

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of September 1 to 5, 2008

Child Care Costs as a Rehabilitation Expense

***Johnson v. Allstate Insurance Company of Canada*, FSCO A07-000194, A07-000195, A07-000196 and A07-000199, July 18, 2008, Arbitrator Judith Killoran**

MVC's of Oct. 24, 2004 and Jan. 13, 2005. At the time of the mvc's Mr. and Mrs. J were retired and were foster parents. They cared for 2 to 4 foster children at a time and received an allowance from the Children's Aid Society (CAS) to reimburse the expenses related to caring for their foster children. They were also provided with some relief funding for child care prior to the mvc's. After the mvc's Mr. and Mrs. J required assistance caring for their foster children and applied for rehabilitation benefits. They also accepted their 3rd and 4th foster children after the mvc's.

The insurer did not agree that child care qualified as a rehabilitation expense and argued that because they continued to take foster children after the mvc's, this confirmed they did not suffer impairments. The insurer also argued that the child care expenses as rehabilitation expenses should be reduced by payments for child care expenses received by CAS.

Arbitrator considered the relevant clauses of section 15 of the SABS which provide that the *rehabilitation benefit shall pay for reasonable and necessary measures* undertaken by an insured person to reduce or *eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his or her family, the rest of society and the labour market*. Subsection 15(5) provides that the rehabilitation benefit shall pay for ... "*other goods and services that the insured person requires, except services provided by a case manager*".

Arbitrator accepted that Mr. and Mrs. J had obligations to the CAS as foster parents which included accepting up to 4 children at any given time and found that they were able to fulfill those pre-existing obligations by continuing to attend therapy while employing relief child care and housekeeping providers. Further, to the extent that they were entitled to payment of some child care expenses by the CAS, those payments were pre-existing and not linked to the mvc's while the child care expenses claimed as rehabilitation expenses were linked to the mvc's and represented amounts paid by Mr. and Mrs. J in excess of the CAS payments.

Finally, Arbitrator referred to the recent judicial review decision in *G.B. v Pilot Insurance Co.* [2008] O.J. NO. 288 (S.C.J.) that restored the order of Arbitrator Blackman in *Ms. G. and Pilot Insurance Company* (FSCO A04-000446, December 22, 2005) which provided in that case that nanny services were an integral part of a proposal to reduce or eliminate the disability resulting from an MVC and to facilitate the insured's reintegration into her family. Arbitrator Blackman in that case rejected the submission that section 13 of the SABS was the exclusive basis for caregiving funding and characterized the case as being about whether the recommended services were reasonable and necessary to rehabilitate a family at risk. Subsection 15(5) was found to contain an express exclusion of services provided by a case manager but no other exclusion limiting the application of the broad language "other goods and services that the insured person requires".

Arbitrator found that the services applied for by Mr. and Mrs. J were reasonable and necessary to rehabilitate a family at risk, not simply to fund child care but for the rehabilitation of the J's. The relief child care was necessary to allow the J's to both attend rehabilitation programs and integrate back into their societal roles as foster parents

Implications:

Given the broad language of s.15(5) it is important to consider SABS funding for rehabilitation measures beyond those measures undertaken to directly treat the injuries from the collision. Where the expenses are distinct from any pre-disability expenses and are necessary to allow an insured to participate in a rehabilitation program or to integrate back into their role in family, society or the labour market, then rehabilitation funding should be considered.

Accessing Arbitration Decisions

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