

## WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For decisions released the week of June 22 to 27, 2008

### Section 42 Examination Request on the Eve of Arbitration

#### ***Forsyth v. Ace INA Insurance, FSCO A07-000872 (June 12, 2008), Arbitrator Wilson***

MVC June 30, 2004. Insured applied for arbitration for SABS. Insurer moved for s.42 insurer examinations “within weeks” of the scheduled arbitration hearing in response to the insured’s occupational therapist report. Insurer argued that it had been taken by surprise, having only recently been advised that there was a psychological component to the insured’s SABS claims. Insurer noted that it had had neither a psychiatric nor an orthopedic assessment.

Arbitrator concluded that further examinations would require an adjournment of the arbitration hearing. Arbitrator refused to Order that the insured attend psychological and orthopaedic s.42 assessments, nor the required adjournment, primarily because of the late timing of the motion. Arbitrator found that the insurer’s motion on the eve of the hearing appeared to be an exercise in trial brinkmanship and not the adjustment of the claim.

Arbitrator considered further reasons for refusing the insurer’s motion:

1. The s.42 assessments at issue did not satisfy the notice requirements under the SABS;
2. The insurer has a positive obligation to assist its insured in claiming entitled accident benefits and s.42 examinations exist in the context of fulfilling that obligation to ensure that valid claims are dealt with promptly. There was no explanation for the insurer’s delay in proceeding with the further investigation of the potential psychological and orthopaedic problems in a time frame that would not have affected the arbitration date;
3. The insurer confirmed that the benefits in issue were attendant care benefits and since there was no evidence of a catastrophic impairment and since more than 104 weeks had elapsed since the accident, the s.42 examinations were barred by s.39 of the SABS;
4. Although the Arbitrator could consider and rule on the consequences of a failure of an insured to make him or herself available for a s.42 examination, there was no authority for an arbitrator to directly compel attendance at such an examination.

### **Implications:**

In addition to the timing of the request for a s.42 examination on the eve of arbitration, it is important to look for other factors in considering the insurer's request such as when the insurer ought to have initiated the examination in accordance with its obligations to assist the insured in claiming benefits and whether the SABS itself would preclude the examination as with s.39 and non-catastrophic attendant care benefits.

### **Accessing Arbitration Decisions**

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.