

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of September 7 to September 11, 2009

Evidence of pre-injury activities and circumstances essential to non-earner benefit entitlement

Heath v. Economical Mutual Insurance Company, 2009 ONCA 391 (CanLII)

MVC March 10, 1998. Plaintiff unemployed, but planning to return to school. Trial judge awarded non-earner benefit (“NEB”) under sections 12(1) and 2(4) of the *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*, O.Reg. 430/96 (“SABS”). Court of Appeal determined plaintiff not entitled to NEB: trial judge applied the wrong test; and insufficient evidence to establish plaintiff’s entitlement.

To qualify for an NEB, the insured must suffer an impairment as a result of an accident and a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. The complete inability must continuously prevent the insured from engaging in substantially all the activities in which insured ordinarily engaged before the accident.

The Court of Appeal adopted a general approach to be followed when determining entitlement to an NEB. This approach involves:

- Comparing the claimant’s pre- and post-accident activities and life circumstances. Detailed comparison may be unnecessary in some cases depending on the nature of a claimant’s post-accident condition.
- Pre-accident activities must be considered over a reasonable period of time. What is “reasonable” will depend on the facts of the case.
- All pre-accident activities in which the claimant ordinarily engaged must be considered. Greater weight will be assigned to those identified as important to the claimant’s pre-accident life.
- Determining whether post-accident changes continuously prevent claimant from engaging in substantially all pre-accident activities. The claimant must prove “disability or incapacity of the requisite nature, extent or degree which is and remains uninterrupted.”
- Considering the manner in which an activity is performed and the quality of performance. If the degree to which an activity can be performed is sufficiently restricted, a claimant is not truly “engaging in” the activity.

- Where pain is a primary factor, the question is whether the degree of pain experienced practically prevents the claimant from engaging in the activity.

The Court of Appeal concluded the evidence could not support the plaintiff's claim for an NEB. There was insufficient evidence related to pre-accident activities and the extent to which the plaintiff was prevented from engaging in these activities within the 104 week period.

Implications:

To establish entitlement to an NEB, a claimant must provide a sufficient evidentiary basis of his or her pre-accident activities and life circumstances. In this regard, it will be important for practitioners involved in rehabilitation and treatment to investigate the nature of a claimant's pre-accident activities and life circumstances for a reasonable period prior to accident and have an accurate understanding of the plaintiff's pre-accident history. All pre-accident activities in which a plaintiff normally engaged must be considered. Activities which are most important to a plaintiff's pre-accident life should be identified. Changes in post-accident activities and life circumstances should be recorded as should the way in which these changes prevent the plaintiff from engaging in pre-accident activities. Where a plaintiff continues to engage in pre-accident activities, particularly in pain cases, the practitioner can record the manner and quality of post-accident performance and degree of pain experienced during and following the activity.

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 Carrie Lynn Simmons at Legate & Associates: csimmons@legate.ca.