

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of May 11 to May 15, 2009

FSCO no longer has time for mistakes

Jose Escobar Uribe and Wawanesa Mutual Insurance Company, FSCO A08-000880, April 29, 2009, Arbitrator William J. Renahan

MVC December 11, 2006. Insured received income replacement benefits until terminated on May 7, 2007. He applied for Arbitration and this matter is a preliminary hearing to determine if income earned by the insured from June 2006 to October 2006 should be included in the calculation of any IRB having regard to section 64.1 of the *Schedule*.

The insured's original 2006 income tax return showed earnings of \$1,971 from a named company. In or about March 2008, he filed an amended return for the 2006 taxation year in which he included about \$20,000.00 in income from a numbered company. He testified that he was laid off by the numbered company and did not receive a T-4 slip or Record of Employment directly, but he did produce a copy of a Record of Employment from the employer that was obtained by the Employment Insurance office showing the relevant income and time period. The proprietor of the numbered company also completed an Employer's Confirmation of Income two weeks after the accident that showed the relevant income and time-period of employment. Canada Customs and Revenue Agency issued a Notice of Reassessment for 2006 after receiving the amended return, which resulted in the insured having to pay a further \$327 in income tax.

The Arbitrator looked at subsections 64.1(1) and (2) of the SABS. He stated that the application of the two subsections, where a person does not report income to CCRA and subsequently files an amended return and is reassessed, is not clear. He felt that if an applicant can file an amended return to remedy his non-disclosure of income, subsection (1) has no meaning.

The only previous case on this subsection reads: "*The legislature's action through its delegate, the Lieutenant-Governor-in-council, who enacted s. 64.1 of the SABS, is strong evidence of a public policy against compensating accident victims for income on which they wrongfully paid no tax.*"

Arbitrator Renahan went on to consider that the no-fault system is designed to be efficient, fair, equitable, reasonably predictable and to move quickly. In this context, he considered that the calculation of income replacement benefits is not simple where the applicant has not declared his income to CCRA and may involve numerous requests for documents, accountant reports and the credibility of the applicant, employer and family members. Arbitrator Renahan felt the purpose of section 64.1 is to avoid these complex and more expensive enquiries.

Consequently, his decision was that the income earned in 2006 and claimed in a revised return in 2008 is not included in the calculation of any income replacement benefit.

Implications:

Based on this decision, an insured will be prevented from receiving an income replacement benefit that is commensurate with their pre-accident earnings if they made any errors or omissions in their initial income tax returns. With great respect for Arbitrator Renahan, I must disagree with his interpretation of section 64.1. The wording of the legislation and its limited prior treatment is most consistent with an interpretation where income declared in an amended return may be considered in the calculation of income replacement benefits where CCRA has accepted the return, the insured has been taxed on such amounts, and the insured has satisfied the onus of proof regarding the authenticity of such earnings.

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 Ryan Steiner at Legate & Associates: rsteiner@legate.ca.