

Ontario Court of Appeal on “Reasons” for an EUO: Aviva Insurance Company of Canada v. McKeown

In *Aviva Insurance Company of Canada v. McKeown*, the Ontario Court of Appeal has clarified the law on “reasons” to be provided by an Insurer when requesting an examination under oath pursuant to section 33 of the *Statutory Accident Benefits Schedule*, O. Reg. 34/10.

Aviva had requested that six applicants attend EUOs pursuant to section 33 of the *SABS*. The Applicants demanded that Aviva provide a “reason” in the sense of a “justification” for its request to conduct EUOs. Aviva brought an application to the Superior Court for a declaration that a justification was not required to compel an applicant to attend an EUO. The application judge dismissed the application. In keeping with an earlier decision of the Superior Court in *State Farm v. Aslan*, the application judge determined that the insurer must provide a “justification” to compel attendance at an EUO. The application judge reasoned that the requirement to provide the “actual reason” or “justification” for the EUO was in keeping with the insurer’s obligation of good faith and prevented an increase in the overall cost of the system.

On appeal, the Court of Appeal set aside the application judge’s decision and concluded that insurers are not required to provide a justification in their notice of an EUO. The Court of Appeal found that in adopting the meaning “justification” from the word “reason,” the application judge drew unsupported inferences, employed extraneous considerations, and failed to consider the entire legislative context of section 33 (4) 3 of the *SABS*.

The Court of Appeal reasoned that requiring an insurer to provide “justification” for its request for an EUO was not in keeping with the cooperative approach to information sharing throughout the *SABS*. Whereas the right of an insurer to obtain information is specifically qualified in other provisions of the *SABS*, such as section 44, which requires examinations to be “reasonably necessary,” section 33 does not contain any such qualifications. Rather, the section 33 (4) requirement to provide notice of the “reason or reasons for the examination” are akin to the other procedural requirements set out in that section which require reasonable efforts to give notice of the EUO and to schedule same for a time and location that is convenient for the applicant. The court also noted that the application judge’s reasons for requiring insurers to provide a justification for requesting EUOs to prevent them from abusing the system were unfounded. The statutory scheme already addresses potential abuse of EUOs by insurers; an applicant can refuse to attend an EUO they regard as needless and abusive and still proceed to an arbitration at FSCO or a hearing at the LAT.

Thus, in citing the FSCO arbitration decision of *Kivell v. State Farm* with approval, the Court of Appeal determined that a general statement of the purpose of the EUO that gives the applicant notice of the general type of questions that will be asked is sufficient to satisfy the “reason or reasons” requirement of section 33 of the *SABS*.

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