

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of January 11 – 15, 2010

Class 4 (Marked Impairment) Rating in Only One of Four Areas of Functioning Sufficient for Catastrophic Designation

Aviva Canada Inc. and Pastore, FSCO P09-00008, December 22, 2009, Director's Delegate Blackman (Appeal Order)

MVC November 16, 2002. Insurer appealed decision that Ms. Pastore met the clause 2(1.1)(g) definition of catastrophic impairment. Decision of Arbitrator Nastasi¹ upheld.

Clause 2(1.1)(g) of the SABS states:

(1.1) For the purpose of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

- (g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) **due to mental or behavioural disorder**.

Four areas of functioning are reviewed: activities of daily living, social functioning, concentration, and adaption.

The CAT DAC found that Ms. Pastore had a class 4 impairment only in her activities of daily living and an **overall** rating of class 3 (moderate impairment). Aviva took the position that the language of Clause 2(1.1)(g) required an **overall** rating of class 4 or 5.

The Director's Delegate held that the use of the word "a" indicated that a single class impairment would be sufficient. Had the legislature intended for there to be an "overall" impairment rating then it would have indicated so in clear language. To determine otherwise would be contrary to the remedial intent of the SABS and result in depriving an accident victim access to much needed benefits. The *AMA Guides* do not state that an overall rating is required but even if it did then that is not binding. Where there is any conflict between the *Guides* and the *Insurance Act* (and *SABS*) then the latter takes precedence.

¹ See "What's Happening at FSCO? The Legate SABS Update" for the week of February 23 – 27, 2009.

Implications:

Where an overall impairment rating for an impairment due to mental or behavioural disorder is less than class 4 a careful examination of each of the four areas is required. If an injured person's life is markedly or extremely impaired in any of those areas then she will meet the criteria of catastrophic impairment.

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 Karen Hulan at Legate & Associates: khulan@legate.ca.