

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of January 18 to 22, 2010

The Real World and Tax World Collide: Evaluating How to Allocate Partnership Income Post-MVC.

Garic v. Markel Insurance Company of Canada, FSCO A07-000909
December 29, 2009, per Arbitrator Bujold.

MVC of July 11, 2006. Insured self-employed partner with spouse in trucking business. Insured sharing truck driving responsibilities before the crash with spouse. The evidence suggested that they split the business's income 50/50 for tax purposes before the crash. There was no partnership agreement and there was no record of what amount of income was generated separately by either the insured or her spouse.

Insured was not able to return to her truck driving duties after the crash except for some minor administrative duties. Her spouse/partner took over some of her duties and a replacement worker was hired to take over most of her duties. There was no evidence that the terms of the business partnership were altered by agreement as a result of her reduced participation. The partners accepted the advice of their bookkeeper to allocate post-mvc income, for tax purposes, according to their new respective contributions to the business, rather than the 50/50 split before the crash.

Insured's position was that her post-mvc income should be limited to 5% of the net business income, consistent with her relative contribution to the business. Insurer's position was that the insured's true financial situation had not changed significantly after taking due account of the wage paid to the replacement worker.

Arbitrator accepted the insurer's approach noting that tax returns are *prima facie* evidence of post-mvc income; the inquiry into the amount of pre- and post-mvc income should go beyond the mere form of financial arrangements and into the substance of each individual's financial situation. An accounting approach that artificially inflates the amount of a benefit will be rejected.

An important finding of fact was that the insured continued to be an equal partner in the trucking business and continued to receive income as such. The insured's approach would have unjustifiably inflated her benefit and resulted in over-compensation. The s.6(4) deduction for replacement worker salary expense was directly and solely attributable to the insured's inability to participate in the business so was deducted from the insured's 50% share.

Arbitrator was prepared to consider some reasonable adjustment to the allocation of post-mvc income to account for the increase in work performed by

the insured's spouse, but this was not presented with reliable and cogent evidence on this issue. There was no evidence upon which to value the additional work performed by the insured's spouse.

Comment:

It is important for self-employed insured's involved in partnerships to clarify and document any changes in responsibilities and related changes in remuneration from the business following an injury. This could be reflected in post-mvc partnership agreements and business records to record and evidence the basis for altering any pre-mvc split of business income. If the non-injured party's additional duties are properly quantified and evidenced in the business records, it may justify an increase in the amount of post-mvc income attributable to the non-injured partner and an increase of IRB's payable to the injured partner to fairly and realistically reflect the income situation without over-compensation.

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.