

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

For the week of July 12 to 16, 2010

### “Employee” status for Insured’s IRB Claim after declaring “Self-employed”.

***Ligocki v. Allianz Insurance Co. of Canada***, [2010] O.J. No. 672 (S.C.J.), per P.C. Hennessy J.

MVC November 17, 1999. Until the summer of 1999, insured provided personal support worker (“PSW”) services to a family as an employee of the Victorian Order of Nurses (“VON”). In the summer of 1999, VON discontinued services to this family and the insured continued to provide PSW for this family by way of an oral agreement. The insured performed the same work for the family as he did before leaving VON. The family supplied all personal care items that were required and from time to time the insured would work extra hours at the request of the family. The insured was paid by the family by cheque without source deductions and no Record of Employment was issued by the family when the insured could not return to work after the MVC.

Justice Hennessy noted the insured’s own identification of the work relationship as an independent contractor and described the insured’s change in designation:

*... Shortly after the accident, in his statement to the adjuster, Ligocki identified himself as self-employed. Then, on January 9, 2000, Ligocki applied for accident benefits and on the form, he indicated that at the time of the accident he was self-employed. Both the application for accident benefits and the statement to the adjuster were made without the advice of counsel.*

*.... In August 2003, Ligocki changed his legal representation and his new counsel requested that the insurer change the designation of the plaintiff’s pre-accident employment from “self-employed” to “employed”.*

*... The plaintiff frankly indicated that he chose to report his income as business income, expecting to benefit from the deductions available to him. Ironically, the declaration as a self-employed person, which triggered advantageous consequences in terms of income taxes, had an opposite and adverse impact on him when the IRBs were calculated.*

Justice Hennessy considered the case law and noted that whether a worker is an employee or an independent contractor is largely a finding of fact. There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Justice Hennessy noted that it requires a review of the total relationship of the parties, and both objective and subjective factors. However, Justice Hennessy also noted that the common

intention of the parties as to the legal character of the relationship will be disregarded if it does not reflect the actual legal relationship the parties profess to have intended. Justice Hennessy concluded:

*...[T]he Ligocki/Deluca relationship is best characterized as an employer/employee relationship. Mr. Ligocki provided services as instructed, on the premises of Deluca. Mr. Ligocki had no business of his own and was not in business on his own account. This situation has no indicia of an independent contractor relationship, except the manner in which Ligocki was paid and how he reported his income.*

*...Once Ligocki learned that his IRBs as a self-employed person were less than half of what they would be as an employed person, he sought 3 years after the fact to characterize the relationship as one of employment. Ligocki seeks the benefits of employment status for the same reasons that he initially sought the benefits of self-employment status, by filling his income tax returns as a self-employed person.*

*This about-face cannot influence the court any more than the original attempt to characterize the relationship if the actual relationship, considered in its context, does not reflect the legal relationship.*

Justice Hennessy was not persuaded that Ligocki's self-identification as an independent contractor should trump this determination on the facts and insured was declared an employee at the time of the mvc.

### **Implications:**

This decision confirms the importance of looking carefully at the actual relationship of the insured person in a pre-mvc working relationship for the purpose of determining the legal nature of that relationship for the SABS application. It may not be sufficient to simply rely on the manner in which the insured was paid or how he or she reported income. However, as in this case even where the insured misidentifies the working relationship in the SABS application it may not be too late to obtain a declaration as to the actual legal working relationship. The particular designation of the working relationship on a SABS application can significantly impact the insured's receipt of a fair IRB.

### **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 Sean Mackintosh at Legate & Associates: [smackintosh@legate.ca](mailto:smackintosh@legate.ca).