

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 28 to July 2, 2010

Newsflash: MIG downed by CRUISe missile:
Conflict with Regulation Undermines Implementation of Superintendent's Guidelines

Section 268.3 of the *Insurance Act* empowers the Superintendent to issue guidelines on the interpretation and operation of the SABS (subsection (1)); and setting out the treatment, services, measures or goods applicable in respect of types of impairments for the purposes of payment of a medical or rehab benefit, including conditions, restrictions and limits of same (subsection (1.1)) A guideline shall be considered in any determination involving the interpretation of the SABS (subsection (2)).

The catch is the Superintendent may not alter the law through a guideline. The Superintendent has attempted to do just that with the MIG (Minor Injury Guideline).

In the meantime, respect for the Legislature and its elected officials demands that we look at this guideline carefully, and from the outset understand its limitations. Previous guidelines have been interpreted by arbitrators at FSCO as being limited in scope to the extent that they conflict with the Act or Regulation. A good example is ***Daniels v. Lumbermens Mutual Casualty Co., FSCO A99-000934, July 5, 2000***, where Arbitrator Renahan, dealing with the transportation expense guideline had this to say:

The Guideline extends the definition of "insured person's automobile" to "any other automobile to which the insured person has access." In my view, a person has "access" to an automobile if the person is allowed by the owner or lessor to use it. Accordingly, any passenger in an automobile has access to the automobile and the exclusion is extended to any person who travels to treatment by automobile. This interpretation goes beyond the exclusion set out in the Schedule and makes the words "in the insured person's automobile" meaningless. **The Guideline does not prevail over the words of the Schedule. I need only consider it.** Here, where the Guideline would make the words of the Schedule meaningless, I can ignore the words "any other automobile to which the insured person has access." [...] **Again, this exclusion goes beyond the exclusion set out in the Schedule. I do not see a policy reason for extending the exclusion to minors who are driven by someone else and not to adults who are driven by someone else.** Accordingly, I find that the Guideline does not limit Ms. Daniels' right to recover transportation expenses.

Similarly, see *James v. Allstate Insurance CO. of Canada*, FSCO A-015580, May 17, 1996, Arbitrator Blackman; *Oliveira v. Wellington Insurance Co.*, FSCO A96-000010, April 7, 1997, Arbitrator Makepeace; *Chahal v. Zurich Insurance Co.*, FSCO A96-001785, August 27, 1998, Arbitrator S.L. Novick; *Nelson v. Liberty Mutual Insurance Co.*, FSCO A00-000253, February 16, 2001, Arbitrator N. Makepeace; *Sanchez v. CGU Insurance Co. of Canada*, FSCO A00-000940, June 22, 2001, Arbitrator D. Leitch; *Carr v. Lombard General Insurance Co. of Canada*, FSCO A00-000441, September 11, 2001, Arbitrator S. Sapin; *Ritorto v. Allstate Insurance Co. of Canada*, FSCO A04-001395, March 3, 2006, Arbitrator F. Sampliner; *Fisher v. Allstate Insurance Co. of Canada*, FSCO A04-002455, November 30, 2006, Arbitrator J. Wilson; *Johnston v. AXA Insurance (Canada)*, FSCO A04-002670, February 8, 2008, Arbitrator R. Bujold; *Lubana*

v. Markel Insurance Co. of Canada, FSCO A07-002502, October 28, 2009, Arbitrator Wilson; *Sekhon v. RBC General Insurance Co.*, FSCO-002442, March 29, 2010, Arbitrator Rogers.

In our view, the MIG is in conflict with the Regulation in significant respects, that go to the very heart of its application.

Conflict with Regulation #1: Application of the Regulation

By its terms, the monetary limit imposed by s. 18 (1) for a minor injury is *one* minor injury: the impairment sustained is “**an** impairment that is predominately a minor injury”. Otherwise, s. 18(3) has determined that the monetary limit shall be \$50,000. The MIG attempts to change that. Minor injury is defined by the Regulation as “a sprain, strain, ...and any clinically associated sequelae.” The MIG adds this phrase to that definition: “This term is to be interpreted to apply where a person sustains any one or more of these injuries.” That is not what the Regulation states, nor does it make clinical sense. If one has one injury, say a sprained ankle, that requires a course of physiotherapy, it makes sense that the limit of \$3500 be imposed. However, if a person has, in addition to that a partial thickness rotator cuff tear, which would be a strain according to the Regulation, requiring an extended course of physiotherapy, perhaps from one specialized in shoulder girdle injuries, or surgical repair, it does not make sense that the limit is shared.

Elsewhere in the MIG, reference is made to minor injury, singular, in particular in section 3, “Impairments that Come within this Guideline”.

At Legate & Associates, in this situation, we will be following the words of the Regulation, not the MIG.

Conflict with Regulation #2: Going Beyond the Authorization in the Regulation

The Minor Injury Guideline is defined under s. 3(1) as one “that establishes a **treatment framework** in respect of one or more minor injuries”. To the extent that the MIG moves beyond the Regulation, there is no authority for it. One example of this is the statement, under paragraph 4, page 5 relating to impairments that do not come within the framework (volunteering this information at all does not come within the authority of the Regulation): “It is intended that the vast majority of pre-existing conditions will not [exclude a person’s impairment from this Guideline]. Only in extremely limited instances where compelling evidence provided by a health practitioner satisfactorily demonstrates that a pre-existing condition will prevent a person from achieving maximal recovery ..is it to be determined not to come within the Guideline”. These statements should be considered gratuitous and without legislative authority.

We say this despite the wording of s. 268.3 (1) which provides that the Superintendent may issue guidelines on the *interpretation* and *operation* of the SABS. To suggest that something should be treated as “extremely limited”, without considering if those who seek treatment for a minor injury are not already in a rarified group, and may in fact be those with pre-existing conditions, is problematic. Again, it is gratuitous and ought not to be given any weight by a treatment provider. If, in a clinician’s view, it is more likely than not that there is a pre-existing condition, and it meets the criteria outlined in the

Regulation, we suggest it is not appropriate to then ask the question: should I come to a different conclusion because this is supposed to be rare or extremely limited? It makes no sense to ask such a question, once the clinician has reached the conclusion. How would a clinician know that this person is the rare case and another is not? More worrisome to the clinician should be a failure to act in accordance with one's professional obligations to the patient.

A final thought

Keep in mind these guidelines were developed in consultation with a group formed by the Superintendent, and heavily weighted in its membership in favour of the insurance industry. Perhaps our Minister of Finance should enquire into the relationship of the industry with the Commission, as was recently done south of the border, with the regulators of the oil industry. Instead of being its partner, Congress is suggesting regulators should perform the intended role of watchdog. One can only hope that, at some point, a similar attitude sweeps through the Commission.

Barbara Legate

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 Barbara Legate at Legate & Associates: blegate@legate.ca

To view the Minor Injury Guideline (MIG) please click [here](#)