

Appeal P14-00030

**OFFICE OF THE DIRECTOR OF ARBITRATIONS**

LOUIS-JACQUES MICHAUD

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

BEFORE: David Evans

REPRESENTATIVES: Alon Rooz for Mr. Louis-Jacques Michaud  
Paul Omeziri for State Farm Mutual Automobile Insurance Company

HEARING DATE: December 21, 2015

**APPEAL ORDER**

Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*, and Ontario Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's order of June 27, 2014, is allowed. That part of paragraph 1 of the order, in so far as it relates to Mr. Louis-Jacques Michaud, is rescinded. Mr. Louis-Jacques Michaud may proceed with his claims against State Farm, and the stay of his arbitration proceeding is lifted.
2. The Respondent, State Farm Mutual Automobile Insurance Company, shall pay the Appellant, Mr. Michaud, his legal expenses of this appeal assessed in the amount of \$3,500, inclusive of all fees, disbursements and taxes.

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David Evans  
Director's Delegate

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May 3, 2016  
Date

## **REASONS FOR DECISION**

### **I. NATURE OF THE APPEAL**

Mr. Michaud appeals Arbitrator John Wilson's order of June 27, 2014, dismissing his claims against State Farm Mutual Automobile Insurance Company for his failure to attend an Examination Under Oath (EUO) pursuant to s. 33(1.1) of the *SABS-1996*.<sup>1</sup>

### **II. BACKGROUND**

The Arbitrator issued two orders in this matter arising out of disputes relating to an accident that allegedly occurred on June 4, 2010. The first decision, dated March 5, 2014, dealt with State Farm's motion against Mr. Michaud and two other parties, Guiteau Saintume and Anderson Seguin, to enforce their participation at EUOs and to deal with certain production requests.

Regarding the EUO request, the Arbitrator noted that s. 33(1.1) of the *SABS* provides a generalized obligation for insureds to participate in an EUO when requested by an insurer, but, he added, "While there is some resemblance to discoveries in a court action, albeit one-sided, the examination under oath is clearly intended to arise from the adjustment of an insurance claim and is not dependent on litigation for its justification."

By way of background, Mr. Michaud initially refused to attend an EUO, in part based on alleged faults in the notice, then agreed to go to it to avoid a preliminary issue hearing, then once again refused to go. The Arbitrator found that counsel undertook to produce Mr. Michaud "rather than to proceed with a potentially expensive and time-consuming hearing on the issue, whose outcome could not be sure." He also found that "the solicitor's undertaking had the effect of settling a preliminary dispute as to the applicability of the examinations under oath to this process" as he found that the undertaking cured the problems with the notice.

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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.

Accordingly, the Arbitrator found that Mr. Michaud had failed to make himself available for an EUO and ordered all scheduled dates in the matter be adjourned *sine die* to allow him to attend an EUO. He also ordered that the Applicants' counsel should provide correct and up-to-date address and contact information for the Applicants so that State Farm could make appropriate arrangements for the completion of the EUOs.

The Arbitrator ordered that any benefits related to the EUOs would not be payable from January 15, 2013, pursuant to s. 33(2) of the *SABS*, which provides that the insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with the request for an EUO.

The Arbitrator did not order Mr. Michaud to attend the EUO, recognizing that he could not compel attendance. He reserved on the dismissal of the arbitration for a period of 90 days from the date of delivery of his reasons, and ordered that only if the matter proceeded after the 90 days would he address productions.

The parties then arranged for EUOs without informing the Arbitrator. This led to his second decision dated June 27, 2014, in which he dismissed the proceedings for non-attendance. Obviously, once the decision was issued, Mr. Michaud did not attend the now-pointless EUO.

In his second decision, the Arbitrator found that Mr. Michaud's ongoing failure to engage in "a necessary part of the claims process, the examination under oath" while advancing his claims in arbitration was an abuse of process. He noted that s. 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, grants adjudicators wide power to control the process and prevent its abuse. In that regard, he referred to the ongoing failure to attend the EUO, the failure to provide updated contact information as ordered, and the breach of an undertaking to attend the EUO. He also inferred that Mr. Michaud was possibly frustrating efforts to get to the bottom of the "accident" because any information revealed might show the claim for accident benefits was invalid.

The Arbitrator concluded that the continuation of the arbitration would run against the spirit of dispute resolution at the Commission: “The Insurer would be irrevocably prejudiced by any continuation of the arbitration process beyond this point due to the wilful failure of the Applicants to provide answers to the questions raised by the Insurer as to the foundations of this accident benefit claim, particularly the circumstances of the ‘accident.’”

The Arbitrator therefore dismissed the claims of Mr. Michaud and the other parties. Because of his findings regarding the EUO, the Arbitrator did not deal with the production requests.

Only Mr. Michaud appealed the Arbitrator’s decision.

### **III. ANALYSIS**

I find the Arbitrator erred in ordering a stay in the first decision because he had no power to do so. It follows that, if he had no power to even stay the proceeding for Mr. Michaud to attend the EUO, he had no power to dismiss his claims for failing to attend it.

There is no power to stay or dismiss a proceeding for failure to attend EUOs because EUOs are not part of the arbitration process. In *Troubitsine and TTC Insurance Company Limited*, (FSCO P09-00019, January 14, 2010), a stay for failure to attend an EUO was removed on appeal because, as Delegate Blackman stated, the arbitrator had confused the adjusting process with the adjudicative process. I found the same had happened in *Zhang and State Farm Mutual Automobile Insurance Company*, (FSCO P15-00050, January 13, 2016). I also find the Arbitrator here showed the same confusion when he ordered the stay to assist State Farm’s adjusting of the file. Interestingly, the Arbitrator himself recognized that EUOs are separate from the arbitration process because in footnote 7 of his first decision he stated that “the examination under oath does not arise from and form part of the arbitration process itself. Rather it is part of the insurance claims process, albeit a part whose work product may be utilized in an arbitration.”

Our processes do not include examinations under oath because the available remedy of suspending benefits addresses fairness between the parties effectively. As noted above, s. 33(2) provides that “The insurer is not liable to pay a benefit in respect of any period during which the

insured person failed to comply with subsection (1) [duty to provide information] or (1.1) [duty to attend an EUO].” As Delegate Blackman stated in *Troubitsine*, “It is difficult to discern what could be more draconian in this context than the non-entitlement to benefits in respect of any period of non-compliance with subsection 33(1.1).” There is no authority to rewrite s. 33 to fashion a more adequate remedy anyway, and there are many other steps available in the process to deal with non-compliance regarding documentary production and other hearing-related issues.

That is really sufficient to conclude the matter, but I will deal with a few additional points.

As in *Troubitsine*, the Arbitrator here found that there was an abuse of process that could be addressed through s. 23(1) of the *Statutory Powers Procedure Act*, which provides that a tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. However, I agree with Delegate Blackman’s statement in *Troubitsine* that the purpose of the *Statutory Powers Procedure Act* is not to protect the integrity of the adjusting process under the *SABS*.

Mr. Michaud submits the undertaking was found to exist in the absence of evidence. Regardless, I am not persuaded that the undertaking had the effect of bringing a procedure that is outside of the dispute resolution process into the process. I find that a lawyer’s conduct cannot bestow jurisdiction on an arbitrator to do something he cannot otherwise do.

State Farm submits that the Arbitrator made his decision not just on the basis of the failure to attend at the EUO but also based on the conduct of Mr. Michaud throughout. It refers to the statement by the Arbitrator in his second decision that “this is more than just a simple failure to attend an examination under oath.” I have also reproduced above some of the Arbitrator’s comments about the allegedly suspicious nature of the accident. State Farm also submits that implicit in the decision is the Arbitrator’s concerns about production issues, since he had been involved in this case for some time. However, the Arbitrator did not make any orders about productions: he had deferred making a decision about them in the first decision, and the second decision did not deal with them at all, except for discussing Mr. Michaud’s contact information. I find that the decision did turn upon a simple failure to attend an EUO, and, for the reasons already set out, the Arbitrator had no basis to stay or dismiss the proceeding for that failure.

While failure to provide contact information is of concern, I am not persuaded that this alone would be grounds for dismissing the claims. In particular, although the Arbitrator stated in his second decision that his order had been for information to be provided to the Commission, the Arbitrator's actual order did not refer to the Commission but stated it was made "so that State Farm may make appropriate arrangements for the completion of the examinations under oath." In other words, it was made more for the furtherance of State Farm's adjusting needs than for the purposes of the arbitration. I have already noted that Mr. Michaud had been set to attend the EUO, which was then logically cancelled after the Arbitrator dismissed the entire case. In any event, I am not persuaded that, standing alone, the mere failure to provide contact information would warrant dismissal of the entire proceeding.

State Farm submits that, even if Mr. Michaud's arbitration claim is reinstated, the hearing would be pointless, as no benefits would be payable due to the non-compliance with the EUO request. State Farm submits that s. 33(2) of the *SABS* disentitles an insured to *all* benefits for any failure to attend an EUO. However, the Arbitrator did not read the provision that way, as he ordered that benefits are not payable only for the period starting on January 15, 2013. Delegate Blackman did not read the provision that way, as he noted in *Troubitsine* that "the non-entitlement to benefits [is] in respect of any period of non-compliance." And I do not read it that way. Subsection 33(2) provides that benefits are not payable for the period of non-compliance, not that no benefits are payable regardless of the period of non-compliance. Accordingly, Mr. Michaud is entitled to pursue his claim for benefits up to January 14, 2013.

In conclusion, the Arbitrator did not have the power to either adjourn or dismiss the arbitration proceeding for Mr. Michaud's failure to attend at an EUO. The appeal is therefore allowed, Mr. Michaud's arbitration claim is reinstated, and the stay is lifted.

The matter is returned to arbitration to deal with any other pre-hearing issues and to set a hearing date.

#### IV. EXPENSES

The parties spoke briefly to the issue of legal appeal expenses. Mr. Michaud was successful on appeal, so he is entitled to his expenses. He claims \$3,500 in total, at a rate of \$150 an hour for about 18 hours plus HST and disbursements. While State Farm submits that the amount is excessive and should be more in the area of \$2,000, I find that the amount claimed falls well within the average for successful insureds on appeal.

Accordingly, I award legal appeal expenses of \$3,500.

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David Evans  
Director's Delegate

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May 3, 2016  
Date