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INSURANCE LAW BULLETIN

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The Applicability and Criterion for the *Minor Injury Guideline*

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***Scarlett and Belair Insurance Company Inc.*, FSCO Appeal P13-00014**

On November 28, 2013, FSCO released the appeal decision in the matter of *Scarlett and Belair Insurance Company Inc.* The case involved a determination of whether the claimant, Lenworth Scarlett, sustained in a motor vehicle accident an impairment that was predominately a minor injury under the *Minor Injury Guideline* ("MIG") of the *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("SABS"). Director's Delegate David Evans allowed the appeal and rescinded the decision of Arbitrator Wilson. The matter was remitted for a full hearing before a different arbitrator.

Director's Delegate Evans made no final determination on whether the claimant suffered an injury that fell within the MIG framework. Director's Delegate Evans focused instead on the errors in analysis that were made in Arbitrator Wilson's decision.

The Impairment Must be Predominantly a Minor Injury

Arbitrator Wilson found that the claimant's injuries were not minor in nature. Without outlining his reasons, he decided that the claimant's chronic pain, depressive symptoms and temporomandibular joint disorder were separate and distinct from the claimant's soft tissue injuries. He found that these issues were not clinically associated sequelae of the soft tissue injuries. He thus concluded that the totality of the claimant's injuries placed him outside of the MIG.

Director's Delegate Evans found that Arbitrator Wilson did not direct his mind to the proper test, which was whether the impairment was *predominantly* a minor injury. Even if some injuries were not clinically associated sequelae, the claimant was still subject to the limit for medical and rehabilitation benefits if the impairment was *predominantly* a minor injury. In Director's Delegate Evans' opinion, Arbitrator Wilson failed to address this fundamental question, which necessitated a new hearing on all issues.

"Compelling" Evidence is more than just "Credible" Evidence

In his decision, Arbitrator Wilson engaged in an analysis of the meaning of "compelling" evidence of a pre-existing medical condition, which serves to provide claimants with enhanced medical and rehabilitation benefits in the context of a minor injury. He analyzed the French version of the MIG and concluded that "compelling" evidence simply meant "credible" evidence.

Director's Delegate Evans failed to understand why Arbitrator Wilson engaged in the analysis of the meaning of "compelling" evidence after he found that the claimant's injuries were not minor in nature. "Compelling" evidence of a pre-existing condition only applied to claimants that fell within the scope of a minor injury. Furthermore, the requirement of "compelling" evidence was found within section 18(2) of SABS, which contradicted Arbitrator Wilson's contention that it was merely a creature of the MIG. Arbitrator Wilson further did not consider the French version of SABS. Director's Delegate Evans opined that "compelling" evidence went beyond being merely "credible" evidence. Whether the evidence met this test in any given case was a determinable matter of fact.

The Burden of Proof Always Rests on the Insured

In Director's Delegate Evans' opinion, Arbitrator Wilson improperly put the burden of proof on the insurer to show that the claimant's injuries fell within the MIG. In his opinion, the burden of proof for entitlement to benefits always rests on the insured. Arbitrator Wilson's approach to the issue of the burden of proof was significant because it impacted on his final decision. Given the difference in opinion between the claimant's and the insurer's experts, Arbitrator Wilson found in favour of the claimant when he should have done the opposite, given that the burden lay on the claimant to prove entitlement.

Director's Delegate Evans rejected Arbitrator Wilson's contention that the $50,000 tier of coverage was presumed to be some form of default coverage for medical and rehabilitation benefits. Director's Delegate Evans outlined the three tiers of coverage for medical and rehabilitation benefits in the SABS, including:

- $3,500 for "an impairment that is predominantly a minor injury" (MIG)
- $50,000 if an impairment is not a minor injury and is not catastrophic
- $1,000,000 for a catastrophic injury

In his opinion, there was no difference in principle between the three tiers.

Director's Delagate Evans concluded that the burden of proof remained on the claimant to prove, via a treatment and assessment plan, that his impairment was not predominantly a minor injury and that the MIG did not apply. It was not incumbent on the insurer to pay medical and rehabilitation benefits simply because the claimant sustained an impairment in the accident. The expenses had to be reasonable and necessary on evidence from the claimant.

The Minor Injury Guideline is Binding in Law

Arbitrator Wilson found that the MIG, while incorporated by reference into the SABS, was a non-binding interpretative aid. He referred to section 268.3(2) of the *Insurance Act*, which stated that any guideline shall be "considered in any determination" and interpretation of SABS. Director's Delegate Evans disagreed and found that Arbitrator Wilson's reliance on subsection (2) was an error. He found that the MIG was published pursuant to section 268.3(1) of the *Insurance Act*, and specially only published in respect of medical and rehabilitation benefits pursuant to section 268.3(1.1) of the *Insurance Act*. In his opinion, the MIG was binding in law.

Procedural Fairness

Arbitrator Wilson relied on case law and statutory provisions that were raised on his own accord after the arbitration hearing, without notice to the parties or an opportunity to respond. He raised several arguments, such as the interpretative use of the French version of the MIG, reliance on section 233 of the *Act* in considering evidence, and a reliance on a number of previous decisions that were not cited in the hearing.

Director's Delegate Evans agreed with the insurer that this resembled judicial decision making, which was contrary to the duty of fairness in these types of hearings. Director's Delegate Evans found that, apart from the issue of fairness and due process raised by the insurer, arbitrators raising their own issues and research without seeking submissions from counsel ran the risk of referring to irrelevant case law or legislation. While FSCO arbitrations are expert hearings and arbitrators have some latitude to refer to materials not submitted by the parties, it was another matter entirely for an adjudicator to make key findings based on materials and research on which the parties had no opportunity to make submissions. Accordingly, Director's Delegate Evans opined that a new hearing was required in this case in order to ensure that the proceeding was fair.

DISCUSSION

While this decision did not involve a final determination on the MIG issue, it clarified a number of legal issues. The relevant test to determine whether a claimant falls within the MIG is whether his or her impairment is predominantly a minor injury or sequelae of a minor injury. Additionally, this decision confirms that the MIG is binding in law through its incorporation by reference into the SABS.

The decision further confirms that the burden of proof for entitlement to benefits ultimately lies with the insured, even for a determination of whether his or her injuries fall within the MIG. This determination is made from evidence, such as treatment and assessment forms completed and submitted by appropriate healthcare professionals that have examined the claimant. The burden of proof should not fall on the insurer to prove how a claimant's injuries should be categorized. Finally, there is no "default" coverage tier to which a claimant with an impairment is presumed to belong.