

*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, as amended;*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

AVIVA INSURANCE COMPANY

Applicant

- and -

*CO-OPERATORS GENERAL INSURANCE COMPANY
and TD INSURANCE COMPANY.*

Respondents

DECISION ON COSTS

COUNSEL:

Meredith A. Harper for the Applicant

Mark K. Donaldson for the Respondent, Co-operators

BACKGROUND:

1. Benjamin Jacobs was seriously injured when the vehicle in which he was an occupant was involved in a single-vehicle rollover accident. That vehicle was insured by Co-operators General Insurance Company (“Co-operators”). Mr. Jacobs was eighteen years old at the time of the accident. He was almost finished high school and was employed on a part-time basis.

2. An application for payment of accident benefits was submitted on Benjamin’s behalf to Aviva Insurance Company (“Aviva”), who insured his father, Gregory Jacobs. Aviva determined that the Claimant did not live with his father, and formed the view that he was accordingly not principally dependent on him for financial support. Aviva provided notice to Co-operators pursuant to section 3 of *Regulation 283/95* that it disputed its obligation to pay benefits to Benjamin.

3. Co-operators investigated the matter, and determined that Benjamin had been living at the home of his friend’s parents at the time of the accident. They were insured by TD Insurance Company (“TD”), and Co-operators accordingly provided notice under section 10 of the regulation to TD.

4. An Examination Under Oath was conducted of the Claimant. It was determined that further information was required, and Aviva subsequently commenced arbitration against Co-operators and TD in July of 2018. Examinations Under Oath were then conducted of both the Claimant’s father (Aviva’s insured) and the mother of the friend with whom Benjamin was living at the time of the accident (TD insured). Based on an accountant’s opinion received some six months after the examinations, Aviva accepted that it was the priority insurer and advised that it would not be pursuing this dispute further.

5. Co-operators seeks payment of its legal costs related tot this proceeding from Aviva. The total amount billed to Co-operators for legal fees, disbursements and HST is \$28,806. Mr. Donaldson suggests that approximately 60% to 70% of this figure would be

a fair amount to award for costs recoverable on a partial indemnity basis. Counsel could not come to an agreement on the quantum of costs payable, and have asked me to resolve the issue.

6. TD has agreed to exit the proceeding without costs, and did not participate in this part of the process.

STEPS IN PRIORITY DISPUTE:

7. Counsel for Aviva and Co-operators have each provided written submissions, which I have closely reviewed. Mr. Donaldson has also provided detailed time dockets outlining the tasks that he undertook relating to the issues posed in the dispute. These reveal the following:

8. The accident involving Mr. Jacobs occurred on August 26, 2017. Aviva forwarded a Notice to Applicant of Dispute Between Insurers (“DBI notice”) to Co-operators on November 21, 2017. TD was subsequently put on notice by Co-operators in February 2018. Mr. Donaldson was retained by Co-operators on April 2, 2018.

9. An Examination Under Oath was conducted of the Claimant in Barrie, Ontario on May 28, 2018, at which all counsel attended. Aviva subsequently commenced arbitration against Co-operators and TD on July 25, 2018.

10. An initial pre-hearing call was convened on January 7, 2019. Counsel agreed that both Gregory Jacobs, the Claimant’s father, and Leigh-Anne Christakos, the mother of the Claimant’s friend at whose home he was living at the time of the accident, should be examined under oath.

11. Examinations Under Oath of the above individuals were conducted on April 12, 2019 in Barrie, with all counsel attending. Various undertakings were provided by the witnesses, and subsequently received.

12. A further pre-hearing call was scheduled to take place on May 10, 2019. It was adjourned at Aviva's request, as were two further calls scheduled in late May and mid-June 2019, as counsel for Aviva awaited an opinion from an accountant whom they had retained to assess financial dependency.

13. A second pre-hearing call took place on August 29, 2019. Counsel for Aviva advised that she continued to await the accountant's opinion. Counsel for Co-operators requested that a date be set for arbitration, and a hearing date of December 12, 2019 was scheduled. A final pre-hearing call was arranged for late September.

14. The September pre-hearing call was later adjourned to October 7, 2019 at counsel for Aviva's request. Ms. Harper advised during the October 7th call that Aviva was prepared to accept responsibility for payment of Mr. Jacob's claim, and that the December hearing date was no longer required. Counsel for TD advised that her client was agreeable to "go out without costs". Mr. Donaldson advised that his instructions were to seek costs, and a timetable was set for an exchange of submissions on the issue.

PARTIES' POSITIONS:

Co-operators' submissions

15. Counsel for Co-operators filed detailed time dockets outlining all of the steps he took pertaining to this case from April 2, 2018 when he was first retained, until September 30, 2019, when Aviva conceded that it was in priority. Mr. Donaldson also provided copies of the six accounts forwarded to his client during that period, which include various disbursements. As noted above, the total amount billed is \$28,806.03. That figure is comprised of \$24,944 in fees, \$3,242.72 in HST on fees, and disbursements (inclusive of HST) of \$619.31.

16. Mr. Donaldson seeks recovery of the costs arising from this dispute on a partial indemnity basis, and suggests that 60% to 70% of the above "solicitor /client" amount would be appropriate. Mr. Donaldson is a senior member of the insurance defence bar with a practice focused on accident benefits matters, with a particular specialty in priority

disputes between insurers. His time was charged out on this file at \$370 per hour in 2018, and \$380 per hour in 2019.

Aviva's submissions

17. Counsel for Aviva contended that this was a complex financial dependency case, with complicated facts that raised difficult questions for priority purposes such as the appropriate time frame to use for the dependency analysis, and the best measure for estimating the Claimant's living expenses. She submitted that it was reasonable for Aviva to have retained an accountant to provide an opinion on financial dependency, given the complexity of the issues and the significant nature of the accident benefits claim presented. She pointed out that Aviva conceded priority 14 days after the opinion was received, and that she and her client had worked diligently to reach a determination on the priority issue. As a result, the Respondents were not forced to incur costs needlessly, as has happened in other cases.

18. Ms. Harper submits that the quantum of costs sought by Co-operators is excessive. She notes that the dockets filed indicate that Mr. Donaldson spent much of his time on administrative or routine tasks that could have been completed by more junior counsel or a law clerk, at a much lower rate. She suggested that some entries in the material provided are duplicative, and others are vague. She contends that some amounts are overbilled and submits that this is an appropriate case for each party to bear their own costs.

ANALYSIS & FINDINGS:

19. Section 54 of the *Arbitration Act* provides me with the jurisdiction to award legal costs to a party as well as any other expenses related to the arbitration. Parties to priority disputes will often agree on the quantum of costs payable, but the frequency with which arbitrators have been asked to determine these issues has increased over time. In my view, that is likely because the level of complexity of these cases has similarly increased, which in turn has attracted expert legal advisors who expect contributions from an unsuccessful party toward the costs incurred by their clients for their services.

20. A central tension exists between the idea that priority disputes should be conducted efficiently and in a streamlined manner on the one hand, and the reality that the issues involved can be factually and legally complicated and often require counsel to devote many hours to the dispute, as it evolves to its eventual conclusion. In my view, it is important that these disputes continue to be conducted in a more streamlined manner than a typical civil action - where procedural steps and rules can often result in much delay and cost – but also that parties involved in priority disputes be entitled to cost recovery on a fair basis. Any other approach would result in capable counsel not taking these cases on, which would impact the relatively efficient manner in which the many disputes of this type are currently conducted.

21. That said, I remain of the view that costs should not be routinely awarded for the few hours that counsel may spend on conducting an initial review of a claim once retained, or for participating in a brief pre-hearing call or two that take place early in the process (see *Motors v. HMQ (MVACF)* (February 10, 2010) and *State Farm Mutual v AXA Insurance* (July 2010)). However, once significant steps like preparing for and attending Examinations Under Oath, or reviewing detailed productions received must be taken, that time should be acknowledged and appropriately compensated by the party that is ultimately unsuccessful. Each case is distinct and will require a different level of attention, making it hard to enunciate a hard and fast rule for the level of an unsuccessful party's contribution to legal costs.

22. The total amount of fees charged by counsel to Co-operators in this case over an eighteen-month period total approximately \$25,000. Mr. Donaldson suggested that 60% to 70% of this amount should be awarded, which would amount to between \$15,000 and \$17,500. I find these figures to be higher than the circumstances of this case warrant for two reasons - all of the tasks, ranging from reviewing correspondence from counsel, court reporters, and my office, to attending two sets of Examinations Under Oath, participating in two pre-hearing calls, reviewing relevant decisions and reporting to the client were completed by Mr. Donaldson, a very senior practitioner in the area. I find that many of

these tasks could have been completed by a more junior lawyer or law clerk, and a significant reduction in the amount claimed is warranted for this reason.

23. Secondly, while I accept that all of the time docketed was in fact devoted to the various tasks described, the cost of items like reviewing or writing routine correspondence should not generally be recoverable in a dispute like this. Mr. Donaldson participated in two set of Examinations Under Oath, both of which took place out of town. I accept that some time was required to prepare for these, and that Co-operators would have expected to receive a full report on what transpired afterwards. Three pre-hearing calls were held with me, and three other scheduled calls were adjourned. Time spent on all of these steps is recoverable. And as Ms. Harper noted in her submissions, the case law relating to how various aspects of financial dependency should be approached has evolved over the last few years, and counsel involved in a complicated case such as this one need to keep up on the state of the law.

24. I note that 6.3 hours of travel time is charged for the two EUO attendances in Barrie. This amounts to \$2,362.50 in fees alone (\$2,670 with HST), and is not recoverable from Aviva.

25. With the above in mind, I find that an appropriate amount to award for fees in this case is \$7,500, plus HST. This figure acknowledges that the issues in this case required a fair bit of attention, but also reflects my view that only the cost of time spent on major steps in the process should be recoverable in a priority dispute. And while an hourly rate of roughly \$375 per hour (an average of the two rates charged during the period in question) may well be appropriate for someone with Mr. Donaldson's level of experience and expertise to bill on a solicitor-client basis, I find that the rate of \$300 per hour is more appropriate when assessing amounts payable in these circumstances.

Disbursements

26. I find that the cost of photocopies, postage and mileage charges are not recoverable. As I stated in *Unifund Assurance v State Farm Mutual Insurance* (February,

2015), it is not within the spirit of the regulation to expect one insurer to pay those charges incurred by another insurer in a priority dispute. On the other hand, invoices paid by Co-operators for attendances at court reporters' offices and for transcripts ordered should be recoverable. The dockets suggest that these items amount to \$345.75, plus HST, for a total of \$390.70.

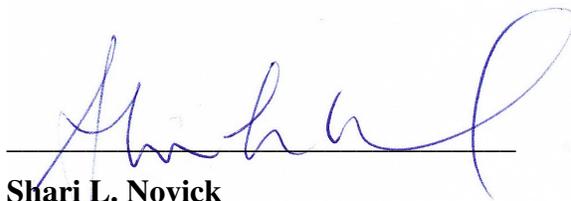
27. For the reasons set out above, Co-operators is entitled to recover costs of \$7,500, plus applicable HST, as well as disbursements of \$345.75, plus HST, from Aviva.

ORDER:

Aviva is hereby ordered to pay Co-operators a total of \$8,865.70, comprised of the following amounts - \$7,500 toward fees, \$975 in HST payable on fees, \$3,45.75 for disbursements incurred, and \$44.95 on HST payable on that amount.

Given the mixed result, each party will bear their own costs related to the determination of this issue, and will pay my additional account for time spent on determining costs in equal shares.

DATED at TORONTO, ONTARIO this __12th__ DAY OF DECEMBER, 2019



Shari L. Novick
Arbitrator