

Accident Benefits – THE MINOR INJURY GUIDELINE

Belair v. Scarlett 2013 FSCO APPEAL

The much anticipated appeal decision of Director's Delegate David Evans in the matter of *Scarlett v. Belair* was released by FSCO on November 28, 2013.

The appeal arises from Arbitrator John Wilson's decision on a preliminary issue hearing, dated March 26, 2013. In that decision, Arbitrator Wilson opined that the *Minor Injury Guideline* was informational and nonbinding only, the burden of proof in determining whether an insured fell within the MIG lay on the insurer, and "compelling evidence" with respect to pre-existing conditions simply meant credible evidence. Arbitrator Wilson concluded that the totality of Mr. Scarlett's injuries, including his chronic pain, depressive symptoms, and TMJ, put him outside of the MIG limits of \$3,500.

On appeal, Director's Delegate Evans opined that when evaluating an insured with a variety of impairments, the proper test is whether all of the impairments as a whole are predominantly within the definition of minor injury or sequelae thereof. In the case of Mr. Scarlett, Arbitrator Wilson failed to direct his mind to the whether Mr. Scarlett's impairments of chronic pain, depressive symptoms, and TMJ were separate and distinct from his soft tissue injuries and were not the sequelae thereof. Director's Delegate Evans specifically noted that a TMJ issue would not necessarily take an insured's injuries outside of the MIG.

Director's Delegate Evans also rejected Arbitrator Wilson's finding that in determining whether or not an insured's injuries fell within the MIG, the burden of proof lies on the insurer. Contrastingly, Director's Delegate Evans found that the burden of proof always lies on the insured whether he/she seeks entitlement to \$3,500 for an "impairment that is predominantly a minor injury," \$50,000 for a non minor injury and non-catastrophic impairment, or \$100,000 for a catastrophic impairment.

With respect to the French-English version of the MIG, the Director's Delegate indicated that the analysis in regards to "compelling evidence" was only relevant if an insured was found to be subject to the MIG. As Arbitrator Wilson had not found Mr. Scarlett to be subject to the MIG, his analysis on "compelling evidence" was unnecessary. The Director's Delegate also found the analysis of "compelling evidence" by Arbitrator Wilson to be inaccurate as it did not apply the shared meaning rule which required that a shared or common meaning be found within the two versions of a legislation. Director's Delegate Evans concluded that in applying the shared meaning rule, "compelling evidence" meant more than simply credible evidence.

Director's Delegate Evans also disagreed with Arbitrator Wilson's finding that the MIG was a non-binding interpretative aid only. Rather, the Director's Delegate found that the MIG was incorporated by reference into the SABS, and was thereby binding. Director's Delegate Evans also examined the recent amendments to section 283 of the *Insurance Act* and opined that the MIG was binding even before the recent amendments.

Throughout the decision, Director's Delegate Evans pointed out several instances where Arbitrator Wilson had raised his own arguments, conducted his own research, and reached his own conclusions without providing an opportunity to counsel to provide submissions. Director's Delegate Evans accepted Belair's submission that this was a gross breach of procedural fairness and ordered that the matter proceed to a new hearing.

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