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INSURANCE LAW BULLETIN

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FSCO Finds MIG Unconstitutional
Maybe the LAT *is* Unconstitutional (but unlikely)
Post-Accident Business Profits Deductible from IRB

Abdirahman Abyan v. Sovereign General Insurance Company **(FSCO A16-003657)**

Arbitrator Benjamin Drory of FSCO held that the Minor Injury Guideline ("MIG") limit on benefits was unconstitutional insofar as it applied to the applicant, Abdirahman Abyan, who suffered from chronic pain as a result of an accident.

Background

Mr. Abyan was a taxi driver injured in a three-vehicle accident. He suffered various soft tissue injuries, including neck and back pain. Around two years after the accident, an MRI of the applicant's lumbar spine showed multi-level degenerative disc disease which resulted in chronic pain. Dr. T. Getahun gave the opinion that the chronic pain condition precluded maximum medical recovery within the MIG. When the applicant submitted a treatment plan for a psychological assessment, Sovereign denied the request stating that the applicant had reached the MIG limit on payable benefits.

Section 3 of the *Schedule* defines a "minor injury" as "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury". When an applicant falls within this definition, medical and rehabilitation benefits are limited to $3,500. However, under s. 18(2) of the *Schedule,* if the insured provides compelling evidence of a pre-existing medical condition "that was documented by a health practitioner before the accident" and that would prevent maximum recovery under the MIG limit, the MIG limit does not apply, thereby increasing the limit on payable benefits to $65,000. The applicant did not have this documentation, so he did not meet the test for the exception.

Mr. Abyan also argued that his injuries, including chronic pain, were caught within the definition of "minor injury". Orthopaedic surgeon, Dr. T. Getahun, testified on behalf of the applicant that "clinically associated sequelae" necessarily included chronic pain despite the fact that chronic pain was maladaptive, multifaceted, devastating and self-perpetuating (in short, anything but "minor" and arguably an apt description of Mr. Abyan's condition). Dr. Getahun's opinion was based on a broad view of the meaning of "sequelae" which encompassed any impairment that followed the original injury(ies). Arbitrator Drory accepted Dr. Getahun's characterization of clinically associated sequelae, and thus concluded that Mr. Abyan's chronic pain, being a result of a whiplash disorder, was included in the definition of "minor injury" and thus subject to the MIG limit. It is important to note that Sovereign chose not to participate in the hearing and consequently, the plethora of FSCO decisions[1] that confirm certain chronic pain conditions are out of the MIG [2] were not considered.

The Charter Argument

Mr. Abyan argued that the requirement of a pre-accident medical report proving the existence of a benign condition, and the discrimination against chronic pain sufferers under the *Schedule* was a breach of his s. 15(1) *Charter* right to equality under the law.

Section 15(1) of the *Canadian Charter of Rights and Freedoms* states:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The applicant argued that the MIG drew discriminatory distinctions that perpetuated an arbitrary disadvantage on the basis of a physical disability. Specifically, the applicant submitted that injured persons deemed to sustain "minor injuries", who also had an asymptomatic pre-existing medical condition that was not documented by health practitioners, were precluded from achieving maximal recovery by the MIG. The applicant went on to argue that because the objective of insurance law was consumer protection, and the purpose of the MIG provided no rational connection for the

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[1] *Arruda v. Western Assurance Co.*, [2015] OFSCD No 177; *Patel v. TD General Insurance Co.,* [2017] OFSCD No 101; *Grewal v. State Farm Mutual Automobile Insurance Co.,* [2017] OFSCD No 128; *Lamasan v. Certas Direct Insurance Co;* [2017] OFSCD No 27; *Arsenault v. State Farm Mutual Automobile Insurance Co.,* [2017] OFSCD No 198; *Ali and Ferozuddin v. Certas Direct Insurance Company,* 2016] OFSCD No 92; *Basson v. Royal and Sunalliance Insurance Co.,* [2015] OFSCD No 94.

[2] The existence of persistent or chronic pain in and of itself does not necessarily put an insured outside the MIG as pain could be clinically associated sequelae to minor physical or soft tissue injuries. In the case of chronic pain, the onus is on an applicant to show that it is an injury or condition "separate and apart from the minor injury" (*Ganal v. Coseco Insurance Co./HB Group/Direct Protect*, [2017] OFSCD No 127). Adjudicators at the LAT have taken a similar view, stating in one case that "pain that lasts for more than six months without any discussion of the level of pain, its effect on the person's function or whether the pain is bearable without treatment is [no] more than mere sequelae" (*Y.X.Y. v. The Personal Insurance Company*, 16-000438/AABS). See also *B.U. v. Aviva Canada Inc.* 16-000143/AABS and *T.S. v. Aviva Canada Inc.* 17-000835/AABS.

discriminatory monetary limit, these provisions failed to respond to his actual capacities, and thereby reinforced, perpetuated, or exacerbated his disadvantage.

Arbitrator Drory agreed with these arguments and held that the MIG violated s. 15 of the *Charter* in two respects. First, "the effect of the MIG arbitrarily discriminates against MVA victims who suffer chronic pain as a clinically associated sequelae to the MVA". Second, the wording "that was documented by a health practitioner before the accident" created discriminatory effects, and there was no clear purpose elaborated for it.

Arbitrator Drory then considered whether the government could justify this discrimination pursuant to s. 1 of the *Charter.* This section guarantees *Charter* rights, but only to the extent that they could be justified by society. The focus of this portion of the analysis was on the least restrictive manner of accomplishing the goals of the legislation. Arbitrator Drory found that even if the objective of the *Schedule* was avoiding fraudulent claims based on chronic pain, it would still not minimally impair the equality rights of chronic pain sufferers. He held that preventing chronic pain sufferers from achieving maximal medical recovery is inconsistent with the MIG's stated objective to focus on a functional restoration approach, and that the legislation could be worded differently to avoid the effect of drawing chronic pain sufferers into the MIG category. Arbitrator Drory also found that the wording "that was documented by a health practitioner before the accident" was not justified under s.1 because it was not clear what the purpose behind the terminology was. If the assumption was the prevention of fraud, this was still insufficient to support the infringement. Arbitrator Drory used the example of a person prevented from achieving maximal medical recovery after an accident simply because they did not have a family doctor to document a pre-existing condition.

Because of the *Charter* violations, Arbitrator Drory severed the wording "that was documented by a health practitioner before the accident" from the *Schedule* <u>for this case only</u>. Additionally, he held that the provision of "clinically associated sequelae" in the definition of minor injury was to be interpreted, <u>in this case only</u>, as excluding chronic pain from among the sequelae.

Commentary

Arbitrator Drory, following the law established in *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*,[3] ruled that his decision did not create a binding precedent and was limited to the matter at hand. While we may see similar challenges of this nature at the LAT, depending on the tribunal's view of their authority to hear Charter challenges, the window opened by this case is limited. Furthermore, considering that in many chronic pain cases the applicant is removed from the MIG before the limits become an issue, the focus of future challenges may be the documentation of a pre-existing health condition by a health practitioner. It remains to be seen whether the Attorneys General of Canada and Ontario choose to attend future challenges at the LAT, given neither attended at the *Abyan* matter.

***Campisi v Ontario (AG)*: 2017 ONSC 2884**

Mr. Campisi has appealed Justice Belobaba's ruling that he did not have standing to challenge the constitutionality of the LAT and that the impugned provisions did not breach the

[3] [1991] 2 SCR 5 at para 17.

Charter. Mr. Campisi's loss on the standing issue alone should make the appeal a difficult battle, as the reasons given by Justice Belobaba were sound:

- Regarding private standing, Mr. Campisi was not directly affected by the law as his firm rarely dealt with accident benefits; and

- Regarding public standing, Mr. Campisi could not show how he had a "real stake or genuine interest in the constitutional validity of the two provisions in question".

It is likely the appeal will be heard later this year or early in 2018, but Justice Belobaba's succinct reasons provide little room for reversal. Beyond the fact that Mr. Campisi lacked standing, Justice Belobaba addressed and dismissed each of his constitutional arguments saying that "it cannot be seriously contested that the resolution of SABS disputes by the LAT is necessarily incidental to the broad policy goals that led the provincial legislature to establish threshold no-fault automobile insurance in the first place."

***Perth Insurance Company and Salim Surani* (Appeal P16-00022, FSCO)**

Background

Mrs. Surani and her husband were pharmacists. Mr. Surani owned a number of pharmacies, and Mrs. Surani worked almost exclusively at one of these businesses. After a car accident, Mrs. Surani claimed income replacement benefits ("IRBs") from her insurer. Perth claimed that it was entitled to deduct this pharmacy's post-accident business income from Mrs. Surani's IRB entitlement pursuant to s. 7(3)(b) of the *Schedule*.

At arbitration, Arbitrator Sone held that if the post-accident income was characterized as "earned income," Perth could deduct 70% of it from the IRB. She determined that what counts as "earned income" turns on the level of involvement in the businesses. Arbitrator Sone compared the level of involvement in the business before and after the accident and used the pharmacies' financial records to determine the IRB quantum. She found that Mrs. Surani only performed trivial, minor tasks at the pharmacy where she worked following the accident.

Arbitrator Sone then focused on the phrase "income earned" and compared it to the phrase "income received" in the previous 1996 *Schedule*. She eventually looked to the *Income Tax Act* ("*ITA*") to help her define "earned income" and concluded that the term required active engagement in the business. Thus it was held that because Mrs. Surani's involvement in the business was only trivial, she was not "actively engaged" and consequently, the income was not "earned." The result of this interpretation was that none of Mrs. Surani's business income was deductible from the IRB quantum. The insurer appealed.

Appeal

Director's Delegate David Evans overturned the arbitrator's ruling. Delegate Evans held that the definition of "earned income" in the *ITA* and its reference to active engagement was not relevant to s. 7(3)(b) of the *Schedule*, essentially for two reasons: (1) the arbitrator quoted from s.146 of the *ITA* which dealt with RRSP and other special income

arrangements and not with determining the amount of a person's profit or loss from the business; and (2) the *Schedule* did not use the specific term "earned income".

Delegate Evans clarified that a self-employed person's income from a business was the profit from the business, both before and after the accident. Post-accident profit was therefore deductible from IRBs. Further, the cost of an injured applicant's lack of active participation in his or her business post-accident was accounted for in the calculation of the weekly base amount. Failing to subsequently deduct business profits would result in double counting the applicant's lack of active participation.

Commentary

Delegate Evans rightly held that it would be inconsistent for a company's profits to be relevant in determining pre-accident income but irrelevant in determining post-accident income. The decision clarifies that section 7 of the *Schedule*, taken as a whole, allows business losses after an accident to be added to a person's IRBs, while business profits after an accident are deducted. Similarly, self-employment income before the accident remains self-employment income after the accident and is not re-characterized as "passive income" simply because little or no active work is performed.