

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 29 to July 3, 2009

Interest payable from date of application for medical benefits not date of Arbitrator's order despite negative DAC

Boyer and Allstate Insurance Company of Canada; FSCO A03-001739; May 29, 2009; Arbitrator Eban Bayefsy

July 24, 2001 collision. Arbitration decision in May 2007 found certain medical benefits reasonable and necessary despite DAC finding that they were not. Issue arose as to the date from which interest on the medical benefits accrued. Insurer argued the relevant date for accrual of interest was the date of the arbitrator's order. Insurer relied upon the FSCO appeal decision in *Pafco Insurance Company Limited and Langdon* (FSCO P02-00017, July 17, 2003) which held that, if a disputed expense is submitted to a DAC assessment and the report does not state the expense is reasonable and necessary, s. 38 does not impose any payment obligations short of a finding by an adjudicator that a benefit is owing. The insurer also relied on obiter comments of the Court of Appeal for Ontario in *Mercier v. Royal & SunAlliance Insurance Company of Canada* (2004), 72 O.R. (3d) 94 distinguishing the medical benefits in *Pafco* from weekly benefits. The insurer argued that the obiter comments amounted to an endorsement by the Court of Appeal of *Pafco*.

Arbitrator Bayefsy followed the FSCO appeal decision in *Coachman Insurance Company and Hejnowicz* (FSCO P05-00024, August 3, 2006) and concluded that interest was payable from the date of receipt by the insurer of the application for benefits, or the invoice, whichever was earlier. An insurer's obligation to pay for the costs of a treatment plan arises initially from sections 14, 15 and 38(7) not a positive DAC or an arbitrator's decision. There is nothing in section 46 restricting the payment of interest to benefits that are payable pending dispute resolution. This was also consistent with the characterization of interest under the SABS as set out in *Sorokin and Wawanesa Mutual Insurance Company* as mandatory and compensatory rather than punitive as previously stated in *Pafco*.

The arbitrator held that *Hejnowicz*, which specifically found that the obiter comments in *Mercier* were not an endorsement of *Pafco*, overturned *Pafco*.

Implications

A number of recent disputes at FSCO and in the Court have involved the issue of payment of interest under the SABS. The decisions consistently reinforce the interest provisions which, in many cases, contain the only mechanism with any "teeth" to ensure timely provision of benefits. Those representing insured persons should not overlook the importance and effectiveness of this



mechanism. According to the SABS and recent decision, interest is (and should always be) non-negotiable.

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.