

INSURANCE LAW BULLETIN

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FSCO CONFIRMS INSURER'S RIGHT TO EXAMINATION UNDER OATH FOR SPECIFIED BENEFITS

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FSCO has recently clarified the time limits relating to an insurer's right to request an examination under oath for specified benefits.

In *State Farm v. Williams* (July 17, 2015), State Farm appealed Arbitrator Maggy Murray's decision that Mr. Williams was not required to attend an examination under oath ("EUO") on the basis that State Farm's request was too late. In this case, disputes arose between the parties regarding the applicant's entitlement to income replacement and housekeeping benefits. State Farm requested an EUO. The claimant attended the reporting centre but refused to answer any questions relating to specified benefits on the basis that the request was made outside of the requisite time period.

Arbitrator Murray concluded that the insurer was precluded from requesting an EUO pursuant to section 36(4)(c) of the SABS. Section 36(4) [section 35(3) of the 1996 SABS] provides that, upon receipt of a completed application and disability certificate, the insurer shall (a) pay the specified benefit; (b) request an insurer's examination; or (c) request information or an EUO under section 33. The response is to be provided by the insurer within 10 business days. Arbitrator Murray held that section 36(4) must be read disjunctively meaning that the insurer was required to provide notice of an EUO within 10 business days after receipt of the completed application and disability certificate. Therefore, State Farm was not entitled to rely on section 33 in suspending income replacement benefits.

State Farm appealed.

Director's Delegate David Evans allowed the appeal and upheld the insurer's right to complete an EUO relating to specified benefits. In the decision, he focused on whether the 10 day time limit extended beyond the initial application. He concluded that the time limit was only with respect to the initial determination of whether the insurer was going to pay the benefit in the first place. Since State Farm had chosen to pay the benefit within the 10 day limit, it had lost its right to suspend benefits under section 36(4) but still maintained its right to suspend the benefit under section 33 if the applicant failed to attend an EUO. Director's Delegate Evans went on to state the following:

To decide otherwise would also limit the insurer's continuing ability to obtain information under s. 33(1), in particular s. 33(1)1, "Any information reasonably required to assist the insurer in determining the person's entitlement to a benefit," as the same logic would apply. The SABS is replete with examples where the insured is required to provide ongoing or updated information, information that would be available long after the initial 10 business days of receipt of the application and certificate. *It would be absurd if the only enforcement capability of the insurer regarding further information was that short period.* (emphasis added).

Director's Delegate Evans' reinforced his position by citing section 37(2) of the SABS. Section 37(2) relates to the "determination of continuing entitlement to specified benefits." Specifically, this section states that "an insurer shall not discontinue paying a specified benefit to an insured person unless... (f) the insurer is no longer required to pay the specified benefit by reason of ...subsection 33(6)..." Under section 33(6), an insurer is not liable to pay a benefit during any period that the insured fails to provide information or submit to an EUO.

Ultimately, the insurer's right to request an EUO was held to be pertinent when addressing an insured's *continuing* entitlement to benefits and not simply their initial entitlement. Director's Delegate Evans further stated that limiting an insurer's right to request an EUO to within 10 days of the application for specified benefits would result in "a great deal of contention" as it would inevitably lead to decisions about which questions were proper (especially considering that many questions relating to other benefits could also be applicable to specified benefits). Such a finding would go against the broad principle outlined in section 33(5) of the SABS which describes the scope of the examination as "matters that are relevant to the applicant's entitlement to benefits."

Commentary

Director's Delegate Evans' decision upholds the traditionally broad and expansive reading of section 33 of the SABS. Not only does this decision confirm the insurer's right to obtain information reasonably required in determining ongoing entitlement to a specified benefit, it allows the insurer the flexibility to make the request when and if it becomes necessary. However, a final determination is not yet known as an application for judicial review of this decision was filed on August 17, 2015.