



COMBAT TRAINING FROM ANTIOPE

Examinations Under Oath: Dos and Don'ts

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Governing Legislation

Section 33 of the *Statutory Accident Benefits Schedule* ("SABS") governs entitlement and how to request an examination under oath ("EUO").¹

Pursuant to section 33(2) of the SABS, if requested by an accident benefits insurer, a person injured in a car accident **"shall"** submit to an EUO. Thus, an insurer has a statutory right to compel a claimant to attend at an EUO.

An applicant is obligated to attend a maximum of two EUOs: one regarding a claim for accident benefits and the other regarding a private dispute between insurers. The latter type of EUO occurs in the course of a private arbitration dispute between insurers and

¹ *Statutory Accident Benefits Schedule*, O Reg 34/10, s. 33(1) ("SABS").

often revolves around specific questions pertaining to liability (loss transfer), dependency, and coverage.²

A claimant is not required to submit to an EUO during a period when the person is incapable of being examined because of his or her physical, mental, or psychological condition.³

Purpose

The EUO is an important tool available to insurers. By conducting an EUO, an insurer has the opportunity to investigate possible misrepresentation claims, evaluate priority disputes, and may be a more efficient way of obtaining information.

Under the new LAT procedures, it is rare that the insurer and defence counsel will ever meet the applicant, so the EUO is especially important in order to assess a claimant's credibility.

Scope

Pursuant to section 33(5), the insurer **"shall"** limit the scope of the EUO to matters that are relevant to the applicant's entitlement to the benefits described in this Regulation.

A common misconception is that questions may only be asked regarding the issues that are presently in dispute. In fact, an insurer is entitled to ask questions regarding any issues that are relevant to the claimant's entitlement to benefits whether or not these claims have been advanced or have been disputed.

Similarly, an insurer's right to conduct an EUO is not extinguished by either a denial or termination of payment of a particular benefit or the commencement of litigation.⁴ Thus, an insurer is entitled to conduct an EUO even if a benefit has been denied and even if a LAT application has been commenced, which is particularly important if the matter is likely to proceed to Arbitration.

When Can an Insurer Conduct an EUO?

An EUO can be conducted during the lifetime of a claim upon receipt of a request for a benefit. Initially, the case law made it so that EUOs were only available within 10 days of the date of the initial application, but now, the request can be made any time, not just

² *Ibid*, s. 33(9).

³ *Ibid*.

⁴ *Echelon General Insurance Company v. Henry*, [2011] ONSC 3673.

after the initial application was received.⁵ There is nothing preventing an insurer from initially paying the claim and then later requesting an examination.⁶

If the claimant refuses to answer proper questions asked during the EUO, then he or she may be obligated to return for a further examination. In *Aviva Insurance Company of Canada v Balvers*,⁷ Justice Stewart ordered the insured to re-attend at an examination indicating that the insured has a statutory obligation to co-operate and make prompt, full, and fair disclosure to the insurer.

Notice Requirements

Pursuant to section 33(4)(3), if a request for an EUO is made, the insurer must provide to the insured the “reason or reasons” for the EUO.

In the recent decision of *Aviva v. McKeown*,⁸ the Ontario Court of Appeal considered whether the word “reason” in section 33(4)(3) amounts to a “justification” or something less. At the Superior Court level, Justice Matheson declared that “a justification is required to compel a SABS claimant to attend, specifically a reason or reasons that must be disclosed under s. 33(4)3 of the SABS. Her Honour held that this was not a “matter of form” and “the insurer must therefore, in good faith, have a reason or reasons to require such an examination in the context of what is intended to be an efficient and streamlined no fault process. The insurer is [statutorily] obligated to disclose that reason or reasons before it can proceed with an examination.”

The Court of Appeal reversed the application Judge’s finding. The Court held that there is no evidence that insurers are abusing the system by requesting EUOs without providing explicit reasons. The Court found that “a general statement of the purpose of the examination under oath that gives the applicant notice of the general type of questions that will be asked is sufficient”.

Failure to Attend

If a claimant fails to attend the EUO, the insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply.⁹

If the claimant later attends at the EUO, the insurer’s only obligation is to pay the benefit from the time that the claimant attends and forward.¹⁰ However, if the insurer did not comply with the notice requirements, interfered with the claimant’s right to be

⁵ *State Farm Mutual Insurance Company and Williams* (FSCO Appeal P15-00001, July 17, 2015).

⁶ *Ibid.*

⁷ 2007, CanLII 17193 (ONSC).

⁸ 2017 ONCA 563

⁹ SABS, s. 33(6).

¹⁰ *Ibid.*, s. 33(8(1)).

represented by counsel, or the claimant provided a reasonable excuse as to the reason for his or her initial non-attendance, then an insurer is required to pay to the claimant the benefits during the period of the suspension.¹¹

Notably, the suspension applies to all benefits – not simply the benefits that are in dispute. As such, if income replacement benefits have already been denied but medical benefits continued to be paid – the insurer is entitled to suspend payment of the latter if a claimant fails to attend.

Moreover, the failure to attend at an EUO may take precedence over a an adjudicative finding regarding an entitlement to benefits.

It appears that the only repercussion to the claimant for failure to attend at an EUO is a suspension of his or her accident benefits. In *State Farm v. Williams*,¹² the Director's Delegate found that an Arbitrator does not have the right to compel the attendance at an EUO and that the only statutory right of the insurer is to suspend payment pending the claimant's attendance.

Takeaways

EUOs are an important tool available to insurers to essentially “level the playing field” when evaluating a claim. EUOs are even more important now that there is no availability for discoveries in an action and direct contact with the claimant is becoming less and less frequent in the accident benefits world.

If conducting an EUO, make sure to take full advantage. Know your file, and make sure to ask all relevant questions, including questions about benefits that may not yet be claimed or in dispute.

¹¹ *Ibid*, s. 33(7) and (8(2)).

¹² (FSCO Appeal P15-00001, July 17, 2015).