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THE BEARD WINTER DEFENDER

* An Accident Benefits Adjuster's Worst Nightmare: An Informed Tort Adjuster

By: Cary N. Schneider

There is no question that it is essential for a tort adjuster to have knowledge of the substance of an accident benefits claim. The insurer examinations, Section 24 reports, and employment information contained within the accident benefits file provide a gold mine of information that is imperative for the assessment of a tort claim. Beyond knowing the basics of the accident benefits claim however, the tort side will often not concern itself regarding any ongoing disputes concerning entitlement to benefits. With respect to claims for income replacement benefits / income loss, this can turn-out to be a costly mistake on the tort side, and a boon to the accident benefits carrier. An accident benefits carrier worst nightmare is an informed tort defendant who takes a second look at the denial of payment of income replacement benefits to see if Plaintiff counsel has missed anything.

It is clearly to the benefit of the Plaintiff to create increased exposure to both the accident benefits carrier and the tort defendant. Two deep pockets to pick are better than one. Since a tort defendant gets credit for any payment of income replacement benefits, it is in the tort defendant's interest to maximize any deductions available. A Plaintiff is only obligated to apply for income replacement benefits, and once a denial is forthcoming, he is not required to take any further action. The law does not force a Plaintiff to proceed to a trial / arbitration. A Plaintiff can then simply advance a claim for the entire income loss as against the tort defendant. If the Plaintiff then settles with the accident benefits carrier on a full and final basis, then a tort defendant does not even obtain an assignment of rights. Essentially, the tort defendant is left to foot the entire bill for the income loss claim.

It is not uncommon for a Plaintiff counsel to miss an improper or weak denial of benefits. Recent case law, such as *Smith v. Cooperators (2002)*, has opened the door for more and more improper technical denial of benefits on the accident benefits side, which has the effect of creating potentially huge exposure for the first party insurer. When I represent an accident benefits carrier, the first thing I do is assess the strengths and weaknesses of the denial. If the denial is less than stellar,

the next thing I do is assess who is Plaintiff counsel and whether they have recognized this problem. If Plaintiff counsel has yet to notice the denial, I will recommend to settle the case on a full and final basis if we are able to obtain a reasonable settlement.

What an accident benefits adjuster should immediately assess when the tort side is brought in, is who is the tort counsel, and what are they going to bring to the table. The tort defendant becomes the wildcard as they may blow a file wide open on the accident benefits side if Plaintiff counsel is asleep at the switch. The accident benefits carrier cannot simply rest on their laurels if Plaintiff counsel misses a faulty denial of income replacement benefits once the tort is involved. When I am a tort counsel, (when dealing with an open accident benefits file), one of the first things that I do is a complete assessment of the accident benefits file. I am looking for any advantage possible to maximize my client's negotiation position. If I determine that the denial is weak, there are four strategies that I may explore.

Firstly, I would contact the accident benefits side and point-out the weaknesses in their denial. I would suggest that we work together to obtain a global resolution and proceed with a joint negotiation strategy. The point of this call would be to let the accident benefits carrier know that the tort is willing to co-ordinate efforts to achieve a mutual goal; but will not be left holding the bag at the end of the day. As an accident benefits carrier, I would heed this warning and work in conjunction with the tort. Recognize that the weaknesses in your case have been exposed and contain the damage. If you do not act now, the next call that the tort counsel may make is to Plaintiff counsel.

Secondly, I may call counsel for the Plaintiff and strategize with her. If the accident benefits carrier will not listen, then I may advise counsel for the Plaintiff about the weaknesses in the denial of income replacement benefits and help them advance their claim. Since the tort can deduct up to \$400.00 weekly (\$20,800.00 annually) in payment of income replacement benefits for the income loss claim, it is incumbent on the tort defendant to help-out the Plaintiff in certain circumstances.



BEARD WINTER LLP
BARRISTERS & SOLICITORS

130 Adelaide Street West, Suite 701, Toronto, ON, M5H 2K4
Main: (416) 593-5555
Fax: (416) 593-7760

Thirdly, it may be necessary to bring this issue up at a global mediation. If I am not getting anywhere with both Plaintiff counsel and the accident benefits carrier, then I may argue the point at a global mediation. This may be done at the openings in front of everyone, (including the claimant), or more discreetly during caucus.

The benefit of doing it during an opening is that it will certainly get everyone's attention and makes it a live matter for debate and negotiation. Some of the drawbacks of doing it this way is that you may inflame the claimant, his counsel, and the accident benefits carrier. The claimant may be angry that his counsel missed something, the claimant may become irritated with the accident benefits carrier for an alleged improper denial of benefits, and the accident benefits carrier may become enraged with the tort defendant for helping out the Plaintiff. This may hinder the negotiation process. The benefit of bringing this matter-up in caucus is that you may be able to be more subtle about your comments and avoid angering the participants. The disadvantage of bringing this matter-up in caucus is that it may lose its effectiveness and your position may not be properly articulated by the mediator.

Fourthly, an accident benefits carrier ought to be concerned that a tort defendant will simply settle with the Plaintiff on a final basis and obtain an assignment of rights. An assignment of rights allows the tort defendant to step into the shoes of the Plaintiff and advance a claim for accident benefits as if it was the claimant herself. This is like a subrogated claim in which the Plaintiff's claim is fully funded and indemnified by the tort insurer. Clearly the threat of an adverse cost award against an insurer has less of a chilling effect than the conse-

quences of a claimant losing his home if unsuccessful at trial. If no one is listening to the tort defendant then this may be an effective tactic to achieve one's goals. A tort defendant may believe that he will advance such a claim more effectively than Plaintiff's counsel.

It is certainly in the best interests of the tort and accident benefits insurer to co-operate as a team against the Plaintiff. Focus on the Plaintiff's weaknesses as opposed to that of one another. The more that you beat each other down, the larger the smile of Plaintiff's counsel. With that being said, both the tort and accident benefits insurers have a job to do. If the denial of payment of income replacement benefits is based on a faulty denial, then address the problems inherent in the file. As an accident benefits carrier you need to recognize that a good tort counsel may pick-up on this even if Plaintiff counsel initially does not. The sooner the accident benefits file settles the better. On the tort side, do not let the opportunity to use an improper denial of income replacement benefits go to waste. Unlike the reality shows "Survivor" and "The Amazing Race", there is no prize for being the last insurer standing.



Cary N. Schneider is an associate at Beard Winter who specializes in accident benefit and tort defence claims. He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely matter. More about Cary at <http://www.beardwinter.com/people/profile.asp?259>

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