BEARDWINTER LLP
The Defender
Vol.11 | Issue 2
August, 2017

The Examination Under Oath: Underutilized and Under-Appreciated (Updated and Revised)

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Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Introduction

The evaluation of any personal injury claim primarily revolves around a question of credibility. The impact of the injuries suffered by one claimant is often significantly different compared to the same injuries suffered by another claimant. There is no scientific-medical diagnostic tool that can predict to what extent one person's injuries will result in a long term disability while as someone else will suffer a temporary health setback. At the dispute stage we are often left to investigate a claim on the basis of competing reports from medical doctors; some of which are well known for their biases. How a claimant presents on paper is often very different from their representations in person. There really is no better substitute than meeting a claimant in person, asking her the tough questions, and getting a sense as to how she will present in front of a decision maker.

Prior to the introduction of the LAT, insurers did have the opportunity to meet the claimant. If the dispute proceeded by way of litigation then we would have the right to conduct an examination for discovery. If the dispute was advanced by way of Arbitration, then in the majority of cases we would at least get a chance to meet the claimant in-person at a pre-hearing. While as the conversation at the in-person pre-hearings was not as effective as at a discovery, it was more impactful than the present telephone case conferences. It is hard to get a sense of a person over the phone and the procedures do not easily lend themselves to an evaluation of the claimant.

To this end, the claimant has the advantage in the present disputes. Claimant counsel will have met their client in order to determine credibility, strengths, weaknesses, secrets, and thereby plot the best way to win the case. Insurers are left speculating in the dark; which often leads to a more challenging time evaluating the risks and making decisions.

The great equalizer in this dispute process is the examination under oath. By conducting an examination under oath an insurer has the opportunity to re-shape the litigation landscape to investigate possible misrepresentation claims, evaluate probable priority disputes, and evaluate important accident benefits disputes. While as some insurers use this investigative tool more than others, it is presently underused and underappreciated.

Frequency And Strategic Considerations Of An Examination Under Oath

A claimant is obligated to attend a maximum of two examinations under oath: (1) one regarding a claim for accident benefits and (2) regarding a private dispute between insurers. The latter type of examination under oath occurs in the course of a private arbitration dispute between insurers and often revolves around specific questions pertaining to liability (loss transfer), dependency, coverage, and other related inquiries (see section 33 (9)).

Pursuant to section 33(2) "if requested by the insurer, an applicant shall submit to an examination under oath". This is important as the claimant does not have the right to refuse to attend. An insurer has the right to compel a claimant to attend at an examination under oath and claimants must present themselves. We often find that where there is a legitimate suspicion of fraud or questionable circumstances that claimants do not show-up for the examinations under oath. This is often the best indicator that our suspicions are justified and allows an insurer to suspend payment of all present as well as future accident benefits. When a claimant fails to attend at an examination special attention should be taken to ensure that all proper procedures were followed and that the notice was legally binding.

It is pivotal to note that if the appropriate questions are not asked at the examination under oath, or a change in circumstances arises, an insurer is not entitled to a second examination (see Section 33(2)(a)). This makes a decision as to when to conduct the examination and the types of questions to be asked very important. For example, in a case involving a dispute over a disability for entitlement to income replacement benefits, it might be premature to question the claimant three months post loss about her injuries. If that same claimant is still not working three years post loss an insurer does not get a second chance to conduct a further examination under oath.

The right of the insurer to determine the time frame to conduct the examination for under oath was upheld on appeal by the Director's Delegate in *State Farm and Williams* (2015). In that case, it was found that there is nothing preventing an insurer from initially paying the claim and then later requesting an examination.

What Questions May Be Asked And Consequences For Refusal To Answer

A common mistake is the assumption that questions may only be asked regarding the issues that are presently in dispute. Section 33(5) states that "the insurer shall limit the scope of the examination under oath to matters that are relevant to the applicant's entitlement to benefits described in this Regulation". An insurer is entitled to ask questions regarding any issues that are relevant to the applicant's entitlement to benefits whether or not these claims have been advanced or have been disputed. For instance, if a claimant is being paid attendant care benefits based on the claimant's Form 1 without any dispute, an insurer is still entitled to ask all appropriate questions that relate to this claim. Another example is if the claimant has not advanced a claim for non-earner benefits, but there is a possible right to claim for this benefit, an insurer is well-within their rights to ask questions regarding same.

Similarly, some counsel have argued that once a benefit is denied that there is no right to conduct an examination under oath regarding same. The argument is that since this benefit has been denied that there is no justification for submitting the claimant to an examination to further investigate the entitlement to the benefit. In *Echelon General Insurance Company v. Henry*, (2011), the Judge found that an insurer's right to conduct an examination under oath under section 33 of the *Schedule* is not extinguished by either a denial or termination of payment of a particular benefit or the commencement of litigation. This is important for two reasons. First, an insurer is entitled to conduct an examination under oath even if a benefit has been denied. Second, an insurer is entitled to conduct an examination under oath even if a LAT application has been commenced. The latter is particularly important for claims that are likely to proceed to Arbitration.

With that being said, an insurer does not have free reign to ask any question that it considers reasonable at the examination under oath. The questions must be relevant to a possible available claim for accident benefits. This can get tricky and results in disputes at the examination under oath as to what is reasonable. For instance, questions about a claimant's restrictions in performing their housekeeping functions before and after the accident may not be reasonable in non-

catastrophic claims as there is no longer an entitlement to housekeeping benefits. However, these questions would be reasonable to assess a claimant's activities of daily living when evaluating a possible claim for non-earner benefits. Lawyers preparing for examinations under oath should structure their questions to make sure that the inquiry is relevant to a claim for possible benefits.

There are repercussions if a claimant refuses to answer reasonable questions. While as the insurer only gets one opportunity to conduct the examination under the oath, the insurer does get a fair opportunity. If the claimant refuses to answer proper questions asked then he may be obligated to return for a further examination. In *Aviva Insurance Company of Canada v Balvers*, (2007) the Judge ordered the insured to re-attend at an examination indicating that the insured has a statutory obligation to co-operate and make prompt, full and fair disclosure to the insurer.

Consequences Of Non-Attendance At Examination Under Oath

The repercussions of the claimant failing to attend the examination are that the insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply (see section 33(6)). If the claimant later does attend then the only obligation is to pay the benefit from the time that the claimant attends at the examination and forward (see section 33(8(1)). However, if the insurer did not comply with the notice requirements, interfered with the claimant right to be represented by counsel, or the claimant provided a reasonable excuse as to the reason for his initial attendance, then an insurer is required to pay to the claimant the benefits during the period of the suspension (see sections 33 (7) and (8(2)).

The suspension of the benefits is not limited to simply the benefits that are in dispute. The suspension applies to all benefits. As such, if income replacement benefits have already been denied but medical benefits continued to be paid – the insurer is entitled to suspend payment of the latter if a claimant fails to attend.

Moreover, the failure to attend at an examination under oath may take precedence over a judicial finding regarding an entitlement to benefits. If a claimant fails to attend at an examination and at the same time proceeds to an arbitration in which he is found entitled to payment of income replacement benefits, there may still not be a requirement for the insurer to pay the benefit. The claimant is obligated by statute to attend at the examination and his failure to do so may take priority over a finding by the adjudicator that he is entitled to benefits. So, the claimant may win his case based on substantive grounds but not be entitled to payment of the benefit due to procedural considerations.

With that being said, it appears that the only repercussion to the claimant is a suspension of his accident benefits. A claimant cannot be forced to attend an examination under oath and an Arbitration cannot be adjourned for his failure to participate. In *Troubitsine and TTC Insurance Company* (2010), the Director's Delegate found that the Arbitrator did not have the power to adjourn a hearing pending the attendance at the examination under oath. Similarly in *State Farm v. Williams*, (2015), the Director's Delegate found that an Arbitrator does not have the right to compel the attendance at an examination under oath and that the only statutory right of the insurer is to suspend payment pending his attendance.

No Requirement To Provide Detailed Justification For Examination Under Oath

In *Aviva v. McKeown* (2017) the Ontario Court of Appeal found that an insurer is not required to provide a detailed justification to the claimant regarding the reasons for an examination under oath. The Court of Appeal found that there is no evidence that insurers are abusing the system by requesting examinations under oath without providing explicit reasons and that an insurer has a duty to act in good faith. The insurer is simply required to provide the claimant notice about the general type of questions that will be asked.

This is an important decision as claimant counsel were previously resisting the requirement of the claimant to attend at an examination under oath based on procedural reasons. Further, claimant counsels were compelling an insurer to provide explicit reasons for the examination under oath in order to determine what the insurer knew. Through these means claimant counsel were trying to determine if the insurer had surveillance or any explicit evidence that hurt their client's case. The Court of Appeal has allowed an insurer to conduct an examination under oath in an unfettered yet good faith manner.

Strategic Considerations And Conclusion

There are many significant substantive and strategic considerations for conducting an examination under oath. Due to the fact that claimant counsel read Defender articles too, I will not disclose all of our secrets in these pages; these will be discussed in private with clients. ☺

With that said, examinations under oath are an indispensable tool when dealing with cases involving substantial benefits and substantive decisions. Cases involving catastrophic determination, non-earner benefits, and post-104 income replacement benefits are potentially worth significant sums of money and much can be learned at the examination stage. Claims that involve possible staged losses, misrepresentation, overpayment of IRBs and other such serious insurance breach questions are difficult to evaluate without the benefit of questioning the claimant. An examination under oath is extremely useful when an insurer's ability to adjust a case has been compromised by the failure of the claimant to complete proper forms, provide requested documentation, and even attend at an insurer medical assessment. Attendant care claims involving disability, proof of economic loss, and incurred expense are prime subject areas to question a claimant about.

Indeed, there is a real risk that if an insurer is wrong about a perceived insurance breach by the claimant that this may result in an adverse finding regarding the entitlement to the benefit as well as a special award.

Examinations under oath are a tool to be used by an insurer to equal the playing field in order to investigate a claim. Questions at the examination should not be limited to just the benefits that are in dispute, but to all claims that may reasonably arise as a result of the application for accident benefits. This may be conducted before or after a LAT application has taken place. A claimant does not have the right to object to attending at the examination simply on the basis that the benefit has been denied and that even an Arbitration is pending to deal with the claim.

If a claimant fails to attend at the examination without a reasonable explanation then an insurer may suspend payment of all benefits; including claims for future medical benefits. This provides a real incentive for a claimant to show up. An insurer is not obligated to disclose the reasons for the attendance with such precision as to handicap the insurer from conducting the examination in a strategic manner.

In conclusion, an examination under oath is a tool in which the insurer has the exclusive right to decide when, how, and why it is to be utilized. These are often used to target significant or questionable claims and therefore there is an added interest in the case. It often serves as a stepping stone to settle cases or to help evaluate a defence for arbitration. In light of the fact that direct contact with the claimant is becoming less frequent in the accident benefits world, the importance of the examination becomes that much more important. It is a tool that is often underused and underappreciated. The examination under oath gives the insurer an opportunity to level the playing field and provide for a more fair opportunity to evaluate risk.

Note: Special thanks to Monika Drobnicki for her research into this subject matter.

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Past Issues

A Year In Review: How The LAT Has Interpreted The MIG

The Licensing Appeal Tribunal ("LAT") has been in existence for one year and decisions are being rendered at a fast and furious pace over the past few months. As we know, this is a new system and very much different from what we are accustomed too in many key respects. It is difficult to predict what an Adjudicator will consider important to their decision making in terms of the influence of past law and evidence. For these reasons, it is important to closely review the decisions of the Adjudicators to analyze any trends and thought processes.

What You Need To Know About Non-Earner Benefits (Now and Into the Future)

Since the changes to the Schedule came about on September 1, 2010, claims for non-earner benefits have skyrocketed. The increase is not as a result of claimants' suffering more substantive injuries than ever before, but it is because of a narrowing of the types of benefits available to claimants.

Deduction of Collateral Benefits: Matching "Apples to Apples" (Tort)

The question as to what a tort defendant is entitled to deduct in terms of a plaintiff's entitlement to accident benefits is one of the most important aspects of any assessment of a case.

The Upcoming Dramatic Impact Of The LAT On Accident Benefits, "The Times They Are A Changing"

Amid controversy and much consternation among the personal injury bar, the Licensing Appeals Tribunal (LAT) is coming into effect on April 1, 2016. It is clear from a review of the procedures and practices in place that the upcoming changes will be significant from an insurer standpoint.