



FSCO A13-001725

BETWEEN:

THOMAS WALDOCK

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON EXPENSES

Before: Arbitrator Knox M. Henry

Heard: In person at ADR Chambers on June 25, 2015 and by written submissions due July 30, 2015

Appearances: Mr. Leonard H. Kunka, Counsel, for Mr. Thomas Waldock
Mr. Carmen Spano, Licensed Paralegal, for Mr. Thomas Waldock
Mr. Eric Grigg, Counsel, for State Farm Mutual Automobile Insurance Company on June 25, 2015
Ms. Anna-Marie Musson, Counsel, for State Farm Mutual Automobile Insurance Company by written submissions after June 25, 2015

Issues:

The Applicant, Mr. Thomas Waldock, was injured in a motor vehicle accident on March 25, 2008 and sought accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Waldock, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

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

In a decision, dated November 10, 2014, I found that Mr. Waldock was catastrophically impaired. After this decision, State Farm paid Mr. Waldock a significant portion of the benefits that he was claiming, but the parties still disagree over \$361,520.30 in unpaid benefits, interest, and expenses related to the November 10, 2014 decision. Mr. Waldock also seeks a Special Award.

The issues in this Expense Hearing are:

1. Is Mr. Waldock entitled to payment of \$361,520.30 for Attendant Care and Housekeeping and Home Maintenance Benefits?
2. Is Mr. Waldock entitled to interest on his overdue benefits and, if so, in what amount?
3. Is Mr. Waldock entitled to payment of his Bill of Costs in the amount of \$125,435.00 and his disbursements of \$45,824.52?
4. Is Mr. Waldock entitled to a Special Award calculated as 50% of the value of all benefits claimed following the Arbitration? He seeks an amount of \$180,760.15 as the Special Award due from State Farm, representing 50% of the \$361,520.30 in unpaid benefits.

Result:

1. Mr. Waldock is entitled to payment of \$361,520.30 for his Attendant Care and Housekeeping and Home Maintenance Benefits, commencing July 7, 2010.
2. Mr. Waldock is entitled to interest in respect of his overdue benefits, calculated at 2% per month, compounded monthly, commencing July 7, 2010.
3. Mr. Waldock is entitled to payment of his Bill of Costs in the amount of \$125,435.00 and his disbursements of \$45,824.52.
4. Mr. Waldock is entitled to a Special Award of \$108,456.09 plus interest at 2% per month, compounded monthly, commencing July 7, 2010, the date the benefits first became payable under the *Schedule*.

EVIDENCE AND ANALYSIS:

Background

Mr. Waldock was seriously injured on March 25, 2008, when struck by a pickup truck while assisting a motorist whose vehicle was stuck in the snow. He applied for and received statutory accident benefits from State Farm, payable under the *Schedule*. Subsequently, various issues arose between the parties, including whether Mr. Waldock's injuries were deemed catastrophic under the *Schedule*.

On May 27, 28, and 29, 2014, I conducted a Preliminary Issue Hearing, the oral part of which was followed by written submissions, dated July 11, July 24 and August 1, 2014. The issues in that Preliminary Issue Hearing were:

1. Did Mr. Waldock's injuries, as a result of the motor vehicle/pedestrian accident which occurred on March 25, 2008, constitute a "catastrophic impairment" within the meaning of Section 3(2)(1.2)(f) and (g) of the *Schedule*?
2. Is Mr. Waldock entitled to his expenses of this Hearing?
3. Is State Farm entitled to its expenses of this Hearing?

In my decision, issued on November 10, 2014, I ruled that Mr. Waldock's injuries did constitute a "catastrophic impairment" within the meaning of Section 3(2)(1.2)(f) and (g) of the *Schedule*. I further decided that the parties' entitlement to their expenses was deferred for consideration by the Arbitrator at the Arbitration Hearing in this matter – a Hearing which I did not expect would come before me. After an appeal by State Farm, the Director's Delegate upheld my decision. Subsequently, a Hearing to deal with the remaining issues noted above was scheduled for June 25-27, 2015, to be heard before me.

At the end of the first day of oral submissions, it was apparent that the balance of the Hearing could be conducted by written submissions from the parties, who consented to this arrangement. I made an oral order on June 25, 2015 setting out timelines for the submissions. I confirmed those

directions in an email to both counsel on July 3, 2015. The issue of a Special Award had been raised by counsel for Mr. Waldock both in the initial Preliminary Issue Hearing and in this Expense Hearing. In my email, I specifically referred to the issue of a Special Award when I stated in Item 4: “Provide written submissions, quoting case law, where the *Insurance Act* (“the *Act*”) requires that an application for a Special Award must be filed as a part of the Application for Arbitration.”

Neither party referred me to any section in the *Act*, the *Code*² or the *Schedule* that requires that an application for a Special Award must be filed as a part of the Application for Arbitration.

Statutory Framework regarding a Special Award

Subsection 282(10) of Part IV of the *Act* states:

Special Award. If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50% of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2% per month, compounded monthly, from the time the benefits first became payable under the Schedule.

Ontario Regulation 34/10³ states in Section 45(6):

If an insured person is determined to have sustained a catastrophic impairment as a result of an accident, the insured person is entitled to payment of all expenses incurred before the date of the determination and to which the insured person would otherwise be entitled to payment under this Regulation by virtue of having sustained a catastrophic impairment.

² The *Dispute Resolution Practice Code* (Fourth Edition, Updated January 2014).

³ The *Statutory Accident Benefits Schedule* -- *Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

The *Code* states in Section C, Practice Note 11, Item 5, Special Award:

Mediation Services does not accept an *Application for Mediation* of a claim for a Special Award, as this is not a benefit provided under the *SABS*. A special award is a matter of the exercise of an arbitrator's discretion.

Is Mr. Waldock entitled to a Special Award?

The copy of the transcript of the Preliminary Issue Hearing does not include the directions I orally made after the last witness was excused on May 29, 2014. My notes indicate that I advised the parties that I expected the issue of expenses and any Special Award would be determined by another Arbitrator, as I had not heard any evidence on the issue of claimed benefits and any Special Award. In other words, in my prior award, I did not award benefits; I simply decided that Mr. Waldock's injuries are deemed catastrophic. I expected, at the time, that the matter would still proceed to Arbitration on these issues. As aforementioned, my decision was upheld by the Director's Delegate on Appeal and the matter did not proceed to an Arbitration Hearing.

At the close of the oral presentations on June 25, 2015 of the Expense Hearing, and with the consent of both counsel, I adjourned the oral portion of the Hearing to provide an opportunity for both counsel to provide written submissions in this matter. I specifically requested that both counsel refer me to the section in the *Act*, the *Code* or the *Schedule* that requires an Applicant to state he/she is seeking a Special Award during the Mediation Application or Arbitration Application. While both application forms provide an opportunity for an Applicant to indicate that he/she will be seeking or is seeking a Special Award, I find that neither party pointed me to any wording, nor am I aware of any, in either the *Act*, the *Code* or the *Schedule* that prohibits an Applicant from seeking a Special Award when it has not been specifically requested in either application form.

Mr. Waldock's Submissions

Mr. Waldock submitted that the issue of a Special Award was raised in his written submissions of July 10, 2014 (paragraph 43) following the oral Preliminary Issue Hearing, and counsel for State Farm failed to make any submissions with respect to the availability or quantum of a Special Award at that time.

Immediately following my November 10, 2014 decision, on November 18, 2014, counsel for Mr. Waldock wrote to counsel for State Farm stating that a request for a Special Award would be made at the Expense Hearing in this matter when the parties reconvened to determine Mr. Waldock's entitlement to claimed benefits and expenses.

Prior to my decision, State Farm had been withholding benefit payments to Mr. Waldock for Attendant Care, certain Medical/Rehabilitation claims, and Housekeeping and Home Maintenance claims since it had determined, based on Dr. Cashman's report, that Mr. Waldock had not suffered a catastrophic impairment and thus was not eligible for Attendant Care, certain Medical/Rehabilitation claims, and Housekeeping and Home Maintenance claims.

In this matter, of the total of \$532,779.82 in benefits, expenses, etc., claimed by Mr. Waldock, he is presently claiming a total amount of \$361,520.30 representing claims for Attendant Care and Housekeeping and Home Maintenance. As a result of my earlier finding that Mr. Waldock suffered a catastrophic impairment, it is my understanding that State Farm has since paid \$171,259.52 to Mr. Waldock as reimbursement for past benefits, plus some expenses and interest, leaving approximately \$361,520.30 outstanding and due to Mr. Waldock.

Mr. Waldock's counsel referred me to *Clark and Royal Insurance Company of Canada* ("*Clark*"),⁴ wherein it was determined by the Director's Delegate that the Arbitrator has inherent discretion to grant a Special Award if the Arbitrator finds that the Insurer unreasonably withheld or delayed the payment of benefits, even when the request for Special Award was not made in the Application for Arbitration.

⁴ 1997 Carswell Ont 4223, Judgement September 26, 1997.

State Farm's Submissions

State Farm submits that the only issue in dispute in this matter was whether Mr. Waldock sustained a catastrophic impairment and the Pre-Hearing letter of September 26, 2013 confirmed the only issues in dispute were determination of catastrophic impairment, expenses and interest. No mention is made of a Special Award in the Application for Arbitration.

Further, Mr. Waldock did not seek to amend the Application for Arbitration to add the issue of a Special Award either before or during the Hearing nor prior to my decision on the preliminary issue being rendered.

While the parties did not address the issue of a Special Award during the oral portion of the Preliminary Issue Hearing, my notes indicate that in the written submissions of Mr. Waldock's counsel, dated July 10, 2014, Mr. Waldock did raise the issue that he would be seeking a Special Award along with the expenses of the Hearing.

State Farm stated that Mr. Waldock's counsel, in his closing submissions, indicated that an Arbitrator has the discretion to award a Special Award on a catastrophic designation, but, State Farm contends, no actual request for such an award was made by counsel for Mr. Waldock.

While no request for an order of a Special Award was made during the final oral submissions during the Preliminary Issue Hearing, counsel for State Farm has not provided any jurisprudence that a request for a Special Award must be made before the end of a Preliminary Issue Hearing.

State Farm submits that there is no authority under the *Code* to permit counsel to request a Special Award after a decision has been issued. Without addressing whether a Special Award can be raised after an Arbitration Hearing, I find there is no prohibition under the *Act*, the *Code* or the *Schedule* that disallows counsel to request a Special Award after a decision has been issued on a Preliminary Issue Hearing, nor any requirement that a Special Award must be sought at the time of the Application for Mediation or Arbitration.

State Farm submitted that the Arbitrator cannot re-open a Hearing after a final order has been made, pursuant to Rule 43 of the *Code*. I find this is not a case of “re-opening” the Hearing. My decision on the preliminary issue as to whether or not Mr. Waldock had suffered a catastrophic impairment was worded in a manner to assume that a further Hearing would be held regarding expenses, costs, etc. Thus, this is a matter separate from my catastrophic impairment decision. It is not a re-opening of the Hearing as it deals with a separate matter from that preliminary issue.

State Farm submitted that procedural fairness precludes the addition of the Special Award claim at the conclusion of the Hearing, after the decision is rendered. State Farm referred me to the Divisional Court decision in *Scarlett and Belair*⁵ wherein the Court confirmed that the basic principle underlying the duty of procedural fairness is that the parties affected by a decision should have the opportunity to present their case fully and fairly and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process. This would include providing interested parties an opportunity to address case law, statutory provisions and lines of argument which the Arbitrator wishes to consider.

Conclusion regarding Entitlement to a Special Award

Following the oral portion of this Hearing on June 25, 2015, the parties provided written submissions, response and reply. The submissions of Mr. Waldock included the request for a Special Award. State Farm had the opportunity in its response to address that request and did so. I find that this procedure was fair as State Farm had the opportunity to present its case fully and fairly in its written submissions. Thus, I find I have followed the basic principles set out in *Scarlett and Belair*.

State Farm submitted that the Application for Arbitration in this matter indicated the only issue in dispute was whether Mr. Waldock sustained a catastrophic impairment.

⁵ *Scarlett and Belair Insurance Company Inc.*, 2015 ONSC 3635 at paras. 38 – 39.

I agree with State Farm that whether or not Mr. Waldock sustained a catastrophic impairment was the only issue dealt with in the Preliminary Issue Hearing that commenced on May 27, 2014. The issue of expenses, etc., was not addressed in that Hearing. I find no requirement in the *Act*, *Code* or *Schedule* requiring that an application for a Special Award must be made prior to the conclusion of the Hearing.

State Farm submits that during the Arbitration Hearing, I did not raise the issue of a Special Award, on my own accord. I agree. I believe it is not the Arbitrator's responsibility to raise the issue of a Special Award, although I believe that in appropriate cases an Arbitrator could do so. I believe it is the responsibility of the parties to raise the issues and the Arbitrator makes her/his decision based on the evidence placed before her/him.

State Farm submitted that Director's Delegate Evans confirmed Arbitrator Henry's (my) decision was a final decision. I agree. My decision on the determination of catastrophic impairment was the final decision on that issue.

State Farm submitted that an Arbitrator cannot re-open a Hearing after a final order has been made, pursuant to Rule 43 of the *Code*. I find this is not a case of re-opening a Hearing. The issue in the Preliminary Issue Hearing commencing May 27, 2014 was the issue of determination of a catastrophic impairment. In this matter, the issue of expenses and/or a Special Award is a totally separate issue and was not dealt with in the initial matter.

Mr. Waldock seeks a Special Award of 50% of \$361,520.30, which he claims were benefits that State Farm unreasonably withheld or delayed.

In my decision on the preliminary issue, issued on November 10, 2014, I referred to the oral evidence of Dr. Waisman wherein he was critical of the report prepared and submitted by Dr. Cashman to State Farm. State Farm relied upon Dr. Cashman's report to deny that Mr. Waldock had suffered a catastrophic impairment. State Farm did not bring Dr. Cashman as a witness to that Hearing and thus, I found that his report was untested and less credible evidence than that of Dr.

Waisman and his colleagues at Multidisciplinary Designated Assessment Centre (“MDAC”), including Dr. Ameis.

Upon considering that State Farm refused to accept Mr. Waldock’s application for determination of a catastrophic impairment by relying on Dr. Cashman’s report, which failed to follow the accepted guidelines to determine whether a person is catastrophically impaired; and, considering that State Farm had ample evidence that Mr. Waldock was very seriously injured and partially incapacitated as a result of the accident, I find that State Farm must be considered responsible for unreasonably withholding or delaying payments to Mr. Waldock, pursuant to the *Act*.

I acknowledge that upon the release of my decision on the preliminary issue, wherein I determined that Mr. Waldock had suffered a catastrophic impairment, it is my understanding that State Farm did pay Mr. Waldock a significant portion of the total past benefits, expenses and interest he sought. In my mind, this action by State Farm serves to reduce the amount of the Special Award sought by Mr. Waldock from State Farm.

Accordingly, I find that Mr. Waldock is entitled to a Special Award calculated as 30% of the value of all benefits claimed following the Arbitration. He has claimed an amount of \$361,520.30. I calculate the Special Award to be \$108,456.09 plus the accumulated interest, to be calculated at the rate of 2% per month, compounded monthly, beginning July 7, 2010, pursuant to Subsection 282(10) of the *Act*.

EXPENSES:

Following my finding that Mr. Waldock was catastrophically impaired, Mr. Waldock has submitted \$361,520.30 after July 7, 2010 in claims for benefits, and the Applicant’s Bill of Costs in the amount of \$125,435.00, plus disbursements of \$45,824.52.

Subsection 282(11) of the *Act* sets out the criteria for determining dispute resolution expenses. State Farm did not raise any persuasive objections to any of the amounts claimed for the legal

expenses sought by Mr. Waldock. Further, I find the amounts claimed by Mr. Waldock for legal expenses are reasonable and conform to the criteria set out in the Regulation.

I find that as Mr. Waldock has been entirely successful in this matter, he is entitled to reimbursement of his Bill of Costs and his disbursements.

Interest

Mr. Waldock is requesting interest on his benefit claims, commencing from the date of the Application for Determination of Catastrophic Impairment (“OCF-19”) form, completed by Doctor Ameis of MDAC on July 7, 2010, onward.

Subsection 46(2) of the *Schedule* states: “If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly.”

I find that Mr. Waldock is entitled to interest on unpaid benefits at the rate of 2% per month, compounded monthly, from the time the benefits first became payable under the *Schedule* -- that being the date of July 7, 2010.

Knox M. Henry
Arbitrator

November 16, 2015
Date



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BETWEEN:

THOMAS WALDOCK

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

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

1. Mr. Waldock is entitled to payment of \$361,520.30 for his Attendant Care and Housekeeping and Home Maintenance Benefits, commencing July 7, 2010.
2. Mr. Waldock is entitled to interest in respect of his overdue benefits, calculated at 2% per month, compounded monthly, commencing July 7, 2010.
3. Mr. Waldock is entitled to payment of his Bill of Costs in the amount of \$125,435.00 and his disbursements of \$45,824.52.
4. Mr. Waldock is entitled to a Special Award of \$108,456.09, plus interest at 2% per month, compounded monthly, commencing July 7, 2010, the date the benefits first became payable under the *Schedule*.

Knox M. Henry
Arbitrator

November 16, 2015
Date