

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of December 1 to 5, 2008

Arbitrator permits insurer examination after finding primary purpose is to buttress defence

Federico and State Farm Mutual Automobile Insurance Company, FSCO A08-001138, November 6, 2008, Arbitrator F. Sampliner

December 20, 2006 collision. Insured sought arbitration of termination of income replacement benefits and housekeeping and home maintenance benefits. Arbitration was scheduled to be heard in March 2009. After the pre-hearing, the insurer requested a neurological examination of insured pursuant to section 42 of the SABS.

The insured had a pre-accident history of neurological symptoms that deteriorated post-accident. At the request of the insurer, the insured underwent a neurological examination in February 2007 and a physiatry examination in December 2008. The February 2007 neurological examination did not address causation or the issue of income replacement benefits. The Insured refused to attend another neurological examination in September 2008 arguing that the examination was intended as a defence medical to the arbitration and not to legitimately assess the claim, and that neurological issues were covered by the physiatry examination.

The arbitrator agreed that the late timing of insurer's request for the neurological examination suggested that the primary purpose was to buttress the defence rather than adjust the claim. Nevertheless, he found the neurological examination to be reasonable and necessary. Despite the "litigation motivator", the insurer retained the right to the examination because it had been unable to assess the insured's condition during the arbitration proceeding. The insured's own neurologist had recommended further neurological testing which led to the parties' exchange of test results and records. The insurer's physiatrist did not have the neurology records in when the examination was done in December 2007, and the delay in requesting the neurological examination was due, in part, to the insurer's impression that all records had not yet been provided.

The arbitrator found that the neurological opinions were central to the arbitration, and that the insurer had not been afforded the opportunity to obtain a neurologist's opinion concerning the neurological issue. The insured would suffer little, if any, prejudice as it would have sufficient time to respond.

Implications:

The arbitrator appears to have found that the primary purpose of the proposed examination was to buttress the defence in the arbitration. A close reading, however, suggests that in fact the arbitrator found the insurer had a mixed purpose – to adjust the claim for ongoing benefits and to aid in the defence. In that case, the arbitrator’s decision is in keeping with past FSCO decisions. This decision should be read in that context and not as standing for the proposition that an insurer examination is appropriate when the primary purpose is to buttress the defence at arbitration.

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.