

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of August 31 to September 4, 2009

Evidence of Primary Caregiver Status and Past Housekeeping Expenses.

Asghar v. State Farm Mutual Automobile Insurance Company, FSCO A08-000123, August 19, 2009, per Arbitrator Sampliner

MVC on August 2, 2006. Insured claimed entitlement to past caregiver benefits and past housekeeping benefits. Insured was 66 years old at the time of the MVC and lived with his nephew's family. Insured was not employed and claims he was unable to return to his responsibilities for taking care of his nephew's children and for housework as a result of his MVC injuries.

The Arbitrator considered that insured would be entitled to a caregiver benefit if he was the primary caregiver for the children at the time of the MVC and unable to perform his caregiver duties. In evaluating child care responsibilities, the Arbitrator considered that they should be evaluated both quantitatively and qualitatively. It was determined that the insured cared for the children for 8 hours per day on weekdays while their mother was working, and their mother cared for the children for 5 hours per weekday and the entire weekend. The Arbitrator concluded that the mother's responsibility for the children was greater than the insured's. With respect to the quality of the care provided to the children, the evidence established that the children's mother assisted them with homework assistance, all meals, most of their hygiene, dressing and main supervisory guidance as a parent in contrast to the insured's basic supervision of the children while their parents were not at home. The Arbitrator found that the insured was not the primary caregiver of the children at the time of the MVC.

With respect to housekeeping benefits, although the Arbitrator found that it was reasonable for the insured to receive housekeeping assistance, the insured did not provide sufficient reliable information upon which to base housekeeping expenses. Although the insured provided invoices for housekeeping services received, the family member providing those services did not actually prepare the invoices, did not sign all of the bills and admitted in her testimony at the hearing that she did not keep track of her housekeeping time and could not verify or supplement the times and dates noted on the invoices. Without establishing on a balance of probabilities the amount of his housekeeping expenses, the Arbitrator found that the insured was not entitled to payment of housekeeping expenses under the SABS.

Implications:

In assessing the availability of caregiver benefits, it is important to consider both the quality and quantity of the care provided.

Furthermore, when establishing entitlement to housekeeping benefits, where the services are being provided by family members, it may not be sufficient to supply invoices for the services provided. Family members should be able to independently verify the work they completed for the insured. To assist with this the insured should maintain a chart from the date of the MVC, initialed by the relevant family member, for the daily household services being provided. This type of chart will also be important in assisting with the proof of past housekeeping expenses by an injured person in a tort claim against an at-fault driver in light of the recent Court of Appeal decision, *McIntyre v. Docherty*, 2009 ONCA 448:

In this case, the respondent seeks compensation for the gratuitous work done by her family members. However, the respondent failed to plead or lead sufficient evidence to support such a claim. Neither the family members nor the respondent provided any particulars of the time the family members spent assisting the respondent as a result of her injuries during the pre-trial period which was seven years. ...

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.

If you have questions or comments about this edition of the newsletter, contact Sean Mackintosh at Legate & Associates: smackintosh@legate.ca.