

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Tribunal File Number: 18-000533/AABS

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

Between:

P. F.

Applicant

And

Jevco Insurance

Respondent

DECISION

ADJUDICATOR: Brian Norris

APPEARANCES:

For the Applicant: Stanley Razenberg, Counsel

For the Respondent: Vlad Stefanescu, Counsel

HEARD: In writing on July 30, 2018

OVERVIEW

- [1] The applicant was involved in an automobile accident on October 20, 2015 and sought benefits from the respondent pursuant to *O. Reg. 34/10: Statutory Accident Benefits Schedule – Effective September 1, 2010* (the “Schedule”).
- [2] The respondent refused to pay for certain benefits sought by the applicant. The applicant has applied to the Licence Appeal Tribunal - Automobile Accident Benefits Service (the “Tribunal”) for resolution of this dispute.
- [3] Following the application and prior to the case conference, the respondent requested the applicant attend an examination under oath (EUO). The applicant did not attend the scheduled EUO.
- [4] As a result of the case conference a preliminary issue hearing was ordered to determine whether the applicant is obliged to attend at the EUO.

ISSUE

- [5] Is the applicant obliged to attend an examination under oath that was requested by the respondent after this application was submitted to the Tribunal?

RESULT

- [6] The applicant has refused to attend a properly scheduled EUO and is not compliant pursuant to section 33(2). The applicant is obliged to attend the EUO and, pursuant to section 33(6), the respondent is entitled to suspend the benefit(s) until the applicant attends the EUO. The adjudication of the substantive issues in dispute will proceed in accordance with Tribunal Rules and pursuant to the Order dated May 31, 2018.

BACKGROUND

- [7] The applicant filed an application with the Tribunal on January 17, 2018, disputing the respondent’s refusal to pay certain benefits. The respondent provided a response dated February 8, 2018.
- [8] On February 12, 2018, the respondent wrote to counsel for the applicant and requested the applicant attend an EUO. During telephone conversations between the offices of the parties’ counsel, counsel for the applicant agreed to produce the applicant for an EUO on March 13, 2018. The arrangement was confirmed in a letter from counsel for the respondent dated February 23, 2018. Later, the applicant retained new counsel and advised the respondent of this by letter dated March 9, 2018. The March 9, 2018 correspondence also requested the respondent cancel the scheduled EUO. The respondent did not cancel the EUO and the applicant did not attend the March 13, 2018 EUO. A new EUO has not been scheduled.

CAN THE RESPONDENT REQUEST AN EUO AFTER AN APPLICATION IS FILED?

- [9] The respondent submits that an insurer's right to an EUO is absolute and can be made after an application has been filed. The applicant does not dispute the respondent's position and relies on the argument the EUO notice was insufficient, invalidating the request and the applicant's requirement to attend.
- [10] Section 33 of the *Schedule* provides an insured shall submit to an EUO when requested by the insurer. The schedule provides two exceptions where an insurer may not request and EUO:
- the applicant has already attended an EUO in respect of matters relating to the subject accident; and
 - the applicant is medically unable to attend and an EUO.
- [11] In addition to these exceptions, there are notice requirements imposed upon the respondent, which I will outline later.
- [12] Considering the arguments before me and the *Schedule*, I find that the respondent may request an EUO after an application has been filed. There are no arguments before me which contradict this finding and the commencement of an application is not one of the two exceptions available to the applicant.

WAS THE EUO NOTICE PROPER?

- [13] Section 33 also provides certain requirements that the respondent must satisfy when scheduling an EUO. Failing which, the respondent is not permitted to suspend the benefit(s).
- [14] First, the respondent must make reasonable efforts to schedule the EUO at the applicant's convenience. Second, pursuant to section 33(4), the respondent must provide advance notice of the following details of the EUO:
- The date and location of the EUO;
 - That the applicant is entitled to be represented at the EUO;
 - The reason(s) for the EUO; and
 - That the scope of the EUO will be limited to matters relevant to the insured's entitlement to accident benefits.
- [15] The applicant does not argue the respondent failed to schedule the EUO at the applicant's convenience.
- [16] The applicant's position is the respondent failed to confirm the scope of the EUO was to be limited to matters that are relevant to the benefits claimed. The

applicant submits the phrase in the EUO notice stating the scope of the EUO would be “in addition to matters relevant in (the applicant’s) entitlement to benefits” contravenes section 33(4)4.

- [17] Additionally, the applicant submits the respondent’s notice failed to confirm the applicant is entitled to be represented by counsel at the EUO.
- [18] The respondent submits the notices provided are sufficient and any ambiguity in the first notice dated February 12, 2018 was remedied by the second notice dated February 23, 2018.
- [19] Considering the submissions and evidence before me, I find that together the February 12, and February 23, 2018 notices by the respondent are proper as they satisfy all the requirements of a proper notice. Specifically:
- the respondent made reasonable efforts to accommodate the applicant when scheduling the EUO;
 - the respondent provides the date, time and location for the EUO;
 - the respondent advises the applicant of the right to be represented at the EUO;
 - the respondent provides the reason(s) for the EUO – requiring detailed information as to the circumstances which led to the accident and details concerning the accident itself and resulting claims; and
 - the respondent provides the scope of the EUO will be limited to matters relevant to the applicant’s entitlement to Statutory Accident Benefits.
- [20] I acknowledge the applicant’s argument that the February 12, 2018 notice could be considered unclear regarding the notice of the scope of the examination. This lack of clarity is remedied in the February 23, 2018 letter, where the unclear language is removed.
- [21] Similarly, the February 12, 2018 notice advises the applicant of the right to be represented but the February 23, 2018 letter does not. Section 33(4) requires the respondent satisfy the above-noted EUO notice requirements in advance of the EUO and does not prohibit the respondent from satisfying the requirements through more than one letter.

SHOULD THIS PROCEEDING BE STAYED?

- [22] The respondent holds the position this proceeding should be stayed as a result of the applicant’s failure to comply with section 33(2). The respondent claims prejudice because, without an EUO, the respondent would be hearing evidence at the hearing on the substantive issues for the first time. The applicant did not respond to this position.

- [23] The proceeding will continue according to the Order dated May 31, 2018 for the following reasons. Although it may not be required, I see no statutory authority before for me to stay the proceedings as a result of failure to attend an EUO. Unlike non-attendance at a section 44 insurer's examination, where an applicant may be precluded from filing or proceeding with the application as a result of non-attendance, the *Schedule* does not provide an avenue to stay the dispute resolution proceedings in the course of a failure to attend and EUO.
- [24] Further, the respondent's claim of prejudice is remedied in two ways. First, because the applicant's entitlement to the benefit(s) is suspended as a result of the operation of section 33(6). Second, because the respondent has conducted insurer's examinations pursuant to section 44. The section 44 examination reports provide the medical basis of the respondent's position on the substantive issue(s) in dispute.

CONCLUSION

- [25] The applicant has refused to attend a properly scheduled EUO and is not compliant pursuant to section 33(2). The applicant is obliged to attend an EUO and, pursuant to section 33(6) the respondent is entitled to suspend the benefit(s) until the applicant attends an EUO. Regardless of the status of the applicant's attendance at an EUO, the adjudication of the substantive issues in dispute will proceed in accordance with Tribunal Rules and pursuant to the Order dated May 31, 2018.

Released: September 19, 2018



Brian Norris, Adjudicator