Oatley Vigmond

ONTARIO'S PERSONAL INJURY LAW FIRM

M E M O R A N D U M

To: Roger G. Oatley

From: Ben and Jordan

Date: May 4, 2015

Re: PIA Webinar – Answers to unanswered questions

As per your instructions, we have answered the questions that were unanswered at the recent PIA – Practical Strategies Webinar.

1. Does economic loss apply to housekeeping also?

Yes. The wording of s.23 under the 2010 *SABS* is very clear. It provides that the insurer shall pay up to $100 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services. By using the word "incurred", an insured is directed to s.3(7) and must prove that the provider sustained an economic loss.

The requirement that a provider sustain an "economic loss" has also been confirmed by recent FSCO arbitration decisions. For example, see *Ansari v State Farm Mutual Automobile Insurance Co*, 2014 CarswellOnt 18426 at paras 6 – 8 (FSCO Arb) [*"Ansari"*]. In *Ansari*, an insured was denied Housekeeping and Home Maintenance benefits because the provider failed to present clear and convincing evidence of an economic loss. (Also see *Simser v Aviva Canada Inc*, 2013 CarswellOnt 422 at para 26 (FSCO Arb))

2. I am told that health providers may have to undergo accreditation prior to being licensed. Any guidance on this?

As of December 1, 2014, service providers who submit OCF-21 forms through Health Claims for Auto Insurance (HCAI) must be licensed with the Financial Services Commission of Ontario (FSCO) in order to invoice and receive direct payment from automobile insurers for specific "listed expenses" in connection with the SABS.

Service providers must ensure that all of their facilities, branches or locations where goods and services are provided to statutory accident benefits claimants are registered with HCAI to qualify for a service provider license.

FSCO will review applications to determine whether a service provider is suitable to hold a license.

As part of the review, FSCO will consider the past conduct of the service provider, as well as the past conduct of the service provider's Principal Representative, officers, directors, partners, employees, agents, contractors, and any other interested persons or entities connected to the service provider.

FSCO will also consider whether the past conduct of the person(s) above provide reasonable grounds for believing that the completion or submission of reports, forms, plans, and OCF-21s for listed expenses will not be carried out in a lawful way, or with integrity and honesty.

FSCO will also examine whether the person(s) referred to above have made a false statement or have provided false or deceptive information to FSCO in the application for a license, or in a response to a request for information by FSCO.

Service provider licenses are issued at the business or legal entity level. This means that only one license is needed for all of the facilities, branches or locations operated by the same service provider who provide specified goods or services (listed expenses) to statutory accident benefit claimants.

3. Can you please explain a bit about importance of psychological services in MIG cases or for attendant care?

Psychological services can play a variety of roles in both MIG and attendant care cases.

With respect to treatment, psychological services play a limited role in MIG cases. As one’s treatment is limited under the MIG, it is rare for a person who is suffering from a variety of orthopedic injuries to exhaust their $3,500 limit on psychological counselling.

Psychological services are more helpful in getting injured persons out of the MIG. According to the MIG, the following injuries do not fall within the guideline:

> **“An insured person’s impairment is predominantly a minor injury but, based on compelling evidence provided by his or her health practitioner, the insured person has a pre-existing medical condition that will prevent the insured person from achieving maximal recovery from**

the minor injury if he or she is subject to the $3,500 limit … under this Guideline."

Therefore, psychological services are often necessary to demonstrate that one's psychological condition is pre-existing and will present a barrier to recovery. Specifically, psychological reports and assessments (especially those produced prior to the accident) are essential in demonstrating that an injured person's pre-existing impairments are distinct from their soft-tissue complaints.

With respect to attendant care, psychological services can be helpful in justifying attendant care increases. A useful example is accident related depression. Quite frequently, activities of daily living (e.g. personal hygiene) become impaired as a result of accident related depression. Accident related depression also increases the probability of an injured person harming themselves. In such cases, psychological reports and assessments are of the utmost importance in substantiating the need for attendant care.

4. **A patient with chronic post traumatic neck pain is now involved in a second accident. The new injuries sustained may not be 'severe' but greatly impact on his ability to control, dialogue with adjuster...to put him in MIG (so he could get treatment asap) and then convert to OCF-18...which of course, we were never able to do. What would have been the best pathway to follow?**

The existence of a pre-accident medical condition does not necessarily mean that the minor injury limits will not apply. It is only in "extremely limited instances" where the existence of a pre-existing condition will be accepted as reason to not impose the limit. To succeed, the condition must prevent the person from achieving maximal recovery from the minor injury if subjected to the $3500 MR limit. Given this, the health practitioner will have to provide information to the adjuster to "make a case" as to how / why the pre-accident condition will prevent the person from achieving maximal recovery if he is subjected to the limit.

Pre-existing chronic pain can make a case very difficult. This is because adjusters often assume that the new injury is of minimal impact and that the ongoing issues are fully related to the past. Instead, the best course of action is to find a way of demonstrating that the current injury simply should not be categorized as minor in the first place. In other cases, where the impairments are overlapping, it is essential to demonstrate that the second accident was the straw that broke the camel's back (so to speak).

For a person living with significant chronic pain, a second accident and its resultant injury may cause a significant psychological impairment that had not previously existed. If this is the case, a psychologist should be brought in as soon as possible to document and describe the reaction. If the emotional reaction is strong enough, the limits ought not to be applied. Otherwise, if there is no psychological impairment, imaging would

be helpful to determine if there is anything objective that can be used to demonstrate the new injury is not minor (e.g. a disc herniation).