

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of May 4 to May 8, 2009

No Re-applications for CAT determination unless Change in Condition.

Timothy J. Wry v. Aviva Canada Inc., FSCO A07-001774, April 17, 2009, Arbitrator Lloyd Richards

MVC December 16, 2000. Insured applied for a determination of whether he had sustained a catastrophic impairment (CAT) on June 19, 2003. On March 17, 2004, insurer provided a notice to insured denying that he was CAT. Insured sent two subsequent CAT applications dated July 21, 2006 and April 13, 2007 which the insurer refused to consider. Insured applied for mediation on February 13, 2007 and arbitration on August 20, 2007.

The insurer argued that the insured was precluded from proceeding because his application for arbitration was filed beyond the two-year limitation period from the date of the insurer's denial of March 17, 2004. The insured argued that he had a right to re-apply for a CAT determination and if he did not have such a right, the limitation period under the *Insurance Act* did not apply because that limitation period refers to the "insurer's refusal to pay the benefit claimed" and no benefit is claimed in the CAT application because it is just an entitlement test.

Arbitrator agreed with the insurer that the insured was precluded from proceeding on the basis of the limitation period. Arbitrator held that the two-year limitation period applies to CAT applications because on reading the SABS and *Insurance Act* provisions together it is clearly indicated that the limitation provisions apply to the entitlement tests. Although the Arbitrator acknowledged that the CAT application forms provide insureds with the place to mark whether the application is a first or subsequent application, he held that these forms reflect the legislative intent to allow multiple applications but they did not, in and of themselves, grant the right to make multiple applications. However, Arbitrator did find that the SABS permitted multiple applications where there is a change in condition:

There appears to be a common thread in the specific provisions in the Schedule relating to catastrophic impairment. The legislation recognizes that degrees of impairment change over time. The legislation allows for a period of time to elapse before assessments should take place and also recognizes that there is a range of impairments that can lead to a catastrophic designation. There is nothing in the legislation precluding an insured from re-applying for benefits in situations where the insured's circumstances change outside of the two year limitation period subsequent to an insurer determining that the insured is not catastrophically impaired. The legislation does not expressly forbid such applications and clearly contemplates re-applications. I therefore find it

reasonable to argue that an applicant can re-apply for determination of catastrophic impairment under the same criterion where his condition changes over time. This approach would be consistent with the broad and liberal interpretation mandated by the consumer protection nature of the insurance legislation.

In this case, however, the arbitrator found that the insured's subsequent CAT applications did not indicate that his condition had changed nor did they indicate that he was applying for a CAT determination on different grounds and so his remedy was to utilize the dispute resolution provisions in the *Insurance Act* and SABS.

Implications:

This case raises an important consideration for counsel on behalf of insureds where there has been a denial of an application for a CAT determination. The dispute resolution should be considered within the two-year limitation period because there may not be a future change in condition sufficient to rely on to permit a re-application.

However, it is important to remember that the first attempt at a CAT determination may not be the only attempt where there is a change in condition at some point in the future or where there is an alternate ground as the basis for the application. It is important to be aware of the significance of any changes in condition. In cases where there is a change in condition and more than two years have passed since the denial of a CAT application or where subsequent litigation has not been successful, the fact that the re-application is based on a change in condition must be clearly stated on the application in addition to the details of the change of condition.

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.