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INSURANCE LAW BULLETIN

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NON-EARNER BENEFITS: ASSESSING ENTITLEMENT FOLLOWING THE COURT OF APPEAL RULING IN *GALDAMEZ*

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Requesting entitlement to non-earner benefits when a claimant has either previously received an income replacement benefit or has returned to work is becoming a popular tactic for claimant's counsel in attempting to have their client qualify for a weekly benefit.

The July 2012 decision of the Ontario Court of Appeal in *Galdamez v. Allstate Insurance Co. of Canada*[1] has muddied the waters with respect to an insurer's determination as to whether a claimant qualifies for a non-earner benefit. In *Galdamez,* the plaintiff sustained injuries in an October 2002 car accident when a vehicle ran over her foot. When the accident occurred, the plaintiff was employed at a supermarket. She continued her employment until January 2004 when she went on maternity leave. She never returned to work following this time.

Initially, the plaintiff applied for income replacement benefits. Allstate denied this application on the basis that she had only missed one day of work. She subsequently sued for breach of contract and a failure to pay income replacement benefits. In 2009, the plaintiff applied for non-earner benefits. Her application was denied and a separate action was initiated in response.

Superior Court

Allstate brought a motion for summary judgment to dismiss the plaintiff's claims for non-earner benefits. Justice Ramsay agreed with Allstate and concluded that a person employed at the time of an accident could not qualify for non-earner benefits, irrespective of whether they met the requisite disability requirement or not. According to the decision, there was no situation in which an employed person at the time of an accident could be disabled enough to qualify for non-earner benefits, but not income replacement benefits.[2]

Court of Appeal

The Court of Appeal disagreed with the motion judge's findings and allowed the appeal. It held that a person employed and earning an income at the time of an accident could still be entitled to receive non-earner benefits. The decision was based on a "plain reading" of sections 4 and 12 of the 1996 *Statutory Accident Benefits Schedule* ("SABS"). These sections respectively state the

[1] [2012] O.J. No. 3394 (ONCA).
[2] *Galdamez v. Allstate Insurance Co. of Canada*, [2011] O.J. No. 3501 (Ont. Sup. Ct.) at para. 11.

following with respect to an individual's entitlement to income replacement and non-earner benefits:

> 4(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:
>
> > 1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.
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> ***
>
> 12(1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a non-earner benefit if the insured person meets any of the following qualifications:
>
> > 1. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit (emphasis added).

Pursuant to section 2(4) of the 1996 SABS, a person will be deemed to suffer a complete inability to carry on a normal life as a result of an accident only if the impairment continuously prevents the individual "from engaging in substantially all of the activities in which the person ordinarily engaged before the accident."

According to the Court of Appeal, entitlement to income replacement benefits is established through a two part test whereby employment status is only *one* factor. Therefore, an individual cannot be barred from receiving a non-earner benefit solely because they meet one of the prongs of the two part test for income replacement benefits (namely, being employed at the time of the accident). In this sense, "substantially all" of an individual's pre-accident activities did not include *all* activities meaning that, in rare circumstances, eligibility for the non-earner benefit could be achieved despite possessing the status of an employed person. These sentiments were best summarized in the following passage:

> *Although I consider it unlikely that persons who can work at their pre-accident jobs following an accident will often meet the disability standard for non-earner benefits, I do not rule out such a possibility.*
>
> *For example, in jobs were mobility is not a requirement (e.g. department store greeter, telemarketer, etc.) and the job was not of great importance in the claimant's pre-accident life, it may be possible for a claimant who returns to his or her pre-accident employment following an accident to satisfy the test for non-earner benefits.*[3]

Therefore, a person who suffers a severe diminution in their overall quality of life, but is still working, could potentially meet the test of entitlement to non-earner benefits.

[3] *Supra* note 1 at paras. 43 & 44.

Spadafora v. Dominion of Canada, [2013] ONSC 182

Since the release of the *Galdamez* decision, there has been much debate regarding its impact on future weekly benefit claims. Fortunately, the overall sentiments in the legal literature seem to support the belief that circumstances where an individual could qualify for a non-earner benefit following a return to work or termination of an income replacement benefit will be rare.

Despite its anticipated rarity, it would appear that claims for non-earner benefits will be proceeding to trial. In a recent January 2013 decision, Justice Reilly was asked to consider a motion for summary judgment on this very issue. In *Spadafora v. Dominion of Canada,* the plaintiff was injured in a rear-end motor vehicle accident on December 1, 2003. In his OCF-1 application for accident benefits, the plaintiff confirmed that he was employed and working, not a student (and had not recently completed school) and that he was able to return to work after the accident. He continued working his sales job at Premier Fitness and subsequently obtained various employment positions at a ceramics company (July 2004) and Dofasco (December 2004).

In response to the OCF-1, the insurer provided the plaintiff with an OCF-9 Explanation of Benefits indicating that he was not eligible for any of the weekly benefits. A second request for a disability certificate was attached. It does not appear that any disability certificates were submitted until 2008. They indicated that the plaintiff met the disability test for income replacement benefits, but not non-earner benefits.

Approximately six and a half years following the accident (May 25, 2010), the plaintiff notified the insurer of his intention to pursue a non-earner benefit. In response, the insurer brought a motion for summary judgment. It argued that the plaintiff was barred from bringing this action on the basis of various limitation periods as well as the fact that there was no medical evidence to suggest that the plaintiff suffered a complete inability to carry on a normal life. In addition, the insurer argued that there was no genuine issue requiring trial relating to the plaintiff's allegations of breach of contract, mental distress, bad faith and aggravated, punitive or exemplary damages.

With respect to the plaintiff's eligibility for non-earner benefits, Justice Reilly stated that the mere fact that the plaintiff continued working following the accident did not disentitle him from non-earner benefits, thus confirming the Court of Appeal's findings in *Galdamez.*

In putting forth its limitation period defence, the insurer relied on sections 32 and 50 of the 1996 SABS. Section 32(3) requires an insured to submit a signed application for a benefit to the insurer within 30 days of receiving the application form. Section 50 similarly states that an insured cannot commence mediation unless they have notified the insurer of the circumstances giving rise to a claim and submitted an application for the benefit within the prescribed time period. Justice Reilly noted that the insured's duty to submit a signed application was the third step in a three step claims process mandated by section 32 of the SABS. A precondition to the third step was the insurer's obligation to provide the claimant with (a) the appropriate forms; (b) a written explanation of the available benefits; (c) information to assist in the application process; and (d) information relating to any possible election of the weekly benefits. An insurer could not hold an insured to a 30 day time limit if the requisite information had never been provided. Since the commencement of a limitation period was a question of fact, the plaintiff's entitlement and any limitation defences were issues that required determination by a trial judge.

Surprisingly, Justice Reilly did grant the insurer's motion regarding the mental distress and bad faith claims. He reasoned that the object of the contract of insurance was "not to secure a psychological benefit that would bring mental distress upon breach upon the reasonable

contemplation of the parties." In light of past case law, we would not be surprised to hear that plaintiff's counsel has appealed this decision.

Commentary

Given the outcome in *Galdamez* and the motion judge's findings in *Spadafora*, we believe that it would be prudent for insurers to establish a clear protocol in assessing an insured's eligibility for non-earner benefits following a return to work or denial of income replacement benefits. If the insurer begins to take a proactive stance in dealing with these types of claims, it may be possible to thwart counsel's attempts through the use of the various limitation defences available in the SABS.

A best practice for these types of cases will require strict adherence to the insurer's obligations under section 32 of the SABS. FSCO Arbitrators have consistently taken advantage of the opportunity to highlight the insurer's obligation to inform claimants about the various accident benefits to which they may be entitled. In *Michalski v. Wawanesa*[4], for example, Arbitrator Alves granted a special award against the insurer for failing to (a) properly advise the claimant of the benefits she was potentially entitled to; and (b) assist the claimant in applying for those benefits. The following was stated in this regard:

> *The Legislature has imposed obligations on accident benefits insurers to inform claimants about benefit entitlement and process….The purpose of section 32 of the Schedule is to ensure that claimants get access to benefits to which they* ***may*** *be entitled. When the insurer fails to identify benefits to which the claimant is entitled, claimants may never assert claims for benefits. This undermines the entire accident benefits scheme….I find that the information the insurer provides must be clear, accurate and timely. Sufficient information should be provided that the claimant is aware of the nature and extent of his or her entitlement to benefits, including the right to raise disputes. Insurers are not permitted to sit by and watch and wait and see if a claim is made – there is a positive duty to inform the claimant of entitlement.*[5]

Insofar as an insurer intends to rely on limitation defences in claims for non-earner benefits made following a return to work or IRB denial, it will be necessary to ensure that compliance has been achieved with section 32. The motion judge's ruling in *Spadafora* confirms that limitation defences cannot be relied upon if the insurer has not met its obligation to inform and assist during the claim process.

Despite the above, it should be emphasized that an insurer's failure to advise a claimant of their potential eligibility for non-earner benefits, whether in the context of *Galdamez* or otherwise, does not garner any explicit consequences in the SABS. The Ontario Court of Appeal decision in *Stranges v. Allstate Insurance Co. of Canada*[6] and the FSCO Appeal decision in *Yogesvaran v. State Farm*[7] confirms that a procedural error on the part of the insurer does not entitle a claimant to the payment of benefits in perpetuity or until the proper steps are taken. A claimant is still required to prove their entitlement to benefits in accordance with the eligibility requirements in the

[4] *Michalski (Litigation Guardian of) v. Wawanesa Mutual Insurance Co.* (FSCO A03-001363, December 13, 2005).
[5] *Ibid., at paras. 118, 120 and 122.* Similar sentiments were also expressed by Arbitrator Renahan in *Beaman v. Guarantee Co. of North America* (FSCO A00-001016, May 1, 2001).
[6] [2010] O.J. No. 2610 (ONCA).
[7] *Yogesvaran v. State Farm Mutual Automobile Insurance Co*. (FSCO Appeal P09-00042, October 28, 2010).

SABS. The only caveat would be an arbitrator's discretion to provide an interim award of benefits subject to a final determination of entitlement.

What does this mean?

Perhaps the most prudent question to address is what all of this information means to an insurer when it is faced with this type of non-earner benefit claim. Unfortunately, it is nearly impossible to advise of a specific set of steps as each case will be assessed based on its own set of facts. However, in the event that a claimant returns to work following the accident or their IRB is denied on the basis of an insurer examination, we suggest providing a letter to the claimant advising of their potential eligibility for a non-earner benefit (in accordance with section 32 and the findings in *Galdamez*) and request that they provide an updated disability certificate. If the claimant responds to the letter, the insurer can move the process along in the standard manner. If no response is provided after several attempts at sending the correspondence (2 to 3 times would likely be sufficient), the insurer will be in a stronger position to rely on its limitation defences in the event the claimant attempts to bring an action for non-earner benefits several years down the road.

We understand that this strategy may not apply in all situations; however, as long as the insurer can show that it has made proactive attempts to advise its insureds of the potential benefits available to them, it will be in a better position to deal with any claims head on rather than scrambling to determine if the proper information was provided to the insured in the first place.

Finally, in light of *Galdamez* and *Spadafora,* the insurer must also re-think its adjusting practices in respect of the insured who misses no time from work. Although in the past these claimants were routinely considered ineligible for non-earner benefits, *Galdamez* and *Spadafora* require the insurer to analyze these situations differently. As stated by Madam Justice Simmons in *Galdamez*:

> *Although I consider it unlikely that persons who can work at their pre-accident jobs following an accident will often meet the disability standard for non-earner benefits, I do not rule out such a possibility. For example, in jobs where mobility is not a requirement (eg: department store greeter, telemarketer, etc.) and the job was not of great importance to the claimant's pre-accident life, it may be possible for a claimant who returns to his or her pre-accident employment following an accident to satisfy the test for non-earner benefits.*

Therefore, the question of whether an insured person is entitled to a non-earner benefit despite the fact the insured has lost no time from work depends on whether the person meets or potentially meets the eligibility criteria. In such circumstances, the insurer would be required to advise the insured of the availability of the non-earner benefit in accordance with the claims process mandated by section 32 of the SABS.