

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of April 5 to 9, 2010

No meeting of the minds at mediation regarding full and final settlement

Allstate Insurance Company of Canada v. Klimitz, FSCO P08-00018, March 16, 2010, Director's Delegate D. Evans

November 7, 2003 collision. Appeal of arbitrator's finding at a pre-hearing that there was a valid offer and acceptance at mediation to resolve the issues in dispute between the parties. Arbitrator had held that an offer for full and final settlement of all accident benefits claims was made at mediation and accepted a few months later. Evidence at the pre-hearing was that the offer made was either \$17,500 or \$17,000. Arbitrator found that the discrepancy between the two figures was not significant enough to conclude there was no meeting of the minds. As well, arbitrator held that there was no evidence that the offer made at mediation had been revoked before it was accepted several months later.

Director's Delegate held that there was no valid offer and acceptance for the following reasons:

1. Report of the mediator stated that the last offer to settle was zero. Either the arbitrator had evidence of a last offer of zero, or gave weight to an alleged offer that should not have prejudiced the insurer's position given the without prejudice nature of the mediation.
2. There was no evidence that the parties had reached agreement on all of the essential terms of the settlement. Director's Delegate held that the arbitrator could not simply dismiss the discrepancy in the figures as not significant. Whether the difference was \$500 or \$50,000, the value of the settlement must be agreed upon.

Director's Delegate concluded there was no meeting of the minds to support a valid offer and acceptance.

Implications:

It is often the case that parties at mediation may discuss full and final settlement of all accident benefits claims despite the fact that only certain issues are the subject of the mediation. Rule 22.1 of the Dispute Resolution Practice Code provides that the mediator will report the last offer made by the *insurer in respect of any issue that remains in dispute*. Offers of full and final settlement will not, therefore, appear on mediator's report. As such, where parties wish to resolve accident benefits claims on a full and final basis at mediation, or wish to ensure such offers remain open to acceptance, steps should be taken before the



mediation has concluded to put those offers in writing, including all of the essential terms and the time that the offer will remain open for acceptance. Otherwise, the without prejudice nature of negotiations at mediation may be a barrier to later enforcement of an offer made and accepted.

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 Joni Dobson at Legate & Associates: jdobson@legate.ca.