

**IN THE MATTER OF** the *Insurance Act*, R.S.O. 1990, c. I.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:

**SECURITY NATIONAL INSURANCE COMPANY**

**Applicant**

- and -

**UNICA INSURANCE COMPANY INC.**

**Respondent**

**AWARD  
WITH RESPECT TO COSTS**

**Counsel:**

Security National (Applicant): Sonya Katrycz

Unica Insurance Company Inc. (Respondent): Mark H. Fonseca

**Background:**

This matter began in April of 2016 when I was appointed as the arbitrator with respect to a priority dispute between Security National Insurance Company (hereinafter referred to as "Security") and Unica Insurance Inc. (hereinafter referred to as "Unica").

The first pre-hearing took place on May 12, 2016. There were two subsequent pre-hearings (July 5 and September 15, 2016) that took place prior to my hearing the preliminary issue.

This case involved a pedestrian knock-down. The pedestrian was struck by a vehicle insured by Security. At the time of the accident the pedestrian's parents were insured by Unica. If the matter had proceeded to a full hearing on the main issue it would have been a question of whether or not the pedestrian was principally dependant for financial support on his parents.

However, early on a preliminary issue was raised as to whether or not Security had initiated the arbitration within one year of serving the Notice to Applicant of Dispute Between Insurers. This was the issue that ultimately proceeded forward to a preliminary hearing which took place before me on October 18, 2016.

Mr. Fonseca acted for Unica at the hearing and Ms. Katrycz acted for Security. Prior to the hearing counsel filed a Statement of Fact and Law, an Arbitration Agreement and a Joint Book of Documents. In addition, counsel also submitted Facta and Books of Authority. The oral hearing took approximately a half day.

I rendered my decision on October 31, 2016 and I concluded the Security had not initiated the arbitration within the required time period. I also concluded that the consequences flowing from the breach of the limitation period was that Security had lost its right to pursue its claim for priority as against Unica. As part of my decision I awarded costs payable on a partial indemnity basis by Security National to Unica.

An appeal was launched by Security from my decision. However, that appeal never progressed. Unfortunately there was minimal communication from Security National's counsel with respect to the fact that there had been an appeal and the progression of that appeal. Ultimately, on January 11, 2018 Unica was notified by Security that it would be abandoning its appeal. Prior to that occurring a further pre-hearing had taken place on December 8, 2017. Subsequent to the abandonment of the appeal further pre-hearings took place on April 9 and May 25, 2018 all of which were dealing with the issue of costs. The parties were unable to agree on costs and I received written submissions from both counsel on the question of costs, a Bill of Costs from both counsel and a Book of Relevant Authorities from counsel for Unica.

This is therefore my decision with respect to the quantum of costs to be awarded to Unica having already determined that they were entitled to costs on a partial indemnity scale. Relevant to that is the fact that on February 26, 2018 Unica made an offer to Security that it would accept the sum of \$8,500.00 for costs.

**Costs Sought by Unica:**

The Bill of Costs submitted by Unica indicates that they are claiming \$25,984.50 in costs. This represents 57 hours for Mr. Fonseca at \$450.00 an hour for a total of \$25,650.00, together with H.S.T. of \$3,334.50. Mr. Fonseca's Bill of Costs starts with his initial file preparation from March, 2015 through to an anticipated time for reviewing the cost submissions of Security and preparing a reply which in fact was done. There are no disbursements being claimed.

**Parties' Arguments:**

It would appear that the main dispute between the parties is the number of hours that Mr. Fonseca is claiming with respect to his costs. Security argues that their counsel (year of call 2013) put in 63 hours of time from the commencement of the arbitration through to the cost

submissions. Security argues that Mr. Fonseca with a year of call of 1994 and with considerable experience in this area should not have similar hours on the file as compared to a more junior lawyer. Security argues that the 57 hours put forward by Mr. Fonseca are excessive considering his experience and considering the issues in dispute. Security also submits (for which they did not provide any support by way of case law) that progressively costs that are awarded in accident benefit disputes are diminishing. Reference is made to recent decisions under the LAT. With respect to counsel for Security, costs that are awarded at the LAT have no relevance to costs awarded in a priority dispute. The LAT provides for most minimal costs in very limited circumstances. In reaching my decision in this case I have therefore relied on the case law provided by Unica which were a series of decisions with respect to costs awarded and the quantum of costs awarded in private arbitration disputes between insurer's relating to priority.

From Unica's point of view their argument is that many of the pre-hearings were unnecessary particularly the post-decision pre-hearings. Unica also argues that Security was delaying matters by failing to respond to various communications and the delay with respect to pursuing the appeal. It was close to a year before Security decided they would not be pursuing the appeal.

Unica argues that costs having been awarded that the number of hours put in is reasonable and that they should be awarded their costs with the appropriate discount to take into consideration the award is based on a partial indemnity basis. Unica made reference to two cases in which a successful party was awarded costs on a partial indemnity basis of 60% (Economical Mutual Insurance Company & Unifund Assurance Company, decision Ken Bialkowski, June 23, 2016) and in another case where 75% of the gross amount of fees were awarded for a partial indemnity claim (Aviva Insurance Company of Canada v. Sovereign General Insurance Company, Arbitrator Lee Samis, January 27, 2016).

#### **Relevant Provisions:**

The Arbitration Agreement that was signed by all parties and marked as an Exhibit in the preliminary issue hearing provided that the unsuccessful party shall pay the costs of the successful party subject to the discretion of the arbitrator. As noted, I have already awarded costs on a partial indemnity scale to Unica based on that provision.

The Dispute Between Insurer's Regulation (Ontario Regulation 283/95) at Section 9(1) also provides that the unsuccessful party (unless ordered otherwise) is to pay the successful party the costs of the arbitration.

My jurisdiction to award costs is not only found in the Arbitration Agreement between the parties but also found in Sections 54(1) and (2) of the *Arbitration Act, 1991, S.O. 1990, c.17*.

### Analysis and Findings:

Unica was entirely successful in the preliminary issue hearing which resulted in bringing an end to the priority dispute between the parties based on a limitation period.

Initially the parties were successful in making the preliminary issue hearing process expedient and efficient. Written materials were filed and oral argument supplemented those written materials.

However, after the decision was rendered I have to agree with Unica that Security seemed to drag its feet. There are numerous instances where e-mail communications from me to counsel for Security went unanswered. It was difficult to schedule pre-hearings. It seemed that Security could not make up its mind as to whether it wanted to proceed with the appeal and what its position would be with respect to costs. I agree with Unica's submission that this caused some delay in moving this matter forward. The delay is evidenced by the fact that I am making a cost decision in December of 2018 for a preliminary issue hearing in which I rendered a decision in October of 2016.

However, I do agree with Security that the amount of time put in to the file (including cost submissions and preparation for the preliminary issue hearing) is higher than I would have expected. This was not a particularly complicated issue at least in terms of the facts that were agreed upon and the documents that needed to be reviewed. There was only one issue. Exhibit 2 which was the Book of Documents I was asked to review was comprised of 16 tabs the majority of which were one or two page letters. There were four cases submitted by Unica. Unica's Statement of Fact and Law was 9 pages long and Security's was 7 pages long. There was a Reply filed by Unica which was 6 pages long. I also do note that Unica filed on the morning of the hearing a document entitled "Submissions".

Taking all of that into consideration I find that the number of hours proposed by Mr. Fonseca for arbitration preparation at 24 is higher than I would have thought would be needed. In addition I found the 7.5 hours to prepare cost submissions and the 2.5 hours to prepare the reply submissions is somewhat on the high side.


Taking that into consideration I have reduced the account from \$25,650.00 to \$17,500.00. H.S.T. on that comes to \$2,275.00 for a total of \$19,775.00 for costs. However, that is on a full indemnity scale.

I agree with Unica that a review of the case law suggests that the range of discount that is applied to costs in these cases to account for a partial indemnity award is anywhere between 60 and 75%. In this case considering what does seem to have been some inordinate delay on the part of Security I feel that a 70% discount is appropriate to reflect a fair award of costs. I therefore award costs to Unica in the amount of \$13,842.50 payable by Security. In addition Security will pay the arbitrator's costs.

**Order:**

Security National Insurance Company shall pay to Unica Insurance Inc. the sum of \$13,842.50 with respect to an award for partial indemnity costs flowing from the preliminary issue decision on the priority dispute between the parties rendered on October 13, 2016.

DATED THIS 18<sup>th</sup> day of December, 2018 at Toronto.

  
Arbitrator Philippa G. Samworth  
DUTTON BROCK LLP