

A Litigation Lawyer and Litigation Consultant Share Their Perspectives on Mediating Disability and Automobile Insurance Disputes

Guest Speakers: John Cowling and Jonathan Hale

By: Mary Korica

Changes to the Statutory Accident Benefits Schedule, including the addition of the Minor Injury Guideline, mean that the tort insurer may be expected to pay the medical treatments already incurred by the claimant.

The Insurance section of the ADR Institute of Ontario ("ADRIO") presented a live program and webinar providing perspectives on mediating disability, life and automobile insurance disputes from litigation consultant Mr. John Cowling and litigation lawyer Mr. Jonathan Hale on Wednesday, December 11, 2013 at the ADRIO office in Toronto. Mr. Hale is a lawyer with Lawson LLP – Barristers and Mr. Cowling is a Senior Consultant at RBC Life Insurance.

Mr. Cowling began the discussion by noting that disability insurance disputes have come to involve a more complex and subjective set of issues given that claims are not only over injuries but also over illnesses like chronic pain, depression, etc. Also, there is a generally positive trend of turning to mediation earlier in the claim resolution process.

In disability insurance cases, the main issue is whether the claimant is or is not disabled. Mr. Cowling distinguished between two types of disability insurance claims. Factors taken under consideration in resolving group insurance (namely, insurance coverage through an employer) claims include whether there are eligibility issues or pre-existing disabilities, what the benefit period is and whether the plaintiff has met mandatory rehabilitation requirements. He noted that benefits under a group disability plan are taxable if the employer pays all or a portion of the premium, and nontaxable if the employee pays all of the premium. Thus taxability,

as well as potential Canada Pension Plan and Worker Safety Insurance Board offsets, play into the negotiation.

Factors commonly taken under consideration for resolving individual disability claims include the timing of the person's disability in relation to the policy, misrepresentation or fraud issues, issues in the claims handling or underwriting process, whether errors were made in filling out the policy application and if so, by whom. Mr. Cowling mentioned that the insurer does exercise discretion in situations where sympathy is warranted.

Mr. Hale discussed similarities and differences in approaching insurance claim mediations when acting as a representative for tort, accident benefits (AB), or life and long term disability (LTD) insurers, particularly during global mediations involving more than one of these parties.

For the long term disability insurer, Mr. Hale said that the main concern in resolving an accident claim is determining whether the claimant qualifies under the policy. However the accident benefits and tort insurers are interested in causation, investigating the claimant's medical history and determining pre-existing injuries.

Mr. Hale noted that new case law means it is important to see who of the insurers for different claims will settle with the claimant on the day of a global mediation involving all or some of them, given that

may impact the situation of the other insurers. According to the new developments, if the LTD insurer settles with the claimant, the tort and AB insurers have the right to deduct from their payout of benefits to the claimant whatever the LTD payments to the claimant are, for both past and future benefits, as long as they do it at the mediation with the LTD settlement.

This adds to the potential for the situation of the insurer at a global mediation to change markedly depending on the moves of other parties: for example, if a tort or AB insurer leaves the global mediation, perhaps assuming the LTD claim will not be settled that day; or if the claimant's lawyer indicates they are committed to settling with the LTD insurer that day. In cases of such changing dynamics, Mr. Hale recommends ensuring clients are aware of the implications for their position. Recognizing that some mediators conduct global mediation by having the negotiation with the LTD insurer occur in a room apart from the negotiations with the tort and AB insurers, Mr. Hale considers it better for all parties to be in the same room, though not overly problematic if LTD is handled

separately. In that case, he recommends the LTD representative get a sense from the mediator of whether the other insurers are near settlement.

Mr. Hale also noted that, despite the new case law, if, for example, the claimant received one year of benefits from the long term disability insurer before the LTD claim went into litigation, the AB and tort insurers still have the right to deduct those LTD benefits.

From the tort insurer perspective, Mr. Hale noted a trend of claimants more aggressively making claims for medical treatment. Changes to the Statutory Accident Benefits Schedule, including the addition of the Minor Injury Guideline, mean that the tort insurer may be expected to pay the medical treatments already incurred by the claimant. He also noted a trend of higher demands for housekeeping expenses and he expects to see requests for caregiving expenses like daycare as well.

In response to audience questions, Mr. Hale noted that surveillance is usually only scheduled by insurers once they have reason to believe there may be a credibility

issue. He mentioned that, from the tort perspective, the global mediation can be an opportunity to access useful information from the other insurers' files, including surveillance.

Mr. Cowling and Mr. Hale agreed that the timing of a global mediation is extremely important, and noted that the parties are likely at different stages on the way to resolving with the claimant, and have different pressures. Mr. Cowling shared elements of his approach to mediation that he has found particularly constructive. This included having an open mind, learning the facts of the case thoroughly and acting in good faith, choosing a mediator who is competent in the subject matter, providing the mediator with a sense of the insurer's position during the pre-mediation, and learning as much as possible about the claimant and claimant's counsel in advance, including the dynamic between them.

Mr. Cowling also noted it is important to indicate consideration by giving undivided attention and eye contact to the claimant's counsel and the claimant during opening remarks, while remaining outwardly unaffected by their remarks, and that allowing the claimant's side to make the last offer can provide them with a psychological benefit far greater than the difference in settlement amount. Mr. Hale indicated he considers it important to use the opening statement to educate the plaintiff on the policy and the rationale behind the position of the insurer he is representing. Mr. Cowling noted that mediations need not include a full resolution to be considered successful—they are often useful in uncovering issues and information, and just moving the resolution process along. ♣

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