



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
25 BEAVER STREET
NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Gregory V. Serio
Superintendent

The Office of General Counsel issued the following opinion on August 25, 2004, representing the position of the New York State Insurance Department.

RE: Videotaping & Use of Props at No-Fault Examination Under Oath

Questions Presented:

- (1) May a No-Fault insurer videotape an examination under oath without the consent of the person to be examined, who instead wishes to record the examination by tape recording or by stenographer, and if an examination is videotaped or audio taped by an insurer, must the insurer provide a complete, unredacted copy of the video/audio tape?
- (2) During an examination under oath, may an insurer require the use of props by the person, such as model toy cars, diagrams and maps, during their verbal testimony, and if the person examined refuses to utilize the props but otherwise verbally responds to questions posed during the examination process, can the refusal of the person to participate in a demonstration which utilizes the props serve as a basis for denial of the claim by the insurer?

CONCLUSION

- (1) There is no bar in the No-Fault regulation to an insurer recording an examination under oath by videotaping or, alternatively, by tape recording it or having it transcribed. The same is true for the person to be examined. In order to prevent prejudice to the applicant for benefits during the claims verification process, an insurer must provide the person examined with a copy of the video or audio tape or written transcript, along with an affirmation or affidavit or other proper sworn statement that the video/audio tape is unredacted and has not been altered or that the copy of the transcript is a true and accurate transcription.
- (2) An examination under oath is utilized to obtain verbal testimony and the production of records in order to verify proof of claim. While the person examined may voluntarily answer questions through the use of props, participation in such type of demonstration by the person against his will may compromise the ability of the person examined to provide accurate testimony. Therefore, rendering testimony through the usage of props cannot be required. When the person examined declines to render testimony through the use of props, but is otherwise cooperative in giving verbal testimony, the failure to provide testimony utilizing props should not be

used as the basis for denial of a claim. In order to prevent prejudice to the applicant for benefits during the claims verification process, when the person examined does voluntarily provide testimony with the assistance of a map or diagram, the insurer must provide an identical copy of such object to the person examined.

Facts:

None presented.

Analysis:

Pursuant to the prescribed No-Fault endorsement found in N.Y. Comp. Codes R. & Regs. tit 11 § 65-1.1(d) (Regulation 68-A), under the policy "Conditions" section of the endorsement, and thereunder, the "Proof of Claim" section, it states:

. . . upon written request by the Company, the eligible injured person or that person's assignee or representative shall:

a) execute a written proof of claim under oath:

b) as may reasonably be required to submit to examinations under oath by any person named by the Company and subscribe the same;

Therefore, the purpose of an examination under oath is to obtain verbal testimony and the production of records under the claims verification process.

With respect to the questions raised about the No-Fault insurer's right to videotape an examination under oath, the regulation does not prohibit videotaping an examination nor specify the method by which a record of the proceedings should be kept. Therefore, an insurer may choose to videotape and/or audio tape and/or have the examination transcribed. However, in order to avoid prejudice to the person being examined in determining whether sufficient proof of claim was provided for claims reimbursement purposes, the insurer must provide that person with a copy of the video or audio tape, or written transcript, along with an affirmation, affidavit or sworn statement that the record of the examination being provided has not been redacted or altered or that the copy of the transcript is a true and accurate transcription. The failure of an insurer to provide such copy may result in an arbitrator or court precluding the admissibility of the examination. Additionally, the failure to provide a copy may be deemed an unfair claims practice during a market conduct of such insurer.

As noted above, the purpose of an examination under oath is for the person being examined to provide verbal testimony and produce written documents requested by the insurer. While the person examined may voluntarily utilize props during verbal testimony, including such items as toy cars, maps and diagrams, the use of such props in demonstrations may confuse or intimidate the person so as to lead to insufficient, incorrect or misleading statements. Therefore, an insurer may not require the person being examined to participate in a demonstration utilizing the props.

If the person being examined declines to participate in a prop demonstration but otherwise verbally responds in the examination, an insurer may not use the failure to participate in the prop demonstration as the basis for denying a claim. In the event that the person does voluntarily utilize a map or diagram during verbal testimony, the insurer must provide a copy of such map or diagram so as to avoid prejudice to the person examined.

For further information you may contact Supervising Attorney Lawrence M. Fuchsberg at the New York City Office.