Insurer refused the request.

#### ***Insurer's Response***

13 In response, TD's position is that no Application for Mediation had been filed on the catastrophic impairment issue and there is no Report of Mediator. Therefore, it is improper to suggest that Mr. Heinecke can somehow add this to the current Application for Arbitration for a Non-Earner Benefit. The Insurer submits that Mr. Heinecke was always aware that he was driving an uninsured vehicle and is ultimately responsible for the consequences.

14 TD submits that its claim for expenses is reasonable in that this is how long it took to sort through Mr. Heinecke's material and his claim for a Non-Earner Benefit.

#### ***Analysis***

15 The record indicates that Intact Insurance had the claim until it was transferred to TD on March 25, 2014. Subsequently, an Application for Arbitration was filed on September 29, 2014.

16 The Form E (Response by the Insurer to an Application for Arbitration) was submitted on October 21, 2014. The Response by the Insurer indicates that the preliminary issue in dispute was that the Application for Arbitration was time barred and that the Applicant did not suffer a complete inability to carry on a normal life as a result of and within 104 weeks of the accident.

17 At some point in time, after filing the initial response to the Application for Arbitration, the Insurer filed an undated Schedule B requesting to add, as a preliminary issue, that the Applicant was driving without insurance.

18 Rule 70.3 of the *Dispute Resolution Practice Code* ("the *DRPC*") provides where a party does not agree to the withdrawal, an adjudicator may:

- a) permit the withdrawal on such terms and conditions as he or she considers just;
- b) award expenses to either party as permitted by Rule 75 and following.

19 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in the *Expense Regulation*, which are, in part, as follows:

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.
7. [...]

20 While I could address each of the criteria set out above, I am of the opinion that the criterion that I should focus on is whether any aspect of the proceeding was improper, vexatious or unnecessary.

21 Based on the evidence submitted, I am not convinced that either party did their due diligence in this matter. On one hand, the Applicant must have either failed to disclose to his Counsel that he had no insurance or, if he did, Counsel was remiss in filing the Application for a Non-Earner Benefit. On the other hand, this claim was in the hands of two adjusters from two insurance companies and there was no evidence submitted to show that the claim for the Non-Earner Benefit was denied because Mr. Heinecke was uninsured at the time of the accident. Further, it is unclear as to when the Insurer's Counsel discovered that Mr. Heinecke was uninsured, as the new Schedule B adding this as a preliminary issue was undated. It appears to me that when the Insurer's defence became clear, the Applicant sought to withdraw his claim within a reasonable period of time afterwards and before a Hearing.

### ***Conclusion***

22 Therefore, for the reasons stated above, TD's request for expenses in preparing for the Arbitration proceeding is denied.

**Expenses:**

23 TD's request for expenses is denied.

***Janet Davies Member:***

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

1. TD's request for expenses is denied.

Footnotes

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