

THE NEW ACCIDENT BENEFITS SCHEDULE

TRANSITION PROVISIONS

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The latest round of auto insurance reform will see new regulations affecting car accidents occurring on and after September 1, 2010. The old SABS is being replaced by an entirely new SABS. The transition from old to new will be complex. This paper will set out some, but not all, of the transition rules and issues.

The starting point for any consideration of the transitional provisions is to look at changes that have been made to the old SABS by virtue of Ontario Regulation 35/10. The significant changes to the old SABS includes:

- a) Assessments done by the insured person under the old section 24 no longer apply after August 31, 2010, whether it concerns an old accident or a new accident under an old policy;
- b) Old Part X, the Procedures for Claiming Benefits, no longer applies after August 31, 2010, whether it concerns an old accident or a new accident under an old policy;
- c) The provisions in (b) apply also to old Parts XII (Obtaining Treatment Duty), XIII (Interaction with other systems) and XV (Miscellaneous);

Under the 35/10 amendments to the old SABS none of the amounts referred to in the old SABS are payable in connection with accidents occurring after August 31,

2010.¹ This is qualified by the provision in these amendments providing that for an amount that would have been paid under the old SABS but due to be paid after August 31st, that benefit amount shall be determined under the Old SABS, except in connection with the obligation to pay the insured's assessment costs. In other words, for old accidents the amount of benefits continuing after August 31st is what the insured would have received under the old rules, qualified by the new limits on assessment costs.

The impact of these transition provisions with respect to the amount of a particular benefit that is payable under an old policy for an old accident but paid after August 31st is unclear. It seems to pivot on the words "amount determined" contained in the new section 2(2) SABS.² At first glance the section seems to suggest that benefit amounts continue to be paid based on the old rules, subject only to limits placed on assessment costs. This may not, however, be the case. In determining the amount of benefit payable one must also have regard to the change in the definition of "incurred" and the deductibility of assessment and examination costs off the medical and rehabilitation limit.

With respect to incurred, does the new definition of incurred³ impact on entitlement to benefits for old accidents paid after August 31st? The transition provisions are ambiguous on this point. Arguably the definition of incurred employed under the old SABS ought to apply to old accidents under the new system.

Under the new SABS, assessment and examination costs incurred by the insured person are to be deducted from the available limits for medical and rehabilitation benefits. For an old accident resulting in an assessment done after August 31st, the issue is whether the cost of the assessment is charged against the available limit of medical and rehabilitation benefits available to the injured

¹ Ont. Reg 35/10, section 3 (1.3).

² See new section 2(2).

party. The new SABS merely indicates that the “amount” of the benefit is determined by the old SABS and that the “amount” of the assessment determined under the new. It fails to say whether the assessment amount comes off the available limits.

Some illustrations of how the transition rules will work with respect to benefits can be made. For an old accident:

Income Replacement Benefits

This seems fairly straightforward. The amount is to be determined under the old SABS. Section 6 of the old SABS indicates that the amount is 80% of net income. To the extent that costs for preparing a report are an issue for old accidents after August 31st, the limits on the amount payable for the preparation of a report, which is \$2,500, likely applies.⁴

Attendant Care

The attendant care benefit under the old SABS must pay for expenses “incurred” for services provided by an aide or attendant or facility.⁵ That term is not defined in the old SABS, but has been thoroughly dealt with in the case law. The new SABS has changed the definition of incurred. It seems that the issue is concerned with how to interpret the meaning of “amount determined”. Narrowly, the amount is the expense attributed to the specific benefit claimed. More broadly, no amount is payable if the limits of coverage have been exhausted. As such, the “amount” is clearly something more than a mathematical calculation. The insurer’s obligation to pay is one that arises out of the old SABS. While each old auto policy

³ New section 3(7)(e).

⁴ See new section 7(5).

⁵ Old section 16(2).

is to some degree modified by the new regulations⁶, there is little to suggest that the method of determining entitlement has been retroactively altered. In other words, the “amount” to be paid under the old SABS is a function of the expense claimed, the available limits and the method for determining entitlement. There is good reason to believe that with respect to old accidents, entitlement ought to be determined using the old definition of “incurred”.

Medical and Rehabilitation

The obligation under the old SABS is to pay the insured for expenses “incurred”. It is submitted that the same analysis as set out above for attendant care would apply to medical and rehabilitation benefits.

Another issue that arises is whether assessment costs for old accidents done after August 31st reduce the available medical and rehabilitation limits. Under the transition section 68 of regulation 34/10, the limits available for medical and rehabilitation benefits are “deemed” to be the optional \$100,000 provided for in section 28(1)3. The new SABS does not preserve the limits from the old SABS, but substitutes the increased coverage for the duration of the policy period on the old policy. Section 18(5) of the new SABS provides that all assessment and examination costs “in connection with any benefit or payment...under this Regulation” be deducted from the available limits. This may mean that assessment costs relating to old accidents and old policies paid after August 31st reduce the available medical and rehabilitation limit of \$100,000 in the case of non-catastrophic cases and \$1,000,000 in the case of catastrophic cases. For new accidents under old policies (that is an accident that

⁶ See section 68 of the new regulation 34/10.

occurs after August 31st, but before the old policy period lapses) the optional benefit limits apply, as does the new SABS.

Housekeeping and Home Maintenance

The transition provisions of the new SABS deems the old policy to contain the option under the new SABS for housekeeping benefits in non-catastrophic cases. For old accidents the treatment of “incurred” set out above ought to apply to this benefit as well.

Part XIII, section 68 of the new SABS sets out the main transitional provisions.⁷ These rules apply to every motor vehicle liability policy in effect on September 1, 2010 and will continue to apply until the policy expires.⁸ This means that for a policy that, for example, was in effect for one year from November 1, 2009 to November 1, 2010, the transitional rules apply to that policy from September 1, 2010 to November 1, 2010. This will be referred to as the “existing policy”.

For purposes of transition the existing policy will be deemed to include:

1. Caregiver, housekeeping and home maintenance benefits under the same terms available under the old SABS. That is, caregiver benefits, even though eliminated under the new rules for non-catastrophic cases, will still be available under the existing policy until the policy lapses. Likewise for housekeeping benefits.
2. Medical and rehabilitation benefits to a maximum of \$100,000;
3. Attendant care benefits to a maximum of \$72,000; and
4. All optional benefits coverage for the above categories purchased by the insured person in the existing policy.

⁷ See Ontario Regulation 34/10, section 68.

⁸ Unless terminated sooner.

Other than the benefits described above, for accident occurring on or after September 1, 2010 the benefits payable are those contained in the new SABS.⁹

For accidents that occurred between November 1, 1996 and September 1, 2010 , in respect of benefits paid under the old SABS, the cost of examinations¹⁰, the procedure for claiming benefits¹¹, and the payment of benefits¹² will be handled in accordance with the new SABS “with such modifications as are necessary”.¹³

This is subject to the following rules:

- i. Any reference in the new SABS to “Minor Injury Guideline” shall be considered reference to the “Pre-approved Framework Guideline” for the purposes of old accidents;
- ii. For assessment costs in relation to an old accident, but payable on or after September 1, 2010, the \$2,000 ceiling under the new SABS applies¹⁴;
- iii. For benefits in old accidents other than assessment costs, the amount of the benefit is to be paid in an “amount determined” under the old SABS¹⁵.

With respect to assessments and examinations, it is clear that assessments relating to old accidents done after August 31st are subject to the limit of \$2,000 prescribed by the new regulations. There may be a problem in the transition provisions relating to assessments done prior to September 1st but not paid until after that date. In other words, if a health care professional performs an assessment in August 2010 but does not bill or get paid until September 2010, will the fee to be charged be limited to the new restriction? Arguably the answer to this question is “yes”.

⁹ See section 2(1) of the new SABS.

¹⁰ The cost of examination is found in new section 25 (1), (3), (4) and (5).

¹¹ Part VIII of the new SABS.

¹² Part IX of the new SABS.

¹³ See section 2(2) of the new SABS.

¹⁴ See new section 2(2)2

The transition rules also provide that certain steps for old accidents are no longer to be taken after August 31st. These steps relate to the delivery of notices, forms and applications.¹⁵ For actions taken after August 31st the corresponding provisions of the new SABS applies and the time limits contained in the new SABS apply.

¹⁵ See new section 2(2)2.ii.

¹⁶ See Ont. Reg. 35/10 section 3(1.5).