

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For decisions released the week of June 30 to July 4, 2008

Usurping the Arbitrator by an Insurer Expert . . . Not on My Watch!

Tajendar Sharma v. Allstate Insurance Company of Canada, FSCO A07-001223 (June 9, 2008), Arbitrator Wilson

MVC November 21, 2001. Insured applied for and received benefits. Insured sought arbitration to determine issues related to catastrophic impairment. Arbitration adjourned at the request of the Insurer which then attempted to file an additional expert report which analyzed the catastrophic issue in the context of that expert's view as to the intentions of the AMA Guides. The insured resisted on the grounds that the expert report was not filed in time.

Arbitrator Wilson reviewed the legislation regarding the serving and filing of expert evidence as found in the Evidence Act, R.S.O. 1990, c. E. 23. However, he noted that Rule 39.1 of the Dispute Resolution Practice Code applied in this circumstance and required expert reports be served at least 30 days prior to a hearing. There was a discretion to allow into evidence reports served less than 30 days before a hearing subject to statutory and legal admissibility principles.

Arbitrator Wilson noted that in this case, the expert report was served and filed less than 30 days before the arbitration hearing. Arbitrator Wilson did not accept the Insurer's contention that the law had been changed and thereby the Arbitrator should exercise discretion to allow an additional expert opinion. The Arbitrator noted that FSCO Arbitrators are individuals with the knowledge and experience in the SABS and its application.

Moreover, Arbitrator Wilson found that the pith and substance of the proposed additional expert report was to usurp the key role of the Arbitrator by proffering a specific interpretation of the AMA guidelines. He noted that this type of distortion was "*precisely the type of distortion of the fact-finding process*" (the Supreme Court of Canada had identified in *R. v. Mohan* [1994] 2 S.C.R. 9) that should be avoided. The additional report was not admitted into evidence.

Implications & Commentary:

Arbitrators have the experience and knowledge to deal with matters relating to interpretation of the enabling legislation. Medical Experts are crossing the line when they are being used to change, interpret or alter legally defined entitlements. Experts will not be permitted to usurp the key role of the Arbitrator.

From a statutory interpretation view, Arbitrators may take comfort from the word “impairment” being defined in the SABS as meaning a loss or abnormality of a psychological, physiological or anatomical structure or function. For Arbitrators, this means that physiological and anatomical losses as well as psychological losses have always been included in the “f” criteria for catastrophic “impairment” irrespective of, and overruling, any suggested contrary interpretation of the AMA Guidelines – even before *Desbiens*.

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.