

Kusnierz Decision on Catastrophic Impairments Overturned

By Darcy Merkur

In his article “A Catastrophic Upheaval – *Kusnierz* Decision Challenges *Desbiens* Ruling” in the Fall 2011 issue of *The Health Professional*, Darcy Merkur mentioned the appeal in the *Kusnierz* case to be heard in November 2011. Here is an excerpt from his update after that appeal.

According to the Ontario Court of Appeal, it would be “unfair” to deny persons with combined physical and psychological impairments the enhanced benefits available to persons with similarly extensive impairments that are exclusively physical or exclusively psychological. This unanimous decision clarifies the law on how to properly calculate “whole person impairment” ratings when evaluating “catastrophic impairments” under the Ontario Statutory Benefit Schedule (SABS).

In *Kusnierz v. Economical Mutual Insurance Co.*, 2011 ONCA 823, the appeal court overturned the October 2010 trial decision by Justice Peter Lauwers and restores the rules for calculating WPI ratings established by Justice Harvey Spiegel in *Desbiens v. Mordini* back in 2004.

In the *Kusnierz* appeal decision, Associate Chief Justice James MacPherson adopts the conclusions of Justice Spiegel in the *Desbiens* decision and rules that it is in accordance with the AMA Guides to assign percentages to psychological impairments and to combine them with physical impairments in determining catastrophic impairment under the WPI test.

The *Kusnierz* appeal decision is welcome news to accident victims across Ontario whose claims have hinged on the interpretation of the WPI test and have essentially been on hold since the 2010 *Kusnierz* trial decision. While FSCO continued to follow the now-confirmed *Desbiens* approach pending the outcome of the *Kusnierz* appeal, practically speaking all such FSCO decisions were under appeal and the flow of benefits claimed therein were at a standstill.

With the proper interpretation of the current WPI test resolved, the catastrophic impairment battle now shifts back to the ongoing demand by the insurance industry to change the definition of catastrophic impairment to expressly exclude psychiatric considerations from the WPI test.



At this time the superintendent of financial services at FSCO is in the process of submitting a report to the Minister of Finance on recommended changes to the definition of catastrophic impairment. In light of the *Kusnierz* appeal decision and the clear comments by the Ontario Court of Appeal relating to the issue of fairness, any proposal to expressly prevent combining physical and psychological impairments would be inappropriate. █

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