

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended

AND IN THE MATTER of Ontario 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

B E T W E E N:

WATERLOO INSURANCE COMPANY

APPLICANT

- and -

SECURITY NATIONAL INSURANCE COMPANY

RESPONDENT

DECISION

Counsel Appearing:

William Sproull: Counsel for Waterloo Insurance Company (hereinafter called Waterloo)

Jamal Rehman: Counsel for Security National Insurance Company (hereinafter called Security)

Issues:

The issues before me are as follows:

- A. What amount of costs is Waterloo entitled to up to October 21, 2020 when Security accepted priority;
- B. What amount, if any, is Waterloo entitled to in terms of costs from October 21, 2020 to April 7, 2021;
- C. Is Waterloo entitled to its costs of this hearing; and,

D. Is Waterloo entitled to interest in the amount of \$2,535.62 for the period October 21, 2020 to August 17, 2021.

Proceedings:

Counsel submitted written submissions, Document Briefs, Books of Authorities, and as well we conducted an oral hearing on December 6, 2021.

Background and Summary of Relevant Facts:

The Claimant, who was an employed nanny, was involved in a motor vehicle accident on January 19, 2019.

The Claimant was rear-ended while driving her employer's Toyota RAV4. The RAV4 was insured by Security. The Claimant submitted an OCF-1 to her own insurer, Waterloo.

Waterloo took the position that Security was the priority insurer on the grounds that the nanny had regular use of her employer's vehicle on the date of loss and was an occupant of the vehicle she was therefore a deemed named insured under the Waterloo Policy. Accordingly, Waterloo claimed Security ranked ahead of it in priority.

Waterloo issued a Notice to Applicant of Dispute Between Insurers on April 18, 2019.

Waterloo issued a Notice of Arbitration as against Security dated June 28, 2019. I was appointed as Arbitrator in those proceedings on consent.

The first pre-hearing in the priority dispute was held on November 14, 2019. At that pre-hearing, counsel for Security indicated they required some additional information including a priority EUO of the Claimant. In addition, Waterloo was seeking various productions which would assist in further understanding the regular use issue.

A further pre-hearing took place on March 31, 2020. As a result of that pre-hearing, I issued an Order to the insureds of Security requiring production of the relevant documents within 90 days of April 9, 2020.

A further pre-hearing took place on July 10, 2020. By this time the transcripts of the SABS EUO of the Claimant had been transcribed and produced and as well some documentation had been received from the Claimant's employers. However, Security took the position that it was not sufficient information in order to make a determination with respect to regular use. Accordingly, the EUO of both employers would have to proceed forward.

The EUO of the Security insureds took place on September 16, 2020. Various undertakings for production were made during the course of those EUOs.

On October 21, 2020, Security communicated to Waterloo that they would accept priority and asked Waterloo's counsel what his position was in terms of costs.

Waterloo responded indicating that they were seeking fees of \$8,313.93 (partial indemnity 60%), plus HST of \$1,080.81, plus the costs of the EUO expense of \$457.65 for a total of \$9,852.39 in costs. Waterloo also took the position that the full amount of the Arbitrator's account should be paid by Security.

By way of an email dated March 9, 2021, Security proposed to resolve the issue of costs by way of a payment of \$6,500.00 all-inclusive. With respect to the disbursements, Security indicated they would pay whatever remained of the Arbitrator's final account and would also look into the question of whether the Professional Court Reporters' account of \$457.65 had already been paid by Security.

By email dated April 1, 2021, counsel for Waterloo rejected the proposal for costs and repeated their position for costs remain at \$9,852.39 unless the EUO expense had already been paid.

By email dated April 15, 2021, counsel for Security increased their settlement proposal to \$8,000.00 and confirmed that they would pay the Professional Court Reporters' account of \$457.65 as well as the balance of the Arbitrator's account.

In May of 2021 counsel for Waterloo received an email from Mr. Rehman indicating that he was now counsel for Security as the previous lawyer was no longer with their firm.

There were a series of further emails exchanged by counsel indicating some considerable confusion as to whether they had or had not paid the Professional Court Reporters fee of \$457.65. Ultimately it was confirmed that Waterloo had paid that invoice and, accordingly, was continuing to seek repayment of that invoice from Security. By email dated May 6, 2021, counsel for Waterloo confirmed that their position remained that they were seeking costs of \$9,852.39 inclusive of HST and disbursements.

By email dated May 14, 2021, counsel for Security proposed that the costs dispute be resolved with an all-inclusive figure for \$8,000.00 for costs and \$457.65 for the transcripts for a total of \$8,457.65. By this time, Waterloo had still not received reimbursement of the recoverable benefits and expenses relating to the underlying claim of the Claimant. The emails do not indicate whether interest had been discussed and arguably that was still outstanding. Further, there was no additional communication from counsel for Security on the issue of costs. Accordingly, counsel for Waterloo contacted me on May 17, 2021 seeking a further pre-hearing resumption in order to arrange a costs hearing.

On June 10, 2021, Security acknowledged that a new OCF-18 that had been received by Waterloo was being referred back to the clinic for handling by Security as it was now the priority insurer.

In August 17, 2021, Waterloo received a cheque for \$30,434.00 representing reimbursement from Security of recoverable benefits and expenses relating to the Claimant's Accident Benefit claim.

The costs pre-hearing was held on September 10, 2021 at which time the outstanding issues were confirmed as:

1. In what amount was Waterloo entitled to costs up to October 21, 2020 when Security accepted priority;
2. Is Waterloo entitled to costs, and if so, what amount after the priority acceptance up until the time that the Arbitrator's account was paid in full as well as the account of the Professional Court Reporters was paid. This took us from October 21, 2020 to April 7, 2021;
3. Was Waterloo entitled to interest on the \$30,434.00 calculated from October 21, 2020 to August 17, 2021 when payment was issued; and,
4. Is Waterloo entitled to costs in relationship to the current hearing.

Analysis and Finding:

Issue 1: Interest

Waterloo claims that it is entitled to interest in the amount of \$2,535.62. This covers the time period of October 21, 2020 when priority was accepted, until the date reimbursement was effective on August 17, 2021.

Security's only submissions on this issue was simply a bold statement that Waterloo was not entitled to any interest. This was not elaborated on, in any fashion, during the course of oral submissions.

Waterloo calculated interest in accordance with Section 121 of the *Courts of Justice Act*. It used the rate at 0.5% during the 6 months until April 21, 2021 and then the applicable 0.333% for the 4 month ending August 17, 2021.

There was no issue taken by Security with respect to my jurisdiction to award interest in the context of this priority dispute. I did not receive any explanation from Security as to the delay in the payment of the reimbursement between October 21, 2020 to August 17, 2021. Accordingly, I Award interest payable by Security to Waterloo in the amount of \$2,535.62.

Issue 2: Costs

In reviewing Security's submissions, both oral and written, they did not appear to dispute Waterloo's claim that they were entitled to costs for the time period up to the date that priority was accepted on October 21, 2020. Their dispute appears to be with quantum in relationship to fees. They take no issue with the disbursements.

Waterloo submitted various statements of account and invoices to support their claim for costs. Mr. Sproull, who was counsel handling the Waterloo claim at all times before me, is shown on all these invoices to be the only timekeeper who completed any work on the Waterloo v. Security file. Mr. Sproull was called to the bar in 1995, and his effective hourly rate varied, for this particular client, from \$265.00 an hour to \$275.00 an hour towards the end of 2020.

The bills submitted show detailed activities on the part of Mr. Sproull and what time was put in to those activities. This included preparing the Notice of Arbitration, communication with counsel for Security, attending pre-hearings, attending EUOs, and following up on productions.

Security's position with respect to the fees being claimed by Waterloo's counsel is that it was inappropriate for "senior counsel" to complete some of the activities on this file. Specifically, they point to the fact that no junior lawyer or student conducted any research, prepared any reports, or performed any other work commensurate with their experience. Security suggests that this is an inefficient use of senior counsels' time and they should have used a junior lawyer or student for some activities which would have resulted in a lower account.

Security also submitted that many of the hours logged by Mr. Sproull were "repetitious with significant duplication for preparation, strategy discussions, and administrative tasks".

Counsel for Waterloo submitted a detailed reply responding to Security's allegations on the time he had spent on the file. He pointed out numerous examples of the delay caused by Security in refusing to accept priority, requiring EUOs, outlined in detail the work that Waterloo had to do in order to respond to numerous production requests both with Security and the Claimant.

Waterloo also pointed out that it was seeking only partial indemnity costs consistent with the case law showed a general range in calculating partial indemnity costs between 60% up to 75%.

Section 9(1) of Ontario Regulation 283/95 provides some guidance to Arbitrators in dealing with the issue of costs in priority disputes:

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.

In addition, an Arbitrator's jurisdiction to award costs is further outlined in Section 54 of the *Arbitration Act* 1991. Subsections (1) and (2) set out the general principle with regard to an award of costs in an arbitration:

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.

The case law also establishes that an Arbitrator may consider the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure* when exercising one's discretion to award costs under the *Arbitration Act* of 1991. Rule 57 directs an Arbitrator to consider the following:

- Any offer to settle
- The complexity of the proceeding
- The importance of the issue
- The apportionment of the liability
- The conduct of any party that intended to shorten or to lengthen unnecessarily the duration of the proceeding
- A party's denial or a refusal to admit anything that should have been admitted
- Whether any step on the proceeding was improper, vexatious or unnecessary
- Any other matter relevant to the issue of costs

On the basis of the information and documentation provided to me as well as the written and oral submissions, and with particular reference to Rule 57, I am satisfied that Waterloo is entitled to the costs it has claimed.

I have carefully reviewed the account submitted by Waterloo. I find nothing wrong with Mr. Sproull being the lawyer to handle all the various issues related to the priority dispute without resort to a junior lawyer or student. There was some complexity to this matter in light of the factual background and the issue of whether a nanny can be provided regular use of her employer's vehicle. I could not find any duplication or overbilling. All the work that is done and set out in the accounts were in my view reasonably required to this matter to be moved forward on behalf of Waterloo.

On that issue, I therefore award costs based on a partial indemnity analysis of \$9,852.39 payable by Security to Waterloo.

The Second claim for costs that Waterloo advances is from the time period after priority was accepted on October 20, 2020. Waterloo submits that significant costs were incurred between October 20, 2020 and up until April 2021 when Security finally agreed that they would cover the EUO expense. Waterloo claims that it had to:

1. Deal with the confusing issue of who was paying the Arbitrator's costs and whether or not they would be reimbursed for a 50% payment already made to the Arbitrator;
2. There were numerous negotiations on the issue of costs
3. There was significant confusion over the payment of the EUO expense; and,
4. There were ongoing issues with respect to exchange of documentation and ongoing issues with respect to the payment of the outstanding reimbursement which was not received until August 17, 2021.

Waterloo's counsel submitted accounts for this relevant time period as well. This account also included some time that was involved in preparing for the costs hearing. I was not given any specific amount by counsel as to what they were claiming in terms of costs for this specific time period. However, the accounts were quite clear in terms of the time put in by Mr. Sproull and the amount that was charged to his client on a 100% basis. Work during this time period included communication with counsel for Security on the issue of costs, dealing with the EUO issue, attending a further pre-hearing, dealing with whether or not the Arbitrator's account had been paid. For this time period Waterloo submits that it should be entitled to full indemnity which they suggest is 75% of that account.

On this issue, Security did not make any specific submissions with respect to this account over and above what had already been made of the previous time period, however, they did submit that I must consider whether an award of full indemnity costs is reasonable in these circumstances. Security submits that an Arbitrator is not bound to accept each expense that a litigant is willing to incur as an accurate indication of what should be regarded as reasonable in terms of costs payable by the opposite party. Security submits that they took measures to keep the costs at a reasonable level.

What I found compelling in terms of the issue of costs was the offers that had been made by the parties up to May of 2021. This is something I can take into consideration at my discretion as set out in the *Arbitration's Act* and Regulation 283/95 and is certainly something that is to be considered when looking at Rule 57 of the *Court of Justice Act*. On May 14, 2021, Security offered to settle the issue of costs by paying \$8,000.00 all-in for the legal fees and HST and in addition to reimburse the cost of the transcripts of \$457.67. Their offer was therefore for \$8,457.65. Waterloo's position was that it still wanted \$9,852.39 all-in. The difference between these two positions is \$1,394.74.

The costs of the pre-hearing to deal with setting up a costs hearing including the costs of the Arbitrator and the legal expenses for both Waterloo and Security probably exceeded \$1,394.74. Neither Security nor Waterloo blinked in this game of brinkmanship. This was a case that cried out for settlement at least in terms of costs. I appreciate that interest continued to be an issue but 90% of the materials in argument before me involved the costs issue.

In light of this, I find that Waterloo is not entitled to any additional costs for this particular time period. I could not find any indication in the materials filed by Waterloo that a significant portion of the time that they had billed to their client was involved on the issue of interest.

This then brings me to the final time period for which Waterloo advances a claim for costs and that is for the costs hearing itself. The only submissions I had from Security on this issue was that they did not think Waterloo was entitled to costs. As I read their materials, they relied on the general submissions they had already made about Mr. Sproull's account. Mr. Sproull submitted an account dealing with his time on the file relating to costs up until October 27, 2021. This account did not include the time for preparing for the costs/interest hearing, attending the oral submissions, and it also did not appear to include the costs of drafting and filing a reply.

Security did not make any submissions over and above what they had already made on the issue of costs with respect to this discrete issue. They did not specifically indicate what position they took in terms of quantum. However, I have concluded for the reasons I have already outlined above, that neither Waterloo nor Security should be entitled to any costs relating to the portion of the hearing that dealt with the costs issue. I have found that the first costs claim for Waterloo was reasonable and that is payable by Security and to that extent Waterloo was successful. However, Security had made a more than reasonable offer and should not, in my view, be penalized for being forced into a costs hearing.

However, interest was not accepted by Security. They simply made a blanket statement that it was not payable with no case law to support that or no explanation. Therefore, with respect to the portion of the hearing that dealt with interest, I award Waterloo the additional sum of \$1,000.00 inclusive of HST payable by Security to Waterloo.

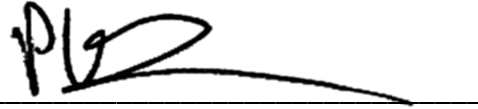
Award:

Security National Insurance Company is to pay Waterloo Insurance Company the sum of the following:

1. \$9,852.39 with respect to Waterloo's costs up to October 2020;
2. \$1,000.00 with respect to the costs of this hearing relating to interest; and,
3. \$2,535.62 for interest.

With respect to the costs of the Arbitrator that is to be payable on a 50/50 basis as between Waterloo and Security.

DATED THIS 26th day of January, 2022 at Toronto.

A handwritten signature in black ink, appearing to read 'PLG', is written above a horizontal line.

Arbitrator Philippa G. Samworth
DUTTON BROCK LLP