

**BETWEEN:**

**ANDREW ZABOROWSKI**

**Applicant**

**and**

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

**Insurer**

**DECISION ON A PRELIMINARY ISSUE**

**Before:** Fred Sampliner

**Heard:** By telephone conference call on January 24, 2005.

**Appearances:** Tripta Chandler for Mr. Zaborowski  
Matt Duffy for State Farm Mutual Automobile Insurance Company

**Issues:**

The Applicant, Andrew Zaborowski, was injured in a motor vehicle accident on May 16, 1998, and received statutory accident benefits from State Farm Mutual Automobile Insurance Company (“State Farm”), payable under the *Schedule*.<sup>1</sup> State Farm terminated Mr. Zaborowski’s weekly income replacement benefits, and he applied for arbitration of this issue at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended. Mr. Zaborowski refused to attend examinations that State Farm scheduled with a physiatrist and psychologist.

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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 issue is:

1. Is State Farm's request that Mr. Zaborowski attend examinations with its health care experts reasonable?
2. If so, what are the consequences of Mr. Zaborowski's failure to attend?

**Result:**

1. State Farm's examinations with its health care experts are not reasonable.
2. Mr. Zaborowski's refusal to attend has no consequence.

**EVIDENCE AND ANALYSIS:**

Generally, State Farm has the right to ask Mr. Zaborowski to attend an examination by a health professional or vocational expert as often as reasonably necessary to determine his entitlement to ongoing income replacement benefits. Under section 42 of the *Schedule*, State Farm retained four different health practitioners in the fall of 2002 to examine Mr. Zaborowski's physical and psychological disabilities in respect of his entitlement to income replacement benefits. A year later, the examiners from a Designated Assessment Centre agreed with State Farm's experts that Mr. Zaborowski was not disabled from any suitable occupation, and his benefits were terminated.

State Farm wants two of its experts, who examined Mr. Zaborowski in the fall of 2002, to re-examine him for purposes of the upcoming hearing. State Farm argues that fairness to its interests in this litigation demands that its medical and psychological experts (Dr. John Heintzer and Dr. Jonathan Siegel) be able to update their information for purposes of the hearing because of the intervening two and a half years. These examinations will not interfere with the currently scheduled mid-June 2005 hearing dates.

However, this is not a claim where the complexion of Mr. Zaborowski's injuries, his disability or opinions concerning his status have changed during this interim.<sup>2</sup> State Farm's medical examiner, Dr. Heintzer, reported in 2002 that Mr. Zaborowski had reached maximum medical recovery, and it is not disputed that this Insurer has had an opportunity to examine him under the appropriate entitlement test, or requires its examiners to respond to any new information or opinions.<sup>3</sup>

Based on this, I am not persuaded that State Farm is significantly prejudiced because these experts are unable to update their information at this late stage in the proceedings as there is nothing to update. I am likewise convinced on the information before me that these examinations will not yield evidence to adjust Mr. Zaborowski's claim.<sup>4</sup> I find that the sole reason for State Farm's request is to bolster its evidence for the hearing, which is contradictory to the purpose of examinations under section 42 of the *Schedule*.<sup>5</sup>

I reject State Farm's argument that time passage alone is sufficient reason for new examinations. State Farm has not met its burden to establish circumstances justifying that these examinations are reasonable. I find the requests for Mr. Zaborowski to be examined by Dr. Heintzer and Dr. Siegel are not reasonable under section 42 of the *Schedule*.

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<sup>2</sup>*Kasperowicz and Royal Insurance Company of Canada* (OIC A96-001306, May 29, 1997), *Martinho and York Fire & Casualty Insurance Company* (FSCO A98-000878, April 12, 1999)

<sup>3</sup>*Hodgins-Babin and Coseco Insurance Co./HB Group/Direct Protect* (FSCO A00-001252, January 22, 2002)

<sup>4</sup>*Swanson and Wellington Insurance Company* (FSCO A98-000067, May 26, 1998)

<sup>5</sup>*Swanson and Wellington Insurance Company* (FSCO A98-000067, May 26, 1998)

**EXPENSES:**

I defer the expense issue to the hearing arbitrator.

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Fred Sampliner  
Arbitrator

March 4, 2005

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Date

FSCO A04-001095

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**ANDREW ZABOROWSKI**

**Applicant**

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**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's requests for Mr. Zaborowski to be examined by Dr. Heintzer and Dr. Siegel are not reasonable, and he need not attend.

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Fred Sampliner  
Arbitrator

March 4, 2005

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Date