

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of December 21 to 25, 2009

Sometimes Trying to Get Fresh, Goes Bad on Appeal

Alan Brookes and Aviva Canada Inc. FSCO Appeal P09-0004, September 21, 2009, Director's Delegate David Evans

MVC July 1, 1994. Insured applied for and received benefits under Bill 164 SABS. There was a dispute as to insured's pre-accident earning capacity ("PEC"). The matter proceeded to Arbitration which was resolved in favour of the insurer. The insured appealed, seeking to get fresh evidence introduced on his PEC, that the arbitrator suggested in her reasons might have altered her decision.

In reaching his conclusion on the introduction of fresh evidence, the Director's Delegate ("Evans") followed the criteria set out in FSCO decisions and the Supreme Court of Canada in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Those criteria are: (a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (c) The evidence must be credible, in the sense that it is reasonably capable of belief; and (d) The evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

Evans noted that legislation prior to 1996 gave the Director's Delegate the power to, in effect, do a second arbitration. However, he also noted the law had changed to limit the Director's Delegate appellate jurisdiction to appeals on points of law. The evidence offered by the insured likely could have been obtained in advance of the arbitration. In looking at the circumstances as a whole, Evans concluded that the fresh evidence did not meet the applicable criteria. He felt that his views could not be substituted for those of the Arbitrator by way of a rehearing.

Implications:

Courts and Tribunals generally have as a goal, the final determination of an issue. They are looking for finality, rather than a regurgitation of the same arguments or recurrence of the same battles by insurers, insureds and parties. The balance between the harshness of the law and justice lies in an understanding of the process and the infrequent circumstances where fresh evidence will be permitted.



Insureds must be aware that in any adjudicative process, it is necessary to put their best foot forward from the outset. Re-characterizing evidence as 'Fresh' after the fact will not stop an insured's appeal from going 'Bad', if the insured's case was already headed that way.

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 Dr. Brian Murphy at Legate & Associates: bmurphy@legate.ca.