

**Accident Benefits – section 51 Interest, formerly section 46 of the *SABS*  
*Federico & State Farm Mutual Automobile Insurance Company (FSCO A08-001138):*  
**Interest is Substantive and is not Retroactive****

On March 23, 2012, the Financial Services Commission of Ontario released a decision by Arbitrator Maggy Murray interpreting the application of compound interest on overdue payments for accident benefits accrued prior to and following the September 1, 2010 statutory changes, in accordance with section 46(2) of the old *Statutory Accident Benefits Schedule* (“*SABS*”) for accidents on or after November 1, 1996, presently section 51 under the new *SABS* for accidents on or after September 1, 2010, and the transitional rules in subsection 2(2) of the new *SABS*.

Arbitrator Murray determined that interest is a matter of substantive law and is compensatory, and that the applicable rate of interest both before and after September 1, 2010 is 2% per month compound monthly. In this case, the motor vehicle accident occurred on December 20, 2006 and various benefits were being claimed, including IRBs, medical/rehabilitation, and Housekeeping.

Arbitrator Murray reasoned that:

- The new *SABS* does not state that the insured’s substantive right under subsection 46(2) of the old *SABS* is altered, and the new *SABS* (in particular the transition rules under subsection 2(2)) does not contain a clear legislative intent to rebut the presumption against interference with vested rights.
- Paragraph 3(1.4) of Ont. Reg. 35/10 of the *Insurance Act*, as amended, supports the interpretation that after August 31, 2010 interest is payable under the new *SABS*, but in the amount determined under the old *SABS*, and does not state that a vested right under subsection 46(2) of the old *SABS* is altered.
- The reference in subparagraph 2(2)2.1 of the new *SABS* does not authorize an interference with a vested right under subsection 46(2), and is consistent with the interpretation that the insured-Applicant’s vested right under the earlier interest section is not to be interfered.

Arbitrator Murray ultimately concluded that the insurer, State Farm, owed interest for overdue payment of benefits to the insured-Applicant in the amount of 2% per month compounded monthly pursuant to the old *SABS*. Therefore, Arbitrator Murray determined that interest for pre-104 and post-104 week IRBs is payable at a rate of 2% per month compound monthly from February 16, 2008, as claimed, to August 30, 2010 and also from September 1, 2010 and ongoing. At the heart of this determination is Arbitrator Murray’s refusal to follow the Superintendent’s Bulletin No A-04/10, Transition to the New Statutory Accident Benefits Schedule – Effective September 1, 2010, which Arbitrator Murray stated were “confusing” and “not law.”

The Bulletin clearly states that interest on amounts that become overdue **on or after** September 1, 2010 in respect of old accidents will accrue at the new *SABS* rate of 1% per month and be compounded monthly, and interest on amounts that become over due **before** September 1, 2010, in respect of old accidents, will accrue at the old *SABS* rate of 2% per month compounded monthly both before and after September 1, 2010.

This decision is significant as Arbitrator Murray essentially interpreted the legislation as meaning interest cannot be changed retroactively and is a substantive benefit. It is uncertain as to whether the determination regarding interest will be appealed by State Farm at this time. Dutton Brock will keep you up to date on this decision.

*If you would like more information on motor vehicle insurance, please do not hesitate to call.*

**Dutton Brock LLP**

438 University Avenue, Suite 1700  
Toronto, Canada M5G 2L9

Telephone: (416) 593-4411 Fax: (416) 593-5922

[www.duttonbrock.com](http://www.duttonbrock.com)