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INSURANCE LAW BULLETIN

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News & Views: Economic Loss and Attendant Care, MIG, Election of Benefits

RECENT CHANGES TO THE SABS

On December 17, 2013, the government published amendments to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("SABS"). The amendments come into force on February 1, 2014, and will affect the provisions relating to attendant care, pre-existing conditions under the Minor Injury Guideline, and the election of weekly benefits.

Attendant Care

Section 19(3) of the SABS will be amended to add a paragraph that clarifies the amount of attendant care payable to persons who do not provide attendant care services in the course of their employment, occupation or profession. The new attendant care provision reverses the law that was recently established by the Court of Appeal in *Henry v. Gore Mutual Insurance Company*[1]. In the *Henry* decision, the Court held that "economic loss" was a threshold requirement for payment of the full amount of the assessed attendant care needs. The insurer in that case was concerned that minimal monetary losses could be used to substantiate a claim for the full amount specified in an assessment of attendant care benefits (Form 1). The Court unfortunately refused to clarify this particular issue because the economic loss in that case had already been established by the care provider's income losses.

The new section 19(3) states that, if an attendant care provider is not acting in the course of his or her employment, occupation or profession, the attendant care benefit payable shall not exceed the amount of the economic loss sustained while, and as a direct result, of providing the attendant care.

[1] 2013 ONCA 480

Pre-Existing Condition

The amendment will also affect the requirements under sections 18(2) and 38(3)(c)(i)(B) in relation to the Minor Injury Guideline ("MIG"). An insured could previously escape the MIG if a health practitioner determined and provided compelling evidence that the insured had a pre-existing medical condition that prevented him or her from achieving maximal recovery within the $3,500 limit for medical and rehabilitation benefits under the MIG. The new change will require that the pre-existing medical condition be documented by a health practitioner before the accident.

Election of Benefits

The election of benefits section will also be changed. Under the current section 35(1), an insured person's election of income replacement benefits, non-earner benefits or caregiver benefits is final. The insured person was allowed to re-elect caregiver benefits within a period of 30 days only if he or she was designated as catastrophically impaired. Subject to this exception, the new section 35(3) clarifies that the election of benefits is final, "regardless of any change in circumstances".

***SIMSER AND AVIVA CANADA INC.*, APPEAL DECISION**

On January 9, 2014, FSCO released the appeal decision in the matter of *Simser and Aviva Canada Inc.*[2] This case involved a determination of the definition of "economic loss" regarding the payment of attendant care benefits. Arbitrator Lee disagreed with Mr. Simser's expert witness that economic loss included all forms of loss of opportunity. Arbitrator Lee held that economic loss had to relate to some form of financial or monetary loss, though he was careful not to limit the possible types of economic loss to lost income or lost wages. He ultimately rejected the service providers' evidence with respect to their alleged economic loss, as the evidence was vague and the allegations of loss were not corroborated with supporting documentation. In addition, Arbitrator Lee held that the payment of trivial out-of-pocket expenses, such as a bus ticket or restaurant meal, were insufficient economic losses to trigger the full payment of the attendant care and housekeeping services claimed. Otherwise, every service provider would be able to circumvent the amended regulations by purchasing a single meal in a restaurant, a tank of gas, a bus ticket or by paying $0.01, rendering the amendment meaningless and superfluous.

Arbitrator Blackman heard the appeal. The Appellant did not challenge the Arbitrator's finding the Julie Simser did not sustain a loss of income and that Kasey Simser did not sustain an economic loss related to her academic plans or potential. The main issue in the appeal pertained to whether out-of-pocket expenses and loss of opportunity constituted an economic loss.

Director's Delegate Blackman considered the out-of-pocket expenses which included $797.96 for hospital parking, a gas receipt for $21.60 and an A & W restaurant bill in the amount of $14.77. The Appellant did not dispute that most of the $797.96 related to parking was sustained while he was hospitalized, before the Form 1 had any application. Director's Delegate Blackman agreed with Arbitrator Lee that the economic loss sustained must be in the course of

[2] Appeal P13-0004 (2014)

providing attendant care services to the insured. The claimed expenses were not incurred while providing services to the Appellant.

The gas and restaurant expenses were incurred as a result of Julie Simser taking the Appellant to medical appointments and refilling his medications. With respect to these more trivial expenses, the Appellant argued that as long as proof of financial loss was provided, the full benefit claimed was payable, or at least the attendant care expenses claimed for the month during which the expenses were submitted. Director's Delegate Blackman noted that the Court of Appeal in *Henry v. Gore* declined to impose a *de minimis* restriction on the definition of economic loss and that Arbitrator Lee did not have the benefit of the Court of Appeal decision. Notwithstanding the suggestion that trivial expenses could constitute an economic loss, Director's Delegate Blackman ultimately concluded that the claimed expenses did not constitute such a loss because driving the Appellant to medical appointments and filling his prescriptions were not included on the applicable Form 1.

Finally, Arbitrator Blackman concurred with Arbitrator Lee that including loss of opportunity as an economic loss would have the Legislature speaking pointlessly, rendering the economic loss requirement superfluous and meaningless.

COMMENTARY

The changes to the attendant care provision will largely limit the payment of attendant care benefits to those individuals who can afford professional help or have a family member who either quit his or her job or took a significant reduction in income. Smaller or less precise claims of economic loss, such as *Simser,* will likely diminish, particularly if there is little cost benefit to pursuing the claim. The government has sent a clear message with the new section 19(3) that family members should not benefit financially from providing care that would have otherwise been provided in due course. The cost savings to the auto insurer remains to be seen as the reduced availability of attendant care may manifest itself in prolonged impairment and disability.

The MIG changes will have the greatest impact on insured persons who are newcomers to Canada, who did not have a doctor prior to the accident, or who failed to see a doctor for a condition. These individuals will likely not be able to escape the MIG. The change will, however, provide more certainty to the insurer's adjusting process.

With respect to re-elections, the legislative intent of the new section 35(3) is quite clearly to prohibit an insured from *electing* a different benefit at a later date. This may be an attempt by the Legislature to address the *Galdamez* type claimants[3]—that is, claimants who, after initially pursuing an income replacement benefit, later pursue a non-earner benefit after returning to work. In these situations, where the claimant initially completed an OCF-10 and elected the income replacement benefit, it is possible that the change in wording to section 35(3) will assist in eliminating a subsequent non-earner benefit claim. However, whether that will be the effect remains to be seen.

[3] In *Galdamez v. Allstate Insurance Company of Canada*, a 2012 Ontario Court of Appeal decision, the claimant was deemed eligible for non-earner benefits after she ceased to qualify for income replacement benefits upon returning to work.