



FSCO A14-004886

BETWEEN:

NIL CHOEUN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator Janette Mills

Heard: By written submissions due January 15, 2016, February 12, 2016 and February 19, 2016

Appearances: Mr. Scott Taylor for Mr. Nil Choemun
Ms. Ellen Gowland for Allstate Insurance Company of Canada

Issues:

The Applicant, Mr. Nil Choemun, was injured in a motor vehicle accident on September 6, 2013 and sought accident benefits from Allstate Insurance Company of Canada (“Allstate”), payable under the *Schedule*.¹ The parties were unable to resolve their disputes through mediation, and Mr. Choemun, through his representative, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

Pre-Hearing discussions were held on November 6, 2014 and on April 8, 2015 and an Arbitration Hearing date was set for January 25, 26, 27 and 28, 2016. Subsequently, on December 21, 2015,

¹ *The Statutory Accident Benefits Schedule – Accidents on or after September 1, 2010*, Ontario Regulation 34/10, as amended.

further Pre-Hearing discussions took place and the Arbitration Hearing date was adjourned to April 25, 26, 27 and 28, 2016 to allow for this Preliminary Issue Hearing to take place.

The issues at this Preliminary Issue Hearing are:

1. Is Allstate entitled to an Examination Under Oath?
2. If Allstate is entitled to an Examination Under Oath, should the Hearing dates be adjourned *sine die* to allow for the Examination Under Oath to take place?
3. If Allstate is entitled to an Examination Under Oath, what will be the consequences if the Applicant does not attend?
4. Are the parties entitled to their expenses for this Preliminary Issue Hearing?

Result:

1. Allstate is entitled to an Examination Under Oath.
2. The Hearing dates should not be adjourned *sine die* to allow for the Examination Under Oath to take place.
3. Allstate is entitled to suspend the Applicant's benefits for non-attendance at the Examination Under Oath.
4. The issue of expenses is deferred to the Hearing Arbitrator.

EVIDENCE AND ANALYSIS:

Background

The Applicant was in a motor vehicle accident on September 6, 2013. Subsequently, he submitted an Application for Accident Benefits (OCF-1) to Allstate along with an Employer's Confirmation Form (OCF-2) and a Disability Certificate (OCF-3). Allstate paid income replacement benefits, medical benefits and the cost of examinations until January 31, 2014, when the Applicant's benefits were terminated based on the Insurer Examination Report completed by a Dr. R. Zarnett, dated January 10, 2014.

Allstate sent two Explanation of Benefits (OCF-9s) to the Applicant, both dated January 22, 2014, advising the Applicant that it had terminated his income replacement benefits, effective January 31, 2014, and that no further medical benefits would be considered.²

The Applicant continued to submit treatment plans, which were denied for lack of up-to-date medical information that supported the need for the treatment requested.³ Subsequently, on July 7, 2015, due to what Allstate considered to be confusion surrounding when items were submitted to Allstate and the non-responsiveness of counsel for the Applicant, Allstate scheduled an Examination Under Oath for November 9, 2015.

On September 17, 2015, Allstate was informed by counsel for the Applicant, that the Applicant would not attend the Examination Under Oath. The Applicant continues to maintain this position.

The Position of Allstate

Allstate submits that pursuant to section 33 of the *Schedule*, it is entitled to an Examination Under Oath. It submits that section 33 is broad in nature and that it applies throughout the period that an Insurer is adjusting the claim and is not limited to the 10 day time limit referred to in section 36(4). Whilst section 36(4) requires an Insurer to respond in one of three ways to the initial application for benefits, this does not restrict or diminish the Insurer's general and ongoing option of requiring an Insured to attend an Examination Under Oath. For these reasons, Allstate is requesting an Order that the Applicant attend at an Examination Under Oath within 90 days of the date of my decision—and if the Applicant fails to comply with that Order, then his Application for Arbitration should be dismissed. Allstate further submits that the Arbitration Hearing should be adjourned *sine die* to allow for the Examination Under Oath to take place.

The Position of the Applicant

² Insurer's Book of Documents at Tab 5.

³ *Ibid.* at Tabs, 7, 8 and 9.

The Applicant submits that at no time during the adjusting of the Applicant's claim did Allstate elect to conduct an Examination Under Oath and that the request was not made until April 17, 2015, which is outside of the 10 day period referred to in section 33. As such, Allstate is statute-barred from obtaining an Examination Under Oath. Furthermore, the *Schedule* does not confer the power on an Arbitrator to compel an Applicant to attend for an Examination Under Oath or to dismiss the Arbitration for failure to attend an Examination Under Oath. The remedy for non-attendance is found in section 33(6) which provides that the Insurer may suspend an Insured's benefits for non-compliance. Since Allstate suspended the Applicant's benefits in January 2014, the point is moot.

Analysis

The Legislative Scheme

Duty of applicant to provide information

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).

(7) Subsection (6) does not apply in respect of a non-compliance with subsection (2) if,

- (a) the insurer fails to comply with subsection (4) or (5); or
- (b) the insurer interferes with the applicant's right to be represented as described in subsection (3). O. Reg. 34/10, s. 33 (7).

(8) If an applicant who failed to comply with subsection (1) or (2) subsequently complies with that subsection, the insurer,

- (a) shall resume payment of the benefit, if a benefit was being paid; and
- (b) shall pay all amounts that were withheld during the period of non-compliance, if the applicant provides a reasonable explanation for the delay in complying with the subsection. O. Reg. 34/10, s. 33 (8).

(9) Clause (2) (a) shall not be interpreted as prohibiting an additional examination of the applicant under oath, under Ontario Regulation 283/95 (Disputes Between Insurers) made under the Act, at the insurer's request that is conducted for the purpose of determining who

is liable under section 268 of the Act to pay statutory accident benefits in respect of the accident. O. Reg. 14/13, s. 4.

Application

36. (1) In this section and section 37, "specified benefit" means an income replacement benefit, non-earner benefit, caregiver benefit or a payment for housekeeping or home maintenance services under section 23. O. Reg. 34/10, s. 36 (1).
- (2) An applicant for a specified benefit shall submit a completed disability certificate with his or her application under section 32. O. Reg. 34/10, s. 36 (2).
- (3) An applicant who fails to submit a completed disability certificate is not entitled to a specified benefit for any period before the completed disability certificate is submitted. O. Reg. 34/10, s. 36 (3).
- (4) Within 10 business days after the insurer receives the application and completed disability certificate, the insurer shall,
- (a) pay the specified benefit;
 - (b) give the applicant a notice explaining the medical and any other reasons why the insurer does not believe the applicant is entitled to the specified benefit and, if the insurer requires an examination under section 44 relating to the specified benefit, advising the applicant of the requirement for an examination; or
 - (c) send a request to the applicant under subsection 33 (1) or (2). O. Reg. 34/10, s. 36 (4).
- (5) If the insurer sends a request to the applicant under subsection 33 (1) or (2), the insurer shall, within 10 business days after the applicant complies with the request,
- (a) pay the specified benefit; or
 - (b) give the applicant a notice described in clause (4) (b). O. Reg. 34/10, s. 36 (5).
- (6) If the insurer fails to comply with subsection (4) or (5) within the applicable time limit, the insurer shall pay the specified benefit for the period starting on the day the insurer received the application and completed disability certificate and ending, if the insurer subsequently gives a notice described in subsection (4) (b), on the day the insurer gives the notice. O. Reg. 34/10, s. 36 (6).

Is Allstate entitled to an Examination Under Oath?

Section 33 makes clear that an Insurer is entitled to request an Examination Under Oath and that an Insured “shall” submit to the Examination Under Oath subject to the conditions that there not be more than one Examination Under Oath and that an Insured cannot be requested to attend an Examination Under Oath when the Insured is suffering from a physical, mental or psychological condition.

Section 36(4) sets out the obligations on the Insurer within 10 days after receiving a completed application and disability certificate. These include the option to request an Examination Under Oath pursuant to section 33(2). The 10 day time limit in this section had been the subject of debate. However, in *State Farm Mutual Automobile Insurance Company and Williams*,⁴ Director’s Delegate Evans discussed the parameters of that time limit and found that it only applied to the limited circumstances at the beginning of the adjustment of a specified benefit, and does not preclude the insurer from paying the claim and then later requesting an Examination Under Oath. A request for an Examination Under Oath is pertinent to the Insured’s continuing entitlement to benefits and not just the initial entitlement to benefits.⁵

Director’s Delegate Evans cited with approval *Singh and State Farm Mutual Automobile Insurance Company*⁶ wherein the Arbitrator found that whilst section 36(4) requires an Insurer to respond in one of the three ways outlined to the initial application for benefits, this does not restrict or diminish the Insurer’s general and ongoing option of requiring an Insured to attend an Examination Under Oath pursuant to section 33.

The above makes clear that Allstate is entitled to an Examination Under Oath provided that Allstate complies with the parameters of section 33. Accordingly, I find that the Insurer is entitled to an Examination Under Oath in these circumstances.

⁴ FSCO Appeal P15-00001.

⁵ *Ibid.* at p. 7.

⁶ FSCO A12-007594 at p. 3.

If Allstate is entitled to an Examination Under Oath, what will be the consequences if the Applicant does not attend?

In the recent case of *State Farm Mutual Automobile Insurance Company and Zhang*,⁷ Director's Delegate Evans dealt directly with the issue of whether or not an Arbitrator has the jurisdiction to compel an Applicant to attend an Examination Under Oath. In that decision, on appeal, he found, *inter alia*, that an Arbitrator does not have jurisdiction to compel an Insured to attend an Examination Under Oath, and that the Preliminary Issue Hearing Arbitrator was wrong in staying the Application for Arbitration until such time as the Applicant had complied with the Insurer's request. Director's Delegate Evans reasoned that:

As set out in *Troubitsine*, our processes do not include examinations for discovery; the available remedy of suspending benefits already adequately addresses fairness between the parties, there is no authority to rewrite s. 33 to fashion a more adequate remedy anyway, and there are many other steps available in the process to deal with noncompliance regarding documentary production and other hearing-related issues.⁸

Section 33(6) makes clear that the Insurer is not liable to pay for a benefit in respect of any period during which the insured person fails to comply with a request for an Examination Under Oath. Therefore, I find that the consequences to the Applicant are that benefits will not be paid for the duration of the non-compliance.

If Allstate is entitled to an Examination Under Oath, should the Hearing dates be adjourned *sine die* to allow for the Examination Under Oath to take place?

Whilst Allstate is entitled to an Examination Under Oath, Director's Delegate Evans' decision in *State Farm and Zhang* makes clear that I have no jurisdiction to order that the Applicant attend one, and no proper jurisdiction to stay the proceeding to allow for attendance. Given the

⁷ FSCO Appeal P15-00050, January 13, 2016.

⁸ *Ibid.* at p. 2.

Applicant's position, I can see no discernable practical difference in adjourning the application *sine die*, as opposed to staying the application until compliance is forthcoming. To do either would be to exceed my jurisdiction.

The Applicant continues to assert that he will not attend an Examination Under Oath. Therefore, the only recourse available to Allstate is to suspend his benefits until such time as that occurs. Allstate has already suspended his benefits in January 2014, albeit for different reasons.

Conclusion

In conclusion, I find that Allstate is entitled to an Examination Under Oath and that the 10 day time limit does not restrict or diminish the Insurer's general and ongoing option of requiring the Applicant to attend an Examination Under Oath pursuant to section 33. I further find that the consequences of non-attendance at the Examination Under Oath are a suspension of benefits under section 33(6) of the *Schedule*. For the foregoing reasons, I find that the Hearing dates should not be adjourned *sine die* and the matter will proceed to the Hearing as scheduled.

EXPENSES:

Both parties request their expenses in this matter. Both parties set their expenses at \$1,000.00. In my view, it is more appropriate to leave the issue of expenses to the Hearing Arbitrator, who will have the benefit of full submissions prior to arriving at a decision.

Janette Mills
Arbitrator

March 14, 2016
Date



FSCO A14-004886

BETWEEN:

NIL CHOEUN

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, it is ordered that:

1. Allstate is entitled to an Examination Under Oath.
2. The Hearing dates should not be adjourned *sine die* to allow for the Examination Under Oath to take place.
3. Allstate is entitled to suspend the Applicant's benefits for non-attendance at the Examination Under Oath.
4. The issue of expenses is deferred to the Hearing Arbitrator.

Janette Mills
Arbitrator

March 14, 2016
Date