

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

For the week of March 16 to 21, 2009

### **An Expense Assessment: An Expensive Lesson**

***Sudhir Bhola and Personal Insurance Company of Canada, FSCO A06-001473, February 24, 2009, Arbitrator Denise Ashby***

MVC January 10, 2004. Insured applied for and received benefits from the Personal Insurance Company of Canada. Benefits were terminated and matter proceeded through mediation unsuccessfully. A preliminary issue regarding the deductibility of long term disability benefits determined that those benefits were deductible from income replacement benefits and the insured was to be considered self-employed. On the eve of an Arbitration hearing, the parties reached an agreement on all issues except the quantum of the insured's expenses. A Notice of Assessment of Expenses was issued.

The insured filed his Bill of Costs along with a Partial Full and Final Release executed by the parties. The Release indicated that the insured would be paid his expenses relating to the arbitration, subject to an assessment. The Personal disputed expenses related to the preliminary hearing which it viewed as in its favour and expenses related to correspondence between the parties.

Arbitrator Ashby noted that the Commission has avoided a line by line assessment of expenses approach. She also felt that the Release was unambiguous - such that it was interpreted as providing for the payment of the insured's expenses from the preliminary matter. Further, it was not the Arbitrator's role to go behind the clear wording of the Release and exclude the costs of certain proceedings. The insured was awarded expenses of \$35,430.00 plus GST. In the decision, the Arbitrator reported that she was troubled by the insurer's submissions and characterized some insurer submissions attempt at isolating the preliminary matter as 'inappropriate'. She also awarded the insured his expenses related to the expense hearing.

### **Implications:**

Releases are nothing more than contractual based documents outlining the understandings and expectations of the parties executing those releases. When the Release provides for payment of all expenses subject to an assessment, Arbitrators will look at the reasonableness of the fees and expenses incurred in determining what expenses ought to be allowed. Insurers will be held to their agreements with insureds and Arbitrators will likely take a dim view of insurers who attempt to vary an agreement prior to or during the assessment process.



## 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.