Appeal P15-00001

OFFICE OF THE DIRECTOR OF ARBITRATIONS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Appellant

and

NEIL WILLIAMS

Respondent

BEFORE: David Evans

REPRESENTATIVES: Darrell March for State Farm Mutual Automobile Insurance Company
Alexander Voudouris for Mr. Neil Williams

HEARING DATE: June 10, 2015

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated December 5, 2014 is allowed. Paragraphs 1, 2, 3 and 5 of the Arbitrator's order are revoked, and the following substituted:

    1. State Farm is entitled to conduct an examination under oath pursuant to s. 33(1.1) of *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended, with respect to income replacement and housekeeping benefits.
    2. Mr. Williams did not submit to an examination under oath on November 29, 2013.
    3. State Farm is entitled to rely on s. 33(2) of the *Schedule* to suspend income replacement benefits.

2. The determination of the expenses of the arbitration are remitted to the Arbitrator.

3. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested pursuant to the *Dispute Resolution Practice Code* (Fourth Edition, Updated — January 2014), but as set out below and within 45 days of the date of this decision.

David Evans
Director's Delegate

July 17, 2015
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Williams was injured in a motor vehicle accident on August 18, 2008. On October 7, 2008, State Farm began paying him income replacement benefits (IRBs) and housekeeping benefits under the 1996 *SABS*.[1] In July 2013, counsel for State Farm sent him a notice for an examination under oath (EUO) for November 2013 related to those benefits. Mr. Williams attended but refused to answer any questions dealing with them on the basis that State Farm's request for the EUO was too late. State Farm then suspended his IRBs pending compliance with the request. The parties relied on the 2010 *SABS*[2] in doing so.

State Farm appeals Arbitrator Murray's finding that under the 2010 *SABS*, Mr. Williams was not required to attend the EUO because State Farm's request for it was too late. Accordingly, she found State Farm had no legal basis for suspending his IRBs. She also stated in her order that Mr. Williams had submitted to an EUO, and found he was entitled to arbitration expenses.

Both parties agree that since this was a 2008 accident the 1996 *SABS* was at issue, so the Arbitrator's order cannot stand as it is. Below, I may refer to the 1996 *SABS* as the old *SABS* or *OS* and the 2010 *SABS* as the new *SABS* or *NS*.

II. BACKGROUND

There is a general provision in s. 33 of both *SABS* to request information or EUOs related to matters that are relevant to the person's entitlement to statutory benefits. Failure to comply with a proper notice entitles the insurer to not pay benefits, or suspend them if they were being paid, pending compliance with the request.

[1] *The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended (*OS*).

[2] *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended (*NS*).

However, there are separate provisions regarding an initial claim for a "specified benefit," namely "an income replacement benefit, non-earner benefit, caregiver benefit or a payment for housekeeping or home maintenance services": s. 35(1) *OS,* s. 36(1) *NS.* These deal with the determination of, first, initial entitlement to the specified benefit, s. 35 *OS* and s. 36 *NS*, or "sections 35/36," and, second, continuing entitlement, s. 37 in both *SABS*.

Sections 35/36 provide rules about requesting EUOs when an insured person applies for specified benefits, like the IRB and housekeeping claims made by Mr. Williams. Insureds claiming a specified benefit have to provide a recent disability certificate along with their benefit application: s. 35(2) *OS*, s. 36(2) *NS*. In turn, insurers are given a time limit of 10 days after receiving the application and certificate to take certain steps, such as paying the benefit, requesting further information or an EUO, or requesting an insurer's examination: s. 35(3) *OS*, s. 36(4) *NS*. The question is whether the time limits extend beyond the initial application for specified benefits.

State Farm took the position that, once it decided to pay IRBs, it was not further limited by sections 35/36 and could request the EUO under the general provision in s. 33. The Arbitrator found that s. 33 is modified by sections 35/36. She found that under s. 36(2) *NS*, the insurer could pay the benefit or request the EUO but not both. Since it had paid the benefit, it could not request an EUO.

III. ANALYSIS

I will analyze both *SABS*, as the appeal turned on the same issues and the provisions in the two *SABS* are basically the same.

Section 33 in both *SABS* is entitled "Duty of applicant to provide information." The old *SABS* refers to a person applying for a benefit, and the new *SABS* to an applicant; I give no particular weight to the slight difference in terminology. Both the right of an insurer to ask for certain information and to request an EUO are referenced by sections 35/36, as we will see, and also s. 37. The right to information is contained in s. 33(1), and in particular paragraph 1: "Any information reasonably required to assist the insurer in determining the person's/applicant's entitlement to a benefit." The right to an EUO is set out s. 33(1.1) *OS*, s. 33(2) *NS*, but the insurer

is limited to only one examination[3] and it can only be requested where the person is capable of being examined:

Old SABS	New SABS
(1.1) If requested by the insurer, a person who applies for a benefit under this Regulation as a result of an accident shall submit to an examination under oath, but is not required to, (a) submit to more than one examination under oath in respect of matters relating to the same accident; or (b) 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.	(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.

As can be seen, a person can only be asked to submit to one EUO and only if the person is fit. The next couple of subsections deal with the terms of the insurer's request, then s. 33(1.4) *OS*, s. 33(5) *NS* sets out that the insurer shall limit the scope of the EUO to matters that are relevant to the person's/applicants entitlement to benefits under the *SABS*.

What follows is the insurer's power under s. 33(2) *OS*, s. 33(6) *NS* to enforce a reasonable information request or a valid EUO request[4] by not being liable to pay a benefit in respect of any period during which the insured person failed to comply with the request.

Finally, s. 33(4) *OS*, s. 33(8) *NS* provides that, if there is compliance with a request for information or an EUO after non-compliance, paragraph (a) provides that benefits are reinstated if they were being paid, and paragraph (b) provides that benefits that were not paid prior to compliance may be paid if there was a reasonable explanation for the delay in compliance.

[3]With the exception now under the new *SABS* in s. 33(9) regarding disputes between insurers.

[4]The insurer remains liable to pay if it gave faulty notice or interfered with the insured's/applicant's right of representation: s. 33(3) *OS*, s. 33(7) *NS*.

It is important to note that the subsection just cited makes it clear that the duty to provide information or submit to an EUO applies not only to new claims but to existing claims, since paragraph (a) provides that once there is compliance, the insurer "shall resume payment of the benefit, if the benefit was being paid." This shows the broad nature of s. 33 in both *SABS*, in that it applies throughout the period that an insurer is adjusting a claim, including at points where the insurer is paying benefits, and not just at the beginning of the claim, where it is deciding whether or not to pay the benefit.

I will now turn to the provisions regarding specified benefits. As already mentioned, insureds have to include a disability certificate along with their application. The insurer then has options subject to a 10-day time limit, such as paying the benefit, requesting information or an EUO, or requesting an insurer's examination (IE). The general principle I find in these provisions is: if an insurer exercises one of its other options instead of paying the benefit, the 10-day time limit for determining whether it will pay the benefit is extended until the option is complied with, at which point a fresh 10-day time limit starts. In fact, an insurer can defer making a decision about payment until it has requested and conducted an EUO and then requested and received an IE report. The options are set out in s. 35(3) *OS*, s. 36(4) *NS*:

Old SABS	New SABS
35 (3) Within 10 business days after the insurer receives the application and completed disability certificate, the insurer shall, (a) pay the specified benefit; (b) send a request to the insured person under subsection 33 (1) or (1.1); or (c) notify the insured person that the insurer requires the insured person to be examined under section 42	36 (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).

Arbitrator Murray drew a distinction between these two subsections. With respect to s. 36(4) *NS*, the Arbitrator found that since an insurer cannot simultaneously pay the specified benefit under s. 36(4)(a) and deny it under s. 36(4)(b), the "or" in s. 36(4) must be read disjunctively (that is, the "or" was exclusive, meaning one choice or the other but not both). Thus, the insurer could pay the benefit or request an EUO, but not both. By that reasoning, State Farm, having decided to pay the benefit, could not later request an EUO.

However, I find the better way to approach both s. 36(4) *NS* and s. 35(3) *OS* is to think of them as setting time limits, with the ultimate time limit of paying the specified benefit or determining that it should not be paid. This analysis applies to either *SABS*. Further, for the reasons set out below, I find the time limit only applies to the limited circumstances at the beginning of the adjustment of a specified benefit claim and does not preclude an insurer from initially paying the claim and then, later, requesting information or an EUO under s. 33(1) or 33(1.1) *OS*, 33(2) *NS*.

The first extension to the ten business day time limit is if the insurer decides to request the information in s. 33(1) or request an EUO under s. 33(1.1) *OS*, s. 33(2) *NS*, or both, in which case the time limit for requesting an IE is extended:

Old SABS	New SABS
(4) If the insurer sends a request to the insured person under subsection 33 (1) or (1.1), the insurer shall, within 10 business days after the insured person complies with the request, (a) pay the specified benefit; or (b) notify the insured person that the insurer requires the insured person to be examined under section 42 [request for an IE].	(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) [request for an IE].

It should be noted that, unlike s. 33(4)(a) *OS*, s. 33(8)(a) *NS*, there is no reference to resuming a suspended benefit, but simply paying the specified benefit. The assumption is that the insurer has opted not to pay the benefit but rather is waiting until it has received the requested information or conducted the EUO, or both. This highlights the significant difference between the roles of sections 35/36 and the role of s. 33: with the former, the insurer is still at the beginning of the

process and has not even necessarily made any payment but is conducting further investigation, whereas in the latter the request for information and/or EUO has occurred after this initial stage, as benefits may be suspended until compliance. This power is confirmed in s. 37, "Determination of continuing entitlement to specified benefits," discussed below.

In any event, (b) above gives the insurer the further option of requesting an IE under s. 42 *OS*, s. 44 *NS*. There are many details about the IE process that I do not need to go into: the main point is that, generally speaking, the insurer is only required to pay the specified benefit if it finds the benefit (or a portion thereof) payable pursuant to the IE, as set out in s. 35(12) *OS*, s. 36(8) *NS*.

Finally, there is a sanction under s. 35(14) of the old *SABS* if the insurer fails to deliver the IE report or its determination, or under s. 36(6) of the new *SABS* if the insurer fails do anything within the 10 business days. Subsection 36(6) of the new *SABS* specifically refers to "the applicable time limit," which is one reason I said it made more sense to think of time limits and their extensions when talking about sections 35/36.

However, it is important to remember the focus of the time limit: a determination about whether or not to pay the specified benefit. It is about the process leading to that determination. That is why I disagree with this statement of the Arbitrator:

> Section 36 of the current *Schedule* modifies s. 33 by placing a time limit on when an examination under oath can be requested. According to s. 36 of the *Schedule*, an insurer must put an insured on notice of its request for an examination under oath within 10 business days of receiving an application for a specified benefit and completed disability certificate.

I find that the time limit is only in respect of the initial determination of whether an insurer is going to pay a specified benefit in the first place. That is, the time limit applies to the process of determination set out in sections 35/36 and not to s. 33. Thus, in this case, having paid the benefit within the 10 days, the insurer lost its right to suspend benefits simply by making a request for information or for an EUO; rather, it only obtained the right to suspend under the general provision in s. 33 if the insured failed to submit to the EUO. (Mr. Williams maintains that, since he attended the EUO, he submitted to it. I will deal with that point later.)

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.

I am reinforced in that finding by s. 37 of both *SABS*, entitled "Determination of continuing entitlement to specified benefits," and its provision under s. 37(2) for the situation where an insured has failed to provide the requested information under s. 33(1) or attend a requested EUO under s. 33(1.1) *OS*, s. 33(2) *NS.* Under the general provision in s. 33, the insurer is therefore not liable under s. 33(2) *OS*, s. 33(6) *NS* "to pay a benefit in respect of any period during which the insured person failed to comply." This power to discontinue paying benefits is extended to specified benefits as follows:

Old SABS	New SABS
37 (2) An insurer shall not discontinue paying a specified benefit to an insured person unless … (e) the insurer is no longer required to pay the specified benefit by reason of … subsection … 33 (2) …	37 (2) 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) …

Thus, a request for an EUO or reasonably required information under s. 33 is pertinent to the insured's *continuing* entitlement to benefits and not just the *initial* entitlement to benefits. That is why a failure to provide that information or submit to that EUO can result in a discontinuation of the payment of the specified benefit under s. 37(2).

Furthermore, if insurers were limited to requesting an EUO within 10 days of an application for specified benefits or foregoing it and being limited at a later EUO to questions unrelated to the specified benefits, then the result would be a great deal of contention. Mr. Williams submits that this case was really a "refusals motion," meaning a motion about which questions were proper at the EUO. Since many questions about other benefits could also be applicable to specified benefits, there would inevitably have to be decisions about which questions were proper and

which not. This goes against the broad principle set out in s. 33(1.4) *OS*, s. 33(5) *NS* that the scope of the EUO is "matters that are relevant to the person's/applicant's entitlement to benefits" in the *SABS*. Insurers would also be more likely to request EUOs regarding specified benefits right at the start, delaying payment to insureds until they submitted to the EUOs, and possibly causing even further delay while IEs were conducted.

I prefer Arbitrator Bayefsky's formulation in *Singh and State Farm Mutual Automobile Insurance Co*., (FSCO A12-007594, August 22, 2014), that while s. 35(3) "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 EUO pursuant to section 33" – assuming of course that the insurer did not exercise its option to conduct an EUO under s. 35(3) *OS*, s. 36(4) *NS*, as insurers only have one opportunity to conduct an EUO.

Accordingly, I find the Arbitrator erred when she found that State Farm was precluded from proceeding with an EUO. The appeal is allowed.

The Arbitrator also stated in her order that Mr. Williams submitted to the EUO on November 29, 2013, although in the body of her decision she simply reaffirmed that State Farm was precluded from proceeding with an EUO. In any event, I find that as a matter of law, if an insured is requested to attend an EUO with respect to specified benefits but refuses to answer any questions about those benefits, the insured cannot be said to have submitted to an EUO. The appeal is allowed, and State Farm is entitled to conduct an EUO because Mr. Williams has not yet submitted to one.

The Arbitrator found that State Farm was not entitled to suspend IRBs for Mr. Williams's failure to comply with a request for an EUO because it was not entitled to request one. I find that was in error because State Farm was entitled to request an EUO and Mr. Williams did not comply with the request.

The Arbitrator found that s. 33(8) of the new *SABS*, s. 33(4) of the old *SABS*, did not apply. This is the provision that requires the insurer to resume paying the benefit, if a benefit was being paid, upon compliance, and also requires it to pay the withheld amounts if the insured had a "reasonable excuse" for not attending. Mr. Williams submits that, if State Farm is successful on appeal, then he had a "reasonable excuse." However, in that regard, Mr. Williams has not yet attended an EUO, so to that extent s. 33(8) does not apply, and there is no need to make a ruling on that point.

The Arbitrator also awarded arbitration expenses to Mr. Williams, although she did not provide any reasons other than to say she was exercising her discretion to do so. The matter of arbitration expenses is remitted to her, where the fact that Mr. Williams was ultimately unsuccessful will have to be considered. State Farm submits that I should make an order about arbitration expenses, but I shall only deal with appeal expenses.

State Farm requests that I make an order that Mr. Williams attend at an EUO, but I have no power to order such attendance. State Farm has the right to suspend payment pending his attendance in any event.

In conclusion, the appeal is allowed, and State Farm is entitled to continue suspending payments of Mr. Williams's IRBs until he submits to an EUO where questions about matters that are relevant to his entitlement to IRBs may be asked.

IV. EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested within forty-five days of this decision. The request shall be accompanied by a Bill of Costs describing the expenses claimed, the services received and the costs, as well as written submissions regarding entitlement to or the quantum of these expenses, or both, as are in dispute.

	July 17, 2015
David Evans Director's Delegate	Date