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INSURANCE LAW BULLETIN

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Divisional Court Confirms NEB not "Pay Pending" & Material Contribution Test not the "usual test" in SABS

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On February 12, 2018, the Divisional Court released *Agyapong v. Jevco Insurance Co.,* [2018] OJ No 747 ("*Agyapong*"), a case that dealt with deemed entitlement to non-earner benefits and causation.

The applicant sustained injuries following two motor vehicle accidents. On July 2, 2005 he was struck by a car while riding his bicycle. On July 12, 2005, he was struck by a pick-up truck. In the two years preceding the car accidents, there were several other incidents in which the applicant sustained bodily and psychological injuries including a knife attack to his neck, a pistol-whipping by an unknown assailant and a variety oF workplace injuries.

The applicant submitted an OCF-1 dated June 9, 2005 (a month *preceding* the first accident) and a disability certificate dated July 5, 2006. The OCF-3 supported the claimant's entitlement to non-earner benefits and housekeeping and home maintenance benefits. Jevco did not respond to the OCF-3 until 2011. In January of 2011, Jevco requested an updated disability certificate and following its receipt of the OCF-3, conducted insurer's examinations which found the applicant not entitled to the non-earner benefit. Jevco issued a notice to the claimant on March 30, 2011.

Presumptive Entitlement

The applicant argued that he made a timely claim for benefits and that Jevco's delay in responding meant that he was presumed to be entitled to the non-earner benefit until the date of denial in 2011. The applicant's argument was rejected at all levels of adjudication. Importantly, unlike the current schedule, the applicable regulation (O.Reg 403/96) was silent on the consequences of an insurer's failure to comply with section 35, which required that within 10 business days of receiving an application and completed disability certificate the insurer had to: (a) pay the specified benefit; (b) send a request under subsection 33 (1) or (1.1); or (c) provide a notice of an insurer's examination. The Divisional Court found there was nothing in the plain meaning of the provision that compelled the result proposed by the applicant. The Court further upheld the arbitrator's finding that the applicant had to prove entitlement to the claimed benefits despite the insurer's technical breach of the *Schedule,* citing the Court of Appeal's ruling in *Stranges v. Allstate Insurance Company of Canada*

(2010 ONCA 457).[1] The Court also emphasized that the applicant's interpretation would have the result that an insured putting forward a seemingly valid but in reality fraudulent non-earner benefit claim, or an exorbitant and unreasonable housekeeping claim, would nevertheless be entitled to the benefits until discovery by the insurer, which could not have been the intention of the legislators.

Causation

The arbitrator found that the psychological and physical impairments exhibited by the applicant prior to the accident mirrored those claimed afterwards. In applying both the "but for" test and the "material contribution test" in determining causation, he found that the claimant failed to meet both tests. On appeal to the Director's Delegate, the applicant argued that the "but for" test did not apply in his circumstances. The Delegate found it unnecessary to address this ground of appeal as the arbitrator applied both tests and did so correctly. The applicant appealed to the Divisional Court on the basis that the appropriate test was the "material contribution to the risk of injury" as set out in the Supreme Court of Canada case, *Clements v. Clements,* [2012] 2 SCR 181.[2]

The Divisional Court found that while a determination of which test applied in the circumstances was not required, comment was made to the effect that the material contribution test was not the "usual test in relation to claims asserted under the SABS".[3] Moreover, the Court noted that in accident benefits, policy considerations of tort law did not apply (i.e., whether the plaintiff should be compensated or the defendant protected from liability) and as such, the issue was purely evidentiary. Therefore, the issue in the current context was whether the applicant's injuries resulted from one or more causes.

As the Court's decision did not delve into much detail regarding the situations where one or the other test would apply, we have provided a brief overview:

- The "but for" test applies in situations where a combination of both the accident and the pre-existing condition have caused the impairment to occur. Even if the accident played a lesser role than the pre-existing injuries, causation is established because the accident was still a **necessary contributing cause** or "ingredient".[4]

- In the material contribution test, either the accident or the pre-existing condition could be the sufficient cause of the impairment. Under this test, causation is established if the accident was a **material, contributing cause.**

The Court confirmed that the standard of review was reasonableness and on that basis, found no reason to overturn the arbitrator's finding under either test.

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[1] In *Stranges,* the Court of Appeal held that an insured was required to prove entitlement to benefits notwithstanding an inadequate notice of denial.

[2] *Clements v. Clements,* [2012] 2 SCR 181 at para 13.

[3] *Agyapong v. Jevco Insurance Co.,* [2018] OJ No 747 at para 25.

[4] *Athey v. Leonati,* [1996] 3 SCR 458 at para 43.

Commentary

Deemed Entitlement

The current *Schedule*, which came into force on September 1, 2010, addressed the concern regarding an insurer's lack of timely response to claims for specified benefits by adding provisions with strict consequences for non-compliance. As the *Schedule* currently reads, a failure to provide one of the three responses mandated by section 36 (4) within the applicable time limit will result in the insurer paying the specified benefit for the period starting on the day the insurer received the OCF-1 and OCF-3 and ending on the day a proper notice is provided.

This is not to be confused with deemed entitlement, such as the provisions relating to the payment of an attendant care benefit which require an insurer to pay benefits until it is challenged by way of evidence. Section 42 (6) of the *Schedule* states that an insurer "shall begin payment of the attendant care benefit within 10 business days after receiving the assessment of attendant care needs". The calculation of the benefit is made on the basis of the Form 1 and subject to the definition of incurred under section 3 (7)(e), *pending receipt by the insurer of the report of any examination under section 44*.[5] There is no similar wording under section 36 which deals with applications for specified benefits.

Causation

In the accident benefits context, the "but for" test applies where both the pre-existing condition and the accident-related injuries globally contribute to a person's impairments. If the applicant does not meet the "but for" test, then the accident played either no role with respect to the applicant's injuries or such a minor role that it was irrelevant. Therefore, if an applicant fails the "but for" test, there is no recourse to the "material contribution" test because the accident was not a cause (even a minor one) of the claimant's injuries.[6] The applicant must therefore pass the "but for" test to access the material contribution test. However, as the "but for" test establishes that the accident was either the direct cause or a necessary contributing cause, there seems to be no need for recourse to the material contribution test. In our opinion, as both tests require the accident to be a contributing cause of the injuries when pre-existing impairments exist, whether the contribution is "necessary" or "material" appears notional, and should therefore result in the same outcome.

We note that *Agyapong* and another relevant causation decision of Director's Delegate Evans, *Sabadash* and *State Farm*,[7] are both under appeal.

ALSO …

Please check our website for an overview of recent, top decisions from the LAT and FSCO, including what constitutes a medical reason when denying specified benefits and treatment plans, who qualifies as a professional attendant care provider (at the LAT, the bar has been raised for practicing professionals and lowered for non-practicing professionals), "CAT at the LAT" and deductibility of CPP benefits not applied for.

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[5] O. Reg 34/10, *Statutory Accident Benefits Schedule - Effective September 1, 2010*, s. 42 (6).

[6] *State Farm Mutual Automobile Insurance Co. v. Sabadash,* [2017] OFSCD No. 245 at para 24.

[7] *Ibid.*