COST AWARDS AT THE LAT

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Those who practice in accident benefits are aware that cost awards at the Licence Appeal Tribunal (LAT) are incredibly rare. Under what circumstances have costs been awarded recently? This article explores recent jurisprudence from 2022-2023 where costs have been awarded.

Rule 19 of the Tribunals Ontario, Common Rules of Practice & Procedure addresses costs. This rule empowers a party to make a request to the LAT for costs at a case conference, at a hearing, or generally at any time before the LAT issues its decision or order. The LAT can award costs if a party has acted unreasonably, frivolously, vexatiously, or in bad faith (subrule 19.1), up to $1,000.00 for each full day of attendance at a motion, case conference, or hearing (subrule 19.6).

Subrule 19.5 stipulates that, in deciding whether to order costs, and the amount of costs to be ordered, the LAT shall consider all relevant factors, including the following:

1. the seriousness of the misconduct;
2. whether the conduct was in breach of a direction or order issued by the Tribunal;
3. whether or not a party's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process;
4. prejudice to other parties; and
5. the potential impact an order for costs would have on individuals accessing the Tribunal system.

Overall, LAT cost awards tend to be low. There does not appear to be any reported decision in 2022 or 2023 where costs were awarded at the maximum $1,000.00 per day.

In terms of the reasons for awarding costs, recent authorities suggest that the LAT is most concerned with ensuring its ability to carry out a fair, efficient, and effective process.

These latest cases demonstrate that the following conduct can trigger a cost award:

- bringing unmeritorious motions, especially if brought on the eve of the hearing or at the hearing itself;
- failing to attend a motion;
- failing to comply with orders;
- being dishonest with the LAT about the reason for requiring an adjournment;
- raising multiple objections that are of little consequence;
- failing to produce the hearing transcript in a timely fashion; and
- failing to abide by page limits for written submissions.

Of note, a party's conduct need not rise to the level of being unreasonable, frivolous, vexatious, or in bad faith to trigger a cost award.

Below are highlights of the latest decisions:

In ***Joseph v. ACE INA Insurance***, 2022 ONLAT 19-010124/AABS-A, Adjudicator Kate Grieves awarded costs totaling $350.00 to the insurer in relation to two pre-hearing motions. Both were brought by the applicant and both were unsuccessful. On the first motion, Adjudicator Grieves awarded costs because the applicant failed to (a) meet the terms of a case conference order to demonstrate best efforts related to document production, (b) provide his position in respect of additional documentary requests, and (c) file an amended application. It was held that though this conduct did not rise to the level of being vexatious, it did interfere with the LAT's ability to carry out a fair, efficient, and effective process. It also prejudiced the insurer. On the second set of motions, brought immediately prior to the hearing, the applicant sought further log notes and to change the witness list. Both were denied. Adjudicator Grieves again held that the applicant's conduct interfered with the Tribunal's ability to conduct a fair, efficient, and effective process. It resulted in wasted resources and prejudice to the insurer.

In ***Robinson v. AIG Insurance***, 2022 ONLAT 20-003795/AABS, Adjudicator Avril A. Farlam awarded costs at $500.00 to the insurer in relation to five motions brought by the applicant, all of which were unsuccessful. On these motions, the applicant sought further documentary productions, to add witnesses, to remove the insurer's lawyer, to have the adjudicator recuse herself, and an implied undertakings motion. Adjudicator Farlam held that all five motions were brought without sufficient notice as required by Rule 15, and too late in the proceedings, specifically on the eve of or during the hearing. Adjudicator Farlam

was satisfied that the applicant acted unreasonably. She ordered costs at $100.00 on each motion, totaling $500.00.

In ***Khanna v. Travelers Canada***, LAT 21-005011/AABS (unreported, released April 27, 2022), Vice Chair Terry Hunter awarded costs at $100.00 to the insurer "for the applicant's willful failure to attend the motion hearing without explanation".

In ***Afshan v. Security National Insurance Co.***, 2022 ONLAT 18-007658/AABS, Adjudicator Rebecca Hines awarded costs at $500.00 to the applicant for the insurer's failure to comply with a production order, which was only discovered on cross-examination of the adjuster at the hearing. This failure necessitated a lengthy break to provide the applicant's counsel time to review the records and to prepare questions for cross-examination. Adjudicator Hines found the insurer to have deliberately failed to produce the records. In her opinion, the insurer's conduct was "unreasonable", in "blatant disrespect of the Tribunal's process", and "worthy of an award". The insurer's behaviour interfered with the Tribunal's ability to carry out a fair, efficient, and effective process, turning a one-day hearing into a two-day hearing. Adjudicator Hines explained that the applicant has a right to transparency in understanding the adjustment of her claim, especially when it comes to the denial of benefits. The insurer's lack of transparency interfered with the parties' ability to engage in meaningful settlement discussions, which could have prevented the need for a costly hearing. Additionally, the failure to produce the records prevented the applicant from preparing for the hearing and properly advocating her position. Adjudicator Hines emphasized that such conduct needs to be deterred as LAT orders need to be respected in order to facilitate timely and cost-efficient access to justice.

In ***Hordo and Hordo v. CAA Insurance Company***, 2022 ONLAT 20-012761/AABS, Adjudicators Tyler Moore and Thérèse Reilly awarded costs at $500.00 to the insurer because the applicants misstated their whereabouts on one of the hearing days. The applicants advised that they had to attend a medical procedure at a hospital, but the insurer provided materials showing that the applicants were actually attending a Divisional Court motion. The Adjudicators did not specifically comment on how this misstatement triggered costs.

In ***Franche v. Wawanesa Mutual Insurance Company***, 2022 ONLAT 21-000723/AABS, Adjudicator Jeffrey Shapiro awarded costs at $2,000.00 to the applicant ($500.00 per day for four days of the hearing). The Adjudicator accepted the applicant's submission that the constant and lengthy objections and interruptions by counsel for the insurer delayed the hearing. Adjudicator Shapiro held, "The two full weeks followed a general pattern of beginning days of each week marked with excessive, unnecessary and/or lengthy objections – and at times all three…" The Adjudicator pointed out that many of the insurer's objections were "over the line", followed by long speeches, and/or on points of little consequence. Moreover, counsel for the insurer would continue to argue the objection after a ruling had been made. All of this delayed the hearing. The insurer sought reconsideration on the costs award (2023, ONLAT 21-000723/AABS-R), which was denied.

Finally, in ***Hathaway-Warner v. TD General Insurance Company***, 2023 ONLAT 2020-002110/AABS, Adjudicators Brian Norris and Taivi Lobu awarded costs at $1,000.00 to the applicant after a five-day hearing. In that case, the insurer failed to provide a copy of the hearing transcript in a timely fashion and failed to abide by the page limits for written submissions, contrary to Rules 3 and 13.3. The Adjudicators held that this conduct offended the principles of fairness and openness. It was a serious breach that, if condoned, could have a systemic impact on fairness between parties beyond just that case. It was "unreasonable" and it prejudiced the applicant by forcing her to rely on excerpts of the transcript that were "cherry-picked" by the insurer.