

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of March 9 to 13, 2009

The *Desbiens* Debate – Time to Say “Uncle?”

***Economical Mutual Insurance Company v. Augello*, FSCO P09-00002, February 18, 2009, Director’s Delegate L. Blackman**

September 7, 2002 collision. We reported this case in a previous issue of this newsletter in December 2007. At that time, the insurer requested the Director to make a reference to the Divisional Court to determine the issue of whether or not it is correct to assign percentage values to psychological impairments under clause 2(1.1)(g) of the SABS and to combine those values with the physical impairment ratings under clause (f). The Director declined to do so.

This past December, Arbitrator Wilson found the insured to be catastrophically impaired on the basis of 55% whole person impairment which included psychological impairments. In so finding, the arbitrator held that he was bound by *Desbiens* and the Director’s earlier decision in this case.

The insurer then appealed the decision of Arbitrator Wilson on the basis that the arbitrator was not bound by *Desbiens*, and that it is wrong to assign percentage values to mental and behavioural impairments under the AMA Guidelines and to combine them with physical impairments. The insurer sought a stay of the arbitrator’s decision. One of its arguments was that the arbitrator’s decision raises legal issues with far-reaching consequences for insurance industry, and no appellate court has ruled on this question.

The Director declined to grant a stay stating, on this issue, that the fact that no appellate court has overruled *Desbiens* diminishes rather than increases the strength of the stay request.

Implications:

The insurance industry continues to pursue the *Desbiens* debate despite numerous past and recent FSCO decisions upholding the principles set out in that decision as they apply to catastrophic impairment under the SABS. The Superior Court of Justice pronounced on the issue last May in *Arts v. State Farm* when it held that the *AMA* guides must be interpreted in a manner consistent with the SABS, and that percentage ratings can be applied to mental or behavioural impairments. In the *Arts* case, the defendant was denied leave to appeal to the Divisional Court on the basis that there was no reason to doubt the correctness of that decision.



The Ontario Trial Lawyers Association has been granted intervenor status in appeal pending before the Ontario Court of Appeal addressing issues of catastrophic impairment, the court there recognizing that its decision will impact on the recovery of accident benefits under the SABS. That the Court of Appeal sees its ruling as important to SABS interpretations suggests that the arbitrator was correct to say that he or she is bound by the results in *Desbiens*, a Superior Court.

One can only speculate as to how much longer the insurance industry will continue to flog this dying horse, but certainly, the injured are the ones who are paying the high costs of this persistence through ongoing litigation both at FSCO and in the Courts. Perhaps an appropriate response is for insureds to seek special awards in cases where catastrophic classification is challenged on the basis of applicability of the *Desbiens* approach.

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.