

2015 CarswellOnt 11474
Financial Services Commission of Ontario (Arbitration Decision)

Sidhu v. State Farm Mutual Automobile Insurance Co.

2015 CarswellOnt 11474

**Harinder Kaur Sidhu, Applicant and State Farm
Mutual Automobile Insurance Company, Insurer**

Deborah C. Anschell Member

Heard: April 17, 2015
Judgment: July 16, 2015
Docket: FSCO A13-004231

Proceedings: additional reasons to *Sidhu v. State Farm Mutual Automobile Insurance Co.* (2014), 2014 CarswellOnt 18595,
Deborah Anschell Member (F.S.C.O. Arb.)

Counsel: Mr. Francis J. Burns, for Mrs. Harinder Kaur Sidhu
Mr. Todd J. McCarthy, for State Farm Mutual Automobile Insurance Company

Subject: Insurance

Table of Authorities

Cases considered by Deborah C. Anschell Member:

Federico v. State Farm Mutual Automobile Insurance Co. (2013), 2013 CarswellOnt 6347 (F.S.C.O. App.)— referred
to

Sidhu v. State Farm Mutual Automobile Insurance Co. (2014), 2014 ONCA 920, 2014 CarswellOnt 18065, 43 C.C.L.I.
(5th) 22 (Ont. C.A.) — referred to

Statutes considered:

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

s. 282 — referred to

s. 282(11) — considered

Legal Aid Services Act, 1998, S.O. 1998, c. 26

Generally — referred to

Mercantile Law Amendment Act, R.S.O. 1990, c. M.10

s. 16 — considered

Regulations considered:

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

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

Generally — referred to

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg. 34/10

Generally — referred to

Deborah C. Anshell Member:

Issues:

1 The Applicant, Mrs. Harinder Kaur Sidhu, was injured in a motor vehicle accident on February 7, 2005 and sought accident benefits from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under the *Schedule*.¹ A dispute arose as to entitlement to benefits and an Arbitration Hearing was held on September 8-10, 2014 further to which a Decision was issued, dated December 15, 2014.

2 In the Decision, I reached, in part, the following conclusions:

1. Mrs. Sidhu was entitled to receive further medical benefits for treatment recommended by Sterling Psychiatric Consultants. State Farm was to fund this program to the extent that the available non-catastrophic limit for non-catastrophic coverage was available to the Applicant, i.e., the amount of \$68,123.37.

2. State Farm was required to pay Mrs. Sidhu's expenses with respect to the Arbitration. Mrs. Sidhu was entitled to her reasonable expenses of this Arbitration, as agreed or as assessed by me at the request of either party in the event of disagreement.

3. Mrs. Sidhu was entitled to interest. Mrs. Sidhu was entitled to interest on the amount of \$68,123.37 (the balance remaining of the \$100,000 non-catastrophic coverage available to Mrs. Sidhu) from September 29, 2012 at the rate of 1% per month, compounded monthly.

3 Neither party made submissions with respect to expenses at the time of the Hearing on the merits. Because they were unable to resolve this issue following my Decision, they subsequently scheduled an Expense Hearing before me in accordance with the provisions of Rule 79 of the *Dispute Resolution Practice Code* (the "DRPC"). Although addressed in my Decision, the appropriate rate of interest was further addressed at the Expense Hearing.

4 The issues in this Expense Hearing are:

1. What is the appropriate rate of interest, and for what period of time should the interest be calculated?

2. What is the amount of expenses that should be awarded to Mrs. Sidhu?

Result:

5

1. Mrs. Harinder Kaur Sidhu is entitled to interest from September 29, 2012 to March 2, 2015 at the rate of two per cent per month, compounded monthly on the amount of \$68,123.37.

2. Mrs. Harinder Kaur Sidhu is entitled to expenses incurred with respect to the Hearing held on September 8-10, 2014 in the amount of \$19,395.29, inclusive of HST.

Evidence and Analysis:

I. Interest

6 In my Arbitration Decision, I set the rate of interest at one per cent per month, compounded monthly, from September 29, 2012. I based this rate of interest on the rate stipulated by the *Statutory Accident Benefits Schedule - Effective September 1, 2010*, O.Reg. 34/10, which reduced the applicable rate of interest to one per cent per month, compounded monthly.

7 The previous *Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996*, O.Reg. 403/96 provided that an Insurer had to pay interest on unpaid benefits at the rate of two per cent per month, compounded monthly.

8 At the Expense Hearing, Mr. Burns, counsel for the Applicant, referenced an endorsement of the Court of Appeal, dated December 23, 2014, in a related proceeding involving these same parties. In its endorsement, the Court of Appeal for Ontario considered the appropriate rate of interest on overdue payments. The Court of Appeal found that for accidents that occurred prior to September 1, 2010, the two per cent per month rate of interest applied (*Sidhu v. State Farm Mutual Automobile Insurance Co.*, [2014] O.J. No. 6150 (Ont. C.A.)). The Court of Appeal referenced an earlier Decision - *Federico v. State Farm Mutual Automobile Insurance Co.*, 2013 CarswellOnt 6347 (F.S.C.O. App.) - that came to the same conclusion.

9 The jurisprudence makes it clear that for accidents that occurred prior to the new legislation coming into force, it is the old rate of interest that applies. This accident occurred five years prior to the 2010 statutory amendments. Based upon the case law referenced above, it is clear that the correct rate of interest is two per cent per month, compounded monthly.

10 The next question to be determined with respect to interest is the end date for the calculation. I had previously ordered that interest should begin on September 29, 2012. The parties disagree as to when interest should be terminated. Mr. McCarthy, counsel for State Farm, submits that he made a payment to Mr. Burns in January 2015 that included the amount ordered payable together with some amount for interest. Thus, Mr. McCarthy's position is that when the payment of the benefit plus an additional amount for interest was delivered to Mr. Burns' office in January 2015, the benefit was no longer overdue.

11 Following the Expense Hearing, Mr. Burns provided me with the correspondence between counsel relating to the payment referenced by Mr. McCarthy. Mr. McCarthy provided a cheque to Mr. Burns in the amount of \$89,929.59 on January 19, 2015 that represented "payment as per the arbitration Order inclusive of interest." Mr. Burns wrote to Mr. McCarthy on January 28, 2015 disputing the interest calculation and advising that he could not accept the cheque in light of section 16 of the *Mercantile Law Amendment Act*, R.S.O. 1990, c. M.10.

12 Subsequently, on March 2, 2015, Mr. McCarthy provided Mr. Burns with a cheque in the amount of \$68,123.00, representing the benefits payable from the Arbitration Order, exclusive of interest. Mr. Burns wrote to Mr. McCarthy on March 6, 2015 confirming his acceptance of the funds, without prejudice to his making submissions with respect to interest.

13 I accept Mr. Burns' concerns that acceptance of the cheque from Mr. McCarthy in January 2015 could have been perceived to have prejudiced his client's position with respect to the interest calculation. On this basis, I am prepared to order that interest shall run until March 2, 2015, when Mr. McCarthy provided a cheque in the amount of \$68,123.00, representing the benefits payable exclusive of interest.

II. Expenses

14 Under subsection 282(11) of the *Insurance Act* (as reiterated in Rule 75.2 of the *Dispute Resolution Practice Code*), an Arbitrator shall consider only the following criteria for the purposes of awarding all or part of the expenses incurred in respect of an Arbitration proceeding:

1. Each party's degree of success in the outcome of the proceeding;
2. Any written Offers to Settle;
3. Whether novel issues are raised;

4. The conduct of a party or the party's representative;

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

15 Both parties provided brief written submissions with respect to the issue of expenses. Mr. Burns is seeking a total amount of \$31,314.25, comprised of \$11,850.00 in disbursements and \$19,464.25 for fees.

16 Mr. Burns submits that Mrs. Sidhu enjoyed substantial success in the three-day Hearing and was awarded her reasonable expenses. State Farm made no offers to settle the Arbitration proceeding. Further, State Farm brought a motion at the outset of the Arbitration in a plan to delay the Hearing.

17 Mr. Burns also submits that several of the issues dealt with at the Arbitration were novel. Neither Mrs. Sidhu nor her counsel took any steps to prevent, obstruct or hinder the proceeding.

18 In reply, Mr. McCarthy argues that the hours claimed by Mr. Burns are excessive and not proportional to the amount in dispute, the length of the Hearing, and the issues at play. Further, Mr. McCarthy argues that the disbursements claimed for Dr. Connell's attendance and report are in excess of what is permitted under the Expense Regulation. Mr. McCarthy also submits that there is some duplication with respect to the disbursements sought for Dr. Connell's reports in the tort proceeding.

19 I find that Mrs. Sidhu was largely successful with respect to the outcome of the Arbitration. There were no formal offers of settlement. I did not have any difficulty with respect to the conduct of either party or their representatives. Further, the proceedings were not improper, vexatious or unnecessary. I do agree that the issue of the multi-disciplinary treatment plan was novel, and there was not much jurisprudence dealing with out-of-country treatment programs.

20 Mrs. Sidhu is clearly entitled to be reimbursed for her fees and disbursements. The question then remains as to the appropriate calculation of the amount.

21 An hourly amount for legal fees is governed by Rule 78 of the *Dispute Resolution Practice Code*, which provides that the hourly rate established under the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, shall apply subject to a 25% increase for lawyers with the equivalent of ten years' experience or more, and an increase of an hourly rate up to \$150.00 for lawyers with the equivalent of ten years' experience or more. Mr. Burns has in excess of ten years' experience, and therefore is clearly entitled to the \$150.00 per hour rate.

22 Mr. Burns cites two authorities in his submission, which he states support a ratio of 2:1 with respect to calculating the preparation time, when compared with the length of the Hearing. However, in both of the Decisions cited, the Arbitrators settled on a ratio of 1:1. Similarly, I find that a 1:1 ratio to be more appropriate so I am reducing the hours claimed for preparation and 3 days of Hearing to a total of 50 hours. The total amount of fees then for Mr. Burns is \$7,500.00. The hourly rate for articling student, Santino Lofranco, is in excess of what is provided for in the *Legal Aid Services Act, 1998*. The maximum hourly rate for an articling student at the time of the Arbitration was \$61.64 per hour. I am therefore allowing \$1,541.00 for Mr. Lofranco's time. Similarly, the maximum hourly rate allowable for a law clerk is \$30.82 per hour. I am reducing the total time allowable for all of Josie Punn, Mirinha Blaff, and Allan Cocunato to 50 hours in total for law clerk support. At the rate of \$30.82 per hour, this amounts to \$1,541.00. Total professional fees are then \$10,582.00. HST at 13% is \$1,375.66 for a total of \$11,957.66.

23 I also take issue with some of Mr. Burns' claimed disbursements. Two of Dr. Connell's reports are in excess of the amount prescribed by the *Dispute Resolution Practice Code*. The maximum stipulated is \$1,500.00 per report. Also, for Dr. Connell's attendance, the appropriate rate is \$200.00 per hour. Dr. Connell was required for approximately three hours. Preparation time for Dr. Connell is limited to \$500.00. The revised total disbursement amount is therefore \$7,437.63.

Expenses:

24 Total expenses inclusive of fees and disbursements are \$19,395.29.

Deborah C. Anshell Member:

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

1. Mrs. Harinder Kaur Sidhu is entitled to interest from September 29, 2012 to March 2, 2015 at the rate of two per cent per month, compounded monthly, on the amount of \$68,123.37.
2. Mrs. Harinder Kaur Sidhu is entitled to expenses incurred with respect to the Hearing held on September 8-10, 2014, in the amount of \$19,395.29, inclusive of HST.
3. State Farm Mutual Automobile Insurance Company shall pay the expenses, forthwith.

Footnotes

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

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.