

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 19 to October 23, 2009

Until insurer intends to rely on surveillance, existence need not be disclosed to insured if arbitration, not court, is selected as forum.

***Suppa v. Motor Vehicle Accident Claims Fund*, File No. FSCO A08-002241, August 11, 2009, per Arbitrator R. Bujold.**

MVC August 7, 2006. Insured claimed benefits from Motor Vehicle Accident Claims Fund ("Fund"). Rule 40 of the *Dispute Resolution Practice Code* requires insurer to provide copies of all videotapes, photographs, investigative reports, notes and summaries taken or prepared in connection with the issues at least 30 days before the hearing if insurer intends to rely on any portion of surveillance or investigative evidence. Arbitrator considered whether Fund was required to produce or disclose the existence of surveillance or investigative evidence regardless of whether Fund intended to rely on same.

The Director's Delegate in *Security National Insurance Co./Monnex Insurance Mgmt. Inc. and Morgan* ("Morgan") concluded insurer is only required to produce surveillance when it decides to rely on same. Insured cited *Suhani-Knox v. Economical Mutual Insurance Co.*, in which Arbitrator Wilson ordered insurer to produce surveillance evidence before insurer advised whether it intended to rely on same. Arbitrator Wilson took the view that decisions of Director's Delegates were merely persuasive or instructive. Arbitrator Bujold, however, concluded he was bound by Director's Delegates decisions, including on matters of interpretation of the *Code*.

Fund not obligated to produce or disclose surveillance on the basis of *Morgan*, nor does the *Code* obligate the Fund to disclose whether it undertook surveillance. Rule 40 extends to disclosure of the existence of surveillance or investigative evidence. Fund is not required to disclose any surveillance, or even whether any surveillance was conducted, unless and until it decides to rely on surveillance or investigative evidence. This is the case for any "insurer" and it is not necessary to distinguish MVAC Fund from other first party insurers.

Implications:

Insurers continue to have an advantage in arbitration hearings in terms of (1) what surveillance must be produced; and (2) the timing of production. Insurers are only required to produce surveillance upon which they ***intend to rely***. Insurers will rely on surveillance showing insured functioning normally. Insurers are not required to disclose the existence of surveillance confirming insured's injuries and functional limitations. Rule 40 requires disclosure of surveillance 30



days before a hearing, **at minimum**. The later surveillance is disclosed, the more likely insureds will have difficulty recalling details of the dates, time and context. Insurers are required to produce all surveillance if they decide to rely on a portion – the question is whether this will provide enough context to ensure an accurate portrayal of insureds functioning.

In order to demonstrate a “balanced” presentation of an insured’s functioning, treatment providers should consider recording, both visually and in clinical notes and records, an insured’s level of functioning. Insureds should gather home videos and photographs of special events, family gatherings, vacations, etc.

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 Carrie Lynn Simmons at Legate & Associates: csimmons@legate.ca.