**DUTTON BROCK *BULLETIN*** ***January 23, 2014***

## ACCIDENT BENEFITS – INCURRED EXPENSE - SIMSER AND AVIVA

In the recent FSCO appeal of *Simser* v. *Aviva* (January 9, 2014, P13-0004), further clarification was provided with respect to the definition of an incurred expense under section 3(7)(e) of the *Statutory Accident Benefits Schedule – Effective September 2010*. Mr. Simser was injured in a motor vehicle accident and his wife provided attendant care services. The issue on arbitration was the interpretation of an incurred expense under s.3(7)(e)(iii) and whether the person who provided the goods or services sustained an economic loss as a result of providing the goods or services to the insured person. Ms. Simser claimed she had lost employment income in order to provide the care. The issue of an incurred expense is triggered with a number of different accident benefit claims including caregiver, housekeeping and attendant care benefits in the post September 1, 2010 accident benefits regime. At the arbitration, Arbitrator Lee concluded that there was insufficient proof to substantiate the alleged loss of income of Ms. Simser. She did not provide documentation from her workplace of her claimed loss of regular or overtime hours. The Arbitrator found her testimony vague and lacking specificity. On the issue of previous payment by the insurer after the accident, Arbitrator Lee found that the expenses were incurred prior to the date when attendant care services were provided and therefore this did not satisfy section 3(7)(e)(iii)(b) that the economic loss be sustained as a result of providing the goods or services. The argument that the out of pocket expenses were an economic loss relating to the benefits in dispute was also rejected by Arbitrator Lee on the basis that economic loss could not have meant trivial out of pocket expenses such as a bus ticket or a meal which would lead to a result that the amendments to the *Schedule* were superfluous and meaningless. The Simsers argued a lawn care company met the requirements under section 3(7)(e)(iii)(a), that the person who provided the goods or services did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged but for the accident. Arbitrator Lee did not find the documentation submitted credible, noting that the invoices provided from the lawn company were generic documents that provided little or no information and an adverse inference was drawn as no representative from the lawn company testified.

On Appeal, Delegate Blackman applied the Court of Appeal decision of *Henry* v. *Gore* and upheld the findings of the Arbitrator and stated, "where no economic loss is sustained, no attendant care benefits are payable in respect of care provided by a family member even if the family member provided care that would otherwise be provided by someone in the course of their employment, occupation or profession that would require the insurer to pay attendant care benefits." On the issue of whether the lawn company / service provider did so in the course of the employment, Delegate Blackman was not persuaded that prior payment by the insurer satisfied the requirements of that section and noted that the onus of proof remained on the insured.

While the parameters of economic loss continue to be undefined in the case law, the decisions to date indicate that there must be a financial element to the loss. In *Gore* v. *Henry*, it was undisputed that loss wages fulfilled the requirement for an economic loss and this continues to be accepted as satisfying the definition of an incurred expense, so long as the insured can prove the economic loss by way of documentation and oral evidence. In *Simser*, the Arbitrator rejected theories of economic loss and the opinion of Economics Professor Jack Carr that a broad definition of economic loss outside the ordinary sense or everyday meaning should be incorporated into the *Schedule*. The Arbitrator however, did leave the door open that a loss of opportunity might equate to an economic loss under the *Schedule* but this type of argument remains untested in Arbitration and in the Courts. In *Simser*, the Arbitrator did not accept an argument that time away from seeing movies, knitting, crocheting, going out with friends or other activity was sufficient to equate to an economic loss. On Appeal, Delegate Blackman agreed with the Arbitrator's interpretation of economic loss. It remains to be seen whether other examples of loss of opportunity might be equivalent to economic loss under section 3(7)(e) of the *Schedule*. For now, the FSCO appeal of *Simser* confirms that where there is no evidence of lost wages as a result of the service provider providing the services, this will be fatal to the claims for certain accident benefits where there is a requirement for an incurred expense under the *Schedule*.

Dutton Brock LLP
438 University Avenue, Suite 1700
Toronto, Canada M5G 2L9
**Telephone: (416) 593-4411 Fax: (416) 593-5922**
***www.duttonbrock.com***