Focus PERSONAL INJURY

Arbitrator slams insurer for acting in bad faith

Leonard Kunka

A recent decision by arbitrator Knox Henry of the Financial Services Commission of Ontario (FSCO) in Thomas Waldock and State Farm Mutual Automobile Insurance Company has sent a wake-up call to all insurance companies about their primary duty of utmost good faith to their insureds when dealing with first party claims.

In this case, a decision regarding expenses, FSCO A13-001725, on Nov. 16, 2015 (and also FSCO A13-001725, on Nov. 10, 2014), the first party claim was a claim for Statutory Accident Benefits ("SABS") pursuant to the Ontario Standard Automobile Insurance Policy.

By way of background, on March 25, 2008 Mr. Waldock was assisting an elderly couple whose vehicle was stuck in a snow bank during a storm. After he helped push the vehicle out of the snow bank, he was standing near the rear bumper of the stranded vehicle when he was struck by a pickup truck which had lost control on the road, throwing him five to ten feet.

As a result of the impact, he suffered horrendous right leg injuries and underwent a total of seven surgical procedures in an effort to avoid amputation. He has suffered recurrent infections and remains at risk of future infection and possible amputation if future infection is not controlled.

At the two-year, post-accident mark, he applied for a "Catastrophic Impairment" (CAT) designation of his injuries, pursuant to the SABS. Well prior to the two-year mark, the funds available for medical and rehabilitation services under his SABS coverage for "non-catastrophic injuries" had run out.

He has been described by his doctors as a model patient. He followed all recommended treatments and rehabilitation. He moved from the Greater Toronto Area to Bracebridge, Ont. to be closer to the university where he taught since he could not tolerate the commute. In short, every aspect of his life was affected.

When he applied for the CAT designation, State Farm denied his claims and forced him to proceed to arbitration at FSCO.

We accumulated volumes of medical reports/records detailing his multiple surgical procedures and his extensive rehabilitative efforts, including a catastrophic assessment from MDAC, which concluded that due to the inevitable deterioration of his leg injuries, combined with the mental and behavioural impact of his injuries on virtually all of his daily activities, his injuries should be considered to be a "catastrophic impairment."

State Farm arranged its own catastrophic assessment through Independent Rehabilitation Services Inc. (IRSI), which concluded that the injuries were not catastrophic.

While the orthopedic assessor from IRSI agreed with the severity and inevitable deterioration of Waldock's physical injuries, the mental and behavioural impairment assessor (Dr. Cashman) provided a 10 per cent whole person impairment (WPI) rating compared to the 35 per cent WPI rating of Dr. Waisman, the assessor from Multiple Disciplinary Assessments Centre (MDAC).

Arbitrator Henry's original decision, released in Nov. 2014, found Waldock to be catastrophically impaired and focused on Dr. Cashman's failure "to follow the accepted guidelines to determine whether a person is catastrophically impaired." Arbitrator Henry was also critical of State Farm for not calling Dr. Cashman as a witness at the arbitration to defend his assessment.

The arbitrator was also highly critical of State Farm for denying Waldock CAT status, based on a report that was seriously flawed and should have been obvious to State Farm .

While not the basis of State Farm's CAT denial, the decision is also of importance because it was the first case in which FSCO confirmed that inevitable deterioration of injuries could be taken into account in assessing whether those injuries constituted a catastrophic impairment.

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Following the CAT decision, counsel for Waldock submitted retroactive claims to State Farm that challenged some of the claims and the date from which interest should be calculated on those claims.

As a result, in the second part of the arbitration, these retroactive claims were brought before arbitrator Henry, together with a claim for interest, legal costs, and a punitive "Special Award" against State Farm.

Arbitrator Henry awarded Waldock his full outstanding past expenses of $361,520.30, plus interest on those expenses at the statutory compounded rate of 2 per cent per month, together with his costs of the arbitration at an enhanced rate.

Arbitrator Henry also granted a special award against State Farm in the amount of $108,456.09, plus interest at the compounded rate on the special award.

It was clearly punishment for relying on the flawed catastrophic assessment, and for forcing Waldock through a prolonged arbitration process when there was ample medical evidence which should have led State Farm to accept his injuries as CAT without the need for an arbitration.

Arbitrator Henry's decisions confirm that the Ontario accident benefits legislation, as first party insurance, requires insurers to treat their insureds fairly.

The decisions also place a positive obligation on insurers not to unnecessarily expose their insureds to unreasonable and costly litigation, simply to recognize the seriousness of injuries they may suffer in a motor vehicle accident.

Leonard Kunka is a partner with the Toronto law firm of Thomson, Rogers and practises exclusively in the area of personal injury litigation. He acted for Waldock.