



Licence Appeal Tribunal File Number: 21-004055/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Roy Myal

Applicant

and

The Co-operators General Insurance Company

Respondent

MOTION ORDER

ADJUDICATOR: Ian Maedel, Vice-Chair

APPEARANCES:

For the Applicant: Francesco Vumbaca, Student-at-Law

For the Respondent: Jennifer Griffiths, Counsel

Motion heard by Teleconference: March 29, 2022 and April 7, 2022

BACKGROUND

- [1] The applicant was injured in an automobile accident on **January 24, 2020** and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (“*Schedule*”).
- [2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service (“Tribunal”).
- [3] The application lists a non-earner benefit (“NEB”), cost of examinations, assistive devices, cost of an updated OCF-3, attendant care expenses, the cost of a Form-1, and an award as issues in dispute.
- [4] A case conference has been scheduled for October 13, 2022.

MOTION

- [5] On **February 16, 2022**, the respondent filed a Notice of Motion requesting that the Tribunal;
 - i. An order suspending the applicant’s entitlement to statutory benefits effective April 6, 2021, pursuant to s. 33(2) of the *Schedule*;
 - ii. An order staying this proceeding pending the applicant’s attendance at an Examination Under Oath (“EUO”), pursuant to s. 33(2) of the *Schedule*.

PARTIES’ POSITIONS

- [6] The respondent submits the applicant failed to attend a properly scheduled EUO on April 6, 2021. As a result of the non-attendance, the benefits were suspended effective, April 6, 2021.
- [7] The respondent submits the language of ss. 33(1) and 33(2) of the *Schedule* is clear, and the claim should be statute-barred for failing to submit to an EUO. The respondent has since attempted to reschedule the EUO, only to be met with the applicant’s blanket refusals to cooperate. The respondent submits it is a breach of procedural fairness to proceed to a hearing where no EUO has been conducted. In the alternative, the hearing should be stayed until the applicant complies with s. 33(2) of the *Schedule* and attends an EUO.
- [8] The applicant submits the only remedy for non-attendance at an EUO is a suspension of benefits, pursuant to s. 33(6), for the period of non-compliance. In this matter, all the benefits were previously denied prior to April 6, 2021, and the NEB is the only ongoing benefit. There is otherwise no legislative authority to bar this application or stay the proceeding. To bar this application would prevent the applicant from effectively participating in the hearing process.

ANALYSIS

Legislation

- [9] Section 33(2) of the *Schedule* defines an insurer's right to request an insured person's attendance at an EUO as follows:
- (2) If requested by the insurer, an applicant shall submit to an examination under oath, but it is not required,
 - (a) to submit to more than one examination under oath in respect of matters relating to the same accident; or
 - (b) to submit to an examination under oath during a period when the person is incapable of being examined under oath because of his or her physical, mental or psychological condition.
- [10] Subsections (4) and (5) then add the following parameters to this attendance:
- (4) The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the applicant and shall give the applicant reasonable advanced notice of the following:
 1. The date and location of the examination.
 2. That the applicant is entitled to be represented in the matter describe in subsection (3).
 3. The reason or reasons for the examination.
 4. That the scope of the examination will be limited to matters that are relevant to the applicant's entitlement to benefits.
 - (5) The insurer shall limit the scope of the examination under oath to matters that are relevant to the applicant's entitlement to benefits described in this Regulation.
- [11] Subsection (6) outlines the following penalty for insured persons that fail to attend an EUO: "The insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with subsection (1) or (2)."
- [12] Section 34 is a remedial provision that can be used to cure certain non-compliance with the "Part" of the *Schedule* that includes s. 33(2): "A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation."

Notice of the EUO and "Reasonable Explanation" for Non-Attendance

- [13] I find the applicant was properly served with a Notice of EUO as anticipated by s.

33(4) of the *Schedule*.

- [14] To start, the respondent sent the applicant detailed correspondence (dated January 22, 2021) which laid out the exact wording of ss. 33(1) to 33(9) of the *Schedule*. This correspondence closed with a sentence indicating that formal Notice of the EUO would follow once a date had been scheduled with the applicant.¹ The applicant does not dispute that he was served with this correspondence, as he objected to the EUO in reply email correspondence (dated January 28, 2021).²
- [15] The formal Notice of EUO was dated February 19, 2021, and it directed the applicant to attend an EUO on April 6, 2021 at 10:00 am at Professional Court Reporters in Toronto, Ontario. It also indicated that the applicant was entitled to be represented at the examination, and that the purpose of the examination was to evaluate his potential entitlement to statutory accident benefits pursuant to the enumerated parts of the *Schedule*. Finally, it indicated the scope of the examination was expressly limited to matters relevant to his entitlement to statutory accident benefits.³ When this correspondence is read together, I am satisfied that the respondent complied with the requirements under s. 33(4) of the *Schedule*.
- [16] The applicant raised objections regarding the timing of the request, indicating the respondent had allegedly failed to comply with s. 268 of the *Insurance Act* (“the *Act*”)⁴. I reject the applicant’s objection as being incorrect in law.
- [17] Section 268 of the *Act* does not include any statutory limitation period regarding the timing of an EUO pursuant to s. 33 of the *Schedule*. Instead, it appears the applicant is citing O. Reg. 283/95 relating to priority disputes, which has no application to this case. Section 33 of the *Schedule* does not otherwise contain specific wording related to any legislated timelines for an EUO to be conducted. Thus, I am not persuaded by the applicant’s submissions regarding the alleged delay in arranging an EUO.
- [18] Similarly, I reject the applicant’s submission that the Notice of an EUO must satisfy that an examination is “reasonably necessary”. This is wording clearly imported from s. 44(1) of the *Schedule*. The Court of Appeal for Ontario in *Aviva Insurance Company of Canada v. McKeown et al.* (“*McKeown*”) specifically rejected arguments regarding the “reasonably necessary” standard and its applicability to reasons for an EUO. The Court also indicated that—once the reasons for the EUO, pursuant to s. 33(4)3, were clearly laid out in the Notice—additional justification for an EUO was not required.⁵

¹ Submissions of the Respondent, Tab 1.

² Submissions of the Respondent, Tab 2.

³ Submissions of the Respondent, Tab 5.

⁴ R.S.O. 1990, c.I.8.

⁵ 2017 ONCA 563, at paras. 57, 71-75.

- [19] In support of this submission, the applicant relies on the Tribunal decision of *W.F. v. Aviva Insurance Canada* (“*W.F.*”)⁶, which is in regard to an insurer’s request for further documentation, pursuant to s. 33(1). This earlier case did not involve a request for an EUO, so *W.F.* is clearly distinguishable and is not persuasive in this case.
- [20] Otherwise, the applicant has not provided any “reasonable explanation” for his non-attendance at the EUO scheduled for April 6, 2021, pursuant to s. 34 of the *Schedule*.

Motion to Suspend Entitlement to Statutory Benefits

- [21] The language of s. 33(2) is clear, an insurer is entitled to require an insured person to attend one EUO per claim. Once the procedural elements are met, specifically regarding notice pursuant to s. 33(4), there is no reason, except incapacity, to deny such a request.
- [22] There is no debate that the applicant did not attend the EUO set for April 6, 2021. As noted above, I have been provided no “reasonable explanation” for this non-attendance. Similarly, I have not been provided any evidence of incapacity, pursuant to s. 32(2)(b) of the *Schedule*.
- [23] Taken together, the respondent’s motion to suspend benefits pending the applicant’s attendance at an EUO is granted from the date of non-attendance, i.e., April 6, 2021, pursuant to s. 33(6) of the *Schedule*.

Motion to Stay this Application Until the Applicant Attends an EUO

- [24] The respondent’s motion to stay this application until the applicant attends an EUO is denied. There is no provision in the *Schedule* that permits this form of relief.
- [25] The Tribunal is a creation of statute, and it is bound by the relief specifically enumerated in its empowering legislation. The remedies available to the Tribunal must, therefore, find some grounding in legislation.
- [26] Unlike a failure to attend an insurer’s examination set under s. 44(1) of the *Schedule*, there is no remedy similar to s. 55(1) for when an insured party fails to attend an EUO. Instead, the only remedy specified in the *Schedule* for failing to attend an EUO is a suspension of benefits, pursuant to s. 33(6).
- [27] The respondent has requested this stay based on the liberal interpretation of the Tribunal’s *Common Rules of Practice & Procedure* at Rule 3.1 or the *Statutory Powers Procedure Act* (“*SPPA*”) at s. 2. Alternatively, the respondent submits the Tribunal could impose a stay, pursuant to s. 25.0.1 of the *SPPA*, which permits

⁶ 2019 CanLII 148032 (ON LAT).

the Tribunal to determine its own procedures and practices.

[28] I do not find these arguments persuasive, and I am not prepared to grant a remedy that goes beyond the specific statutory wording of the *Schedule*. Of note, the Court of Appeal stated in *McKeown* that “the only possible consequence to an applicant who fails to attend an EUO is a suspension of benefits for the period of non-compliance” pursuant to s. 33(6) of the *Schedule*.⁷ I fail to see a reason why I should go beyond this clear wording from the Court of Appeal.

ORDER

[29] I order the following:

- i. The applicant’s entitlement to statutory benefits is suspended effective April 6, 2021, pursuant to s. 33(2) of the *Schedule*;
- ii. The respondent’s motion for a stay of this application is denied;
- iii. The parties shall attend the case conference scheduled for October 13, 2022 at 9:00 am via teleconference.

Released: June 7, 2022



Ian Maedel
Vice-Chair

⁷ *McKeown*, para. 67.