

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of January 25 to 29, 2010

Using Interim Benefits to Avoid Tactical Denials: Reform in Practice

M.R. and Gore Mutual Insurance Company, FSCO A09-001224, December 30, 2009, Arbitrator Suesan Alves

MVC December 1, 2006. Insured sought a determination that he sustained a catastrophic impairment, and is entitled to case manager services, medical and attendant care benefits and interest. The insurer disputes entitlement to all the relief claimed.

Despite best efforts to move the matter to Arbitration on a timely basis, schedules did not allow mutual availability for Arbitration until September 2010. Consequently, the insured brought an oral motion for interim benefits pursuant to section 279(4.1) of the *Insurance Act*. The insured requested interim benefits in the amount of \$5,953.46 for psychological treatment to be incurred.

The test on motion for interim benefits is that the Applicant must put forward a *prima facie* case for entitlement, such that the evidence, if unanswered and believed, is sufficient to render reasonable a conclusion in favour of entitlement. In addition, interim benefits should only be awarded where there is a need or urgency.

In this matter, reports and rebuttals from the treating psychologists demonstrated a variety of psychological diagnosis including symptoms of severe depression including suicidal ideation, symptoms of notable anger and aggressiveness, including reported homicidal ideation. The Arbitrator gave special attention to the threat of the insured causing harm to himself or others.

The insurer conducted an IME in November and December 2008. The IME assessor concluded that the insured's presentation during assessment, including symptom exaggeration and suboptimal levels of motivation and effort, precluded an objective opinion of current functioning. He opined that the treatment was not reasonable and necessary.

The insured's treating psychologists provided opinion evidence on or about April 2009 that the insured will continue to deteriorate further, without proper treatment, which at this point may necessitate hospitalization.

Notwithstanding the negative IME opinion, Arbitrator Alves found that the opinion evidence adduced by the treating psychologists, if unanswered and believed, would support that the psychological treatment is both reasonable and

necessary, and demonstrates a need and urgency. The insurer was ordered to pay interim benefits for the psychological treatment in the amount of \$5,953.46.

Implications:

It is a reality of the system that an insurer can deny benefits at any time. The denial of benefits can often have a negative effect on the insured's wellbeing. Section 279(4.1) is an underutilized tool to shift the pressure back upon the insurer when there is strong *prima facie* support for entitlement to the benefit. Consider a situation where an insured has his income replacement benefits stopped despite numerous opinions from treating practitioners that he is unable to return to work due to chronic pain. The stoppage of the benefit creates a severe financial burden for the insured resulting in increased anxiety and depression, as well as matrimonial discord. This type of situation is not uncommon. A claim for interim income replacement benefits fits the criteria applied by Arbitrator Alves in this matter. The payment of interim benefits in such a circumstance would shift the balance of power from pressure on the insured to settle his benefit claim so his family can survive, to pressure on the insurer to examine its denial more closely in the face of positive reports from treating practitioners. This power shift is more in line with the objectives of consumer protection legislation and may well result in fewer denials, which are clogging up the dispute resolution system. More frequent and aggressive pursuit of interim benefits may have a very beneficial effect on dispute resolution as a whole.

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.