

## **WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE**

For the week of February 23 to 27, 2009

**Catastrophic Impairment established with a Class 4 Marked Impairment in just one of the Areas or Aspects of Functioning in the AMA Guides.**

***Anna Pastore and Aviva Canada Inc.*, FSCO A04-002496, February 11, 2009, Arbitrator Elizabeth Nastasi**

MVC November 16, 2002. Insurer disputed the CAT DAC determination that insured suffered a catastrophic impairment under clause (g) of section 2(1.1) of the SABS. Clause (g) provides that a “catastrophic impairment” means an:

*... impairment that, in accordance with the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.*

Arbitrator explained that the *AMA Guides* deal with mental and behavioural impairments in Chapter 14 and four areas or aspects of functioning are considered: (1) activities of daily living; (2) social functioning; (3) concentration; and (4) adaption. Furthermore, a class of impairment is assigned to each of these four aspects of functioning as follows: Class 1 is no impairment; Class 2 is mild impairment; Class 3 is moderate impairment; Class 4 is marked impairment ; and Class 5 is extreme impairment.

The CAT DAC determined the insured suffered a catastrophic impairment under clause (g) alone but it had only found that she had sustained a class 4, marked impairment, in the single area of activities of daily living. The CAT DAC also maintained that the insured was catastrophically impaired under clause (g) even though it concluded that overall the insured suffered from only a class 3, moderate impairment. The insurer argued that a finding of only one marked impairment in one of the areas of functioning alone does not give rise to a determination of catastrophic impairment.

Arbitrator also found that the insured’s impairment fell within a class 4 marked level of impairment with regard to her activities of daily living. Arbitrator reviewed the court decision of *Desbiens v. Mordini*, 2004 CanLII 41210 (ON S.C.) which noted in passing that it would be sufficient to establish a catastrophic impairment for the insured to establish a class 4 or 5 impairment in any one of the areas of functioning. Arbitrator found there was nothing in the language of clause (g) to suggest that the approach taken by the Court in *Desbiens* is incorrect.

Arbitrator found that one marked impairment in any of the four areas of impairment was adequate for the insured to meet the definition of “catastrophic impairment” after further examining each of the four areas of functioning:

*...it is clear that these areas represent the most basic and core aspects of function – they are the things that define us. The four areas are interrelated with significant overlap between them. ...*

*...*

*If an individual has reached a marked level of impairment in any one area, then they are being deprived of a level of function in a basic and core area of life. This amounts to a serious loss. It is highly unlikely that in such a case the other areas of function would not also be negatively affected in some way. Given the importance of each area of functioning the loss of any one alone is significant and adequate to meet the definition of catastrophic impairment. To accept that one marked impairment is adequate is in line with a remedial approach to the Schedule.*

A number of other issues relating to the determination of catastrophic impairments are also considered in this decision including a finding that there should be some flexibility in the choice of assessment tool and method selected for rating mental or behavioural impairments when considering the whole person impairment for each particular individual and impairment. The decision also includes a confirmation of the importance of considering the role of pain in evaluating mental or behavioural impairments under clause (g).

### **Implications:**

This decision again raises the importance of a careful and comprehensive consideration of mental or behavioural impairments in evaluating an insured’s entitlement to extended benefits coverage. Although the combined level of impairment for all of an insured’s mental or behavioural impairment areas may not be sufficient, any one of the areas of impairment may be sufficiently impaired to establish a “catastrophic impairment”.

### **Accessing Arbitration Decisions**

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