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FSCO ARBITRATOR SAYS INSURERS MUST NOT APPLY A "COOKIE-CUTTER" APPROACH TO THE MINOR INJURY GUIDELINE

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On March 26, 2013, a decision was rendered by the Financial Services Commission of Ontario in the case of Lenworth Scarlett and Belair Insurance Company Inc.

The applicant, Lenworth Scarlett, suffered soft tissue injuries, psychological injury and a TMJ injury arising from a motor vehicle accident which occurred on September 18, 2010.

The decision of Arbitrator John Wilson is the first decision regarding the Minor Injury Guideline ("MIG") pursuant to the MIG which came into effect on September 1, 2010 and which can limit the medical/rehabilitation benefits available to motor vehicle accident victims who have suffered a "minor injury" to $3,500.00. In a decision that will be very helpful to accident victims like Mr. Scarlett, Arbitrator Wilson found that the MIG did not apply in his circumstances.

Arbitrator Wilson noted that the default category of benefits available under the SABS is non-catastrophic benefits (where $50,000.00 in medical/rehabilitation benefits are available). Arbitrator Wilson said that the MIG is a specified exception to non-catastrophic claims, that insurers should not rely upon where there is credible evidence of a non soft tissue injury, including psychological, emotional or cognitive impairment.

Arbitrator Wilson was critical of the insurer's "cookie-cutter" approach to relying on the expense limit under the MIG and commented that, "it makes no sense if the insurer is positioned to veto access to benefits on the basis of delivery of a single report, in the face of credible evidence to the contrary when the resulting delay in treatment could last for years." Arbitrator Wilson was also critical of the insurer having spent "a surprising" $3,658.60 on medical assessments (the insurer exceeded the MIG cap on assessments alone) to try and justify its MIG classification and only $1,582.34 on benefits.

Arbitrator Wilson held that because the applicant provided timely and credible information that taken by itself would have justified that he was outside the MIG, the applicant should not have been considered to have suffered a minor injury.

Arbitrator Wilson's decision requires that insurers not make early claims decisions under the MIG, where there is any doubt whatsoever whether the MIG is applicable. The proper approach in these circumstances is to consider the reasonableness of the treatment, as it is proposed, as a non-catastrophic claim and not rely on the MIG claims limit.

This decision will hopefully end the practice of many insurers of automatically limiting claims to the monetary limits under the MIG where there are any signs of soft tissue injury, as that rigid approach is clearly unreasonable where there is credible evidence of a non-minor injury.

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