

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c.1.8, (as amended)
AND IN THE MATTER of the *Arbitration Act*, S.O. 1991, c.17, as amended
AND IN THE MATTER OF an Arbitration
BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Applicant

- and -

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

A W A R D

COUNSEL:

Kevin D. H. Mitchell
Counsel for the Applicant, Wawanesa Mutual Insurance Company ("Wawanesa")

Joyce Tam
Counsel for the Respondent, State Farm Automobile Insurance Company ("State Farm")

ISSUES:

This arbitration involves a priority dispute between insurers. Indeed, the insurers have resolved the underlying dispute. The question for me to determine is whether Wawanesa, having succeeded on the underlying priority dispute, is entitled to costs and, if so, the quantum of costs together with the costs of the hearing in relation to costs. The issues specifically enumerated in the long form arbitration agreement are:

- (a) What is the quantum of costs, if any, and which party has the burden of payment?
- (b) Which party is responsible for the account of the arbitrator from June 4, 2016 onward?

EVIDENCE:

The matter proceeded on a written record. I have received and distributed my short form arbitration agreement, signed in counterpart and dated by me on June 3, 2016. Similarly, I have received and distributed a long form arbitration agreement, signed in counterpart and dated by me on September 21, 2016.

In addition, I received written submissions from counsel for the parties, a record of the written evidence from each of the parties and briefs of authorities, all of which I have read and considered.

The underlying facts are neither complicated nor complex. The claimant was involved in a motor vehicle accident on November 3, 2014. She was a passenger in a vehicle insured by State Farm. She applied to Wawanesa for statutory accident benefits pursuant to an application dated December 6, 2014. Wawanesa insured the claimant's mother. The claimant purported to be a dependent of her mother.

Wawanesa obtained a statement from the claimant on December 4, 2014. It indicates, among other things, that the claimant was living with her mother and stepfather and had done so since 2001. The claimant was born on July 14, 1990, making her some 24 years of age at the time of the accident. The statement indicates that she is not financially dependent upon anyone. It indicates that the claimant was working at Tim Hortons and had been working there for one year. The claimant did not miss any time from work other than the night of the accident. She works 32 – 40 hours per week and is paid \$11.00 per hour.

Wawanesa issued / served a Notice to Applicant of Dispute Between Insurers dated December 17, 2014. This was acknowledged by State Farm on January 23, 2015. Thereafter, there was an exchange of correspondence between the insurers driven by State Farm's request for additional information and documentation. Among other things, State Farm wanted to determine when the claimant stopped going to school and whether she had consistently worked full time in the year prior to the accident. This information and documentation was not under Wawanesa's control; rather, it was under the control of the claimant who was generally disinterested and uncooperative [perhaps by reason of what appears to be the very minor magnitude of injury, impairment and disruption to her life].

Wawanesa, having made 2 requests of the claimant on April 14 and July 10, 2015, retained counsel who initiated arbitration by way of a Notice Demanding Arbitration dated October 5, 2015 served on October 7, 2015. State Farm did not respond to this Notice within 30 days and, as a result, counsel for Wawanesa wrote to me by fax on November 9, 2015 advising of my appointment. Within 2 days, counsel for State Farm was appointed and was in telephone and written communications with counsel for Wawanesa.

State Farm made it known by email between counsel dated December 2, 2015 that it would accept priority if Wawanesa was able to resolve the claim within the minor injury guideline limits. Despite making several attempts to contact the claimant, Wawanesa was unable to resolve the underlying claim as requested. Consequently, counsel for Wawanesa requested that the initial pre-hearing be scheduled and it took place on March 8, 2016. Among other things, there was a discussion regarding the need for an examination under oath of the claimant and this was scheduled for May 3, 2016. Counsel for Wawanesa prepared a summons to witness and this was served on the claimant. Following service but before the examination, the underlying claim was settled for an additional payment of \$500.

On June 1, 2016, State Farm accepted priority, agreed to indemnify Wawanesa in the total amount of \$2,556.50 and to pay the arbitrator's account in full to and including June 3, 2016. State Farm refused to pay costs of the arbitration and this gives rise to the issues requiring determination by me.

Wawanesa has submitted a Bill of Costs which totals \$7,575.80 all inclusive. This is approximately three times the amount of the indemnity payment.

ANALYSIS AND FINDINGS:

As I have indicated, the factual circumstances which gave rise to the priority dispute and the factual circumstances of the arbitration are hardly complex. Wawanesa, having received a completed application for statutory accident benefits, assessed the facts available to it and initiated the within priority dispute. State Farm, having received a Notice to Applicant of Dispute Between Insurers, was not satisfied that it would be found to be the higher priority insurer and requested additional information and documentation. This was State Farm's prerogative. However, State Farm subsequently accepted priority [whether as a matter of principle or on a practical or pragmatic basis]. By the time this decision was made, the arbitration had been commenced. I find that Wawanesa is entitled to its costs on a partial indemnity basis and that State Farm is responsible for the arbitrator's costs throughout.

ONTARIO REGULATION 283/95 - DISPUTES BETWEEN INSURERS provides as follows:

9. (1) *Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration*

(2) *The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the Arbitration Act, 1991.*

I agree with Arbitrator Bialkowski in his decision, *State Farm Insurance Company v The Dominion of Canada General Insurance Company*¹ when he states "I am compelled to follow this general directive ... in the absence of special circumstances." There were none in the case before him and there are none in the case before me.

Sections 54 through 56 of the Arbitration Act, 1991, S.O. 1991, CHAPTER 17, provides as follows:

Costs

Power to award costs

54. (1) *An arbitral tribunal may award the costs of an arbitration.*

What constitutes costs

(2) *The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.*

Request for award dealing with costs

(3) *If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs.*

Absence of award dealing with costs

¹ Decision of Kenneth Bialkowski, November 12, 2013

(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration.

Costs consequences of failure to accept offer to settle

(5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in respect of the period from the making of the offer to the making of the award.

Disclosure of offer to arbitral tribunal

(6) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than costs.

Arbitrator's fees and expenses

55. The fees and expenses paid to an arbitrator shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred.

Assessment

Fees and expenses

56. (1) A party to an arbitration may have an arbitrator's account for fees and expenses assessed by an assessment officer in the same manner as a solicitor's bill under the Solicitors Act.

Costs

(2) If an arbitral tribunal awards costs and directs that they be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court.

Idem

(3) In assessing the part of the costs represented by the fees and expenses of the arbitral tribunal, the assessment officer shall apply the same principles as in the assessment of an account under subsection (1).

Account already paid

(4) Subsection (1) applies even if the account has been paid.

Review by court

(5) On the application of a party to the arbitration, the court may review an assessment of costs or of an arbitrator's account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions.

Idem

(6) On the application of an arbitrator, the court may review an assessment of his or her account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions.

Time for application for review

(7) The application for review may not be made after the period specified in the assessment officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise.

Enforcement

(8) When the time during which an application for review may be made has expired and no application has been made, or when the court has reviewed the assessment and made a final determination, the certificate may be filed with the court and enforced as if it were a judgment of the court.

In reaching my decision with respect to costs, I have considered the factors set out in Rule 57.01 (1) and Rule 1.04 of the Rules of Civil Procedure which provide as follows:

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

- (i) *improper, vexatious or unnecessary, or*
- (ii) *taken through negligence, mistake or excessive caution;*
- (g) *a party's denial of or refusal to admit anything that should have been admitted;*
- (h) *whether it is appropriate to award any costs or more than one set of costs where a party,*
 - (i) *commenced separate proceedings for claims that should have been made in one proceeding, or*
 - (ii) *in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and*
- (i) *any other matter relevant to the question of costs.*

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

I am cognizant of the overarching principle of proportionality which is very much a factor in the case before me.

Finally, I am mindful of the provisions of the long form arbitration agreement which provides, inter alia, that:

The parties agree that the dispute between them shall be resolved by this arbitration in accordance with the direction of the arbitrator or in such manner as the parties may agree upon from time to time. All matters of discovery, disclosure, production and procedures shall be as directed by the arbitrator in the absence of an agreement between the parties.

...

ARBITRATOR'S ACCOUNT

The parties agree that [State Farm] is solely responsible for the account of the arbitrator to and including June 3, 2016. Future interim accounts, if any, shall be paid by the parties equally until the arbitration is concluded and the outcome determined, including any appeals.

LEGAL COSTS

The parties agree that the cost of the arbitration shall be in the discretion of the arbitrator. Notwithstanding, the amount or scale of such costs shall be determined in accordance with Regulation 283/95 and the Arbitration Act [, 1991] and determined by the arbitrator.

The process of determining costs is very much an art rather than a science. My first task is to distinguish between fees incurred as between counsel and the client as distinct from fees which may be recoverable as between the parties to this proceeding. I find that the amount which falls into the latter category amounts to \$3,350.00. Costs are awarded on a partial indemnity scale which I determine to be 60-75% of the amount charged by counsel to their client. This creates a range in the amount of \$2,010.00 - \$2,512.50. I find the amount of \$2,200.00 to be appropriate fees on a partial indemnity scale. In addition, HST is awarded in the amount of \$286.00.

Disbursements are claimed in the amount of \$418.94 inclusive of HST. I have excluded a portion of postage, facsimile charges, photocopying, long-distance charges and courier charges and allow disbursements in the amount of \$390.00 inclusive of HST.

Ultimately, I conclude, having exercised the discretion provided to me by and under the governing legislation and regulations and pursuant to the governing arbitration agreements, that partial indemnity costs of \$2,876.00 is appropriate in the circumstances. This amount is awarded in favour of Wawanesa and is to be paid by State Farm. In addition, State Farm is required to pay the arbitrator's costs to and including June 1, 2016, by agreement, and from that date forward pursuant to the within decision.

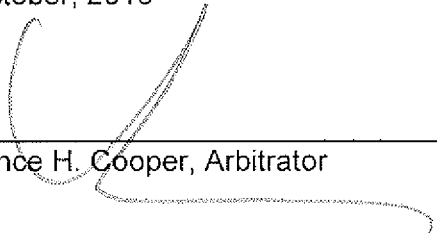
I am obliged and indebted to counsel for their courtesy and cooperation extended to me and to each other throughout the course of the brief arbitration and the thoughtfulness of their written submissions.

ORDER

I hereby order that State Farm pay to Wawanesa its cost of the arbitration fixed at \$2,876.00.

I hereby order that State Farm pay the Arbitrator's costs.

DATED AT Toronto, Ontario this 20th day of October, 2016



Vance H. Cooper, Arbitrator