

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of November 16 - 20, 2009

Dire Financial Need Not Enough for Payment of Interim Benefits

Cendoya-Sotomayor and State Farm Mutual Automobile Insurance Company, FSCO A00-000909, October 15, 2009, Arbitrator Judith Killoran

MVC September 5, 2007. The insured brought a motion for interim income replacement benefits pursuant to subsection 279(4.1) of the *Insurance Act* pending the resolution of his dispute with State Farm. The insured sought retroactive payment of a weekly IRB as well as ongoing entitlement to an IRB.

The insured returned to work within five days of the collision as he was the sole income earner for his household and had sponsored his wife and child who were immigrating to Canada. He continued to receive treatment for injuries sustained in the collision. He worked until his family doctor, upon receiving the results of an MRI, advised him to discontinue his employment. His employer was unable to make accommodations for him and laid him off. He completed additional training and attempted other less physically demanding employment which he could not continue due to his injury related limitations. At the time of the interim benefits hearing he had maintained work in one job, working approximately 15 12-hours shifts in three months.

Each of the three Insurer Medical Examinations found that the insured was not substantially disabled. The insured then sought interim benefits on three bases: (1) financial hardship (2) adverse physical and mental consequences as a result of the insurer's refusal to pay benefits (3) likelihood of success at arbitration.

The motion was dismissed as the insured did not satisfy the general principles outlined in the case law: there was neither necessity nor urgency for the benefits and there was no evidence that the insurer acted in blatant disregard of the *Insurance Act* or the *SABS*. There were issues of causation, disability and post accident income requiring a full hearing: the Insurer Medical Examinations concluded that the insured was not substantially disabled; he returned to work for one year post collision; and, there was also a second collision in the winter 2009 for which he had not applied for benefits.

Implications:

The arbitrator was not prepared to award interim benefits based on the insured's apparent financial need alone. In this case the collateral benefits carrier denied the insured's claim, the insured was forced to pay his bills and cover his basic needs using his credit card which was then cancelled. His savings was exhausted and he was forced to borrow money from friends. He was reluctant to



apply for social assistance as he then would have been unable to sponsor any family members for immigration to Canada. This was a case where the insured was in dire financial circumstances and yet interim benefits were denied. In many cases clients attempt a return to work in the same or different occupation. This decision suggests that such a step, combined with Insurer Medical Examinations favourable to the insurer, may sufficiently complicate matters so that interim benefits will be denied.

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: khulan@legate.ca.