

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of November 23 to 27, 2009

No Entitlement to IRB's where alternative employment is identified that does not require substantial upgrading.

***Burtch v. Aviva Insurance Co. of Canada* [2009] O.J. No. 2462 (C.A.) per R.G. Juriansz J.A.**

MVC of March 27, 2001. The insured was 29 years old at the time of the mvc and was employed as a general labourer and was required to do some heavy lifting and to drive a vehicle. At issue was whether the insured was entitled to IRB's after 104 weeks: i.e., whether the insured was completely unable to perform the duties of any occupation for which he was suitable by virtue of his education, experience and training.

The vocational counselor found that the insured's greatest potential for future employment was in the field of long haul truck driving and in order to qualify, the insured needed to complete a truck-driving course at a cost of about \$4,250 and to obtain a border crossing card. The insured testified that he was prepared to try long haul trucking.

The trial judge found that long haul trucking was comparable to the insured's former employment in remuneration and that he did not need a substantial amount of upgrading either. It was also found by the trial judge that truck-driving opportunities were available within Canada and without the need for cross border trucking. However, the trial judge noted that the insured lacked the financial resources to take the program and suggested that both the insured and the insurer failed to pursue this rehabilitation option: *Here was the obvious partnership in rehabilitation for these parties but neither pursued it, either at the time of the Post-104 DAC assessment or at the time of trial.*

The Court of Appeal (CA) found that the trial judge applied the wrong test by finding that the insured was entitled to benefits because he *"was not qualified either at the assessment or by trial, and might never qualify"* for the trucking job. The CA noted that the proper test was whether he suffered a complete inability to engage in any employment for which he was reasonably suited by education, training or experience. The CA concluded that the insured was not entitled to IRB's and stated:

*It is not necessary that the insured person be formally qualified and able to begin work immediately in order for a particular employment to be considered a reasonably suitable alternative. A job for which the insured is not already qualified **may** be a suitable alternative if substantial upgrading or retraining is not required. (Emphasis Added)*

Comment:

This decision suggests that a job for which the insured is not already qualified *may* nevertheless be considered a suitable alternative if “substantial” retraining is not required. However, it is submitted that result of this case ought to be limited to the facts of this case: *viz., where an alternative employment opportunity is available with retraining that is not substantial and where the insured takes no steps to obtain this retraining.* Here the trial judge found that the retraining was not substantial and the insured apparently did not take any steps to secure funding from his insurer.

It was specifically noted by the CA that the insured neither plead nor raised at trial the issue of his entitlement to a rehabilitation benefit for retraining. Had the insured in this case actually requested rehabilitation benefits to obtain the required retraining and had the insured failed to provide these benefits, then it is submitted that he may have been found to be entitled to the IRB until after the retraining had been completed as was the case for the insured in *Little and Aviva* (FSCO A04-002278, September 16, 2005).

Accordingly, where a suitable alternative occupation is identified for an insured that does not require substantial retraining, the insured should attempt to obtain this retraining and secure funding by way of a rehabilitation benefit under the SABS for any expenses associated with the retraining. Where the insurer unreasonably fails to support the retraining the insured ought to be entitled to IRB’s until retraining has completed as in the *Little and Aviva* decision.

Insurers ought not to be able to rely on the *Burtch* decision to argue that an insured should no longer be entitled to IRB’s merely because an alternate job is identified for which the insurer argues does not require “substantial” retraining. First, as noted above, the result in the *Burtch* decision should be limited to cases where the insured unreasonably fails to obtain the “less than substantial” retraining. Furthermore, it would seem unreasonable for an insurer to take the position that retraining for an alternative job is “not substantial” where it is required to take place over an extended period after losing the weekly support of the IRB but before the insured would actually be able to earn income from that alternative job.

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.