



FSCO A14-001463

**BETWEEN:**

**NEIL WILLIAMS**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY**

**Insurer**

## **DECISION ON A PRELIMINARY ISSUE**

**Before:** Arbitrator Maggy Murray

**Heard:** July 3, 2014, at the offices of the Financial Services Commission of Ontario in Toronto. Written submissions completed September 15, 2014

**Appearances:** Alex Voudouris for Mr. Williams  
Paul Omeziri for State Farm Mutual Automobile Insurance Company

**Issues:**

The Applicant, Neil Williams, was injured in a motor vehicle accident on August 6, 2008. He applied for and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.<sup>1</sup> Disputes arose concerning the Applicant’s entitlement to weekly income replacement benefits and the parties were unable to resolve their disputes through mediation. Mr. Williams then applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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<sup>1</sup>*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The preliminary issues are:

1. Is State Farm precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule*<sup>2</sup> with respect to income replacement and housekeeping benefits?
2. If State Farm is not precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits, has Mr. Williams already submitted to an examination under oath pursuant to s. 33(2)(a)?
3. Was State Farm entitled to rely on s. 33(6) of the *Schedule* to suspend income replacement benefits?
4. Is State Farm obliged to resume payment of income replacement benefits and pay all income replacement benefit amounts that were withheld pursuant to s. 33(8)(a) and (b) of the *Schedule*?
5. Is either party entitled to its expenses of this preliminary issue hearing?

**Result:**

1. State Farm is precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits.
2. State Farm is precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule*.
3. State Farm was not entitled to rely on s. 33(6) of the *Schedule* to suspend income replacement benefits.
4. Section 33(8) is not applicable to this case.

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<sup>2</sup>The Statutory Accident Benefits Schedule – Effective September 1, 2010, Ontario Regulation 34/10, as amended.

5. Mr. Williams is entitled to his expenses in this preliminary issue hearing. If the parties cannot agree on the amount of the expenses, they may make submissions on the issue of quantum in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition* within sixty days of the date of this decision.

## EVIDENCE AND ANALYSIS:

The parties filed an Agreed Statement of Facts. It states, in part:

- Mr. Williams applied for income replacement benefits pursuant to an OCF-1 dated August 18, 2008. On September 11, 2008, State Farm received Mr. Williams' OCF-1, OCF-2 and an OCF-33. State Farm began paying Mr. Williams weekly income replacement benefits on October 7, 2008. State Farm also paid Mr. Williams housekeeping and home maintenance for two years totalling \$10,400.
- By letter dated July 9, 2013, counsel for State Farm confirmed that an examination under oath was scheduled for November 29, 2013. The Notice of Examination confirmed that the scope of the examination was restricted to Mr. Williams' entitlement to accident benefits.
- On November 29, 2013, Mr. Williams attended a court reporter's office for the examination under oath.

According to the transcript of the examination under oath,<sup>3</sup> Mr. Williams refused to answer any questions dealing with income replacement or housekeeping benefits. The examination under oath concluded 10 minutes after it began and the insurer's counsel stated "The examination is done. That's it."

State Farm then terminated Mr. Williams' income replacement benefits pursuant to s. 33(6) of the *Schedule* based on Mr. Williams' alleged refusal to submit to an examination under oath.

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<sup>3</sup>Agreed Statement of Facts, Tab 5

**Parties' Positions:**

According to the Applicant, if State Farm wanted him to undergo an examination under oath, it was required to ask him to do so within 10 business days of receiving an application for accident benefits and completed disability certificate, pursuant to s.36(4)(c) of the *Schedule*. By September 11, 2008, State Farm received both the application for accident benefits and completed disability certificate.

According to the Insurer, an Applicant shall submit to an examination under oath and there is no time limit on when it can be requested.

State Farm submitted that the Applicant alleged that according to s. 36(4) of the *Schedule*, an insurer is required to conduct an examination under oath within 10 days of receiving an application for a specified benefit and completed disability certificate.<sup>4</sup> However, Mr. Williams' position is that State Farm is required to request, not conduct, an examination under oath within 10 business days of receiving an application for a specified benefit and completed disability certificate.

**1. Is State Farm precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits?**

Section 33(2) of the *Schedule*<sup>5</sup> states:

...

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

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<sup>4</sup>Insurer's Written Submissions, para.'s 40 and 41

<sup>5</sup>The *Statutory Accident Benefits Schedule — Accidents on or after September 1, 2010*, Ontario Regulation 34/10.

...

Section 36(1) of the *Schedule* states:

- (1) “specified benefit” means an income replacement benefit, ... or a payment for housekeeping or home maintenance services ...

Section 36(4)(c) of the *Schedule* states:

**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) (emphasis added).

According to the Supreme Court of Canada, “there is only one principle or approach, namely words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”<sup>6</sup>

State Farm relied on *Deol and Gore Mutual Insurance Co.*,<sup>7</sup> *Aviva Insurance Co. of Canada v. Balvers*,<sup>8</sup> and *Echelon General Insurance Co. v. Henry*.<sup>9</sup> However, I do not find any of the aforementioned cases persuasive in this proceeding because they did not consider the application of s.36 of the *Schedule* on s.33 and that s.36 of the *Schedule* modifies s.33.

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<sup>6</sup>Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) as cited in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, QL at para. 21 (S.C.C.)

<sup>7</sup>(FSCO A13-003801, September 3, 2013)

<sup>8</sup>(2007) 49 C.C.L.I. (4<sup>th</sup>) 313 (Ont. S.C.J.)

<sup>9</sup>(2011) 99 C.C.L.I. (4<sup>th</sup>) 316 (Ont. S.C.J.)

*Singh and State Farm Mutual Automobile Insurance Co.*,<sup>10</sup> dealt with a similar issue but considered s. 35(3) of the former *Schedule*.<sup>11</sup>

Section 35(3) of the former *Schedule* states:

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.

Although s. 35(3) of the former *Schedule*<sup>12</sup> is similar to s. 36(4) of the current *Schedule*,<sup>13</sup> the two sections are not identical. An insurer could, under s. 35(3) of the former *Schedule* carry out all three responses simultaneously within 10 business days. However, under s. 36(4) of the current *Schedule*, an insurer cannot, for example, simultaneously pay income replacement benefits<sup>14</sup> while denying their payment.<sup>15</sup> Therefore, “or,” in s. 36(4) of the current *Schedule*, must be read disjunctively.<sup>16</sup>

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<sup>10</sup>(FSCO A12-007594, August 22, 2014)

<sup>11</sup>The *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended (“1996 *Schedule*”)

<sup>12</sup>The *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended

<sup>13</sup>The *Statutory Accident Benefits Schedule - Accidents on or after September 1, 2010*, Ontario Regulation 34/10

<sup>14</sup>Pursuant to s. 36(4)(a)

<sup>15</sup>Pursuant to s. 36(4)(b)

<sup>16</sup>In addition, s. 35(4) and (12) of the former *Schedule* were not considered in *Singh*, which, when read in conjunction with s. 35(3) which provides that an insurer under s. 35(3)(a) can pay the benefit. Pursuant to s. 35(3)(b) of the former *Schedule*, if an insurer requests an examination under oath under s. 33, s. 35(4) of the former *Schedule* requires the insurer to simultaneously either pay the benefit or have the insured assessed under s. 42. Or, pursuant to s. 35(3)(c), if the insurer requested a s. 42 examination, the insurer could pay the insured benefit pursuant to s. 35(12) of the former *Schedule* upon receipt of the report.

State Farm was approximately 1,707 days too late to request an examination under oath for a specified benefit, namely, income replacement and housekeeping benefits. Therefore, State Farm is precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits.

**2. If State Farm is not precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits, has Mr. Williams already submitted to an examination under oath pursuant to s. 33(2)(a)?**

State Farm was approximately 1,707 days too late to request an examination under oath for a specified benefit, namely, income replacement and housekeeping benefits. Therefore, State Farm is precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits.

**3. Was State Farm entitled to rely on s. 33(6) of the *Schedule* to suspend income replacement benefits?**

State Farm was not entitled to rely on s. 33(6) of the *Schedule* to suspend income replacement benefits. Mr. Williams refused to answer questions about income replacement benefits and housekeeping benefits because State Farm was “out of time”.<sup>17</sup> State Farm failed to request the examination under oath within 10 days of receiving an application for a specified benefit and completed disability certificate. Therefore, Mr. Williams’ refusal to answer questions regarding specified benefits, namely, income replacement and housekeeping benefits, was proper and in keeping with the plain and ordinary reading of s. 36(4)(c) of the *Schedule*.

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Section 36 of the current *Schedule* is similar to s. 35 of the former *Schedule* whereby under s. 36(5), the insurer shall pay the specified benefit upon the insured’s compliance with a s. 33 request. Section 36(7)(b) allows the insurer to pay the specified benefit upon receipt of an insurer’s examination.

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.

<sup>17</sup>Agreed Statement of Facts, Transcript of examination under oath, Tab 5, at 14

**4. Is State Farm obliged to resume payment of income replacement benefits and pay all income replacement benefit amounts that were withheld pursuant to s. 33(8)(a) and (b) of the *Schedule*?**

Section 33(8) of the *Schedule* states:

If an applicant who failed to comply with subsection (1) or (2) subsequently complies with that subsection, the insurer,

(a) shall resume payment of the benefit, if a benefit was being paid; and

(b) shall pay all amounts that were withheld during the period of non-compliance, if the applicant provides a reasonable explanation for the delay in complying with the subsection.)

Section 33(8) of the *Schedule* is not applicable to this case. There was no valid request for an examination under oath because State Farm was “out of time” in requesting it. If there was no valid request for an examination under oath, the Applicant could not fail to comply with s. 33(2) of the *Schedule*, as modified by s. 36(4).

**EXPENSES:**

I exercise my discretion to award Mr. Williams his expenses in this preliminary issue hearing. If the parties cannot agree on the amount of the expenses, they may make submissions on the issue of quantum in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition* within sixty days of the date of this decision.

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Maggy Murray  
Arbitrator

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December 5, 2014  
Date



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**BETWEEN:**

**NEIL WILLIAMS**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY**

**Insurer**

## **ARBITRATION ORDER**

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. State Farm is precluded from conducting an examination under oath pursuant to s. 36(4)(c) of the *Schedule* with respect to income replacement and housekeeping benefits.
2. Mr. Williams submitted to an examination under oath on November 29, 2013.
3. State Farm was not entitled to rely on s. 33(6) of the *Schedule* to suspend income replacement benefits.
4. Section 33(8) is not applicable to this case.
5. Mr. Williams is entitled to his expenses in this preliminary issue hearing. If the parties cannot agree on the amount of the expenses, they may make submissions on the issue of quantum in accordance with Rule 79 of the *Dispute Resolution Practice Code — Fourth Edition* within sixty days of the date of this decision.

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Maggy Murray  
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December 5, 2014  
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