

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For decisions released the week of July 14 to 18, 2008

Interim SABS entitlement during dispute regarding the applicability of an exception permitting SABS to be received where WSIB benefits otherwise would have been payable.

Sumal v. American Home Assurance Company, FSCO P07-00029 (June 25, 2008), Director's Delegate Lawrence Blackman

MVC October 23, 2002. Insured applied for SABS on November 5, 2002. Insured's employer filed a WSIB Employer's Report of Injury on November 3, 2002. On November 27, 2002 the insured swore a statement to the SABS insurer indicating his intention to advance a tort action against the owner and driver of the vehicle involved in the collision. On December 6, 2002, the insured signed a WSIB assignment in which he agreed to have any WSIB benefits sent to the SABS insurer. The insured claimed that due to extreme financial distress he abandoned his option of a tort claim and on July 6, 2003 the insured elected to receive WSIB benefits and began receiving these benefits in August 2003.

S. 59(1) of the SABS provides that a SABS insurer is not required to pay SABS where the insured is entitled to receive benefits under any workers' compensation plan. However, s. 59(2) provides an exception to this restriction where the insured elects under the WSIB legislation to bring a tort action and that the election is not primarily made for the purpose of claiming SABS. S. 59(5) of the SABS provides that an insurer shall pay full SABS benefits if there is a dispute as to whether s.59(1) applies.

Arbitrator determined that there was no dispute over his entitlement to WSIB benefits and so the insurer was not required to pay interim benefits pursuant to s. 59(5) since that section only operated when there was a dispute regarding WSIB entitlement and not whether the insured fell within the exception provision of s. 59(2). Director's Delegate Blackman, however, held that the Arbitrator erred as to the scope of subsection 59(5). Interim benefits are also required to be paid, subject to other defences available to the insurer under the SABS, where there is a dispute as to the validity of the insured's election to make a tort claim under s.59(2) and the resulting exception to s.59(1).

Director's Delegate Blackman noted:

... An insurer should not be allowed to ignore the pay-pending provisions of subsection 59(5) with impunity.

For the period of time the Appellant elected not to proceed under the WSIA, he should have received benefits solely under the Schedule, subject to reimbursement by the WSIB if his election was subsequently not allowed or was changed.

Implications:

Although an insured may be entitled to WSIB, if there is an election to sue the at-fault driver then the insurer must not ignore their obligation to pay interim SABS where they are disputing the validity of the insured's election. The insured is required to execute an assignment for WSIB benefits to be paid to the SABS insurer if the election is determined to be improper and the insured should not be compelled in these circumstances by economic strain in the absence of SABS benefits to abandon a tort claim and choose WSIB.

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.