

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of September 14 - 18, 2009

Nuclear analysis requires less concentration than insurance advising? Claim not proven where medical evidence insufficient and insured not credible

Masroor v. State Farm Mutual Automobile Insurance Company; FSCO A07-002725; August 11, 2009; Arbitrator Edward Lee

March 31, 2006 collision. Insured suffered severe headaches, dizziness, loss of concentration, and neck, shoulder and body pain. She returned to work as an insurance advisor one week post-collision. Three months later she resigned her position as insurance advisor to accept a position as a nuclear analyst. By the date of the arbitration, she admitted to approximately 90% recovery from her injuries.

The insured claimed medical, attendant care and housekeeping and home maintenance benefits from September 2006 to August 2007. Medical benefits claimed included treatment plans for functional exercise, passive modalities and massage. No medical evidence was provided to support the medical benefits. An IME found it neither reasonable nor necessary. Additionally, the amount claimed was inconsistent with the amount of the treatment plan, and no explanation for the inconsistency nor invoices for treatment were provided. Attendant care benefits claimed had partial support in a Form 1 completed in May 2006, five weeks post-collision; however, the insurer's Form 1 completed in August 2006 indicated no need for attendant care. Finally, there was no medical support for housekeeping and home maintenance benefits. The only assessment was an IME report of August 2006.

The arbitrator questioned the credibility of both the insured and her husband who also gave evidence. He did not accept the evidence of the insured that all of her assessors, including her own, misquoted or misunderstood the information she provided to them. He also found the insured was less than forthright when she testified respecting her ability to work despite her concentration problems and complaints of headaches, that it took less concentration to be a nuclear analyst than an insurance adviser. Given his concerns about credibility, and absent supportive objective medical evidence, the arbitrator held that the insured was unable to prove her claim.

Implications:

It is often the case that medical evidence regarding need for benefits is conflicting. In those cases, the evidence of the insured and other lay witnesses is important to the determination of need in the context of a dispute. It is not,



however, a substitute for supportive medical evidence relevant to the time period and the specific type of benefit claimed. In this regard, where an insured is unable to obtain insurer approval for her own assessments, the rebuttal provisions of the SABS (42.1) should be invoked to obtain same. If the recommendation in FSCO's Report on the Five Year Review of Automobile Insurance to revoke this provision is carried out, the insured's ability to obtain medical evidence from a treatment provider of her own choosing may be adversely impacted, particularly where the insured has no family physician.

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