

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of April 14 to 18, 2008

Twelve month period for notice of overpayment starts to run at first payment

Slater v. Personal Insurance Company of Canada; FSCO A07-000592, March 27, 2008, Arbitrator D. Ashby

May 14, 2004 collision. Preliminary issue to determine whether or not insurer was entitled to receive repayment of income replacement benefits overpaid. Insurer calculated weekly income replacement benefits to be approximately \$44 per week more than they should have been. Insurer continued to pay weekly benefits for almost 2 years. In March 2006, insurer gave notice of overpayment for the past 12 months, and notified that the overpayment would be deducted from weekly income benefits at the rate of 20%. At issue was the interpretation of subsection 47(3) of the SABS which provides as follows:

The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

Insured argued that subsection 47(3) creates a limitation period requiring notice to be given within 12 months of the first payment. Insurer argued "the payment" provided for in subsection 47(3) refers to any payment made in error within the 12 month period prior to giving notice, and so creates a rolling limitation period.

Arbitrator found the meaning of "the payment" is ambiguous in circumstances where an insured is receiving serial payments. An insured entitled to a benefit paid out in one payment would be treated differently than an insured entitled to successive benefits. This results in an inconsistent application of the notice period to different classes of benefits. To permit a rolling limitation period would place an unfair burden for repayment on those entitled to successive benefits, and deny certainty in respect of benefit payments. To avoid the creation of a rolling limitation period "the payment" must be interpreted as meaning the first payment made in error. A 12-month period from the first payment made in error provides a short but reasonable period in which an insurer can investigate, verify the accuracy of its calculations and notify insured of any error. The insured was not required to repay the income replacement benefit overpayment.

Implications:

Representatives of insured persons should diarize 12 month limitation period which starts to run from the first payment date of any particular benefit, including successive benefits. Arguably, where an income replacement benefit varies



weekly, a new 12 month limitation period under subsection 47(3) may be created with each payment depending on the nature of the error.

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