

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of March 8 to 12, 2010

Seeing the Forest for the Trees: Understanding the Criteria for Catastrophic Impairment

Dean Fournie and Coachman Insurance Company, FSCO A07-000297
February 12, 2010, per Arbitrator Lloyd Richards.

MVC of April 11, 2004. Insured suffered significant injury to his left heel and ankle. Reconstruction was not successful and two canes and a brace were required for ambulation. The Insured was also diagnosed with chronic pain, post traumatic stress disorder, and depression. The primary question for the Arbitrator was whether the Insured had suffered a catastrophic injury.

The decision is split into two parts. The first part deals with impairment ratings for objective injuries. Points of interest from this analysis are that the Guides allow that a final WPI may be rounded to the nearest values ending in 0 or 5. Consequently, a WPI of only 53% is required for catastrophic impairment. Additionally, bilateral leg impairments are not required for a WPI over 40% based on a lower extremity. Finally, the procedure used by MDAC, assessors for the Insurer, was critiqued. MDAC used a process whereby individual assessors completed individual assessments for review by the executive assessor. There was no sharing of reports between assessors and no consensus opinion with regard to an impairment rating. The Insured was deemed to have suffered a catastrophic impairment based on this physical analysis alone.

The second part of this decision looked at whether the Insured had suffered a mental/behavioural impairment at a Class 4, or marked, level. The psychologist for the Insured opined that Mr. Fournie did suffer from a marked impairment in a number of the four categories used to measure the effect of mental/behavioural impairment in Chapter 14 of the AMA Guides. In support of this conclusion, Dr. Merskey, a psychiatrist with a special interest in pain management, used a similar approach. Dr. Merskey followed the Guides' mandate that where an assessor cannot find an assessment tool that precisely addresses an impairment, then trained observers should use all resources at their disposal to arrive at a conclusion. Prior Arbitration decisions have supported the concept that an assessor should use whatever method is available under the Guides that best captures the totality of the limitation.

In this regard, Dr. Merskey used the Pain-Intensity-frequency Grid in Chapter 15 of the Guides and opined that the Insured's pain should be described as marked. As the Chapter 15 rating scale is similar to the Chapter 14 mental/behavioural rating scale, he then used the percentage values historically attached to mental/behavioural disorders in past editions of the Guides to provide his rating

score. The Arbitrator found it appropriate to have compared the Pain Intensity-frequency Grid to the Mental and Behavioural Impairment Table in arriving at a determination of how pain affects the Insured's overall mental and behavioural functioning. The Arbitrator agreed that the Insured suffered a marked impairment in a least one Chapter 14 category, and therefore was catastrophically impaired from this perspective as well.

Comment:

With the latest changes to the SABS limiting medical/rehabilitation amounts, it is more important than ever to fully understand the criteria for catastrophic impairment to ensure that individuals with long-term care needs have access to funding. Arbitration decisions have made it clear that the AMA Guides were not designed for the purpose of determining catastrophic impairment. As such, application of these Guides requires a great deal of flexibility. The most important task is to ensure that all limitations are addressed and scored. Assessing chronic pain has historically provided difficulty for CAT assessors. This decision supports a flexible approach that looks holistically at the level of impairment and fully scores the impairment, without unduly imposing penalty for the source of impairment.

For more information on the criteria for determining catastrophic impairment, please keep an eye out for our breakfast seminar on this topic. Once the date of the seminar is finalized, we will be forwarding further details to your attention.

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.