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The Examination Under Oath: Underused and Underappreciated

An insurer is at a sizeable disadvantage when a claimant chooses to proceed to Arbitration as opposed to Litigation in a claim for accident benefits. Among other things, an insurer does not have a right of discovery in an Arbitration and accordingly will typically not have an opportunity to assess how a claimant will present as a witness, (or even meet her), until the Arbitration. Although the claimant will most often attend at the pre-hearing at the Financial Services Commission of Ontario, (FSCO), her contribution to the discussions is normally limited to a few words at best. Insurers are left essentially to guess-work and speculation about the claimant's credibility, key details of her life, and substantive matters about her claim. As of October 1, 2003, however, an important provision was enacted which has granted insurers the right to proceed with an examination under oath. The examination under oath is a powerful tool which is a right given to an insurer and not the insured. Yet, for some reason, this tool is being underused and underappreciated by insurers.

Section 33 (1.1) of the *Schedule* provides that an insured "shall" submit to an examination under oath if so requested by an insurer but is only required to attend at one examination for that particular accident. Accordingly the choice of when to conduct the examination under oath is important as the insurer only gets one shot. The insurer is not restricted to asking questions regarding the specific benefits that are in dispute as the section provides that: "the insurer shall limit the scope of the examination under oath to matters that are relevant to the person's entitlement to benefits". This means that an insurer can ask all relevant questions regarding his "entitlement to benefits" as opposed to just benefits that are in dispute.

The section is silent as to the time frame in which the examination under oath must be conducted. The Court of Appeal in *Baig v. Guarantee Company of North America* (2007) (leave to appeal to the Supreme Court of Canada denied), concluded that even in cases in which the insured has commenced a civil action against the insurer, this did not affect the separate statutory entitlement of the insurer to conduct an examination under oath. The insurer's right to conduct an examination of the insured under oath is statutory. As such, an insurer has the right to proceed with an examination under oath even after the commencement of a Regular Rules Statement of Claim, a Simplified Procedure Statement of Claim, a Small Claims Court Claim, or an Application for Arbitration. Indeed, an insurer would have the right to conduct both an examination under oath in a Regular Rules Court Action and a separate examination for discovery.

The main drawback of the examination under oath is the consequences of non-cooperation. Section 33(1.1) (2) states that the repercussions of the claimant failing to attend the examination is that the insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply. In *Salah v.*

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State Farm (2005) and *Balanki and Zurich* (2005) the insurers sought to stay the arbitration due to the non-attendance of the insured at the examination under oath similar to the failure of an insured to attend at a section 42 assessment. The Arbitrators concluded that the only remedy provided under the section is a suspension of benefits (section 33(2)) or if non- compliance is unreasonable, the loss of those benefits for the period of non-compliance (section 33(4)). Otherwise, the Arbitrators are powerless to order any other sanction.

As such, if a matter has proceeded to Arbitration on account of the fact that all benefits have been terminated, then there is no repercussion to the claimant failing to attend at an examination under oath. The fact that his benefits have already been terminated means that a suspension of his benefits is irrelevant. However, if the claimant is only proceeding to Arbitration with respect to one benefit such as medical benefits, but is still receiving other benefits such as an income replacement benefit, an insurer is entitled to suspend or ultimately deny all of his benefits (including in this example income replacement benefits) for the time period to which the claimant fails to attend at the examination under oath. The suspension of the benefits is not limited to simply the benefits that are in dispute.

Accordingly, the most effective use of the examination under oath provisions is to conduct the examination when the claimant has something to lose by failing to attend. This means that an insurer has to be strategic regarding when to conduct the examination.

For instance, in questionable soft tissue injury claims where the claimant is receiving income replacement benefits, it may be beneficial to examine the claimant to determine whether their complaints are legitimate, the nature of their job, whether they have obtained another job, attempts to seek other work, and assess credibility. In claims involving caregiving/housekeeping/attendant care benefits an insurer would have the right to inquire as to the claimant's pre-accident activities, the family situation, post-accident activities, the invoices submitted, and the veracity of the claim. For medical benefits, the extent to which the claimant has incurred a benefit from the treatment, whether they are in fact going for treatment, and why they continue to go if their condition is not improving. If surveillance has been obtained then this would be a good opportunity to specifically question the claimant in order to ascertain the usefulness of same.

For more substantial claims, it is an opportunity to meet and assess the claimant with an eye on what will transpire into the future. For claims involving potentially fraudulent circumstances, an examination under oath is an essential investigative tool. If an insurer alleges fraud on behalf of the claimant, but cannot prove this at the Arbitration, then there is a distinct possibility that the insurer be obligated to pay both the denied accident benefits and a special award.

At the examination under oath, the insurer has an opportunity to determine through the questioning what further records are required and ought to be obtained. Although there is no statutory right to ask for an undertaking at the examination under oath, an insurer can certainly make requests for documentation pursuant to section 33 of the *Schedule*. Most importantly, the examination under oath transcript is admissible evidence at trial/arbitration and may be used effectively to cross-examine the claimant if her evidence is contradictory.

There is no question that the vast majority of claims revolve around the credibility of the claimant. The best way of assessing this is to proceed to an examination under oath and put the claimant under a microscope. Although there is a short term cost for retaining a lawyer to conduct the examination under oath, there is a distinct likelihood that there will be a cost savings down the line. At the very least, in all circumstances, the insurer will have a more complete and better understanding of the nature of the claim.

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