

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of May 25 to 29, 2009

Criminal has right to silence. Arbitrator suggests insured does not.

***Troubitsine v. TTC Insurance Company Limited*; FSCO A08-000681, April 30, 2009, Arbitrator Elizabeth Nastasi**

November 10, 2006 accident. The insured sustained injuries when a bus on which he was travelling suddenly stopped. The insurer sought an examination under oath claiming that there was no information to confirm that the insured's injuries arose as a result of the direct use or operation of a TTC vehicle. A motion to determine the preliminary issue of whether or not the insured was injured in an "accident" was scheduled and postponed pending the outcome of this motion.

An examination of the insured under oath was arranged on three occasions, but the insured failed to attend the examination on any of the scheduled dates. At the time of the arbitration, the insured still had not attended an examination under oath. The only explanation for the failure to attend was a period of incarceration for a few months. No explanation for the failure to attend at other times was provided. The arbitrator found that the insured had a reasonable excuse for failing to attend the examination during the time he was incarcerated; however, he had no reasonable excuse for failing to attend at other times. As such, pursuant to s. 33(2) of the SABS, specified benefits were not payable for the time that the insured failed to attend with the exception of the period of incarceration.

The more interesting issue in this decision concerns the request by the insurer that the arbitrator make an order compelling the insured to attend an examination under oath. The insurer argued that, without an examination under oath, it would be unable to obtain basic information about the alleged accident, and would be prejudiced in its ability to prepare for the hearing on the issue of whether the insured was injured in an accident. The arbitrator declined to compel the insured to attend the examination, but rather ordered a stay of proceedings until such time as he did so attend. Nevertheless, the arbitrator appears to have concluded it was within her jurisdiction to make the order requested had she been inclined to do so. She stated that, where the available remedy under the SABS is not adequate to address issues of significant unfairness, an arbitrator has a duty to prevent an abuse of the process. She continued as follows:

Although arbitrators have stepped outside of the prescribed remedies in the case of non-compliance with section 42 assessments and ordered a stay of the arbitration proceedings, they have not gone so far as to compel attendance at a medical assessment. An examination under oath, however, serves a very different role in the arbitration process than a

medical assessment. Most importantly, an examination under oath does not raise the obvious invasion of privacy concerns that compelling someone to undergo a medical exam would raise. Attending an examination under oath is part of the more general disclosure obligations placed on a claimant making a claim for benefits. For cases in which there are potential allegations of fraud, an examination under oath is an important investigative tool. It can assist in assessing credibility as well as identifying potential witnesses and relevant documents.

Implications:

The arbitrator's suggestion that an examination under oath does not raise invasion of privacy issues is simply incorrect. An insured has the right to decide if he or she will undergo any kind of examination whether it is a medical examination or a questioning under oath. Even a person charged with a criminal offence has the right to silence. The insured will suffer the consequence of failing to meet his or her obligations under the SABS should he or she decide not to undergo an examination. That consequence is loss of entitlement to benefits. Any unfairness to the insurer is thus addressed. There is no need, nor, I would submit, authority to dispense with the insured's basic right to autonomy.

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. If you have questions or comments about this edition of the newsletter, contact Joni Dobson at Legate & Associates: jdobson@legate.ca