

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

For the week of May 26 to May 30, 2008

**Denial of SABS where the Election between WSIB Benefits and Tort Action is found to be Primarily for the purpose of claiming SABS.**

**Lawrence v. ACE INA Insurance, FSCO Appeal P07-00007, May 16, 2008, Director's Delegate David Evans**

MVC on July 10, 2003. Insured was driving a school bus and in the course of his employment at the time of the collision and therefore entitled to Workplace Safety and Insurance Board benefits ("WSIB benefits"). Insured continued to work after the collision and only lost a little time from his two part-time jobs. Shortly after the collision the insured retained a paralegal firm specializing in SABS claims and commenced a SABS claim. Insurer argued that he was precluded from claiming SABS because he was in the course of his employment and entitled to WSIB benefits.

Director's Delegate referred to section 59(1) of the SABS which precluded insured from claiming SABS unless he elected to bring a court action and so long as the election was not made *primarily* for the purpose of claiming benefits under the SABS. Evidence of the basis for the insured's election included:

- a statement to the SABS adjuster on September 8, 2003 that his paralegal had told him that he was not going with WSIB but that he would have to take legal action against the other party.
- his paralegal wrote to the other driver in the mvc by letter dated August 14, 2003 advising of his intention to sue.
- the first evidence of the involvement of tort counsel is a statement of claim that was issued against the other driver on July 8, 2005.
- in direct examination by his paralegal to the question why he chose SABS rather than WSIB, he answered "*I thought it would be beneficial to me in the long run so I decided to go through that channel*".
- he testified that he understood that he had to choose between the WSIB and SABS benefits and that if he wanted SABS he had to sue the other driver.
- he answered "yes" each of three times he was asked if he believed that the election was that between WSIB and SABS.

Arbitrator referred to the SABS and emphasized that the election is not between WSIB and SABS and concluded that because the insured believed this was his real election, the insured's belief does not satisfy the essential criterion for a valid

election, i.e. that it be made not primarily for the purpose of claiming statutory accident benefits.

Arbitrator also concluded that the substance of the matter prevailed over the procedural formalities. Although a tort claim was eventually issued against the other driver, the insured's involvement with a firm that only dealt with SABS when the election was made suggested to the Arbitrator that the insured's primary interest when he made the election was SABS.

On appeal from the decision of the Arbitrator to deny his entitlement to SABS, the insured argued that the Arbitrator erred by focusing on his testimony about the reason he made the election to pursue SABS rather than the objective factors supporting his intention to pursue a tort claim against the other driver. Also on appeal the insured referred to additional evidence of a settlement of his tort claim against the other driver after the Arbitration in question for \$2,500.00.

Director's Delegate found that the Arbitrator correctly stated that the validity of the insured's election to opt out of the WSIB benefits into the auto insurance system must be assessed as of the time he made that election. Although an arbitrator can consider the actions after the election is made to aid in determining whether it was in fact made *bona fides*, delay in bringing an action or failure to prosecute it are likely to undermine a claimant's accident benefits claim. Director's Delegate considered that while objective factors such as the strength of the court action and the steps taken to pursue the claim may be considered in evaluating the insured person's motivation, the SABS makes it clear that the issue is the insured person's reason for making the election. Director's Delegate had no basis on which to substitute the Arbitrator's finding that the insured subjectively made an election he was not entitled to make and he was not persuaded that the Arbitrator erred in his consideration of the objective and subjective factors.

With respect to the further objective factor of actually settling the tort claim, Director's Delegate did not consider that this factor would have persuaded the Arbitrator since it was just one more factor to consider and it was settled for 25% of the value of the SABS claim in dispute.

**Implications:**

Although in this case it is apparent that the objective evidence does not suggest the existence of a tort claim of any significance, it is conceivable that an injured person caught in the middle of these two legislated insurance regimes could be subject to an interpretation of subjective intent based on a critical semantic analysis of his or her answers about the election and based even on the initial choice of representation.

An injured person simply seeking to maximize his or her fair compensation may not be able to navigate these insurance regimes independently and will ask for help. Without knowing who to turn to, the insured may make a costly mistake of first turning to a paralegal with the apparent associated inference of an intention to primarily make a SABS claim.

The injured person must receive a concrete explanation of the collateral role and purpose of the SABS claim when in these circumstances an election to sue an at-fault driver is pursued.

Injured individuals involved in collisions while in the course of their employment faced with the election to sue the at-fault driver ought to obtain initial advice and representation from a lawyer at the time of the election to navigate these regimes to maximize fair compensation.

### **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.

