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INSURANCE LAW BULLETIN

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TRANSITIONING THE RATE OF INTEREST ON OVERDUE PAYMENTS

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The rate of interest on overdue accident benefits payments changed from 2% per month, compounded monthly, in the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996* (“1996 SABS”), to 1% per month, compounded monthly, in the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (“2010 SABS”). The initial guidance on the transition was offered in the Superintendent’s Bulletin No A-04/10: *Transition to the New Statutory Benefits Schedule – Effective September 1, 2010*. It was suggested that the rate of interest outlined in the 2010 SABS (i.e. 1%) would apply to the benefits that become overdue on or after September 1, 2010, and that the rate of interest outlined in the 1996 SABS (i.e. 2%) would apply to the benefits that became overdue before that date.

The decisions of Arbitrator Maggy Murray in *Federico v. State Farm Mutual Automobile Insurance Co.*, [2012] O.F.S.C.D. No. 20 and Arbitrator Jeffrey Rogers in *Subramaniam v. Wawanesa Mutual Insurance Co.*, [2012] O.F.S.C.D. No. 100 have since provided an alternative interpretation.

BACKGROUND

Jeyapalan Subramaniam was involved in a high impact collision on January 22, 2008. He claimed accident benefits from Wawanesa Mutual Insurance Co. pursuant to the 1996 SABS. At arbitration, he sought attendant care benefits, housekeeping and home maintenance benefits, and income replacement benefits from January 22, 2008. He further maintained a claim for various treatment and assessment plans, a special award, arbitration expenses, and interest at the rate of 2% per month, compounded monthly.

Nicola Federico was involved in a motor vehicle accident on December 20, 2006. He claimed accident benefits from State Farm Mutual Automobile Insurance Co. pursuant to the 1996 SABS. At arbitration, he sought income replacement benefits from February 16, 2008 and ongoing, housekeeping and home maintenance benefits from January 13, 2008 to December 19, 2009, an MRI expense from 2007, two treatment plans from 2007 and 2008, a special award, arbitration expenses, and interest at the rate of 2% per month, compounded monthly.

ISSUES

The parties in both cases agreed that the interest rate of 2% per month, compounded monthly, applied to the benefits that became overdue on or before August 31, 2010. The contentious issue concerned the applicable rate of interest on payments that became overdue on or after September 1, 2010. The insurers argued that the rate of 1% should be applied to all benefits that became overdue on or after September 1, 2010. The claimants argued that the rate of 2% should be applied to all overdue benefits, regardless of whether or not they became overdue on or after September 1, 2010.

DECISION OF ARBITRATOR MURRAY IN *FEDERICO*

Arbitrator Murray opined that the rate of interest is a matter of substantive law and is vested on the date of the collision. In Arbitrator Murray's opinion, transition rule 2(2)2.i. of the 2010 SABS and the Ontario Regulation 35/10 (i.e. the amended 1996 SABS) do not authorize any interference with an insured person's vested right to interest, which is outlined in subsection 46(2) of the 1996 SABS (i.e. 2%).

Arbitrator Murray awarded Mr. Federico all of the disputed benefits, a special award, and interest at the rate of 2% per month, compounded monthly. The interest rate was the same for the benefits that became overdue both before and after September 1, 2010.

DECISION OF ARBITRATOR ROGERS IN *SUBRAMANIAM*

Arbitrator Rogers agreed with Arbitrator Murray that interest is a matter of substantive law. In his opinion, however, the right to interest vests when the payment of the benefit becomes overdue.

Arbitrator Rogers acknowledged the restriction that is outlined in section 3(1.3) of the 1996 SABS, which states: "No amount referred to in this Regulation shall be paid after August 31, 2010". In his opinion, transition section 2(2) of the 2010 SABS modifies this restriction in a way that allows for payment of certain benefits as if the restriction did not exist. Section 2(2)2 of the 2010 SABS specifically requires payments of old benefits in the amounts that are determined under the 1996 SABS, with specific exceptions. The exceptions do not include the interest provisions in section 46(2) of the 1996 SABS. As the Legislature did not specifically include section 46(2) in its list of specific exceptions, Arbitrator Rogers concluded that Legislature did not intend to erode the right to payment of interest at the rate of 2% per month, compounded monthly.

Arbitrator Rogers awarded Mr. Subramaniam housekeeping and home maintenance benefits, income replacement benefits, and interest at the rate of 2% per month on all overdue payments, compounded monthly. He specifically opined that the interpretation of the transitional rules that is outlined in the Superintendent's Bulletin is not supported by the transitional provisions.

COMMENTARY

Given the guidance that was provided in the Superintendent's Bulletin with respect to interest, insurers may have been working under the misapprehension that interest is calculated at the rate of 1% per month on any benefits that became overdue on or after September 1, 2010. Arbitrators Rogers and Murray have made it clear that the interest rate is a substantive right. Therefore, interest will accrue at the rate of 2% per month for accidents that occurred prior to

September 1, 2010 and 1% per month for accidents that occurred on or after September 1, 2010, regardless of when exactly the payments became overdue.

Arbitrator Rogers' decision also clarifies that costs of examinations incurred on or after September 1, 2010 are payable under the 2010 SABS because they are specifically exempted from his analysis through section 2(2)2 of the 2010 SABS.

Arbitrator Murray's decision is currently under appeal and may ultimately be revised.