NRIO Breakfast Seminar – June 26, 2007

Defining, Assessing and Paying Attendant Care:

Assessors' and Insurers' Responsibilities

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DEFINING ATTENDANT CARE

DEFINING ATTENDANT CARE

- Assessment of Attendant Care now defined:
  - "Shall be in the form of" Form 1;
  - *"Shall contain the information required"* in the Form 1.

DEFINING ATTENDANT CARE

- Section 16 of the SABS Attendant Care Benefit means:
  - "reasonable and necessary expenses incurred…for services"
    - "aid or attendant"; and
    - "services from nursing home, home for aged chronic care hospital".

DEFINING ATTENDANT CARE

- For the most part we must look to the Form 1 determine what is Attendant Care.

- Form 1 preamble = instructions to user

- “Use this form to report the future needs…”

  needs = to require

  future = immediate future

  see 43(13) of SABS

DEFINING ATTENDANT CARE

Preamble: … “as a result of an automobile accident”

Result = outcome

Result does not = caused by

“Result” is less strict than “caused by”

DEFINING ATTENDANT CARE

What the Form 1 says is important;

What the Form 1 preamble does not say is just as important.

Form 1 preamble does not say

"use this form to report the net future needs"

Form 1 preamble does not say

"use this form to report the needs that are not being met…"

Defining Attendant Care See example on page 4 of paper.

DEFINING ATTENDANT CARE
Preamble

"Users of the Form 1 should review other accident benefits…"

Willie Handler writes:

"this statement is not intended to imply that any amounts be deducted from the overall attendant care benefit calculations."

COMPENSATION OF ATTENDANT CARE PROVIDER

Compensation of Attendant Care Provider

39 (4) Insurer pay within 10 days of receiving Form 1

and

Section 33 (1) says that the person applying for a benefit shall…provide the insurer with

> *"any information reasonably required to assist the insurer in determining the person's entitlement to a benefit".*

Unfair and Deceptive Act or Practice

"Charging an amount in consideration for the provision of goods or services…if the goods or services are not provided" - section 3 (2) 1 Unfair and Deceptive Acts and Practices Regulation, 547/05

WHO PAYS FIRST:

MINISTRY OF HEALTH
OR
SABS INSURER?

Who Pays First: Ministry of Health or SABS Insurer?

Section 16 SABS insurer shall pay: "…services provided by a long term care facility, nursing home, home for the aged or chronic care hospital."

→ SABS Insurer pays for institution services

Who Pays First: Ministry of Health or SABS Insurer?

Section 58 of SABS Insurer shall pay benefits *even if insured person is entitled to or has received COMSOC or Ministry of Health benefits.*

→SABS insurer pays first

(see page 8 and 9 of paper for discussion)

Who Pays First: Ministry of Health or SABS Insurer?

Section 60 “Other collateral benefits”

NOTE:

SECTION 60 HAS NOTHING TO DO WITH THE PROTOCOL TO BE USED IN ASSESSING ATTENDANT CARE OR HOW A FORM 1 IS TO BE COMPLETED.

→ s60(2) Only to do with payment

Who Pays First: Ministry of Health or SABS Insurer?

Section 60 (2): *"payment not required "for the portion of the expense for which payment is reasonably available to the insured person under any insurance plan or any other plan or law."*

Key Language in 60 (2) "for which payment is reasonably available *"to the insured person"*

No payment available to insured person for personal support worker under *Long Term Care Act.*

Who Pays First: Ministry of Health or SABS Insurer?

What About Attendant Care in Hospital?

Is Attendant Care Provided in Hospital?

Answer: Ministry of Health: Anne Utley – No

Not an insured service under *Health Insurance Act* – Section 7 *Health Insurance Act* -See MOH letter at back of paper: whereas CCAC and some retirement homes provide personal support worker under *Long Term Care Act,* no personal support worker as an insured service for hospital under *Health Insurance Act*.

Who Pays First: Ministry of Health or SABS Insurer?

Attendant Care in Hospital

Section 60 (2) and the Health Insurance Act (HIA)

Under HIA person entitled to "Insured services". Insured services do not include personal support worker or attendant care or private duty nurse.

- HIA is not a plan or law for which payment is available to insured person for attendant care.

- Since no attendant care in hospital

→ section 60(2) doesn't apply

Because of HIA, residents of Ontario do not incur any personal expense therefore there is no "payment reasonably available to the insured person" – 60 (2) SABS

Who Pays First: Ministry of Health or SABS Insurer?

Attendant Care in Hospital

Because of HIA, residents of Ontario do not incur any personal expense therefore there is no "payment reasonably available to the insured person" – 60 (2) SABS

Who Pays First: Ministry of Health or SABS Insurer?

Incurred Expense – The Law

There is no debate:

"an insured, to incur any expense…need not actually receive the items or services or spend the money or become legally obliged to do so. It is sufficient if the reasonable necessity of the service or item and the amount of the expenditure are determined with certainty.

See five cases listed in paper.

McMichael and Belair

Accident 1998

Form 1 2002

Denied by insurer

Need identified but no services provided

Insurer's mistake: it didn't seek information or assessments to determine if need was appropriate.

McMichael and Belair

- Form 1 supported attendant care need
- Other experts at Arbitration supported need
- There is no evidence to the contrary
- Insurer did not request particulars for services provided
- McMichael completely decompensated for 6 years with no attendant care (helps to prove need was real)

McMichael and Belair

Because no payment was provided, no services could be provided

Belair said no services = insurer no pay

- Rejected by Arbitrator and
- Rejected on Appeal and
- Rejected at Divisional Court
- If the order wasn't made, Director noted it would cause resistance of claims:
- Insurer could say no because injured people can't afford to get the benefit without funding

Insurer could go to Arbitration and say we don't have to pay for that which we denied because insured person did not get it after we denied.

…and the Director's Delegate said…

McMichael and Belair

On Appeal, Director's Delegate:

> "Belair's position would mean that an Arbitrator has no authority to order payment of benefits to which the claimant has proven entitlement, unless the claimant has obtained the services without the insurer's approval. ***This is an absurd result that would render the Dispute Resolution Process meaningless.***"

McMichael and Belair

McMichael stands for the following proposition

1. If a Form 1 is submitted which identifies need for attendant care; and
2. The Insured chooses to ignore a claim for attendant care; or
3. Refrains from obtaining assessments to address the need which has been identified for attendant care; or
4. Refrains from requesting information to support the need for services for attendant care; THEN

The insurer is at risk of having an Arbitrator or Judge make an Order for payment of past benefits even if services have not been provided because there was no funding for them.

ATTENDANT CARE
SINCE MARCH 1, 2006

Attendant Care since March 1, 2006

- Application for Attendant Care benefits must be in the form of a Form 1 prepared by a health professional authorized to treat impairment

Attendant Care since March 1, 2006

Since insurer may pay attendant care expense before Form 1 done but shall after Form 1 done,

Very Important to have the attendant care needs recognized and assessed and a Form 1 submitted at an early stage.

Attendant Care since March 1, 2006

When receives Form 1, insurer has to begin payment of benefit within 10 days

Pay pending

Section 33 – Insurer can request additional information

Attendant Care since March 1, 2006

If insurer requests additional information response may be

"we are unable to provide the attendant care without the funding by the insurer"

If so, the insurer should begin funding and continue requests for information.

Attendant Care since March 1, 2006

Section 39 (4) preserves pay pending responsibility of insurer while it waits for report from its section 42 evaluator.

Attendant Care since March 1, 2006

If a person has applied to be CAT then payments for attendant care while waiting for determination of CAT/Non-CAT = $6,000.00.

Attendant Care since March 1, 2006

If Section 42 says attendant care is less than the original Form 1 = dispute

- Go to Mediation
- Go to Arbitration
- Bring Motion for Interim Benefits

INTERIM BENEFITS MOTIONS

Interim Benefits Motions

After denial, can appear on motion for interim benefits before an Arbitrator in eight weeks or less

See *Haimov and Ing* and *Keyes and The Personal* decisions

Arbitrator's don't like "partisan" approaches to attendant care assessment by DAC or IE

If Urgent need and *prima facie* case

= reinstatement of benefits

= past benefits?

= benefits until Arbitration

REBUTTAL REPORTS

Rebuttal Reports

Insurer obliged to pay for only one in every 12 months.

Original provider must do rebuttal unless, section 42 was not same profession

Original provider must use same information as Section 42 evaluator

Payment = $450.00 unless two assessors did Section 42.

Rebuttal Reports

Counsel for insured should pay additional costs for rebuttals

Include comments on whether Section 42 evaluator complied with OSOT guidelines rebuttal reports

Helpful for interim benefits motion

Accident Benefit Reporter at www.thomsonrogers.com

Highlights of Attendant Care Cases are available with each issue.

QUESTIONS

THANK YOU