

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 1 - 5, 2009

Can failure to attend an IME result in termination, not just suspension, of IRBs?

A.A. v. Dominion of Canada General Insurance Company, April 1, 2009, FSCO A08-001205, Arbitrator John Wilson

MVC July 29, 2006. The unrepresented insured failed to attend three section 42 examinations. Dominion suspended IRBs due to non-attendance and the insured applied for mediation and arbitration. Dominion asserted that the insured was barred from claiming an ongoing IRB and other benefits due to his failure to attend the Insurer Examinations.

The arbitrator held that the IME's were reasonable and necessary. Therefore, Dominion was entitled to stop or suspend the IRB during the time of non-compliance with section 42.

In an unusual order, the Arbitrator

1. declared that Dominion was entitled to suspend payment of benefits pending notice of compliance with the s. 42 examinations;
2. gave the insured 60 days from the date of the order to advise Dominion he would attend the IME's;
3. permitted Dominion to "move for an order lifting my stay and dismissing Mr. A's claim for " IRBs if he failed to so advise or attend the IME's;
4. stayed the arbitration until August, 2009 or such time as a party sought lifting of the stay.

Implications:

The combination of sections 37 and 42 of the SABS clearly require an insured to attend a section 42 examination as often as is reasonably necessary or risk suspension of benefits for the period of non-compliance. The only sanction outlined in the SABS is suspension of benefits. There are no permanent repercussions established by the SABS.

The order made in item '3' above is troubling. It effectively permits the termination as opposed to suspension of benefits, without a determination of entitlement. When the arbitrator granted Dominion the right to use the arbitration system to terminate irrespective of entitlement pursuant to the SABS, with respect, the arbitrator went outside his authority. The issue before the arbitrator, and as framed by the arbitrator, was whether the insured was barred from claiming an ongoing IRB and other benefits by reason of his failure to attend scheduled section 42 examinations. The arbitrator was not asked to determine

entitlement. In fact, Dominion had not terminated the IRB on the basis of entitlement. Under s. 37(10) and (11), in a case of failure to attend an IME, once the insured attends, the insurer is required to reconsider the application. Otherwise, there is only a suspension of payment. This decision is an example of how the lines between issues of entitlement to benefits, quantification or determination of amount, and obligation of the insurer to pay benefits (the issue in this case) can be blurred. Dominion had not yet made an evaluation of entitlement to the benefit. Stoppage of an IRB can only be done in accordance with the SABs under s.35. It is noteworthy that the insured in this decision was self-represented and so the arbitrator was left to render a decision on the matter without the assistance of counsel representing interests of both the insured and insurer.

Insured persons should attend section 42 assessments so that the insurer can adjust the claim and that any disputes between the insured and insurer be disputed on the merits. An insured person should not attend section 42 assessments for the reason that this case suggests, that is, that he risks dismissal of his claim for benefits for non-compliance. The insurer may not be able to properly adjust a claim without the benefit of section 42 assessments. If too much time lapses between the MVC and the insurer being able to have the injuries assessed then it cannot properly assess and determine whether, or to what extent, the injuries are attributable to the MVC. An insured should not expect that assessments by his own treatment providers be given any more weight than section 42 assessments that the insured delayed attending. Such a strategy would likely reduce the weight that an arbitrator or judge would give to the assessments provided by treatment providers.

The already weighty consequences of non-attendance have been added to by this decision, but in our view, to that extent, the decision is wrong. It ought to be reviewed by the Divisional Court.

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