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PERSONAL INJURY LAWYERS

May 10th Practical Strategies Webinar Q&A

The Dawn of a New Day – Understanding the "Catastrophic" Impact of the Coming SABS Changes

Q: Will there still be any need for life care plans/future cost of care reports for non-CAT cases?

A: Yes. Life care plans/Future cost of care reports are going to be even more essential for cases where the injured person has a tort claim. For non-catastrophic cases with no tort claim, we expect that life care plans/future cost of care reports will remain a rare thing.

Q: We can be helpful in advising family, friends, clients, etc. regarding the optional benefits that are available. Can you please itemize the various optional benefits that we should suggest?

A: We recommend that all drivers purchase at least $2mm in third party liability limits. We also recommend that they purchase the optional $1mm in medical/rehabilitation/attendant care benefits for non-catastrophic injuries. This automatically increases to $2mm for catastrophic injuries. Lastly, if the insured person is a higher income earner, we also recommend that they buy the optional enhanced Income Replacement Benefits up to $1,000 per week.

Q: Are there any changes to the Minor Injury Guideline?

A: No. The Minor Injury Guideline is not changing on June 1, 2016.

Q: Can you settle a file in the LAT before the 1-year mark after June 1st?

A: Effective April 1, 2016, an individual may enter into a cash settlement with their AB provider: 1) on or after the first anniversary date of the accident; or 2) if they have applied to the LAT, on or after the date a case conference was held.

Q: Is it true that there is no longer partial approval for OCF 18s? It will only be approve or deny?

A: We are unaware of any change of this nature. However, for accidents on or after June 1, 2016, for uncommon expenses the insurer will only be responsible for "other goods and services" they agree are "essential." Previously this test was "reasonable and necessary".

Q: What if we continue treating on a protected account for 6 months and then were protected by the LAT? Are we going to be paid by the insurer?

A: In most cases, yes. If a denied treatment plan is later deemed reasonable and necessary by the LAT, the services provided during those six months should be paid for by the insurer with interest as set out in the SABS.

Q: Hemosiderin deposits… should qualify?

A: Yes. A hemosiderin deposit is a positive finding on a medically recognized brain diagnostic technology indicating intracranial pathology that is a result of the accident. We expect that a hemosiderin deposit would qualify for the positive imaging component of the new catastrophic impairment tests.

Q: Without case managers, will referrals come directly from law firms typically?

A: We expect that this will depend on the law firm and the case. Some referrals may come from an OT who is acting as de facto case manager and others may come from the law firm.

Q: Are you going to be coaching clients on how to manage $65,000 for attendant care vs. rehab? e.g. Are you going to encourage family members to help with attendant care (like pre 2010), even if they are not reimbursed so they have more rehab dollars?

A: This will obviously depend on the family situation, the specifics of the case, the lawyer and the law firm. That having been said, in cases with family members available to provide attendant care who do not have an incurred expense, we expect that most clients will want to use most of the $65,000 on rehabilitation and have their family member provide them with attendant care.

Q: With Somatoform Disorders explicitly excluded from being a qualifying criterion for CAT under mental and behavioural disorders, how can clinicians provide helpful data for CAT assessments without focusing on the global impact of the pain?

A: We do not believe that Somatoform Disorders are excluded from qualifying for CAT under the mental or behavioural disorders. Injured people can continue to apply at 104 weeks for confirmation that they have an impairment that, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 results in a class 4 impairment (marked impairment) in three or more areas of function or a class 5 impairment (extreme impairment) in one or more areas of function that precludes useful functioning, due to mental or behavioural disorder. If the Somatoform Disorder creates 3 areas of marked impairment, we believe the injured person should still qualify as CAT.

Q: One of my concerns with the further-reduced non-cat limits is - who will take responsibility for monitoring the use of these limited funds, and helping clients to determine how best to use them?

A: This will depend on the injuries and the facts of the case. In most cases it will have to be a combination of the law firm, the treatment team and the client working together to determine the best use for the money and to ensure that it is used in the most effective and efficient way.

Q: What is the responsibility of brokers & agents of direct writers to educate/explain reduction of benefit amounts? Do you feel that there will be exposure to these brokers, agents?

A: Insurance Brokers have a fiduciary duty to recommend appropriate coverage to their clients. They are professionals who are held to a commensurately higher duty of care. There will likely be lawsuits against insurance brokers for failure to sell optional benefits, higher liability limits and enhanced IRB coverage.

Q: The LAT requires a one page summary of an IE assessment....what can be charged for this & who pays for it?

A: We aren't certain about the exact provision that you are referring to. The LAT does require experts who will testify at the LAT to provide, amongst other things, a concise summary of the facts and issues that are agreed upon, those that are in dispute, and the expert's findings and conclusions. We expect that the law firm will likely draft this with input from the expert. Any costs associated with it would have to be negotiated between the professional and the law firm. If you are asking about IE reports, we are unaware of any fee guideline that permits IE vendors to bill insurers for additional summary reports and we cannot comment as to whether insurers would prepare the summaries themselves or otherwise rely on vendors for this purpose. We can only anticipate that any such expenses would have to be reviewed between insurers and their selected vendor companies directly.

Q: How can the treating professionals help with LAT applications / submissions?

A: Professionals can help with LAT Applications/Submissions through providing strong documentation and validation of the need for the good or service proposed and by being in regular communication with the law firm.

Q: Will there be a need for IE Assessments under the new LAT system? Will they still be requested by insurers?

A: Yes. The IE system does not explicitly change under the post June 1, 2016 system. We expect that adjusters will still request IE reports on many treatment plans of substance and nearly all important issues like CAT, IRB and Attendant Care.

Q: How can we, as care providers, get more information about the Henderson decision related to the cost of the Catastrophic Assessment? Thanks.

A: Every insurance company is treating this differently. Some insurers are accepting that catastrophic assessments should be paid out of medical and rehabilitation benefits and some are not. If they are not, you should proceed with a dispute. Please see attached the Henderson v. Wawanesa decision.

Q: What about charges for interpretation services? To date, I have been told that the costs of interpretation come from the benefit pool which seems very unfair - it would imply that those who do not speak English are eligible for fewer benefits.

A: This is something the lawyer should be taking up with the insurer. The lawyer should argue that this should be paid out of insurer's costs. There is nothing in the legislation that states that an interpreter should be paid out of medical and rehabilitation benefits.

Q: What happens when the brokers don't actually explain the optional benefits and instead send you to the FSCO site for the explanation?

A: It's up to the brokers to be educated on optional benefits and to explain optional benefits to customers. In tort cases, brokers' failure to advise customers about optional benefits has led to successful cases against the broker for negligence.

Q: Can you do more than one at once? (i.e. 12? so cost is 100 not 1200)

A: Every application requires a $100.00 filing fee. Each application can include multiple issues.

Q: Re: Optional Benefits - is the insurer obligated to honour those additional benefits, or can they challenge or dispute them on a case by case basis?

A: They are obliged to honour the optional benefits provided that the insured meets the test for eligibility.

Q: What about MIG or CTI? Are there any changes in psychological treatment?

A: There are no changes to the MIG. Neuropsychologists must now be registered in Canada and must be practicing for at least 5 years and per s. 3(1) of the SABS.

Q: Are the LAT decisions binding?

A: The LAT decisions will at least be persuasive authority for later cases. In addition, a party may apply for judicial review on a question of law if there is a significant error of law or if the LAT exceeds its jurisdiction. There are also very limited internal reconsideration mechanisms.

Q: Who makes up LAT?

A: 40 full-time adjudicators, 60 part-time adjudicators, case management and staff.

Q: Are there still IME?

A: Yes.

Q: Does it make a difference with regard to Guide 4 as to whether to use DSM-IV or -V?

A: Guide 4 provides only that the DSM should be used, and in fact refers to the DSM-III-R. There is no prohibition on using the DSM-IV or DSM-V. By way of clarification, the DSM -IV had 5 axes which laid out the big picture. DSM-IV was able to give you a nice summary of how the client was presenting. It was also able to catch any types of stressors and classify a patient's level of function. DSM-V got rid of all that.

Q: Is there a website where we can learn more about upper and lower moderate disability?

A: This information is discussed in more detail in Dr. Kaplan's paper which was one of the materials supplied with the webinar. A copy of Dr. Kaplan's paper is attached to this email for your ease of reference. In addition, please find enclosed an article from the Journal of Neurotrauma commenting on the use of the GOS-E.

Q: What about children that live in more remote areas where there aren't specialized acute and rehab children's hospitals? Are all of these children being air lifted to major urban centres?

A: Yes, as far as we know but it's ultimately up to the hospital. IN addition, as discussed during the webinar, there are other ways to have an injured child determined to be catastrophically impaired.

Q: Do you see a continued role for case managers?

A: Yes. There will still be CAT files.

Q: On a protected account what is a reasonable rate of interest to charge?

A: This is dependent on different treatment providers, and the facts of each case. Our offices have dealt with protected accounts at interest rates between 2.5 and 5%.

Q: Can you discuss what the anticipated difference will be between "reasonable and necessary" and "essential"?

A: There is no definition for essential in the regulations. This will have to be determined by the dispute resolution process.

Q: For clients injured pre-June 1 but applying for CAT post June 1, do the new definitions apply?

A: No. In general the date of the accident dictates which legislation applies.

Q: While protected accounts may become more of the norm; there are only so many a therapist can take on- they still have to make a living and with less work possibly being the case - can you determine what you think will be a reasonable time to settle a case?

A: Each case has to be judged on its merits. There is no set time for any case to be settled.

Q: When you are talking about clinicians working on "protected funds/accounts" with lawyers, do you mean the clinician works but only gets paid at settlement time or where the clinician(s) are being paid as they work, or is this negotiated with lawyer?

A: This is an exceptionally complicated question: The more serious the injury the more each party has to explore alternative means of funding and protecting accounts. There will be cases where we all know the claimant will ultimately be declared catastrophic and could very well have a straightforward uncomplicated tort claim. Conversely a major challenge will come about in a case involving a seriously injured claimant who might not be declared catastrophic or who has an inordinately complicated case that seems to take forever. We would strongly recommend immediate discussions between the lawyer and the health care provider to determine what course of action can be undertaken. Protecting accounts, the sharing of selected services, the payment of reports, applying for tort advances and lastly financial loans are all considerations.

Q: I may have missed this but what might I expect to see in my practice regarding providing examinations in relation to other healthcare professionals' (e.g., psychologists) OCF-18s, and my examination of those? Will they cease?

A: If we understand your question correctly, it is safe to say, the system has been made more complicated and you will still need an approval from an insurer to proceed with the examination or service.

Q: Will Life Care Planning services still be a required service for these accidents after June 01?

A: We are of the opinion that Life Care Planning will continue to be a vital tool in properly assessing "future" accident benefit and tort claims.

Q: With children; the constant re-testing of neuro-psychs is so damaging for the child's self-confidence/image & affects their participation. Will this new system decrease this constant retesting?

A: From the medical perspective the doctors will dictate the necessity of the testing. From a legal perspective this is somewhat of a difficult question because answers might be needed because of developmental changes. For example, questions might arise when a child hits puberty, when first entering post-secondary education, and even regarding employability. Unfortunately it is incumbent upon everyone involved to try to lessen the onerous obligations imposed upon the child while going through the process. We doubt this new system will decrease this constant need for retesting.

Q: If an OCF18 is denied (e.g. for housing ax) before June 1st, will the new rules apply to the resolution of this denial?

A: Yes, the resolution process will fall within the LAT system.

Q: Regarding transition -- Would you cancel a policy which renews after June 1st and have it re-written before June 1st in order to retain the prior level of SABS benefits?

A: I wouldn't cancel the policy and renew it just before June 1 although that would be a 'cute' solution. I would though by optional benefits.

Q: Did Darcy say that it is possible to purchase optional benefits to obtain CAT status bypassing any assessment and determination?

A: Yes, you can purchase optional benefits that provide for CAT like coverage even when you are non-CAT (i.e. you can get case management and $1 million plus in AC and Med/Rehab, etc.)