

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

For the week of February 9 to 13, 2009

### Treating Physicians' Credibility Assessments Preferred to IME Assessors' Validity Measures in Chronic Pain Case

#### ***Tharmalingam v. TD Home and Auto Insurance Company, FSCO A05-000372, February 3, 2009, Arbitrator E. Bayefsky***

February 7, 2003 collision. Insured's entitlement to income replacement benefits more than 104 weeks post-collision was at issue. Pre-collision, the insured was a welder. He suffered soft tissue injuries to his neck and lower back. He continued to suffer pain in these areas affecting his ability to walk, stand and sit. He experienced dizziness, irritability, and had difficulty sleeping and concentrating.

Physicians who examined the insured during IMEs and DAC assessments, though acknowledging persistent pain, depressive symptoms and anxiety, relied upon the absence of an organic basis for the pain, self-limiting behaviour during assessment and validity measures suggesting symptom magnification and embellishment. They noted the absence of internal validity measures used by the treating physicians in their assessments, and concluded that the insured could return to work either at his former position or at an alternative position.

The arbitrator preferred the opinions of the insured's own treating physicians who indicated that the insured suffered a major depressive episode and chronic pain syndrome. The arbitrator placed weight the treating physicians' acceptance of the legitimacy of the insured's symptoms which was based on the fact that they had seen him on a number of occasions, and other indicia of the veracity of his complaints including asymptomatic pre-existing degenerative disc disease, absence of pre-existing neck and back pain, extensive post-accident use of medication, objective muscle spasm, limited range of motion and the inability to sit in one position.

The arbitrator found that the insured suffered physical, psychological and emotional injuries as a result of the collision, which developed into chronic pain syndrome, depression and adjustment disorder. Medical reports finding that he was capable of returning to work did not give sufficient weight to the non-organic nature of his disability and to the general credibility of his complaints. The combined effect of the insured's physical pain, psycho-emotional problems, fatigue, dizziness and lack of concentration would preclude him from fulfilling the physical and intellectual demands working on a competitive, full-time basis. He was entitled to ongoing income replacement benefits.

### **Implications:**

This decision underscores the value of the opinions of treating physicians who have treated the insured both before and after the collision. The treating physicians' own "credibility" assessments of the insured's complaints may provide better validity measures than those employed in one-off formal testing sessions. As well, the overall impact of all the insured's symptoms, as subjectively and objectively measured, must not be overlooked. One must go beyond the words of the reports and the score card of the assessors.

At Legate & Associates, when we prepare experts for trial testimony where credibility is an issue, we encourage clinicians to get back to basics: credibility of complaint comes from the history (does it sound like the many complaints you have heard before; does it match the inciting event); comparison to the literature respecting this type of complaint; comparison to findings made by other examiners; and consistency of complaint.

### **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.