

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of January 12 to 16, 2009

Interest payable under SABS is a benefit - insurer ordered to pay interest on late payment of interest awarded at arbitration

Sorokin v. The Wawanesa Mutual Insurance Co. (2009), 92 O.R. (3d) 314 (S.C.J.)

May 27, 2000 collision. This was a decision of Boswell J. on a summary judgment motion. The insured sought to enforce the payment of interest awarded at arbitration pursuant to s. 46 of the SABS. The arbitral decision was appealed by the insurer and a partial stay granted with respect to payment of the interest. The interest portion of the arbitral award was upheld on appeal. Thereafter, the insurer continued to delay paying the interest which was in excess of \$40,000; it was ultimately paid just before the hearing of the summary judgment motion. The insured sought interest on the interest payment which was delayed approximately one and one half years.

Citing three prior FSCO decisions holding that interest payable under the SABS is not a “benefit”, the insurer argued that s. 46 of the SABS did not permit interest payable on an award of interest. The insured, citing the Court of Appeal decision of *Attavar v. Allstate Insurance Co. of Canada*, argued that the interest provisions in the SABS are not intended to be punitive, but rather they are designed to compensate the insured for the loss of the time value of money owed to the insured. As such, they represent a benefit.

Noting that the *Attavar* decision was rendered after the three FSCO decisions relied upon by the insurer, Boswell J. held that those decisions were no longer good law as they were based on the notion that the interest provisions in the SABS are punitive and not a benefit. The compensatory nature of the interest suggests that it is part of the overall scheme of benefits – accumulation of interest is a benefit under the SABS that accrues to the insured.

Implications:

This decision reinforces one of the purposes interest provisions which is to encourage insurers to payment benefits promptly. The characterization by the Court of interest as a benefit should not be overlooked at mediation where the insurer may attempt to negotiate a reduction in the interest owing on benefits. The Court did not characterize interest as a medical or rehabilitation benefit or some other existing category of benefit. Rather, the interest benefit is a separate category of benefits. As the SABS are silent regarding any limits to be imposed on interest, other than the rate of interest, presumably payment of interest will not



erode the limits of medical, rehabilitation or other benefits to which the insured is otherwise entitled.

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.