

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of April 12 to 16, 2010

No Re-applications for CAT determination after the Limitation Period even where there is a Change in Condition.

Aviva Canada Inc. and Timothy J. Wry, FSCO Appeals P09-00016 and P09-00016C, March 12, 2010, Directors Delegate Blackman

MVC December 16, 2000. Insured applied for a determination of whether he had sustained a catastrophic impairment (CAT) on June 19, 2003. On March 17, 2004, insurer provided a notice to insured denying that he was CAT subsequent to a CAT DAC finding that the insured was not CAT. Insured sent two subsequent CAT applications dated July 21, 2006 and April 13, 2007 which the insurer refused to consider. Insured applied for mediation on February 13, 2007 and arbitration on August 20, 2007.

Arbitrator agreed with the insurer that the insured was precluded from proceeding on the basis of the limitation period. However, Arbitrator did find that the SABS permitted multiple applications where there is a change in condition even after the two year period subsequent to an insurer's determination that an insured is not catastrophically impaired:

There appears to be a common thread in the specific provisions in the Schedule relating to catastrophic impairment. The legislation recognizes that degrees of impairment change over time. The legislation allows for a period of time to elapse before assessments should take place and also recognizes that there is a range of impairments that can lead to a catastrophic designation. There is nothing in the legislation precluding an insured from re-applying for benefits in situations where the insured's circumstances change outside of the two year limitation period subsequent to an insurer determining that the insured is not catastrophically impaired. The legislation does not expressly forbid such applications and clearly contemplates re-applications. I therefore find it reasonable to argue that an applicant can re-apply for determination of catastrophic impairment under the same criterion where his condition changes over time. This approach would be consistent with the broad and liberal interpretation mandated by the consumer protection nature of the insurance legislation.

The insurer appealed and Director's Delegate found that Arbitrator erred in law in finding an exception in the legislation regarding a change in circumstance:

... the Arbitrator does not directly refer to subsection 40(4) of the Schedule. ...

Regarding reapplications or challenges to a CAT DAC determination, subsection 40(4) is precise and unambiguous. Where there is a CAT DAC determination, that determination is binding on both the insured and the insurer. The only stated exception is the determination of a dispute in accordance with sections 279 to 283 of the Insurance Act.

... Mr. Wry is correct that an insured person does not have a crystal ball in determining the most appropriate time to make a CAT application. It is also correct that the insurer has no input in determining, from its perspective, the most opportune time for a CAT DAC assessment. Neither of these concerns, however, override the clear and unambiguous wording of subsection 40(4).

To allow reapplications as argued herein would be inconsistent with a societal and systemic need for the finality of disputes. ... Further, it would be incongruous to read in the argued additional exception of changed conditions as applying only to insured persons when subsection 40(4) is specifically binding both on insured persons and on insurers. Most fundamentally, it would leave subsection 40(4) with little, if any, meaning.

Implications:

This decision was supported with reference to section 40(4) of the SABS which expressly makes the CAT DAC decision binding on the insured and insurer subject to the dispute resolution process which must be commenced within two years of the insurer's refusal to pay the benefit claimed. While section 40(4) no longer exist for accidents after October 1, 2003, it remains to be seen if the reapplication exception for changes in conditions can be read into the current and new SABS legislation and so the dispute resolution process must be considered within the two-year limitation period. Certainly, the outcome of this appeal leaves insureds with questionable CAT impairments a difficult decision as to the timing of the CAT designation application process.

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 Sean Mackintosh at Legate & Associates: smackintosh@legate.ca.