

## WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of September 28 to October 2, 2009

### Insurer's assessors are far from experts

#### ***Babakar v. Brown, (2009) 95 O.R. (3d) 206***

MVC February 15, 2004. State Farm was the accident benefit insurer for the various plaintiffs. The plaintiffs applied for certain benefits that were denied by State Farm on the basis of its receipt of insurer medical reports from Dr. Hoath, Dr. Kadish and Mr. Diaz. The issue of the denial of benefits failed at mediation and an action was commenced. The action included a claim of bad faith against State Farm specifically alleging that State Farm denied and terminated benefits without regard to all medical information made available to it and that State Farm ignored medical information. State Farm produced Smita Kazi at discovery. A number of questions were asked, and refused, regarding the foundation for the opinions rendered by the insurer's medical assessors. The questions included the following:

1. To ask Dr. Hoath whether pre-accident or other historical records were needed and if he ever made a request to State Farm for the records.
2. If pre-accident records were information Dr. Hoath thought he needed, why didn't he request it? To ask Mr. McCready, when he had the report, if he ever considered sending such information to Dr. Hoath.
3. To ask Dr. Kadish what use he made of or what possible benefit to him Mr. Diaz's Functional Ability Evaluation Report was, given that Mr. Diaz says in his report he can't tell you anything without the Functional Demands Analysis.
4. With respect to [a specific plaintiff], ask Dr. Hoath why he didn't have the pre-accident records of Dr. Sheikh, whether he thought they were necessary, did he ever ask for them? Did the adjuster, after having reviewed the report, think to send the records to Dr. Hoath or ask Dr. Hoath if the pre-accident reports were important?
5. To ask Dr. Dorman why he was answering questions that he was not asked by the insurer to address.

Master Hawkins ordered that the questions were proper and should be answered. The insurer appealed the decision and argued that the questions were improper pursuant to Rule 31.06(3), as they were an indirect attempt to cross-examine the Defendant's expert.

In this appeal, Justice Lederer agreed with the insurer that the questions are all in the nature of cross-examination and would not be allowed by the terms of Rule 31.06(3); however, he found that Rule 31.06(3) has no application in the matter

at hand because insurer's assessors are not experts as that term is used in Rule 31.06(3).

An expert opinion is offered to help the judge understand and interpret the facts. The traditional example is a doctor who examines a party after an accident to provide the court with an opinion as to the pain and suffering the victim has or will endure. Contrast this with a doctor who witnessed the accident and is being asked what he saw. In the former, the witness is giving an opinion based on his expertise at interpreting the technical facts. This type of opinion garners the protection of Rule 31.06(3). In the latter, the doctor merely is describing facts and is not providing an opinion. Rule 31.06(3) has no application here.

Justice Lederer treated the evidence of an insurer's assessor as a third scenario. He compared it to the evidence of an engineer who designs a bridge that collapses and a lawsuit commences. At discovery, the witness would have to answer questions that look behind the work that led to the conclusion that the bridge would stand. The witness would have to describe the tests that were performed and the findings, opinions and conclusions that were arrived at and relied upon in concluding the bridge would be safe. This witness is providing information as to what happened that led to the collapse of the bridge. He or she may provide an opinion, but it is an opinion that formed the basis for proceeding to build the bridge. It is an opinion that may be a direct cause of the collapse.

In the accident benefit context, the claim is derived from the denial of benefits. The assessor must answer questions that look behind the work that led to the conclusion that the benefit should be denied. The assessor is providing information as to what happened that led to the decision to deny benefits. He or she may provide an opinion, but it is an opinion that formed the basis for the denial of the benefits. It is an opinion that may be a direct cause of the denial. It is a fact that must be looked at to decide if the denial was proper; it is not an opinion on the correctness of the denial based on the facts.

Using the same principles, similar questions regarding a Dr. Lloyd were not found to be proper because Dr. Lloyd's opinion was sought after the decision to terminate the benefits and/or in anticipation that he would provide evidence at trial.

### **Implications:**

This ruling expands the scope of questioning regarding insurer's assessors at discovery. The opportunity to pursue these types of questions is an important consideration in determining whether to file for Arbitration or bring an action. In these types of actions, query whether it is even necessary to specifically pursue a bad faith claim in order to expand the scope of questioning. Even without a bad faith claim, the assessor's opinion forms the basis for the denial and is therefore



a fact; it is not an opinion on the denial itself. Furthermore, consider that the insurer has an ongoing duty of good faith to the insured that includes a duty to continue to assess and adjust the claim on a fair and impartial basis. In this context, isn't Dr. Lloyd's opinion a potential direct cause of the ongoing denial of benefits? If so, there is a good argument that this line of questioning should apply to all insurer assessors, regardless of the status of the claim. Also note that the reasoning in this decision should equally apply in disability claims.

### 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 Ryan Steiner at Legate & Associates: [rsteiner@legate.ca](mailto:rsteiner@legate.ca).