

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of November 30 – December 4, 2009

Time To Let Go: The Story Of An Insurance Industry Unable To Come To Grips With The Test For Catastrophic Impairment

Economical Mutual Insurance Company and Maria Augello, FSCO Appeal P09-00002, October 22, 2009, Delegate Lawrence Blackman

MVC September 7, 2002. The insurer appealed the Decision of Arbitrator Wilson that, among other things, percentage values must be assigned to mental and behavioural impairments under the *AMA Guides* (“*Guides*”), and that mental and behavioural impairments are to be combined with physical impairments to determine catastrophic impairment under clause 2(1.1) (f) of the Statutory Accident Benefits Schedule (“*Schedule*”). The insurer made this appeal despite various decisions over the last few years supporting both propositions. Not surprisingly, Delegate Blackman agreed with the recent decisions in this area and concluded that the *Schedule* requires an impairment rating for mental and behavioural impairments, and that such rating is to be combined with physical ratings for the purposes of determining if the insured has suffered a 55% whole person impairment (WPI).

The analysis by Delegate Blackman is thorough and refers to the bulk of recent decisions in this area. Particular agreement is noted for MacKinnon J’s decision and reasoning in *Arts v. State Farm*, 91 O.R. (3d) 394. The *Arts* decision and this Appeal are essential resources for determining how the *Schedule* intends a CAT determination to be performed.

Some key points from the analysis in the Appeal are as follows:

- The legislature’s definition of “catastrophic impairment” is intended to foster fairness for victims of MVA’s by ensuring that those with the most health needs have access to expanded benefits. The definition is intended to be remedial and inclusive, not restrictive
- The *Schedule* confirms its paramountcy at subsection 2(3) that provides that if an impairment is not listed in the *Guides*, the impairment shall be that which is listed that is most analogous to the sustained impairment
- Whatever the original creators may have intended when they developed the *Guides*, the *Guides*, as included in the *Schedule*, have developed a life of their own. Judges and arbitrators have, through their decisions over time, added a gloss, or an interpretation that is helpful in integrating them into the scheme as a whole. This is exactly how jurisprudence in the common law is meant to develop

- The *Guides* were clearly not designed by the AMA for the purpose directed by the Ontario Legislature. They must be interpreted in a manner that is contextually consistent with the language of the *Schedule*.
- There are no precise measures of impairment in mental disorders. An impairment percentage derived by means of the *Guides* is intended to represent an informed estimate of the degree to which an individual's capacity to carry out daily activities has been diminished.
- The onus on an insured person is not to establish catastrophic ratings on the basis of "certainty"; rather, the civil standard of a balance of probabilities applies.
- An assessor should run a parallel analysis of several methods in the *Guides* in order to see if results agree. One would then pick the highest of the alternate methods as the applicable WPI rating if the results of the different analysis' yield roughly the same score and are determined valid
- The paramountcy of clause 2(1.1)(f) of the *Schedule* makes WPI ratings for mental or behavioural impairments not merely essential but mandatory. The ratings on page 301 of Chapter 14 and Table 3 on page 4/142 provide avenues for attaining requisite percentage ratings.

Implications:

The current proposal's for changes to SABS legislation will make it more important than ever for insured's with significant medical and rehabilitation needs to be deemed catastrophic. This requires a keen understanding of how the *Guides* are to be used in making CAT determinations and ensuring the CAT assessors have applied the *Guides* in a proper manner. There is a great deal at stake for all parties in determining the limits of WPI ratings for the purpose of the *Schedule*. From a treatment perspective, treatment providers can certainly assist in the process by keeping in mind that the purpose of the enquiry regarding catastrophic impairment is to determine the degree to which an individual's capacity to carry out daily activities has been diminished. A full investigation and focus on this area, and detailed documentation regarding same, will assist all parties in determining whether an insured is catastrophically impaired.

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 Ryan Steiner at Legate & Associates: rsteiner@legate.ca