

**IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, SECTION 268(2) 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:

UNIFUND ASSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

DECISION ON COSTS

COUNSEL:

Calogero Rumeo for the Applicant
D'Arcy McGoey for the Respondent

BACKGROUND:

1. Sadia Liagat (“the Claimant”) was injured when the car she was travelling in was involved in an accident on July 11, 2009. The car was owned and was being driven by her sister Hina Liagat at the time. The Claimant was not a named insured or listed driver on any policy of insurance at that time. It appears that her sister’s vehicle had been insured by State Farm, but that the policy was cancelled a few days prior to the accident and subsequently re-instated.

2. The Claimant submitted an Application for payment of accident benefits to Unifund, the insurer of the other vehicle involved in the accident, on September 2, 2009. Unifund accepted the application, and provided notice of its intention to dispute its obligation to pay benefits to State Farm on February 10, 2010, more than ninety days beyond the time permitted in section 3 of the regulation. Unifund subsequently delivered a Notice Demanding Arbitration within one year of having provided this notice.

3. The parties retained me to arbitrate this case in late 2011. An initial pre-hearing teleconference was convened in April 2012. Counsel identified three issues in dispute - whether the policy covering the Claimant's sister's vehicle was validly cancelled by State Farm prior to the accident, whether Unifund's late notice to State Farm of its intention to dispute its obligation to pay benefits to the Claimant should be excused by the 'savings provisions' in section 3(2) of the regulation, and whether State Farm had "deflected" Ms. Liagat's application for benefits. Counsel agreed to exchange all documentation relevant to these issues. I understand that this was essentially completed by the time of our third pre-hearing call in October 2012.

4. A date was scheduled for an Examination Under Oath of the State Farm adjuster in February 2013, but was cancelled by agreement of counsel.

5. I was subsequently notified in July 2013 that Unifund had changed its counsel, and that Mr. Rumeo would be assuming carriage of this matter on their behalf. A further pre-hearing call was scheduled for September 2013.

6. I was advised at that time that a date had been scheduled for examinations of both the Unifund and State Farm representatives, but that it was cancelled at the last minute due to counsel for Unifund falling ill. At our subsequent pre-hearing call in December 2013, counsel advised that the examinations had not yet been rescheduled. Mr. Rumeo advised that his office would make arrangements to do so early in 2014. A date in October 2014 was scheduled for a preliminary hearing on the "deflection" and "ninety-day" issues during that call.

7. One final pre-hearing call took place in mid-September 2014, three weeks prior to the hearing. Counsel confirmed at that point that examinations of both representatives were conducted a few weeks earlier. Counsel for State Farm advised that he intended to argue the “ninety-day issue” at the upcoming hearing, based on the evidence provided by the Unifund adjuster at the EUO. Counsel for Unifund advised that he was awaiting instructions regarding whether he would be pursuing the “deflection” argument against State Farm.

8. Counsel then advised me on October 2, approximately one week prior to the scheduled hearing date, that the issues in dispute had been resolved. No factums were prepared or exchanged. The parties could not come to an agreement on the quantum of costs payable, and a brief telephone call was convened to confirm a timetable for exchanging written submissions on State Farm’s entitlement to costs.

9. In total, six pre-hearing teleconferences were held. Counsel for State Farm prepared for and appeared at two different EUO appointments. The examinations of both representatives were completed in half of a day in August 2014.

REQUEST FOR COSTS:

10. State Farm seeks payment of \$12,238 in legal fees, plus HST of \$1,590.94, for a total of \$13,828.94 in costs. It also seeks disbursements of \$442.21, inclusive of HST, for parking, mileage and transcript fees related to the attendances for Examinations Under Oath.

11. The claim for legal costs is comprised of three parts – approximately \$5,300 is claimed for the “initial pre-hearing steps” consisting of time spent on reviewing material received and reporting to the client, preparing for the first three pre-hearing calls, reviewing productions and providing various opinions to the client. A further \$5,700 is claimed for preparation and attendance at two scheduled examinations under oath and follow-up. Approximately \$1,200 is claimed for time spent preparing for and participating in the final pre-hearing call and matters related to settlement.

PARTIES' SUBMISSIONS:

12. Counsel for State Farm submitted that once the relevant documentation was exchanged between the parties in late 2012, it was clear that there was no basis for Unifund's "deflection" argument. He stated that it was also evident that Unifund did not have a valid defence for failing to submit a DBI Notice to State Farm within ninety days of having received the OCF1 from the Claimant. Despite this, the matter proceeded for almost two more years and Unifund insisted on conducting an examination under oath, which simply confirmed the information contained in the documents. Counsel contended that given Unifund's insistence on proceeding in this manner, and on maintaining the "deflection" argument up until a few weeks prior to the scheduled arbitration hearing, State Farm should be entitled to its costs "for the entirety of the proceeding".

13. Counsel for Unifund submitted that the issues in dispute were relatively straightforward and of limited complexity. He contended that it was reasonable for Unifund to have investigated the "deflection issue" through an EUO. He noted that the log notes produced by State Farm detail repeated discussions between its claims representative and its insured, the Claimant's sister, and that the notes reference the delivery of various Application for Benefits packages, without detailing the intended recipients.

14. Counsel submitted that Unifund acted swiftly once the evidence was obtained from the State Farm representative on the examination under oath, and abandoned the arbitration prior to either party incurring any costs to prepare for the upcoming hearing. He also noted that State Farm has claimed its full costs, when at best, it would be entitled to an award of partial indemnity costs. He contended that if the costs submitted by State Farm were awarded, it would serve to discourage insurers from conducting investigations for fear of excessive costs being awarded against them, which would have the effect of preventing insurers from raising valid disputes.

REASONS/ ANALYSIS:

15. I find this to be an appropriate case in which to exercise my jurisdiction under section 54(1) of the *Arbitration Act* and order Unifund to reimburse State Farm for the legal costs and expenses incurred in defending the claim brought against them. I do, however, find the amount claimed by State Farm to be excessive.

16. As priority disputes have become more complex, the frequency of disputes over the quantum of costs payable have increased. While the circumstances of each case must be considered in determining the quantum of costs awarded, some general guidelines have emerged from the case law.

17. In *Motors Insurance Corporation v. MVACF* (unreported, February 10, 2010), the Fund advised Motors that it was prepared to accept priority just before the first pre-hearing teleconference was convened. Motors sought payment of the legal costs it incurred up to that point. I acknowledged that while costs should generally be awarded to the successful party, the priority regulation does not necessarily contemplate that outcome in every case. I determined that the Fund was not obliged to reimburse Motors for its legal costs, and stated that while costs might generally be awarded to counsel for time spent on large steps in the process, I did not think a costs award was merited for the few hours spent by counsel in the initial stages of an arbitration proceeding.

18. I also addressed a dispute over the quantum of costs payable in the case of *State Farm v. AXA Insurance (Grlak)* (unreported, July 12, 2010). In that case, a settlement of the priority dispute was reached on the day prior to the scheduled start of an arbitration, once some important documentation from third parties was finally received. Counsel for State Farm sought repayment of \$17,500 in costs, and I awarded \$9,000. Given the late breaking settlement, counsel had prepared and exchanged factums and briefs of authorities, and presumably had prepared submissions for the hearing.

19. Counsel for Unifund cited Arbitrator Samis' decision in *Citadel Insurance v. Pembridge Insurance* (July 4, 2006), in which he awarded \$5,000 of the \$28,000 claimed for costs in a financial dependency case. Counsel in that case had attended two full days of Examinations Under Oath and argued the case at an arbitration that took a half day.

20. Using these cases as a guideline, I find that State Farm is entitled to legal costs of \$5,800, plus HST, for a total of \$6,554. I have allowed \$2,000 for the "Initial pre-hearing steps", \$2,800 for the preparation and attendance at the Examinations Under Oath, and \$1,000 for the last pre-hearing call and settlement segment.

21. I agree that the disputed issues in this case were relative straightforward, although the underlying facts seemed relatively complicated. I was not provided with the documentation exchanged, so am not in a position to determine whether the Examinations Under Oath were required or were unnecessary as alleged by counsel for State Farm. In any event, it is not clear to me why they did not take place until late August 2014, almost one year after the first date scheduled was cancelled due to counsel's illness, and only seven weeks prior to the scheduled hearing date.

22. Six pre-hearing calls were convened prior to the scheduled arbitration, spanning approximately two and one-half years. Given the issues, that seems a bit excessive. While Unifund certainly has the right to retain new counsel in the midst of a priority dispute, it can only be expected that that will cause some delays along the way, and it appears that may have been a factor in this case.

23. Finally, in terms of disbursements claimed, I am prepared to award \$295 (inclusive of HST) of the amount claimed by State Farm, representing the appointment and transcript fees for the examinations. Counsel for Unifund did not specifically address this part of the claim in his submissions. In my view, it is not within the spirit of the regulation to expect one insurer to pay mileage and parking charges incurred by the other insurer's counsel for attending an examination, and I decline to order repayment for those expenses.

ORDER:

24. For the reasons set out above, I hereby order Unifund to pay State Farm a total of \$6,849 comprised of \$6,554 towards its legal fees and HST (on fees) and \$295 for disbursements. This amount should be paid within sixty days of this decision.

25. I will forward my account for time expended on this issue to both counsel split equally, as success was divided. If any offers to settle are relevant in this regard, I would ask counsel to advise me within seven days.

DATED at TORONTO, ONTARIO this _____ DAY OF FEBRUARY, 2015.

Shari L. Novick
Arbitrator