

CITATION: *State Farm Mutual Automobile Insurance Company v. Aslan*,
2016 ONSC 2725
COURT FILE NO.: 15-65937
DATE: 2016/04/26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY) David Raposo, for the Applicant
)
Applicant)
)
- and -)
) L. Craig Brown and Miryam Gorelashvili,
SIMON ASLAN, MATHIEU) for the Respondents
CORRIVEAU, HAWRAA DAHER,)
SAMAH GASMI, SANAA MAIKHAN,)
KHITAM MOHAMMAD-WAJIH and)
BUSHRA SHEIKH)
)
Respondents)
)
)
HEARD: April 13, 2016 (Ottawa)

REASONS FOR DECISION

HACKLAND J.

[1] The applicant, State Farm Mutual Automobile Insurance Company (State Farm) moves for an order that the respondents attend an Examination Under Oath pursuant to s. 33 of the Statutory Accident Benefit Schedule – O. Reg 34/10 (the schedule) in order to answer questions relevant to their entitlement to benefits under the schedule and an order allowing State Farm to withhold payment of Statutory Accident Benefits to each respondent until they attend the examination.

[2] There are seven respondents. They were each injured in motor vehicle accidents occurring in Ontario between 2011 and 2013. They were involved in separate accidents and do not know each other. However, they are all represented by the same counsel, Ms. Gorelashvili.

[3] They are all currently receiving Statutory Accident Benefits from State Farm. Three of the respondents have been accepted by State Farm as catastrophically impaired (CAT), three others have been medically assessed as CAT and the seventh respondent has been denied CAT designation and an adjudication is pending. State Farm has authorized attendant care benefits for all seven respondents. Each of the respondents suffers from cognitive, mood or psychiatric problems. As would be expected, State Farm has comprehensive medical records for each respondent and these records are before the Court on this motion.

[4] State Farm was in receipt of claims for payment of attendant care benefits from each of the respondents. Some or all of the attendant care was provided by one or both of two service providers who, in State Farm's opinion appeared to have been billing in an irregular, if not fraudulent manner. State Farm's witness deposes that when the attendant care invoices are cross-referenced, it appears that one of the service providers, in February of 2015, provided attendant care to three of the respondents for a total of 113.16 hours per week or 16 hours per day. In March of 2015, one of the service providers provided attendant care to two of the respondents in excess of 93 hours per week.

[5] I would note that the respondents submitted the attendant care claims to State Farm utilizing the statutory OCF-6 Expense forms to which the service providers' invoice is attached. The form requires the insured to certify that the information provided is true and correct.

[6] In March of 2015, State Farm began an investigation of the claims in question and formed a concern as to the validity of some of the claims. As a result, State Farm decided to conduct an Examination Under Oath of each of the respondents as is permitted by section 33 of the SAB's schedule. The respondents' counsel, Ms. Gorelashvili, advised that none of the seven respondents would attend for examination relying on section 33(2)(b) of the SAB's schedule which provides an insured is not required to be examined "when the person is incapable of being examined...because of his or her physical, mental or psychological condition."

[7] On this motion, the respondents oppose State Farms request for an order compelling them to attend an Examination Under Oath because (1) they were not provided with the "reason or reasons for the examination" as required by section 33(4)(b) of the SAB's schedule and (2) because of their "mental or psychological condition".

[8] Section 33(1) to (6) of the SAB's schedule provides as follows:

33. (1) An applicant shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:

1. Any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit.
2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.
3. The number, street and municipality where the applicant ordinarily resides.
4. Proof of the applicant's identity. O. Reg. 34/10, s. 33 (1).

(2) If requested by the insurer, an applicant shall submit to an examination under oath, but 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. O. Reg. 34/10, s. 33 (2).

(3) An applicant is entitled to be represented at his or her own expense at an examination under oath by such counsel or other representative of his or her choice as the law permits. O. Reg. 34/10, s. 33 (3).

(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 advance notice of the following:

1. The date and location of the examination.
2. That the applicant is entitled to be represented in the manner described 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. O. Reg. 34/10, s. 33 (4).**

(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. O. Reg. 34/10, s. 33 (5).

(6) 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). O. Reg. 34/10, s. 33 (6). (Emphasis added)

[9] With respect to notice, the respondents argue that they are not required to attend an Examination Under Oath until they have received proper notice. They say they were never given notice of the reasons for the examination as required by s. 33(4)3 of the schedule. Specifically, they were never told that State Farm wished to question them about their claims for attendant care benefits.

[10] I would note that the parties are in agreement that questioning about the attendant care claims was the reason for the proposed Examination Under Oath and that this information was first disclosed in the affidavit materials filed on this motion.

[11] I find on the evidence that the respondents were never given the notice required by s. 33(4) of the schedule and therefore, the respondents are not required to attend for examination unless and until they receive such notice. That is to say, providing the respondents with reasonable advance notice of the "reason or reasons for the examination" is a condition precedent to the respondents' obligation to attend, under section 33(4)3 of the schedule.

[12] In this case, when State Farm decided to examine the respondents, they sent a letter to each of them which, on the subject of the reason for the examination, said only this: "We are requesting the examination for the purpose of determining whether State Farm is liable to pay benefits." The respondents argue that this is not an adequate statement of the reasons for the examination. State Farm responds that this was not intended as a statement of the reasons for the examination but was merely a "courtesy letter" advising of the insurer's intended course of action. They explain that the reasons for the examination are to be found in their counsel's "proposed" Notice of Examination Under Oath which would have read as follows:

You are required to attend this Examination Under Oath in order to provide State Farm Mutual Automobile Insurance Company with information regarding the circumstances that gave rise to their Applications for Accident Benefits. This includes, but is not limited to, questions regarding the circumstances of the accident, your entitlement to specified benefits, your entitlement to medical and rehabilitation benefits, your claims for attendant care and housekeeping benefits, the treatment you have received and your possible ongoing entitlement to these benefits into the future.

[13] This notice of examination was never served on the respondents because in the interim, respondents' counsel advised of her clients' refusal to attend. As Mr Whitmore of State Farm explained in his supplementary affidavit:

...the reason Mr. Raposo has not served formal notices of examination pursuant to section 33 of the SABS is because immediately after his retainer, there was a blanket refusal by Ms. Gorelashvili to co-operate in scheduling the EUO including a mutually convenient date, time and location in scheduling the said EUO's, rendering the issuing of a "proper" section 33 EUO notice impossible.

[14] The substantive issue between the parties is as to what is required by way of "reasons or reasons for the examination" under s. 33(4)3 of the schedule. State Farm submits that the general or generic information in their proposed Notice of Examination is all that is required. They say that to be more specific, particularly in a case such as this, would remove a tactical advantage and possibly inhibit or hinder exploration of the benefit entitlement question sought to be explored in the examination. The respondents argue that fairness to the insured and the plain wording of the schedule requires disclosure of the real reasons(s) for the Examination Under Oath.

[15] State Farm relies on a recent decision by an arbitrator in *Kivell v. State Farm Mutual Automobile Insurance Company*, FSCO A14-008358 dealing with this issue. In this case, the insured refused to make herself available for examination under s. 33 of the SABS on the basis that insufficient reasons were provided. The arbitrator considered whether the requirement to give "reason or reasons" was a requirement of substance or of form. The arbitrator ruled:

Given that the provision is found in section 33(4) and not in 33(2), I find that the requirement to provide "the reason or reasons" is merely a matter of form, not one of substance. Accordingly, any wording that alerts the Applicant that questions will be asked about the matters giving rise to the claim is sufficient to comply with the requirement. The reason or reasons do not have to be detailed; they merely have to give the Applicant notice about the general type of questions that will be asked.

[16] State Farm also relies on several cases which hold that the only restriction placed on an insurer's questions is that the scope of the Examination Under Oath be limited to matters relevant to an insured person's entitlement to statutory accident benefits. In *Baig v. Guarantee Company of North America*, 2007 ONCA 847, the Court of Appeal stated at para. 25:

The purpose of the statutory examination is to provide insurers with the opportunity to obtain the knowledge of facts necessary to enable them to decide upon their obligations and to protect them against false claims. In my view, questions that are material to the insurer's liability and the extent thereof are within the scope of the statutory examination

[17] And at para. 27:

I recognize the force of counsel for Baig's submission that taking a broad view of the scope of the statutory examination could provide insurers with the opportunity to conduct baseless reviews of the underwriting of the insurance contract in an effort to find a basis to refuse claims. Undoubtedly, the statutory examination is not intended to permit insurers to embark on fishing expeditions or take blind shots in the dark. However, where the insurer has an objective and reasonable basis for suspecting fraud in the initial appraisal, questions about the matter are relevant.

[18] So, while it is clear that the scope of questions which may be asked at the Examination Under Oath are those which are broadly relevant to the insured's entitlement to SAB benefits, it does not follow that the "reasonable advance notice" of reasons to be given to the insured under section 33(4) of the schedule are satisfied by simply stating that the examination will relate to the insured's entitlement to accident benefits.

[19] In my opinion, a review of section 33 of the SAB schedule demonstrates that the Legislature sought to achieve a balance between an insurer's right to properly determine eligibility for benefits with the insured rights to convenience and fairness in the process by receiving reasonable advance notice of the examination, a right to counsel or other representation, a right to be told in advance of the reasons for the examination and a right not to be examined during a period of medical incapacity. This is reflective of the good faith obligations owed by an insurer and an insured in contracts of insurance and of general considerations of fairness to both parties.

[20] Further, while State Farm's proposed notice complies with ss. 33(4)4 of the schedule by specifically advising the insured that "the scope of the examination will be limited to matters that are relevant to the applicant's entitlement to benefits", there must be some meaning accorded to the insurer's ss. 33(4)3 obligation to advise of "the reason or reasons for the examination". The reasons must be something more than determining entitlement to benefits. Subsections 33(4)3 and 33(4)4 are quite separate and give rise to separate

obligations. I respectfully disagree with the arbitrator's observation in *Kivell* that the requirement to give reasons is "merely a matter of form, not one of substance".

[21] In the context of the present issues, ss. 33(4)3 would require State Farm to advise the respondents that the reason for the Examination Under Oath was to review the claims submitted for attendant care. Among other benefits, this would allow the insured and his or her representative to come prepared to discuss that issue and possibly to brief counsel and to bring along relevant documentation. It might also permit the insured and his or her counsel or physician to better assess whether the examination would engage a capacity issue under ss. 33(2)(b), as is claimed in this case.

[22] As noted above, no reason or reasons for the proposed examination in this case were ever given to the insured or their counsel and I therefore hold that the respondents are not required to submit to an Examination Under Oath at this time. State Farm's application is therefore dismissed.

[23] In the event State Farm wishes to serve a proper notice that includes the reason or reasons for the proposed examination, the respondents will be obliged to attend unless any or all of them are "incapable of being examined" because of their physical, mental or psychological condition within ss. 33(2)(b). The respondents' cross-motion on that issue is before me and may be renewed if necessary. Should that occur, the Court would expect proper affidavit evidence disclosing medical or psychological reasons for any claim of incapacity to be examined and addressing any accommodation issues which may arise. The affidavit of counsel, Ms. Gorelashvili currently before the Court, which attaches a brief medical note referable to each respondent is unsatisfactory, as is the practice of counsel appearing on her own affidavit.

[24] There will be no costs of this motion.



Justice Charles T. Hackland

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Respondents

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Released: April 26, 2016