

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week April 13 - 17, 2009

Cost of Assessment for Future Care Costs Payable Under the SABS

***Baker v. ING Insurance Company of Canada*; FSCO A08-000194; April 7, 2009; Arbitrator Eban Bayefsky**

April 5, 2002 collision. Legate & Associates represented the insured in this arbitration. The insured sought an assessment of the costs of his future care relating to the collision. An application for approval of the future care costs assessment was submitted to the insurer. On the OCF-22 form, the details and rationale for the assessment were described as, "*Assessment of Future Care Costs/Housekeeping/Home Maintenance...Based upon medical documentation indicating client may need assistance in the future...potential for deterioration.*" The insurer denied payment on the basis that the assessment was for the purpose of settlement, was not a reasonable or necessary expense contemplated by the SABS, and was not subject to a DAC assessment. The insured provided further information about the purpose of the assessment (to determine whether vocational retraining would likely be necessary in the future), and requested that the matter be referred to a DAC for assessment. The insurer continued to refuse to refer the matter to a DAC. The issue in the arbitration was whether or not the OCF-22, at the time it was prepared, was sufficient to trigger the DAC process.

At the arbitration, the insurer argued that the DAC process was not triggered because the OCF-22 did not meet the minimum requirements of section 38.2(2)(c) of the SABS, particularly, that it did not state with sufficient clarity that the assessment was reasonably required in relation to a benefit. The arbitrator held that it did. The proposed assessor certified that the services were reasonable for the insured's assessment, and though the description of services was general, it was sufficiently detailed to convey the nature and purpose of the assessment.

The insured also argued that because OCF-22 also mentioned costs of housekeeping and home maintenance benefits which were no longer available to the insured under the SABS, it was not reasonable. The arbitrator held that the question was whether the OCF-22 met the requirements of section 38.2(2)(c), not whether the insurer considered it reasonable in the absence of the DAC process having been engaged.

The arbitrator held that the matter ought to have been sent to a DAC for independent review of the reasonableness of the future care costs analysis.

Implications:

An assessment of an insured's future costs of care is a potential benefit covered under the SABS. Though a future care costs assessment may be used during settlement discussions, it also provides a valuable decision making tool when considering alternative treatment and rehabilitation paths. It is not sufficient for an insurer to take a no-coverage position without an independent evaluation to determine if the proposed assessment is reasonable and necessary. Insured's should provide particulars of the purpose of the assessment and the benefits targeted in order to satisfy the requirements of section 38.2(2)(c). As well, the assessment for which the insurer is requested to make payment should be limited to those benefits applicable under the SABS.

Accessing Arbitration Decisions

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