

INSURANCE LAW BULLETIN

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SABS CATASTROPHIC IMPAIRMENT UPDATE

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On October 19, 2010, the Ontario Superior Court of Justice released the decision in *Kusnierz v. The Economical Mutual Insurance Company*, [2010] O.J. No. 4462. The decision outlines changes with respect to the calculation of whole person impairment (WPI) regarding the designation of catastrophic impairment under the Statutory Accident Benefits Schedule (SABS).

Despite this decision by the court, FSCO arbitrators have recently released decisions referencing *Kusnierz* but ignoring the new approach and continuing with the previous method of calculation as outlined in *Desbiens v. Mordini* (specifically the late 2010 decisions of *Jaggernaut v. Economical* and *T.S. v. Allstate*). Accordingly, the issue remains at the forefront of accident benefit dialogue, and likely will remain there until the Court of Appeal renders an appellate decision in *Kusnierz*.

BACKGROUND

The case arose from a claim for statutory accident benefits as a result of a motor vehicle accident which resulted in the plaintiff's amputation of his left leg below the knee. The plaintiff sued the insurer for a declaration that as a result of his injuries, he sustained a catastrophic impairment and was entitled to enhanced benefits under the SABS.

ISSUES

The parties agreed on many facts and issues. The only classification of catastrophic impairment that the plaintiff could possibly qualify for was clause 2(1.1)(f) of the SABS. Two issues were identified for determination by the court:

1. Is it permissible to assign percentage ratings in respect of the plaintiff's psychological impairments under clause 2(1.1)(g) of the SABS and combine them with percentage ratings in respect of the plaintiff's physical impairments under clause 2(1.1)(f) of the SABS, for the purposes of determining catastrophic impairment pursuant to the SABS and the 4th Edition of the AMA's Guides to the Evaluation of Permanent Impairment?

2. If the combining of physical and psychological impairment ratings was not proper, has the plaintiff nevertheless sustained a catastrophic impairment on the basis of 2(1.1)(f) of the *SABS* alone?

It was conceded by the insurer that if the plaintiff's physical and psychological impairments were combined he would meet the definition of catastrophic impairment. The court discussed the legislative and common law history in detail. Pursuant to the decision in *Desbiens v. Mordini*, the caselaw suggested that ratings under physical and psychological impairments could be combined to determine whether the plaintiff had suffered a "catastrophic impairment" by reaching the accepted threshold of 55% WPI.

Two experts were called in connection with this case, Dr. Ameis for the plaintiff, and Dr. Lacerte for the defense. Both experts agreed that the Guides did not permit physical impairments to be combined with "mental and behavioural disorders" for the purpose of calculating whether the plaintiff had suffered a catastrophic impairment. The experts only disagreed on the second issue, namely whether the plaintiff was "catastrophically impaired" under clause 2(1.1)(f) of the *SABS*.

COMBINATION OF IMPAIRMENT RATINGS

The court examined the issue of the combination of percentages and impairment ratings, despite the experts' unanimous opinion on that issue. The court found that the *SABS* must prevail over any provision of the Guides which conflicted with a related *SABS* provision. However, where the *SABS* were silent, the Guides would apply.

The court condemned the practice of combining different impairments to achieve the 55 per cent threshold for a finding of catastrophic impairment. The introduction of subjective mental and behavioural factors would undermine the objective approach to the assessment of impairments that contributed to the calculation of whole-person impairment required by the Guides and the Schedule. Justice J. Lauwers delineated the following reasons for his decision:

1. The Guides deliberately did not permit mental and behavioural disorders in Chapter 14 to be assessed in percentage terms and combined with the percentage values derived from impairments assessed under the other chapters of the Guides for the purposes of determining WPI;
2. The structure of the *SABS* reinforced the bright line demarcation between mental and behavioural disorders referred to in Chapter 14 of the Guides from the impairments assessed under other Chapters of the Guides; and
3. This interpretation was consistent with the purpose of the specific provisions of Bill 59 and the *SABS* that this issue engaged.

Justice Lauwers also examined whether his decision to refuse a combined total produced a just result for Kusnierz. He considered the purpose of the legislation as follows: "Bill 59 aimed at reducing no-fault benefits to most people with the savings going to stabilize insurance premiums, while creating a narrow exception for people who were catastrophically impaired". The court emphasized it was not permitted to substitute its own notion of good policy for the legislature's intent.

CATASTROPHIC IMPAIRMENT UNDER CLASS (F)

The court then moved to the second issue, namely whether the plaintiff had sustained a catastrophic impairment on the basis of section 2(1.1)(f) of the *SABS* alone. The court observed that the definition of catastrophic impairment in the *SABS* granted no overriding discretion to the court. The *SABS* through the use of the Guides prescribed a highly structured framework that was precise and mathematical. The result of a bright line threshold like 55% WPI meant that some people would meet it handily, others would fall far short, and some would come close. For those who come close, there was no discretion to the court out of sympathy to push the plaintiff over the line. This is the scheme that the legislation had adopted, and accordingly bound the court in determining this second issue. The court found that the final value of the plaintiff's impairment rating was 50% WPI. Accordingly, the plaintiff did not meet the required 55% WPI under either calculation method, and was therefore not catastrophically impaired.

COMMENTARY

The decision in *Kusnierz* suggests that 2(1.1)(f) and (g) cannot be combined as has been the practice in multidisciplinary CAT assessments since the decision in *Desbiens*. *Kusnierz* is very unique in that both experts agreed that combining (f) and (g) is not permissible. Accordingly, while this creates conflicting case law at the Superior Court level, the decision can be used in court-based claims to argue that plaintiffs are not permitted to combine impairment ratings as had previously been done under *Desbiens*. The decision has been appealed to the Court of Appeal and is expected to be heard in the late spring of early fall of 2011.

It is unlikely that *Kusniersz* will have much influence with arbitrators. Given that the majority of catastrophic decisions are made by arbitrators, few will feel compelled to follow *Kusnierz* in the face of the Director Delegate's decision in *Desbiens* and other Delegates' decisions (for example, *Augello v. Economical Mutual Insurance Company*; *McMichael v. Belair Insurance Co. and Pilot Insurance Company and Ms. G.*). In a recent FSCO decision, *Jaggernauth v. Economical Mutual Insurance Company*, Arbitrator Richard Feldman indicated that arbitrators were bound by the Delegate's decision in *Desbiens* until the appeal level of FSCO or the Ontario Divisional Court, the Court of Appeal or the Supreme Court of Canada stated otherwise or the *Schedule* was amended in such a way as to overrule the interpretation that FSCO had given to Section 2(1.1). We therefore fully expect that arbitrators will continue to follow *Desbiens*, barring judicial pronouncement from the Court of Appeal on *Kusnierz*.

At the same time, the legislature has confirmed that a new definition of catastrophic impairment is being considered which could have impact upon both the Superior Court decision in *Kusnierz*, and any subsequent pronouncement from the Court of Appeal.

Thrown into this mix is the provincial election scheduled for approximately 18 months' time. A new definition coupled with an appellate announcement that reduces consumers' access to hundreds of thousands of dollars worth of additional accident benefits could be highly problematic for the incumbent government, particularly in the face of rising insurance premiums. To what extent the Court of Appeal will balance all of these considerations in the decision they render, remains to be seen.

Here are additional considerations the Court of Appeal is left to grapple with:

- Given that the definition of a catastrophic impairment has been amended in the new Schedule to include single arm or leg amputees and the total permanent loss or use of a limb, the scope of entitlement under the new 55% WPI is much broader. Had *Kusneirz* been considered under the new Schedule, the plaintiff would have been deemed catastrophically impaired.
- In terms of a good policy decision, the Court could also feel obligated to consider that under the new *SABS* there are significantly fewer medical and rehabilitation benefits available to consumers from the outset (unless costly optional benefits are purchased). Accordingly, the Court could feel compelled to balance the shortfall of cash for benefits required up front with the ability to secure the funding down the road.
- The Court must balance the legislative goal of keeping insurance rates in check with the fluid and flexible interpretation required of consumer protection legislation.

Of further interest (and another consideration for the Court of Appeal) is that the newer editions of the Guides permit the combination of impairment ratings, which may suggest that future decisions could eventually overturn *Kusnierz*. However, the newer editions do not equate psychological scoring in any way similar to the approach taken in *Desbiens*. Specifically, the version of the Guides referenced in *Desbiens* used high percentages of psychological impairments, while the newer Guides use significantly reduced percentages.

Catastrophic impairment remains an interesting area of the *SABS*, with many new developments both from the recent legislative changes and the ever-evolving common law and arbitration decisions. A detailed analysis of *Kusnierz* is available upon request.