

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of November 24 to 30, 2008

Bill 164 - Reasonable and Necessary . . . When Adjusters Don't Know What They Are Doing

Celeste De Lorenzi and Wawanesa Mutual Insurance Company, FSCO A05-002712 Nov 11, 2008, Arb. Susan Sapin

MVC March 28, 1994 Insured applied for and received statutory accident benefits from Insurer. In 2004, insurer refused to pay certain transportation, home maintenance, and therapeutic expenditures. A mediation was unsuccessful and the claim proceeded to arbitration.

The insured's claims for attendant care, housekeeping, home maintenance, transportation (taxi), and treatment had been paid for 10 years. The insurer then retained an independent adjuster ("TJ") to commence a complete file review. The insurer did not dispute that the insured was disabled with arthritis and fibromyalgia, that the 1994 whiplash injury aggravated a pre-existing injury and that she suffered from chronic pain. The insurer based its position on a legal arguments – for example: that the insured was not entitled to housekeeping because she didn't perform "all" her own housekeeping/home maintenance before the MVC; and that the MVC did not result in the loss of her driving license.

One factor which was considered was an application for CPP Disability benefits prior to the 1994 MVC. The insured explained this as a recommendation from her physician which she followed. Other medical reports confirmed a level of independence prior to the 1994 MVC. Oral evidence was called at the Arbitration. The insured and her daughter provided evidence that supported to a significant degree the contentions of the insured. The insurer adjuster ("AC") from 1994 to 2004 gave some evidence that was very consistent with the evidence of the insured in the pre-2004 time frame. *AC admitted that while he was the decision making adjuster on the insured's file, he did not feel he had the ability or competence to deal with a Bill 164 claim. He admitted he did not tell his supervisors he did not know what he was doing.*

Arbitrator Sapin noted that AC's evidence did little to assist the insurer. She thoroughly reviewed the documentary evidence. She felt that the evidence supported the view that the insured performed most of her pre-1994 chores. She recognized that responsibilities and performance of chores change over time. The Bill 164 test for benefits is not to be interpreted in a static fashion to exclude things where the insured received some assistance prior to the 1994 MVC. Transportation expenses are to be considered a reasonable rehabilitation measure to reduce or eliminate the effects of any disability. It was noted that economics did not necessarily determine what was reasonable. The Arbitrator

also spoke favourably on other therapeutic programs and made a special award of \$18,000.00 against the insured.

Implications:

Insurers are obligated to act towards insured's in good faith. They have a duty to responsibly manage the accident benefits file. As statutory regimes fall off the insurance landscape, fewer adjusters will be familiar with statutory regimes and how they are to be managed. Insureds and their representatives are also at a disadvantage. When the proper information is given to a decision maker, insureds can be reassured that attempts by insurers to re-interpret Bill 164 'reasonable and necessary' provisions so as to limit an insurers' exposure will be carefully evaluated by Arbitrators and Judges.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.