CITATION: Waldock v. State Farm Mutual Automobile Insurance Company 2019 ONSC 6105
DIVISIONAL COURT FILE NO.: 632/18
DATE: 20191028

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
D.L. Corbett, Gray and Sossin JJ.

BETWEEN:	)	
	)	
THOMAS WALDOCK	)	*Leonard H. Kunka*, for the Applicant
	)	Talaal Bond
Applicant	)	
	)	
– and –	)	
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and FINANCIAL SERVICES COMMISSION OF ONTARIO	)	*Saro Setrakian*, for the respondent State Farm Mutual Automobile Insurance Company
	)	
	)	*Martina Aswani*, for the Respondent,
Respondents	)	Financial Services Commission of Ontario
	)	
	)	
	)	**HEARD at Toronto June 27, 2019**

REASONS FOR DECISION

Sossin J.

OVERVIEW

[1] This judicial review concerns the benefits to which the applicant, Mr. Waldock ("Waldock"), will be entitled arising from severe injuries suffered in a motor vehicle/pedestrian accident on March 25, 2008 (the "accident"). After the accident, Waldock claimed various expenses from his automobile insurer, State Farm Mutual Automobile Insurance Company ("State Farm"). State Farm denied certain aspects of those expenses.

[2] Waldock applied for arbitration at the Financial Services Commission of Ontario ("FSCO"). under the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act").

[3] The procedural journey this matter as followed is somewhat complex and occurred under a dispute resolution scheme which will no longer apply to disputes of this kind in light of the

Insurance Act, R.S.O. 1990, c. I.8. (the "*Insurance Act*"), which was amended to provide that, effective April 1, 2016, all new disputes regarding the payment of statutory accident benefits ("SABS") must be filed with the Licence Appeals Tribunal. FSCO maintains jurisdiction over SABS disputes filed with it prior to April 1, 2016, such as the one in this application.

[4] Under the FSCO process, the dispute between Waldock and State Farm was referred to an Arbitrator, Knox Henry, of ADR Chambers ("Arbitrator Henry). Arbitrator Henry issued two decisions on this matter, which confirmed a range of benefits, awards and expenses. These decisions were appealed by State Farm to the FSCO Director's Delegate Edward Lee ("Delegate Lee"), who rescinded both of Arbitrator Henry's decisions in his Appeal Order, dated September 10, 2018.

[5] This application for judicial review, dated October 9, 2018, seeks to reverse the decision of Delegate Lee and restore the decisions of Arbitrator Henry.

[6] For the reasons that follow, this application for judicial review is granted, in part.

The Decisions of Arbitrator Henry

[7] In the first decision in this matter, dated November 10, 2014, Arbitrator Henry determined that Waldock suffered a "catastrophic impairment" within the meaning of the *Statutory Accident Benefits Schedule* - Accidents on or After November 1, 1996, O. Reg. 403/96 (the "preliminary decision").

[8] In the preliminary decision, Arbitrator Henry ordered that Waldock's entitlement to expenses be deferred to a future hearing.

[9] On December 9, 2014, State Farm filed an appeal of the preliminary decision, and specifically whether Waldock's injury constituted a "catastrophic impairment." The Director of Arbitrations for FSCO appointed Director's Delegate Evans ("Delegate Evans") to deal with State Farm's appeal.

[10] Delegate Evans convened a pre-appeal telephone conference on March 9, 2015 and reached a procedural agreement with the parties, whereby State Farm would withdraw its appeal and the issues in dispute would be dealt with at the hearing before Arbitrator Henry to determine the expenses, which was held on June 25, 2015.

[11] After that hearing, Arbitrator Henry issued his decision on expenses on November 16, 2015 (the "expenses decision"). He found that Waldock was entitled to $361,520.30 for attendant care, housekeeping, and home maintenance benefits ("AHHB") commencing July 2010, plus 2% interest for overdue benefits. Waldock was also entitled to payment of his Bill of Costs in the amount of $125,435.00 and disbursements of $45,824.52. Finally, Arbitrator Henry said Waldock was entitled to a special award of $108,456.09, plus 2% interest starting July 2010, pursuant to s. 282(10) of the version of the Act in force at the time.

[12] Arbitrator Henry concluded that State Farm unreasonably withheld or delayed payments to Waldock. State Farm did pay a significant portion, however, so the special award amount was

reduced to 30% of the value of all benefits claimed ($361,520.30) for a total of $108,456.09 plus interest. State Farm appealed this decision, but the parties ultimately agreed to proceed with a motion for clarification before Arbitrator Henry, rather than the Judicial Review Application.

[13] Arbitrator Henry heard the motion for clarification and released his decision on May 8, 2017 (the "clarification decision").

[14] State Farm filed a Notice of Appeal, on December 11, 2015 appealing Arbitrator Henry's expenses decision dated November 16, 2015. Waldock filed a Response to Appeal on January 15, 2016, and State Farm delivered a Reply on January 28, 2016.

[15] Several motions followed the Notice of Appeal, resulting in a judicial review application being launched by Waldock.

[16] In her endorsement of October 21, 2016, Justice Molloy for the Divisional Court considered several issues that Waldock sought to resolve and concluded a judicial review of those issues was premature. For example, with respect to the scope of Arbitrator Henry to clarify his original decision on expenses, it was necessary for Arbitrator Henry to first have an opportunity to do so, with an appeal if either party so wished, before the matter would be appropriate for consideration by the Divisional Court.

[17] Consequently, Arbitrator Henry heard the motion for clarification, and released his decision on May 8, 2017 (the "clarification decision").

[18] State Farm appealed the clarification decision of Arbitrator Henry, and it was agreed between the parties that the Appeal of the clarification decision would be heard at the same time as the Appeal of Arbitrator Henry's expenses decision.

[19] The two appeals proceeded to a hearing before Director's Delegate Lee on July 4, 2018.

The Decision of Delegate Lee

[20] Delegate Lee, in a decision dated September 10, 2018, rescinded both of Arbitrator Henry's decisions in his Appeal Order. Delegate Lee remitted the issues of expenses arising from the preliminary decision to be heard by a different arbitrator.

[21] Delegate Lee found that Waldock's entitlement to AHHB was never an issue properly before Arbitrator Henry. AHHB were not listed on the application for arbitration or any pre-hearing letter, or mediated, or referred to in the preliminary decision, or added by agreement. Thus, Delegate Lee concluded that Arbitrator Henry erred in law and exceeded his jurisdiction by determining entitlement to AHHB.

[22] Additionally, Delegate Lee concluded that State Farm did not receive notice that these issues would be determined, and so was denied natural justice. Delegate Lee found that Arbitrator Henry also erred in law by finding that AHHB were outstanding and owing without a proper evidentiary record and without providing adequate reasons for that decision. Delegate Lee also concluded that Arbitrator Henry did not apply the relevant legal test.

[23] Further, Delegate Lee found that the special award was also not properly before Arbitrator Henry both because it was not included in the arbitration from the beginning and because at the end of the preliminary issue hearing, the only issue stated to be remaining was the expenses of the hearing.

[24] According to Delegate Lee, even if Arbitrator Henry had the jurisdiction to unilaterally raise the issue of special award, he denied State Farm natural justice by failing to provide notice that he would do so. The Arbitrator also erred in law by determining the issue of the special award without hearing any evidence on that point. Delegate Lee rejected the idea that a claim for expenses at FSCO could encompass a claim for benefits, interest, and a special award; or that a special award could be granted based on solicitor/client costs rather than outstanding benefits.

[25] Delegate Lee held that the Arbitrator was precluded by s. 286 of the *Insurance Act* from making any changes to his expense order while it was under appeal, including a correction or clarification.

[26] Further, Delegate Lee found that even if Arbitrator Henry had the authority to issue a correction or clarification under Rule 65.5 or 65.6 of the *Code*, his decision on the motion was not actually a correction or clarification, but really a new or different order varying his previous ones and even adding new issues.

[27] With respect to expenses, Delegate Lee held that the Arbitrator erred in law by granting hourly fees and expenses in excess of the maximum amounts allowed under the Act and Code.

[28] Waldock now brings this Application for Judicial Review and seeks an order setting aside the Appeal Order of Delegate Lee and restoring both Arbitrator Henry's expenses decision and clarification decision.

RELEVANT LEGISLATIVE PROVISIONS

[29] Section 282 and 286 of the version of the *Insurance Act*, R.S.O. 1990, c. I.8, in place during the relevant period of this dispute, provides,

> 282. (1) An insured person seeking arbitration under this section shall file an application for the appointment of an arbitrator with the Commission. R.S.O. 1990, c. I.8, s. 282 (1); 1996, c. 21, s. 38 (1).
>
> Arbitrator's appointment
>
> (2) The Director shall ensure that an arbitrator is appointed promptly. R.S.O. 1990, c. I.8, s. 282 (2).
>
> Determination of issues
>
> (3) The arbitrator shall determine all issues in dispute, whether the issues are raised by the insured person or the insurer. 1996, c. 21, s. 38 (2).

Procedures

(4) The arbitration shall be conducted in accordance with the procedures and within the time-limits set out in the regulations. R.S.O. 1990, c. I.8, s. 282 (4).

(5)-(9) Repealed: 1996, c. 21, s. 38 (3).

Special award

(10) 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 per cent 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 cent per month, compounded monthly, from the time the benefits first became payable under the Schedule. R.S.O. 1990, c. I.8, s. 282 (10); 1993, c. 10, s. 1.

Expenses

(11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration proceeding as may be prescribed in the regulations, to the maximum set out in the regulations. 1996, c. 21, s. 38 (4).

Interim award of expenses

(11.1) The arbitrator may at any time during an arbitration proceeding make an interim award of expenses, subject to such terms and conditions as may be established by the arbitrator. 1993, c. 10, s. 33.

Liability of representative for costs

(11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,

(a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;

(b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or

(c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default. 2002, c. 22, s. 127.

...

286. An arbitrator appointed by the Director cannot vary or revoke an order made by him to her and cannot make a new order to replace an order made by him or her if the order is under appeal. R.S.O. 1990, c.I.8., s.286; 1996, c.21, s.41.

[30] Rule 75 of the FSCO's *Dispute Resolution Practice Code* ("DRPC" or "*Code*"), provides

75. Award of Expenses

75.1 An adjudicator may award expenses to a party if the adjudicator is satisfied that the award is justified having regard to the criteria set out in Rule 75.2. The items and amounts may which may awarded are found in Rule 78 and the Scheduled of the Expense Regulation found in Section F of the Code.

75.2 The adjudicator will consider only the criteria referred to in the Expense Regulation found in Section F of the Code. These criteria are:

(a) each party's degree of success in the outcome of the proceeding;

(b) any written offers to settle made in accordance with Rule 76;

(c) whether novel issues are raised in the proceeding;

(d) the conduct of a party or a party's representative tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;

(e) whether any aspect of the proceeding was improper, vexatious or unnecessary; ...

[31] Rule 78 of the Code provides,

78. Expenses of Representatives

78.1 The maximum amount that may be awarded to an insured person or an insurer for legal fees, is an amount calculated using:

(a) The hourly rates established under the Legal Aid Services Act, 1998 for professional services in civil matters before the Ontario Superior Court of Justice; or

(b) The hourly rate referred to in Rule 78.1(a) adjusted to include, where appropriate, the experience allowance established under the Legal Aid Services Act, 1998

> Where an adjudicator is satisfied that a higher amount for legal fees to an insured person is justified, an hourly rate of up to $150 may be awarded. (Emphasis in original)

[32] The Schedule with respect to "Dispute Resolution Expenses" referred to in s.282(11) sets out, in part,

> ... 3(1) The legal fees payable by the insured person or the insurer for the following matters may be awarded:
>
> 1. For all services performed before an arbitration, appeal, variation or revocation hearing.
>
> 2. For the preparation for an arbitration, appeal, variation or revocation hearing.
>
> 3. For attendance at an arbitration, appeal, variation or revocation hearing.
>
> 4. For services subsequent to an arbitration, appeal, variation or revocation hearing.
>
> (2) The number of hours for which legal fees may be awarded shall be determined by the arbitrator, having regard to the criteria set out in subsection 12(2) of this Regulation
>
> (3) The maximum amount that may be awarded for legal fees is the amount calculated using the hourly rates set out in the Dispute Resolution Practice Code published by the Ontario Insurance Commission or Financial Services Commission of Ontario, as it may be amended from time to time.

ANALYSIS

[33] This application for judicial review raises four issues:

1) Was Delegate Lee's finding that a special award should not have been ordered by Arbitrator Henry reasonable?

2) Did Delegate Lee misapprehend the purpose of the evidence relating to AHHB at the hearing on expenses?

3) Was Delegate Lee's finding which voided Arbitrator Henry's clarification decision reasonable?

4) Was Delegate Lee's decision rescinding Arbitrator Henry's order respecting expenses of the hearing reasonable?

[34] Each of these issues will be discussed in turn.

[35] In the context of Delegate Lee's findings, the applicable standard of review is reasonableness. As FSCO submits, courts have consistently found that the standard of review for

a Director's delegate's decision on the interpretation or application of the legislation governing a SABS. dispute in Ontario is "reasonableness"; See *Allstate Insurance Company of Canada v. Klimitz*, 2014 ONSC 7108 at paras 28-30; 2015 ONCA 698 at para 4; and *Sidhu v. Aviva Canada Inc.*, 2018 ONSC 3710 (Div Ct) at paras 23-26.

1) Was Delegate Lee's finding that a special award should not have been ordered by Arbitrator Henry reasonable?

[36] One of the grounds on which Delegate Lee found Arbitrator Henry had erred was his granting of a special award of $108,456.09 as part of his expenses decision.

[37] Delegate Lee found that the special award was not included as an issue in the application for mediation or application for mediation or in other pre-hearing documents setting out the issues in dispute.

[38] State Farm submitted that there was no authority to permit counsel to request a special award after a decision was issued.

[39] State Farm also submitted that procedural fairness precluded the addition of the special award claim after the decision is rendered since parties need the opportunity to present their case fully and fairly.

[40] Arbitrator Henry, however, stated that there was no denial of procedural fairness since State Farm had the opportunity to present its case fully and fairly, and address Waldock's request for a special award, after the expenses hearing in written submissions. He stated in his expenses decision:

> At the close of oral presentations on June 25, 2015 of the Expenses 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 on 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 to 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.

[41] Waldock submits that the question of a special award was raised in written submissions of July 10, 2014, following the preliminary issue hearing. Subsequently, on November 18, 2014, after the preliminary decision had been released, counsel for Waldock wrote to State Farm's counsel, to confirm that the special award issue would be raised at the hearing on expenses.

[42] Correspondence from March 9, 2015, from counsel for Waldock to the administrators of the arbitration and copied to counsel for State Farm, for example, stated that further to a conference

call with Delegate Evans, a one-day arbitration "dealing with Ms. Musson's special award motion and our expense hearing" was scheduled for June 25, 2015.

[43] State Farm argues that (at para. 19 of its factum), "The issue raised was **whether** retroactive benefits or a Special Award **could be added** to the arbitration proceedings at that stage, which State Farm contested." (Emphasis in original) State Farm relies on correspondence to this effect between counsel, dated January 19, 2015.

[44] State Farm argues not just that it did not have an opportunity to make submissions on the substance of the special award, but that the matter could never properly reach Arbitrator Henry, as it was not included in the application for arbitration from the beginning.

[45] The implication of State Farm's argument, however, would be to preclude the possibility of a special award from ever being heard in this case. In oral submissions, State Farm confirmed this position and stated this is because there were no benefits in dispute capable of leading to a special award.

[46] In my view, given the broad discretion accorded to the Arbitrator to consider the matters in dispute, including the potential justifications for a special award, Delegate Lee's finding that no mechanism could arise for a special award to be considered unless included in the application at the outset was unreasonable.

[47] Arbitrator Henry stated that he was not aware of any wording in the Act, SABS., or *Dispute Resolution Practice Code* (Fourth Edition, Updated January 2014) (the "DRPC" or the "Code") that prohibits an applicant from seeking a special award when it has not been specifically requested in a Mediation or Arbitration Application.

[48] While Rule 43 of the Code prevents an arbitrator from "re-opening" a hearing after a final order has been made, Arbitrator Henry confirmed that he was not "re-opening" the hearing since the preliminary issue dealt only with catastrophic impairment, not "expenses," which included a consideration of any special award.

[49] Arbitrator Henry had inherent discretion to award a special award. As Delegate Draper stated in *Clark v. Royal Insurance Co. of Canada*, [1997] O.I.C.D. No. 198 ("Clark") (at para. 32):

> [32] Royal contends that because it did not receive notice before the hearing, the arbitrator could not order a special award based on the propriety of its conduct. In my opinion, however, section 282(10) gives arbitrators the authority to impose a special award based on the evidence presented at the hearing, whether or not notice was given before the hearing. In other words, a special award is always a possibility if the arbitrator finds that the insurer unreasonably withheld or delayed the payment of benefits. (Emphasis added.)

[50] I agree. Delegate Lee's conclusion that Arbitrator Henry had no jurisdiction to consider a special award, and his decision to substitute his own finding on the question of special awards rather than remitting the matter back to Arbitrator Henry, were both was unreasonable.

[51] Finally, Delegate Lee erred in his decision that State Farm was denied procedural fairness with respect to the special awards.

[52] The record makes clear that State Farm was aware of the special award issue by the time of Arbitrator Henry's decision on expenses, and had opportunities to make submissions on the issue. Arbitrator Henry confirmed this was the case in his clarification decision. Though aware of the issue, State Farm chose to contest Arbitrator Henry's jurisdiction to make the award, rather than to make submissions on the justification or quantum of the award. Where a party is given the opportunity to be heard and chooses to remain silent, the duty of fairness has not been breached.

[53] Delegate Lee relied on another passage from Clark, which states, "*The arbitrator had the authority to raise the issue of a special award on her own initiative, but had to give Royal a reasonable chance to respond.* ... In the particular situation here, I accept Royal's contention that it would have presented its case differently if it had known a special award was being considered. It did not call the adjuster or any of its medical experts as witnesses. *I am not persuaded, therefore, that allowing written submissions was sufficient.*" (Emphasis in original)

[54] Delegate Lee concluded that Arbitrator Henry had failed to observe the mandatory requirements of procedural fairness by denying State Farm an opportunity to present evidence, question Mr. Waldock's evidence, and to make submissions on the merits of the special award and its quantum.

[55] Delegate Lee stated (at p.24), "I thus find the Arbitrator erred in law by determining the special award and its quantum in the absence of any evidence in regard to the special award, or he misconstrued evidence he had heard to determine whether a person was catastrophically impaired and erroneously applied to a determination of entitlement and quantum of a special award."

[56] In my view, it is Delegate Lee who misapprehended the evidence before him. That evidence clearly showed State Farm was aware of the special award issue, and chose not to address it in the hearing which had been provided. Further, the evidence disclosed no basis for Delegate Lee to interfere with the discretion exercised by Arbitrator Henry to make a special award in the circumstances and based on the record before him.

[57] For these reasons, Delegate Lee's finding with respect to the special award must be set aside.

2) Did Delegate Lee misapprehend the purpose of the evidence relating to AHHB at the hearing on expenses?

[58] In his appeal decision, Delegate Lee found that the AHHB issues were never properly before Arbitrator Henry, nor did State Farm have notice that these issues were going to be addressed in the expenses decision. Delegate Lee stated that a finding of catastrophic impairment does not mean that an applicant is automatically entitled to benefits and that this entitlement must be proven before an arbitrator at a hearing.

[59] Waldock submits that Delegate Lee erred in finding that the Applicant never made a claim for attendant care or housekeeping expenses in the original Application for Arbitration. Waldock

argues that the "catastrophic impairment" finding was a precondition to Waldock being entitled to advance further claims for AHHB.

[60] This precondition required the application for arbitration to list the "issues in dispute" in a provisional or conditional format. Because benefits already had been paid by State Farm, Waldock did not view the benefits per se as in dispute. Furthermore, Waldock argues that the claim for interest on overdue expenses would be meaningless unless there was a claim being advanced for those expenses.

[61] The "issues in dispute" in this case were framed in the following way:

> "Issues in Dispute
>
> As a result of the serious injuries sustained in this accident, Thomas Waldock is claiming entitlement to the issues which have failed and are contained within the FSCO Report of Mediator dated January 4, 2013, more particularly:
>
> 1. Pursuant to s.2(2) or s.45 of the S.A.B.S., a declaration that he sustained a catastrophic impairment, which would entitle him to the maximum limits under the SABS (medical benefits, rehabilitation benefits, attendant care benefits, and housekeeping/home maintenance benefits) as well as case management services"...
>
> 2. Pursuant to s. 2(2) of s.51 of the S.A.B.S., interest on all payments found to be overdue...."

[62] Waldock submits that Delegate Lee misdirected himself by concluding that the Applicant's AHHB could not be dealt with by Arbitrator Henry because those expenses had never been mediated. By the date of the Hearing on Expenses, State Farm had paid the Applicant's claimed expenses (except for the issue of interest), and there was no need to mediate those expenses or argue about them because they had been paid. In addition, State Farm never challenged the summary of claims submitted by the Applicant and paid by State Farm.

[63] State Farm argued that Arbitrator Henry awarded the sum of $361,520.30 of expenses in addition to the $361,520.30 of expenses already paid by State Farm prior to the expenses decision. According to Waldock, State Farm maintained that position, despite repeated acknowledgement from Waldock that the only sum in issue at the hearing on expenses was the outstanding interest totalling $63,471.05.

[64] Delegate Lee finds that Arbitrator Henry failed to provide a justification for the award of AHHB benefits. He states (at p.14), "Nowhere does the Arbitrator detail or mention any evidence or analysis he applied to come to the conclusion at any amount of Attendant Care or Housekeeping or Home Maintenance was *reasonable and necessary* (as required under the sections 16 and 22 of SABS) and *outstanding and owing* to the applicant at the time of his decision." (Emphasis in original)

[65] Finally, Delegate Lee found that Arbitrator Henry's treatment of AHHB lacked adequate reasons, relying on *Clifford v. Attorney General of Ontario*, 2009 ONCA 670 ("*Clifford*"). He stated,

> I find that the reasons provided by Arbitrator Henry in regard to how he determined Mr. Waldock was entitled to Attendant Care and Housekeeping and Home Maintenance were inadequate because they do not demonstrate how the decision was made, do not permit effective judicial review, and do not demonstrate the basis of the decision.

[66] Given the funds at issue relating to AHHB had been paid by State Farm, Delegate Lee's concerns with respect to fairness to State Farm misapprehended the evidence before him. Given the payments made by State Farm, and the finding of a "catastrophic impairment" finding in the preliminary decision, there was no basis on which to conclude that State Farm was unaware of the AHHB issue, or unaware of the basis for the calculations in Arbitrator Henry's decision on expenses.

[67] With respect to reasons, the question of sufficiency as a matter of fairness (the question at issue in *Clifford*) has given way to the analysis of whether reasons meet the minimum threshold of "justification, transparency and intelligibility" so as to determine the reasonableness of the decision as set out in Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190.

[68] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, Abella J held,

> [14] Read as a whole, I do not see Dunsmuir as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47). ...
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision

and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[69] Delegate Lee did not consider the reasons of Arbitrator Henry based on this standard, and failed to apply the proper legal test for the assessment of reasons in administrative law. The sufficiency of reasons is not a matter of procedural fairness but rather a matter of whether the reasons are sufficient to disclose whether the decision was reasonable.

[70] Applying this standard, it is clear that Arbitrator Henry provided reasons that made clear the basis for his findings on the AHHB issue, which were based on benefits already paid by State Farm and related calculations. Those findings on this issue were among the range of acceptable outcomes open to him in light of the record before him and his statutory jurisdiction and discretion.

[71] For these reasons, Delegate Lee's conclusions on Arbitrator Henry's authority to make an AHHB award, and the procedural fairness of Arbitrator Henry's decision in this regard cannot stand and are set aside.

3) Was Delegate Lee's finding which voided Arbitrator Henry's clarification decision reasonable?

[72] Delegate Lee found that Arbitrator Henry's clarification decision exceeded his jurisdiction and is void.

[73] Waldock argues that Delegate Lee erred in finding Arbitrator Henry's clarification decision void and that this finding should be quashed. Waldock's primary basis for this challenge to the decision of Delegate Lee is a dispute over the relevance and interpretation of s.286 of the *Insurance Act*, which was repealed through certain amendments to the Act, in 2014.

[74] The former s.286 of the *Insurance Act* provided: "An Arbitrator appointed by the Director cannot vary or revoke an order made by him or her and cannot make a new order to replace an order made by him or her if the order is under appeal."

[75] Waldock submits that Delegate Lee erred in law by relying upon a repealed section of the *Insurance Act* to find that Arbitrator Henry had no jurisdiction to issue his clarification decision, dated May 8, 2017.

[76] State Farm submits that s.286 was repealed in 2014, but the repeal only became effective April 1, 2016 and that s. 21(3) of "Automobile Insurance", R.R.O. 1990, Reg. 664 ("Regulation 664") provides that the pre-transition Act continues to apply in respect of proceedings continued at FSCO after the transition, so that the provision was in effect at the relevant time of Arbitrator Henry's clarification decision.

[77] Prior to the clarification motion, Waldock had raised several matters in an application for judicial review before the Divisional Court. These matters were argued before Justice Molloy in October, 2016.

[78] In her endorsement dated October 21, 2016, Justice Molloy considered several of the issues involved in this judicial review. Specifically, she considered a motion by State Farm to quash a judicial review application by Waldock for an order permitting Arbitrator Henry to provide clarification of his expenses decision prior to the hearing of an appeal from that decision. Molloy J. found Waldock's judicial review application premature (at para 25):

> [I]t would be inappropriate for this Court to issue a declaration in advance authorizing the Arbitrator to issue a clarification. That decision should be made in the first instance by the Arbitrator, and then subject to appeal to the tribunal. The Divisional Court ought not to step in prematurely to render a decision as to the Arbitrator's jurisdiction or potential jurisdiction.

[79] Neither the version of the *Insurance Act* in force at the time, nor the reasons of Justice Molloy, however, prevented Arbitrator Henry from proceeding to clarify his earlier decisions. Arbitrator Henry did not vary or alter his earlier expenses decision, but addressed potential ambiguity in light of the disagreements between the parties as to whether he had awarded expenses in excess of the amounts already paid by State Farm, and in response to the need to provide counsel with clear direction arising out of the decision on expenses.

[80] In his clarification decision, Arbitrator Henry clearly stated that the $361,520.30 he had awarded to Waldock for AHHB was not in addition to the benefits already provided by State Farm. Further, he clarified that State Farm and Waldock had been advised they could make submissions on the granting of a special award, the quantum of AHHB benefits and the legal expenses relating to the preliminary decision that he had made relating to the determination of "catastrophic impairment" and the hearing of the expenses motion. He also clarified that he had considered the submissions received before issuing the expenses decision.

[81] Additionally, clarifications by an Arbitrator are governed by Rules 65.5 and Rules 65.6 of the *Dispute Resolution Practice Code*, which permit an Adjudicator to clarify their decision at any stage in a proceeding. Even if section 286 of the *Insurance Act* had not been repealed, that section did not specifically address "clarifications" of a decision by an Adjudicator, though the Rules in the Code do.

[82] Rules 65.5 and 65.6 of the Code provide,

> 65.5 An adjudicator may, at any time, correct a typographical error, error of calculation, technical error or similar error made in his decision or order.
>
> 65.6 An adjudicator may at any time, clarify a decision or order that contains a misstatement, ambiguity, or other similar error.

[83] Delegate Lee found that Arbitrator Henry's clarification that the award of $361,520.30 for AHHB was inclusive of and not in addition to benefits already paid exceeded his jurisdiction, as this does not correct a typographical, technical, calculation or other similar error.

[84] This narrow approach to clarifications cannot stand. Arbitrator Henry's clarification of that the award of benefits in the expenses decision was inclusive of amounts already paid resolved both ambiguity and the calculation of benefits and on its face was authorized by the *Code*.

[85] In these circumstances, it was unreasonable for Delegate Lee to decide that Arbitrator Henry lacked the discretion to provide clarification with respect to his previous decision on expenses.

4) Was Delegate Lee's decision rescinding Arbitrator Henry's order respecting expenses of the hearing reasonable?

[86] On the question of legal costs, Arbitrator Henry addressed the issue only in passing in his expenses decision, stating,

> 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 are reasonable and conform to the criteria set out in the Regulation.

[87] On this issue, Delegate Lee found that the hourly rates in the legal costs Waldock had submitted varied between $225 per hour to $750 per hour, and that (at p.31) "the Arbitrator erred in law by exceeding the limits of what he could validly grant for legal fees in an arbitration." Delegate Lee also found certain disbursements were not in accordance with the Dispute Regulation Expenses.

[88] Waldock submits that Delegate Lee erred in law by failing to address whether Arbitrator Henry's award of solicitor/client costs was appropriate considering Rule 78 of the DRPC, when read in the context of the overriding principles of Rule 1.1 of the DRPC.

[89] Waldock argues that Delegate Lee erred in law in interpreting the DRPC and s. 282(10) of the *Insurance Act* by failing to consider that Arbitrator Henry applied a balanced and reasoned approach to assessing costs, taking into consideration the combined effect of s. 282(10) of the *Insurance Act*; the factors to be considered by Rule 75.2 of the DRPC; Rule 78.1 of the DRPC, and the Schedule to Regulation 664 (Dispute Resolution Expenses). It is submitted that Arbitrator Henry granted a reduced Special Award of 30% of the overdue expenses (rather than the 50% maximum requested by the Applicant) in view of his award of solicitor/client expenses.

[90] State Farm takes the position that Delegate Lee exercised his core area of expertise properly in determining that Arbitrator Henry had erred in his award of legal expenses. Delegate Lee found that the default maximum rate for legal expenses is set in Rule 78 of the DRPC, which are tied to hourly rates established by the Legal Aid Services Act, or as an alternative, a maximum up to $150 in hourly fees which is permissible where justified, applied to the legal expenses at issue in the dispute before Arbitrator Henry.

[91] Waldock argues that Rule 78 must be read against the backdrop of Rule 1.1 of the FSCO DRPC Rules of Procedure, which sets out: "These Rules will be broadly interpreted to produce the most just, quickest and least expensive resolution of the dispute."

[92] In his factum, Waldock submits (at para. 34) "...Delegate Lee erred in law by narrowly applying Rule 78.1 of the DRPC, which interpretation creates an unfair advantage and an incentive to an insurer to take unreasonable positions in denying benefits to an Applicant. It is submitted that the discretion given to an Arbitrator to award solicitor/client costs against a party who has steadfastly maintained an unreasonable position, and forced an arbitration to proceed, is the safeguard necessary to ensure that parties who take unreasonable positions cannot use the costs of proceeding to an arbitration as a weapon against the opposing party, thereby creating an unequal bargaining position between the parties."

[93] The issue, however, is not Arbitrator Henry's discretion to award costs, but rather the scale and quantum of costs available to him under the *Code*. Nothing in the combined effect of the factors to be considered by Rule 75.2 of the DRPC; or the Schedule to Regulation 664 (Dispute Resolution Expenses) alters the cap set out in Rule 78.1 of the DRPC. Rather, these various sources governing an arbitrator's award of costs each refer in one way or another to the cap set out in Rule 78.1 of the *Code*.

[94] The interpretive guidance provided by Rule 1.1, while broad, does not change the clear intent of Rule 78. This is not a context where a more just, quick or least expensive resolution can be obtained by adopting a particular interpretation of a rule. Rule 78 provides a cap on legal fees (the upper limit of which, if justified, is $150 per hour). Arbitrator Henry set out no authority that would justify not complying with this cap, nor has Waldock raised authority for any discretion on the part of an arbitrator for disregarding the *Code* in this way.

[95] Section 282(10) of the *Insurance Act*, as discussed above, permitted the arbitrator to make a special award of up to 50% of the amount of benefits to which the insured is entitled at the time. Waldock submits that Arbitrator Henry granted a "reduced" special award of 30% of the overdue expenses in view of his award of legal expenses, and so, following this logic, if the legal expenses were reduced, Arbitrator Henry might have increased the special award accordingly. Whether or not this was Arbitrator Henry's intent, the special award cannot be revisited as a result of any decision with respect to legal expenses.

[96] The costs award of Arbitrator Henry will need to be revised in accordance with Rule 78.1. In my view, this is the only aspect of Arbitrator Henry's decisions on which Delegate Lee was justified in finding an error that requires a remedy. In light of the legal costs submitted by Waldock and accepted by Arbitrator Henry in the expenses decision, it should be a straightforward exercise to revise the award of legal expenses based on the cap in Rule 78.1 of the Code and the limits on disbursements in the Dispute Regulation Expenses.

DISPOSITION

[97] For the reasons set out above, this application for judicial review is granted, in part. The findings of Delegate Lee voiding the decisions of Arbitrator Henry as set out above must be set

aside, apart from the finding with respect to the legal fees awarded by Arbitrator Henry not being in accordance with the *Code*.

[98] The option at this stage generally would be to remit the matter back to a different FSCO delegate to consider Arbitrator Henry's decisions in light of these reasons.

[99] Given the complex and long procedural history of this matter and the statutory transition with respect to disputes over SABS, however, I see no reason to return the matter to a different FSCO delegate to consider afresh the decisions of Arbitrator Henry.

[100] The procedural disputes over the relative jurisdictions of the Arbitrator, Delegate and Divisional Court already have resulted in this dispute remaining unresolved over a decade after the 2008 accident. Delay of this nature in a case of this kind is difficult to justify and further delay would be unacceptable. Moreover, additional processes are not likely to shed new light on or provide a more fully considered resolution to the matters in dispute. At this point, what is needed is finality.

[101] I have found that, apart from his finding with respect to legal costs, Arbitrator Henry's decisions should not have been interfered with, and those decisions therefore should be restored. I so order.

[102] The question of legal costs which comply with the Rule 78.1 of the *Code* should be dealt with by an agreement between the parties, but if necessary in the event the parties cannot reach agreement, that issue alone should be returned to Arbitrator Henry to resolve in compliance with the Code.

[103] By agreement of the parties, the applicant Waldock, as the successful party on this judicial review, is entitled to $10,000.00 in costs, all inclusive, from State Farm to Waldock.

Sossin J.

I agree

D.L. Corbett J.

I agree

Gray J.

Released: OCT 28 2019

CITATION: Waldock v. State Farm Mutual Automobile Insurance Company 2019 ONSC 6105
DIVISIONAL COURT FILE NO.: 632/18
DATE: 20191028

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
D.L. Corbett, Gray and Sossin JJ.

BETWEEN:

THOMAS WALDOCK

Applicant

– and –

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and FINANCIAL SERVICES COMMISSION OF ONTARIO

Respondents

REASONS FOR DECISION

Sossin J.

Released: October 28, 2019