

INSURANCE LAW BULLETIN

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RECENT TOP DECISIONS FROM THE LAT & FSCO

MEDICAL REASONS CLARIFIED for SPECIFIED BENEFITS & TREATMENT PLANS

[The information below is provided as a service by Shillingtons LLP and is not intended to be legal advice. Those seeking additional information on the issues above should contact the firm at (519) 645-7330.]

Income Replacement Benefits

M.B. v. Aviva Insurance (Reconsideration 16-002325/AABS, December 12, 2017)

The respondent had paid income replacement benefits during the Pre-104 period and wished to determine ongoing entitlement. The respondent's notice stated that insurer's examinations were required in order to assess entitlement to IRBs now that the applicant was in the Post-104 period. In considering the validity of the respondent's notice, Executive Chair Linda Lamoureux provided a historical overview of the legislative trend that obligated insurers to provide increasingly more detailed reasons for conducting assessments. The fact that the requirement for "medical and any other reasons" arose in various contexts throughout the *Schedule* required that the phrase be interpreted consistently while at the same time, remaining context-sensitive. The Executive Chair indicated that an insurer satisfied its obligation to provide "medical and any other reasons", whether under s.44 or elsewhere, by explaining its decision with reference to the insured's medical condition and any other applicable rationale. The explanation would turn on the unique facts of each case. At the very least, the reasons should include:

- a) Specific details about the insured's condition forming the basis for the insurer's decision; or alternatively
- b) Information about the insured's condition that the insurer does not have but requires.

Additionally, the insurer was required to state the specific benefit or determination at issue along with the section of the *Schedule* upon which it relied. Ultimately, an insurer's "medical and any other reasons" should allow an unsophisticated person to make an informed decision to either accept or dispute the decision at issue. Executive Chair Lamoureux found that the reason provided by the respondent did not offer an explanation that allowed an unsophisticated person to understand, let alone make an informed decision, about how to respond. However, had Aviva set out the complete

disability test in clear language, the explanation “might have gone a considerable way”¹ to providing the applicant with the requisite medical reason under (b), above.

Treatment and Therapy

T.F. v. Peel Mutual Insurance (16-003316/AABS, October 18, 2017)

The applicant made claims for occupational and physiotherapy services. The respondent denied both benefits and requested insurer’s examinations on the basis that the medical documentation did not support the need for such services. The respondent further indicated that the occupational therapist who submitted the OCF-18 did not appear to follow recommendations made by the vocational rehabilitation specialist. The adjudicator reviewed the requirements set out in *Augustin v. Unifund Assurance Co.*² and, using that as a guideline, indicated that a sufficient medical reason for assessing treatment and therapy had to include two elements:

1. A statement that the claims adjuster reviewed the health practitioner’s opinion;
and
2. A statement that the claims adjuster concluded that the health practitioner had not provided *compelling evidence* [emphasis added] to support that the treatment plan was reasonable and necessary.

The adjudicator found that the insurer’s notice indicated that the adjuster had reviewed the medical documentation and came to the conclusion that the evidence did not support entitlement to the services claimed. However, in our opinion, the test under section 15 of the *Schedule* is whether the proposed goods and/or services are reasonable and necessary. In the absence of express language requiring that the evidence also be “compelling”, the standard of proof would be a balance of probabilities.

¹ *M.B. v. Aviva Insurance Canada* (16-002325/AABS, December 12, 2017) at para 31

² FSCO A12-000452