

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of August 24 - 28, 2009

Insured must pursue tort claim in a meaningful way in order to receive SABS and avoid presumed WSIA benefits

Mahjourian v. TD Home Auto Insurance Company, FSCO A08-001115, August 6, 2009, Arbitrator Richards

July 6, 2006 MVC. Insured was a school bus driver who was injured while exiting her school bus. Her employer notified the Workplace Safety and Insurance Board within days of her injury. Less than three weeks following the incident the insured applied for statutory accident benefits. At no point did she elect WSIB benefits. A memo in her WSIB file indicated that a WSIB claim was registered but that the insured did not wish to pursue a WSIB claim because she was proceeding with private insurance.

Claim for attendant care benefits denied and housekeeping and home maintenance benefits were terminated effective May 9, 2007. The issue was whether she was entitled to claim auto accident benefits in light of the availability of WSIB benefits.

Section 59 of the SABS indicates that an insured cannot receive accident benefits where she is entitled to receive benefits under any workers' compensation plan for the injury unless she elects to bring an action against the tortfeasor who is not her employer if it supplied a motor vehicle without supplying drivers for that vehicle. When a worker chooses to sue she cannot receive workers' compensation benefits. The auto insurer must then pay accident benefits provided that the election to sue was not made primarily for the purpose of claiming accident benefits.

The insured was precluded from applying for and receiving accident benefits. While she was entitled to sue the manufacturer of the bus, the Arbitrator found the timing of the claim was suspect. The fact that the lawsuit was filed one day after the expiration of the limitation period was not necessarily an indication that she did not intend to pursue the lawsuit, however, the Arbitrator drew an adverse inference about her motive to begin the claim. The timing of the tort claim appeared to be in response to TD Home's defence to her claim for accident benefits. She applied for auto accident benefits almost immediately after the incident, but did not begin a tort claim for two years. Finally, she did not advance her tort claim in any meaningful way.

Implications:

Plaintiff counsel wants to ensure that their clients make a clear election and notify WSIB of the intent to sue. The earlier this can be done following injury, the better. It is essential to explain the consequences of such an election to your client. Making the election early on is a relatively simple decision for cases where liability and damages are clear, however, there are many cases where it is not known if there is claim worth advancing until you approach the two-year limitation period to sue. For instance, this can happen where liability is complicated and requires forensic investigation. Similarly, it is not always clear in the months immediately following injury whether a person's injuries will meet the threshold. It is often only after the passage of some time that the full extent of the injury is known that a claim is then issued. Given the current \$30,000 deductible in tort claims you must be fairly confident with your ability to prosecute a tort claim before advising your client to take that step.

Workers compensation benefits are intended to be the first payor and it is only where the injured person intends to sue that statutory accident benefits become available to her. As a result, the decision to opt out of the WSIA should be driven by the early viability of a tort claim and not the attraction to SABS over WSIB benefits.

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 Karen Hulan at Legate & Associates at khulan@legate.ca.