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INSURANCE LAW BULLETIN

April 15, 2013 – Rose Bilash

LIMITATION PERIODS and the TERMINATION OF BENEFITS

STATE FARM & FEDERICO APPEAL

Under the "Old SABS", *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*, s.37(9) stated that if the insurer required an insured person to be examined under s.42 and determined that the insured was no longer entitled to a specified benefit, the insurer was not permitted to stop payment of the specified benefit unless it had provided the insured with a copy of the report of the examination and its determination under s.37.

Section 37(9) was removed from the "New SABS", O.Reg 34/10. As a result, specified benefits are often terminated retroactively to the date of the insurer's examination report.

Limitation periods for the denial of benefits have been considered in a number of decisions, from FSCO to the Supreme Court of Canada. In these decisions, the limitation period discussed is under s.281(5) of the *Insurance Act*. This section reads:

> A proceeding in a court of an arbitration proceeding in respect of statutory accident benefits must be commenced within two years after the insurer's refusal to pay the benefit claimed or within such period as may be provided in the Statutory Accident Benefits Schedule.

When considering when the two year limitation period commences, it was held that it cannot begin to run until the refusal of benefits has been properly and clearly communicated to the insured by the insurer: *Papathanasiou* v. *Allianz Insurance Company of Canada* (FSCO A97-000807); *Zoubian v. Zurich Insurance* (FSCO A98-001129); and *Smith v. Co-operators General Insurance* (SCC 30). In accordance with this principle, a denial that is back-dated would not begin the running of the two year limitation period until the insured received the notice.

Commentary

The absence of s.37(9) in the new SABS does not affect the procedure followed under the Old SABS for denying benefits given the wording of s.281(5) of the *Insurance Act* and the

jurisprudence that has evolved regarding its interpretation. Therefore, the requirements of s.37(9) continue under the new SABS, despite the absence of a provision to that effect.

State Farm & Federico **(FSCO Appeal P12-00022, March 25, 2013)**

Further to our recent Bulletin discussing Arbitrator Murray's ruling in *Federico,* the appeal decision by Director's Delegate Blackman was recently released. The key issue was whether interest under the SABS was payable at the rate of 1% or 2% if the accident occurred prior to September of 2010.

Arbitrator Murray's decision was upheld on appeal. Director's Delegate Blackman agreed with Arbitrator Murray that a Superintendent's Bulletin was not binding, that the Superintendent's Bulletin regarding the transition rules was unclear and that the transition provisions, irrespective of the Guideline, did not authorize interference with vested rights under the old Regulation (interest being a vested right). The transition provisions under the SABS did not rebut the presumption against retroactive legislation. The insured as of August 31, 2010, had "tangible, concrete, vested and materialized rights to interest at 2% per month compounded monthly pursuant to a crystallized private contractual right" that could not be taken away by the wording of the transition provisions[1].

This case also discussed the payment of an MRI. Director's Delegate Blackman held that the collateral provisions of the SABS would apply where an MRI can reasonably be arranged through OHIP. OHIP would *not* be the primary payer if there were extenuating circumstances to support that the OHIP payment would not be reasonably available and/or that the MRI could not be completed within a reasonable period of time.

[1] *State Farm Mutual Automobile Insurance Company v. Federico* [2013] FSCO Appeal P12-00022 at p.9.