IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990, c. I. 8, SECTION 268 and *REGULATION 283/95*

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

STATE FARM MUTUAL INSURANCE COMPANY

Applicant

- and -

AXA INSURANCE COMPANY

Respondent

DECISION - COSTS

COUNSEL:

D'Arcy McGoey for the Applicant

Susannah Travers for the Respondent

ISSUE:

1. Is State Farm entitled to recover its legal fees incurred in pursuing this priority dispute against AXA, and if so, in what amount ?

RESULT:

1. State Farm is entitled to recover the sum of $9,000 plus GST from AXA, for payment of legal fees incurred.

BACKGROUND:

Zdena Grlakova and Karel Grlak allege that they were injured while occupants in a vehicle that was involved in an accident on October 27, 2007. The vehicle was insured by State Farm Mutual Insurance Company ("State Farm"). The claimants are mother and son, and both submitted applications for accident benefits to State Farm. State Farm paid benefits to each of them until July 2008, when it terminated the benefits due to alleged misrepresentations made.

During the course of its investigation into priority, State Farm determined that the father of Karel Grlak and spouse of Zdena Grlakova, also named Karel Grlak, was a named insured on an automobile policy issued by AXA Insurance ("AXA"). State Farm took the position that AXA was in higher priority to pay both claims, as AXA's insured was both Ms. Grlakova's spouse, and the person upon whom Karel Grlak was financially dependant.

State Farm commenced an arbitration pursuant to *Regulation 283/95*, and a hearing was scheduled to take place on April 22 and 23, 2010. On April 21, after receiving some long-awaited documentation from the Ontario Disability Support Program ("ODSP"), counsel for State Farm advised that her client was prepared to accept priority for the claims, and the hearing was cancelled. A dispute arose regarding the quantum of costs payable to counsel for State Farm, and the parties directed submissions to me on that issue.

CHRONOLOGY OF EVENTS:

The accident is alleged to have taken place on October 27, 2007. State Farm provided notice of its intent to dispute its obligation to pay benefits to AXA on December 27, 2007. When no response was received to its DBI notice, State Farm followed up with letters to AXA on both February 26, 2008 and April 24, 2008. No response was received to either of these letters. Arbitration was initiated by State Farm with regard to both claimants on November 12, 2008, and the first pre-hearing teleconference was convened with me on April 27, 2009.

The arbitration hearing was initially scheduled to take place on January 21, 2010. The hearing was adjourned at the request of counsel for AXA, as the documentation that had been requested from CRA and the Ministry of Social Services had not been received. The hearing was rescheduled for April 22 and 23, 2010. The CRA documents arrived on February 15, 2010, but counsel for AXA advised two weeks prior to the hearing that the Ministry had advised that her request for the social assistance and ODSP files was being transferred to the City of Toronto. She sought a further adjournment of the hearing, which was opposed by counsel for State Farm. I declined to grant the adjournment. As set out above, the documents arrived shortly before the scheduled hearing dates, after which AXA advised that it would accept priority of both claims.

State Farm had conducted examinations under oath of both claimants in April 2008, prior to commencing the arbitration. Interestingly, these examinations were conducted by Robert Franklin, a partner in the law firm that Ms. Travers, counsel retained by AXA, works for. No arguments were raised regarding a conflict of interest, but Mr. McGoey noted that he had provided a memo authored by Mr. Franklin after conducting the examinations to Ms. Travers, upon her being retained in March of 2009. While the priority issues were not the focus of the examinations conducted, Mr. Franklin expressed the view in the memo that the AXA policy would be in priority. The full transcripts from these examinations were located, and reviewed by counsel in October 2009.

PARTIES' ARGUMENTS:

Mr. McGoey contends that AXA should pay State Farm the sum of $17,557.50 in legal costs. He filed detailed dockets outlining the work performed by him and his colleagues on the priority dispute, as well as copies of the firm's invoices sent to State Farm.

He submits that section 54 of the *Arbitration Act* provides me with the jurisdiction to award the above costs, and notes that my pre-hearing letter specifies the parties' agreement that costs of the arbitration will be "in the cause", with the level of such costs to be determined by the arbitrator. He contends that State Farm should be awarded its costs on a substantial indemnity scale, as it should have been obvious to AXA from the outset that it was the priority insurer. He claims that AXA delayed taking the claims over from State Farm until the last possible moment, and that it did so in order to avoid incurring costs. He submitted that insurers who behave in this manner should face cost consequences for pursuing this approach.

Ms. Travers disputed that it was clear that priority rested with AXA from the outset. She noted that the claimants' evidence varied at different points in time, and was often inconsistent with what the documentation indicated. She pointed out that there was initial confusion around the identity of the named insured on the AXA policy, given that the father and son have the same name, and that both allege that they were involved in accidents on the same day. She submitted that a thorough investigation was warranted, and that the process of acquiring the relevant documents was difficult and fraught with hurdles. She stated that even after receiving the documentation, it was not clear that Zdena Grlakova and the AXA named insured were "spouses".

Specifically, Ms. Travers pointed out the following inconsistencies between the evidence provided by the claimants at the examinations conducted, and the documentation subsequently obtained –

- Ms. Grlakova testified at the examination in April 2008 that she, her husband and her son all lived together around the time of the accident, but declared that she was "separated" on her 2007 tax return

- The ODSP file contains at least three conflicting entries between May and November 2007 (spanning the time of the MVA) regarding whether or not the couple lived together

- Karel, jr. testified at his examination that he was able to work, but the ODSP file indicates that Zdena was receiving benefits for herself and for her son, who was a "dependent adult"

Ms. Travers also submitted that there was no evidence to confirm whether Zdena and Karel, sr. had gone through a legal marriage or whether they had a common-law relationship.

Finally, Ms. Travers also suggested that the hourly rates claimed by Mr. McGoey ($420 to $455 per hour) were too high, and submitted that if the partial indemnity rates used to assess costs in civil cases were applied, Mr. McGoey would be entitled to $300 per hour, and the clerk who worked on the file would be entitled to $80 per hour, (as opposed to the $225 hourly rate claimed).

REASONS:

Section 54(2) of the *Arbitration Act* clearly provides arbitrators with the jurisdiction to award legal expenses incurred by insurers involved in priority dispute arbitrations. However, as I stated in *Motors v. HMQ (MVACF)*, (Yavorska – unreported reasons released on February 10, 2010), costs should not be routinely awarded for the time spent by counsel for the few hours required to investigate and assess a claim, or participate in pre-hearing calls at the early stages of an arbitration. The intent behind *Regulation 283/95* is to resolve priority disputes quickly and efficiently, and in my view, a close

examination of lawyers' accounts and an assessment of the various amounts claimed would not be consistent with the intent of the regulation, as a general rule.

However, when an arbitration progresses through the initial stages, and counsel are required to compile briefs and draft factums, prepare examinations of witnesses and craft submissions, they should be compensated for the time they have spent on these steps. Arbitration hearings often address factually and/or legally complex questions, and in my view, there is no reason why counsels' efforts in this regard should not be compensated in the same manner as they are in most other types of litigation.

In this case, AXA advised that it would accept priority one day prior to the start of the scheduled hearing. Clearly, counsel for State Farm had prepared extensively for the scheduled hearing, and I find it reasonable to make a costs award in these circumstances.

I think it is beyond dispute that in the event that an insurer has intentionally avoided accepting priority at an early stage for the sole purpose of avoiding the associated cost, that conduct should be penalised through a costs award.

I do not accept State Farm's submission that it was clear from the outset that priority rested with AXA. While the evidence provided at the claimants' examinations under oath suggested that result, the inconsistencies outlined above would have created a reasonable concern on AXA's part and justified a search for corroborating evidence. I note that State Farm decided to terminate benefits in July 2008 on the basis of misrepresentations made by the claimants, suggesting that they were also concerned about the credibility of the claimants' statements.

In the circumstances, I order AXA to pay State Farm the amount of $9,000 plus GST, for legal costs incurred in pursuing this priority dispute. This payment should be made within thirty days of the release of this decision.

I thank counsel for their able arguments and the efficiency with which this matter was addressed.

DATED at TORONTO, ONTARIO this _____ DAY OF JUly, 2010.

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Shari L. Novick
Arbitrator