

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of May 10 to 14, 2010

Delay in Delivery of Rebuttal Report a Substantial Savings for Insurer

Carbone v. State Farm Mutual Automobile Insurance Company, FSCO A08-001871, March 30, 2010, Arbitrator Kowalski

MVC April 10, 2002. The insured sought payment for the cost of a CAT rebuttal report by Dr. Harold Becker in excess of \$20,000. The report was not provided to the insurer within the time lines prescribed in the SABS. The issue was whether the insured had a reasonable explanation for delayed delivery of the report. Absent reasonable explanation payment of the invoice was barred.

Dr. Becker wrote to insurer and indicated that he would provide a rebuttal report within the 80 business days from his receipt of the report. The insurer then sent an addendum report to the insured within three weeks of the original section 42 report which indicated that a review of further documentation did not alter the opinion contained in the original report.

Within the 80 business days Dr. Becker provided his rebuttal report to plaintiff counsel who in turn wrote to the insurer requesting payment for past housekeeping and attendant care benefits *“now that our client has been deemed catastrophically impaired, further to the report of Omega Medical Associates dated January 15, 2007...”* Plaintiff counsel mistakenly assumed that Dr. Becker provided a copy of the rebuttal report to the insurer and so a copy of the report was not sent by counsel the insurer.

Plaintiff counsel provided what it thought was a second copy of the report to the insurer on February 9, 2007. It was not until July 2007 that counsel was advised by Dr. Becker's office that it had not been paid its invoice. The insurer then denied payment of the report because it was received in February and beyond the 80 business days required.

Section 42.1(3) states:

If the insurer person has sustained a catastrophic impairment of the examination under section 42 relates to whether the insured person has sustained a catastrophic impairment, the assessment or examination under this section is conducted and the report provided to the insurer not more than 80 business days after the day the insurer gave the insured person notice of it determination.

Section 31 of the SABS provides that an insured person is not disentitled to payment of a benefit where the person has reasonable explanation for non-compliance with the time limits for service of CAT rebuttal reports.

The arbitrator decided that reasonable explanation was not provided in this case. There was no evidence at arbitration that the report had been faxed by Dr. Becker or counsel to the insurer. For instance, facsimile transmission sheets were incomplete and it was not evident that the insurer received the transmission.

The fact that the insurer provided an addendum report almost three weeks after the section 42 report did not extend the running of the 80 business time period for delivery of the rebuttal report to the insurer. Since the addendum simply stated that the original decision remained unchanged, notice of the determination referred to in section 42.1(3) was provided with the original section 42 report.

Implications:

There are principles in insurance law to guide resolution of disputes. First, any ambiguity in terms is decided in favour of the insured. Second, coverage provisions should be construed broadly and exclusion clauses narrowly. Third, it is preferable, at least where the policy is ambiguous, to give effect to the reasonable expectations of the parties. While neither of these issues was directly at issue in this decision they reflect the ameliorative intent and nature of the *Insurance Act* under which the SABS is regulation. This intent is not reflected in the decision in this instance.

The errors made by counsel and the author of the rebuttal report ended up generating a substantial savings to the insurer. Neither counsel nor the assessor was aware that the other did not provide the rebuttal report to the insurer; however, the insurer knew that the rebuttal was not provided. It was aware that a rebuttal was being done. Counsel's letter indicated that the rebuttal was complete.

Aside from paying the invoice, as it is required to do under the SABS, there was no discussion about what prejudice was caused by delay in the delivery of the rebuttal report which the insurer knew existed.

To avoid costly errors such as this, counsel and assessors should clearly state in writing which will submit reports and invoices to the insurer.

Accessing Arbitration Decisions



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