

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of March 22-26, 2010

A LTD Policy that is not an “Income Continuation Benefit Plan” under the Schedule may still be deducted from an IRB

Sharma-Singh v. Co-operators General Insurance Company, FSCO A07-000588, February 26, 2010, Arbitrator Leitch

MVC May 17, 2006. Insured was employed full-time at the date of the collision. She was entitled to an IRB in the amount of \$400 week. She also received a LTD benefit through a group disability plan from her employment. The LTD benefits in this case did not fall within the types of benefits to be deducted under the Schedule’s deductibility of collateral payments provisions; however, the LTD benefit was ultimately deducted from the IRB payable because the LTD policy was generally one of indemnification. There was nothing in the amendments to the Schedule which displaced the ordinary collateral source rule aside from payments of CPP disability pension benefits.

Section 7(1) of the Schedule indicates that the IRB payable is reduced by net weekly payments for loss of income received (or available) under the laws of any jurisdiction or under any income continuation benefit plan. Section 2(9) deems the following to be payments for loss of income under an income continuation benefit plan:

- 2. Periodic payments of insurance, if the insurance,
 - i. is offered by the insurer **only** to persons who are employed at the time the contract for the insurance is entered into, and
 - ii. is offered by the insurer only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person’s income from employment.

The purpose of section 2(9) is to ensure that payments of benefits that may not be caught by section 7(1) are deducted under section 2(9).

The LTD policy in this case did not fall within the language of section 2(9) 2.i. because it had an effective date that allowed the policy to apply to employees after that date and not “**only**” to those employed at the time that the contract was entered into. However, the general conditions of the policy indicated that the policy was generally intended to indemnify a disabled employee for loss of income: the policy was arranged by her employer; she had to be actively at work for coverage to commence; the amount of the benefit was linked to her earnings at the time of disability; entitlement was linked to inability to perform her

employment; and, finally her coverage would be terminated upon termination of employment or at age 65. While there were also provisions in the policy that contemplated payment of benefits “where the context of the policy requires” and to employees “granted leave without pay”, neither of which clearly intended to indemnify a disabled person for loss of income, the majority and nature of the other terms examined indicated that the policy was intended to indemnify the insured for income loss.

Finally, the fact that a waiting period may not exist does not mean that it does not meet the “continuation” aspect of the income continuation benefit plan. The deeming provision replaces the earlier distinction made by the same arbitrator in a previous decision where he stated that a policy could have no significant waiting period or interruption of benefits if it were to be deducted from the IRB.

Implications:

The language of a collateral benefit policy remains the decisive factor in determining whether the benefit will be deducted from the IRB. Furthermore, while it is important to examine all provisions of that policy, it is the totality of the provisions which is significant in determining the nature of the policy, that is, whether it is a policy of indemnification.

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