Ask the Expert – Duty to Mitigate under SABS

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Q. Is there a duty to mitigate imposed on insureds in the Bill 59 SABS context, and, if so, has it been affected by the Bill 198 amendments?

A. There are express provisions under Bill 59 dealing with an insured's "responsibility to obtain treatment, participate in rehabilitation, and seek employment."

This duty to mitigate is found in Part XII of the SABS: section 55 (treatment and rehabilitation) and section 56 (employment). These provisions were substantially amended by the SABS reform of October 2003 (Bill 198).

There are interesting features in both the treatment and the employment mitigation provisions. However the employment mitigation section, is worthy of close examination by insurers, particularly in light of the recent amendments.

Pursuant to section 56, an insured person who is entitled to an income replacement benefit shall make reasonable efforts to: (a) return to the employment in which he or she engaged at the time of the accident, or (b) obtain employment for which he or she is reasonably suited by education, training, or experience.

However, under section 56(2), this requirement is not mandated if: (a) employment would be detrimental to the insured person's treatment or recovery, or (b) the insured person is participating in a vocational rehabilitation program.

If an insurer wishes to rely on section 56, notice must be given to the insured person that the insurer intends to reduce the amount of the benefit. If fourteen days have elapsed since giving notice and the insured person is still not complying with the section, the insurer may reduce the amount of the insured's benefit by fifty per cent (note: based on the Bill 198 SABS reform, the benefit may now be reduced to zero).

These notice requirements have been very strictly upheld by F.S.C.O.

This provision appears to have been rarely utilized by insurers under the Bill 59 regime. However, now that an insurer may reduce the benefit to zero (without triggering the stoppage provisions), the section may be relied upon more frequently. This is particularly so when one realizes the actual import of this section and the amendments.

Collapsing the any occupation test into the first 104-week period test:

The section now permits an insurer to terminate a benefit with respect to an insured person who fails to make reasonable efforts to obtain employment for which he or she is reasonably suited by education, training, or experience (section 56(1)(b) "any occupation" test).

Presumably, this will be the case even during the 104-week period test for entitlement (the "own occupation" test).

Therefore, in a situation where an insured admittedly cannot return to the employment in which he or she was engaged at the time of the accident ("own occupation"), but is nevertheless able to, and is not obtaining employment for which he or she is reasonably suited ("any occupation"), an insurer may reduce the benefit to zero without regard to the stoppage of benefit (section 37) provisions.

In certain circumstances, this may well have the effect of requiring an insured to take commensurate employment (thereby permitting the insurer to make appropriate deductions for post-accident income), or upon notice and continued alleged non-compliance, allow the insurer to terminate an insured's benefits within the 104-week period (the "own occupation" test), based on an insured's arguable ability to meet the "any occupation" criteria.

In essence, this seems to permit a collapsing of the much harder to meet "any occupation" test into the "own occupation" test period by insurers.

In short, there is indeed a mitigation provision contained within the Bill 59 SABS, and, based upon the Bill 198 amendments, the application of this provision could potentially have a profound impact upon the actual test insureds must meet in order to be entitled to income replacement benefits, even within the first 104- week period.