

2007 CarswellOnt 8564
Financial Services Commission of Ontario (Arbitration Decision)

VanDyk v. State Farm Mutual Automobile Insurance Co.

2007 CarswellOnt 8564

**Erica VanDyk, Applicant and State Farm Mutual
Automobile Insurance Company, Insurer**

J. Miller Member

Judgment: December 28, 2007
Docket: FSCO A07-000898

Proceedings: additional reasons to *VanDyk v. State Farm Mutual Automobile Insurance Co.* (2007), 2007 CarswellOnt 6072 (F.S.C.O. Arb.)

Counsel: Nestor E. Kostyniuk, for Ms VanDyk
Robert Robinson, for State Farm Mutual Automobile Insurance Company

Subject: Insurance

Related Abridgment Classifications

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

Civil practice and procedure

XXIII Costs

XXIII.5 Scale and quantum of costs

XXIII.5.g Bill of costs

XXIII.5.g.iv Miscellaneous

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

Insurance

XII Automobile insurance

XII.5 No-fault benefits

XII.5.j Miscellaneous

Headnote

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

Expenses — Insured was injured in automobile accident — Insured received income replacement benefits until she returned to work — Insured ceased to work and claimed she was unable to continue work, but insurer refused additional benefits — Insured brought proceedings for benefits — Insured brought motion for interim benefits — Motion dismissed — Parties made submissions regarding costs — Insurer entitled to expenses totalling \$1,046.44,

exclusive of GST — Insurer was completely successful — No novel issue at stake — Some duplication occurred regarding hours billed by counsel — Total preparation time of six and one half hours was reasonable.

Table of Authorities

Cases considered by *J. Miller Member*:

Adusei-Peasah v. TTC Insurance Co. (2007), 2007 CarswellOnt 7776 (F.S.C.O. Arb.) — followed

Henri v. Allstate Insurance Co. of Canada (1997), 1997 CarswellOnt 2837 (Ont. Insurance Comm.) — followed

Statutes considered:

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

s. 282 — referred to

s. 282(11) — referred to

Regulations considered:

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

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

s. 12(2) — considered

Sched., s. 3 — considered

Sched., s. 3(1) — referred to

Sched., s. 3(2) — referred to

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

Generally — referred to

ADDITIONAL REASONS to judgment reported at *VanDyk v. State Farm Mutual Automobile Insurance Co.* (2007), 2007 CarswellOnt 6072 (F.S.C.O. Arb.), regarding expenses.

J. Miller Member:

Issues:

1 The Applicant, Erica VanDyk, was injured in a motor vehicle accident on October 11, 2004. In a decision dated August 15, 2007, I dealt with her request for interim benefits under the *Schedule*.¹ I made the following order, while reserving on the issue of expenses:

1. Ms. VanDyk is not entitled to interim benefits.
2. If the parties cannot agree on the issue of entitlement or amount of expenses of this motion, they may make a written request for a determination of these issues within 30 days of the date of this order.

2 The issue in this further hearing is:

1. Is State Farm entitled to its expenses for legal services in the amount of \$1,660.46 and disbursements in the amount of \$141.64 in respect of the motion on interim benefits?

Result:

3

1. State Farm is entitled to its expenses for legal services in the amount of \$904.80 and disbursements in the amount of \$141.64.

Preliminary Matter:

4 Ms. VanDyk requests that the expenses for this interim benefit hearing be reserved to the Arbitrator at the full hearing.

5 For the following reasons, I decline this request. In coming to this conclusion, I rely on my reasoning in the case of *Adusei-Peasah v. TTC Insurance Co.* [2007 CarswellOnt 7776 (F.S.C.O. Arb.)]² wherein I stated:

While there are situations where the expense issue is deferred until after the arbitration on the substantive issue is heard, I do not find it appropriate to do so on the facts of this case. There are situations where the preliminary issue arbitrator remains seized to hear the substantive issues. In that situation, it would be practical to leave the expenses until the arbitration is complete. This is not the situation in the present case. I will not be presiding at the arbitration hearing. Part of assessing expenses on a hearing involves evaluating the conduct of the parties and the complexity of the hearing as factors in assessing costs. This can only best be done by the arbitrator who has had carriage of the preliminary issue where a final determination was made. Accordingly, as there is no appeal or review underway, I find that I have the jurisdiction to deal with the issue of expenses.

6 Accordingly, for these reasons I will deal with the issue of expenses in respect of the interim benefits hearing.

Expense Issue

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

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.

8 The criteria for determining entitlement to expenses of an arbitration proceeding are enumerated in section 12(2) of Ontario Regulation 664, R.R.O. 1990, as amended. The criteria are:

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.

9 With these criteria in mind, I make the following findings:

1. Each party's degree of success in the outcome of the proceeding.

State Farm was completely successful in the interim benefits hearing. Ms. VanDyk was completely unsuccessful.

2. Any written offers to settle made in accordance with subsection (3).

Neither party made any written offer to settle.

3. Whether novel issues are raised in the proceeding.

The issue of whether an Applicant is entitled to interim benefits has been considered numerous times by arbitrators and is not a novel issue.

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.

Neither party prolonged, obstructed or hindered the progress of the proceeding.

5. Whether any aspect of the proceeding was improper, vexatious or unnecessary.

No aspect of the proceeding was improper, vexatious and unnecessary.

Amount of Expenses

10 The amount of expenses and disbursements which I may award are set out in section 3 of the *Schedule - Dispute Resolution Expenses to Ontario Regulation 664* which states:

3(1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:

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

(2) 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.

11 In the decision of *Henri v. Allstate Insurance Co. of Canada* [1997 CarswellOnt 2837 (Ont. Insurance Comm.)],³ Arbitrator Makepeace (as she then was) outlined a number of general principles that have emerged from the arbitration decisions with regard to the assessment of arbitration expenses. These principles include the following:

- The overriding consideration in fixing arbitration expenses is reasonableness.
- A line-by-line assessment of the expenses claimed is not appropriate. Rather, the Arbitrator should make a global assessment of reasonable expenses.

12 In deciding the issues in this expense hearing, namely, what is the amount of legal fees, hourly rate and disbursements that State Farm is entitled to for the services rendered by his counsel, I will adhere to the above principles of "reasonableness" and "global assessment."

(1) Legal Fees

13 Pursuant to section 3 of the Expense Schedule, legal fees are payable for the preparation and attendance at an arbitration as well as for services performed before and subsequent to an arbitration hearing.

14 State Farm claims 19.4 hours for the following legal services:

- Darrell March, 0.6 hours at the rate of \$92.34 per hour for "Preparation for Motion for Interim Benefits; Consideration of Applicant's Materials;"
- Alexander Curry, 7.1 hours at the rate of \$73.84 per hour to "Prepare Responding Materials for Motion for Interim Benefits; Consideration of Jurisprudence re Same; Letters to FSCO and Applicant's Counsel re. Same; Letters to Applicant's Counsel re Document Brief and Documents to be relied upon;"
- Robert Robinson, 7.7 hours at the rate of \$92.34 per hour to "Prepare Materials for Motion for Interim Benefits; Consideration of Jurisprudence re Same; Revisions to Brief of Authorities;"
- Robert Robinson 4.0 hours at the rate of \$92.34 per hour for "Attendance and Argument at Motion for Interim Benefits."

15 The total amount for legal fees claimed by State Farm is \$1,660.26.

16 Ms. VanDyk disputes the number of hours claimed by Mr. Curry and Mr. Robinson to prepare for the Motion. Ms. VanDyk submits that there is a duplication of work by Mr. Curry and Mr. Robinson. Ms. VanDyk further submits that Mr. Curry's work could have been done by a "clerk" and should have taken two hours. She submits that Mr. Robinson's should have also taken two hours.

17 Ms. VanDyk also submits that the Motion totalled three hours, not the four hours claimed.

18 With respect to this latter point, Mr. Robinson in State Farm's reply submits that the attendance and argument on the Motion by Mr. Robinson included:

[T]ravel time, review of submission notes, meeting with client, settlement discussions with opposing counsel and taking instructions regarding same and engaged in the hearing and accordingly, the claim of four hours was reasonable in the circumstances.

Findings:

19 In reviewing State Farm's Bill of Costs, I note that State Farm did not provide its dockets to support its claim for its legal services. Without supporting documentation, on the face of it, I would agree with Ms. VanDyk that there appears to be duplication between the work done by the junior lawyer and Mr. Robinson.

20 This was a very straight forward Motion. There was very little evidence to review and the hearing took a half a day to complete. I find the preparation time ratio of 15.4 hours to 3 hours of hearing, (that is a 5 hour preparation to one hour hearing) to be excessive in this case.

21 In my view, the reasonable ratio of preparation time to hearing time for this case is two hours of preparation to one hour of hearing for a total of six hours. Since the majority of the work appears to have been provided by Mr. Curry, subject to review by Mr. Robinson, I am allotting four hours of preparation time to Mr. Curry and two hours preparation to Mr. Robinson.

22 With respect to State Farm's claim for Mr. Robinson's attendance time at the hearing, I find State Farm's submission as to why it is claiming four hours for attendance by Mr. Robinson at the hearing to be reasonable.

23 Accordingly, I find that State Farm is entitled to \$904.80 for its legal services, detailed as follows:

- Mr. March 0.6 hours preparation time, for a total of \$55.40
- Mr. Curry 4 hours preparation time, for a total of \$295.36
- Mr. Robinson 2 hours preparation time, for a total of \$184.68
- Mr. Robinson 4 hours for attendance at hearing for a total of \$369.36

(2) Disbursements

24 State Farm claims \$141.64 for disbursements for Online Research, Service of Documents and Fax/Copies. I find these expenses to be reasonable and are allowed.

Conclusion

25 Accordingly, for these reasons I find that Ms. VanDyk shall pay State Farm \$1,046.44 as its expenses of the Motion on interim benefits. State Farm did not ask for GST, accordingly, I am not including GST in my order.

J. Miller Member:

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

1. Ms. VanDyk shall pay State Farm \$1,046.44 as its expenses of the Motion on interim benefits.

Order accordingly.

Footnotes

- 1 The *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.
- 2 at p. 11 (FSCO A05-000865, October 31, 2007)
- 3 (OIC A-007954, August 8, 1997)