

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 15 to June 19, 2009

Chronic pain for the insurer

Diane Brazier and RBC General Insurance Company, FSCO A07-001290, May 28, 2009, Arbitrator Robert Bujold

MVC September 25, 2005. Insured received income replacement benefits until terminated on April 3, 2006. Issues were whether insured entitled to IRB's from date of termination to present and ongoing, and whether the insured is entitled to a special award.

This matter is a classic chronic pain dispute. Of interest is the determination on entitlement to a special award. The insured was struck as a pedestrian and suffered contusions, bruising to her right lower extremity, as well as a lumbosacral contusion and strain. She had a pre-accident history of family and spousal abuse, felt tired and stressed on occasion, but performed extremely well at her full-time job and completed all activities of daily living. After the accident, she continued with constant pain in her right lower extremity and reported being unable to return to her employment or complete her ADLs.

A second insurer's orthopaedic assessment was performed on March 20, 2006. The conclusion was that the examination failed to reveal any evidence of a current disability and IRBs were terminated. The insured reported that the assessor did not listen to her pain complaints and the examination lasted only 15 minutes. At the Arbitration, the orthopaedic assessor stated that if the physical examination shows no abnormalities, then "[the insured] can complain about what she wants". He also acknowledged he did not examine the insured with a view to a possible chronic pain condition because it was only six months post-MVA.

The insured attended for a psychological assessment on December 20, 2006, arranged by her counsel. Testing revealed severe levels of depression, anxiety and PTSD. The conclusion was that the insured suffered a substantial inability to perform her pre-MVA employment. Upon receipt of this report, the insurer did not arrange a section 42 psychological assessment.

The insured obtained a psychological report and treatment plan from a second assessor in November 2007. The insurer arranged a section 42 assessment to address the treatment plan. Although testing revealed severe mental/emotional stress, the assessor found indicators suggesting symptom magnification and exaggeration and/or indiscriminant endorsement of symptoms. Consequently, he concluded there was a "lack of psychological impairment". The treating psychologist prepared a rebuttal indicating such findings were likely a cry for help

concerning chronic pain, rather than malingering. The insurer's assessor reviewed the rebuttal "with interest", but did not change his opinion.

Later, a CAT assessment psychiatrist diagnosed chronic depression, anxiety and chronic pain in June 2008, and a treating physiatrist diagnosed chronic pain in May 2008. The insurer continued its denial.

Arbitrator Bujold found the insured entitled to IRBs from the date of stoppage to present and ongoing, and also to a special award, in an amount to be determined if not agreed upon by the parties. The special award was based on the insurer's failure to conduct its own assessment of the insured's psychological condition and impairments after receipt of the initial psychological report. The arbitrator also found it was neither sufficient nor reasonable for the insurer to have relied on their psychologist's opinion when he did not really provide an opinion, especially on the central issue of whether exaggerated responses could represent a cry for help. Unreasonable withholding of IRBs were found to have begun no later than 30 days following receipt of the initial psychological report.

Implications:

An insurer will regularly respond to pain complaints and an inability to return to work by arranging for a section 42 orthopaedic assessment within the first year. Be aware that the orthopaedic assessor may not be interested in addressing any subjective pain complaints or considering a diagnosis of chronic pain within that time frame. It is therefore important to explore a chronic pain or risk of chronic pain diagnosis early on in the process through either a physiatrist, psychologist, psychiatrist or physiotherapist, and put the insurer on notice of this diagnosis. This should then require the insurer to arrange assessments to address the possibility of chronic pain. In doing so, the insurer's physical assessors will likely be required to address subjective pain complaints, consider non-organic factors and acknowledge limitations in their field of expertise concerning chronic pain. Similarly, psychological and psychiatric assessors will be required to provide an opinion on a diagnosis of chronic pain and not be able to simply dismiss test results based on concerns of exaggerated response or malingering. This will hopefully restrict an assessor from simply mentioning the possibility of malingering and will require a more in-depth analysis and definitive opinion.

The final conclusion to be drawn is that chronic pain is recognized as a very real and serious impairment and an insurer has a duty to thoroughly investigate such an impairment or risk facing a special award.

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>.



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