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FSCO APPEAL DECISION CLARIFIES "MINOR INJURY GUIDELINE"

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The recent and much anticipated release of the FSCO appeal decision in *Scarlett v. Belair*[1] signals that injured accident victims will have to work harder to get out from under a *Minor Injury Guideline* ("MIG") classification by their insurers.

Mr. Scarlett was involved in a motor vehicle accident in which he suffered soft tissue injuries (i.e., sprains, strains and whiplash related injuries). Later, he went on to develop chronic pain, depression and other psychological problems, as well as temporomandibular joint syndrome ("TMJ"). Belair, his accident benefits insurer, considered Mr. Scarlett's injuries to fall under the MIG and capped his medical and rehabilitation benefit entitlements to the prescribed $3,500 limit, including the cost of medical assessments.

The MIG defines "minor injury" as:

> "A sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae." This term is to be interpreted to apply where a person sustains any one or more of these injuries.

The MIG goes on to say that an insured's injuries do not fall within the MIG where:

> "An insured person's impairment is predominantly a minor injury but, based on compelling evidence provided by his or her health practitioner, the insured person has a pre-existing medical condition that will prevent the insured person from achieving maximal recovery from the minor injury if he or she is subject to the $3,500 limit … under this Guideline."

Mr. Scarlett disputed his MIG classification. He argued that although he indeed suffered strains, sprains and whiplash related injuries, he also suffered from pre-existing conditions and subsequent psychological disabilities that he said were not associated with his soft-tissue injuries and which would take him out of the MIG constellation.

On a preliminary issue hearing at FSCO, Arbitrator John Wilson ruled in Mr. Scarlett's favour, finding that: (1) the insurer had the burden of proving that an insured's injuries were "minor" and within the MIG; (2) the MIG was itself was nothing more than a non-binding, interpretive aid; and, (3) "compelling evidence" of a pre-existing condition that would prevent an insured from achieving maximal recovery if subject to the $3,500 limit meant nothing more than "credible evidence." Arbitrator Wilson specifically found that Mr. Scarlett had significant problems (i.e., psychological, TMJ) that were not necessarily the consequence of his soft tissue injuries and, when the totality of Mr. Scarlett's injuries were assessed, they fell outside the MIG.

Belair appealed. In a decision released November 28, 2013, Director's Delegate David Evans ruled in favour of the insurer. The Delegate rescinded the arbitration order and sent the question of whether Mr. Scarlett's injuries fell within or outside the MIG back for determination on a new hearing before a new arbitrator.

[1] *[2013] O.F.S.C.D. No. 42 (Dir. Del. Evans)*

The Delegate specifically rejected Arbitrator Wilson's interpretation and application of the MIG and, in doing so, provided some guidance for injured accident victims seeking to avoid a MIG classification:

1. The burden of proof as to whether an insured's injuries fall outside the MIG always rests entirely with the insured.

2. The MIG is binding on arbitrators, having been incorporated by reference into the Statutory Accident Benefits Schedule – it is more than simply an interpretive aid.

3. In deciding whether an injured person falls outside the MIG, arbitrators must address why any non-soft tissue complaints are "distinct" from (i.e., not clinically associated with) soft tissue or other "minor" injuries.

4. In deciding whether an injured person falls within the MIG, arbitrators should specifically address the question of whether the injuries are "predominantly" minor injuries (as required by the MIG), rather than simply finding that the "totality" of an insured' injuries may take him or her out of the MIG.

5. "Compelling evidence" (required for proof of the "pre-existing condition" exception to the MIG) goes beyond being merely credible, although the question of whether the evidence meets the test in any given case is a matter of fact to be determined by the arbitrator.

Mr. Scarlett may seek to further appeal this decision by way of judicial review by the Divisional Court of the Ontario Superior Court of Justice. For the time being, however, the FSCO appeal decision remains the guiding authority on the interpretation and application of the MIG.

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