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WHAT YOU NEED TO KNOW ABOUT NON-EARNER BENEFITS (NOW AND INTO THE FUTURE)

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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** me and I will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Introduction

Since the changes to the *Schedule* came about on September 1, 2010 claims for non-earner benefits have skyrocketed. The increase is not as a result of claimants' suffering more substantive injuries than ever before, but it is because of a narrowing of the types of benefits available to claimants. Commencing on September 1, 2010 claims for caregiving and housekeeping benefits were eliminated for all non-catastrophic type claims. Further, the new provisions that required a claimant to prove an economic loss / incurred expense for attendant care benefits also curtailed the availability of this benefit to the vast majority of claimants. As such, if a claimant did not work prior to the loss the only weekly benefit potentially available was for non-earner benefits. Historically, claims for non-earner benefits had been the claim of last resort as it encompassed a smaller percentage of claimants, has a very onerous test to prove entitlement, and included a six month waiting period. However, since claimants had no other form of recourse to weekly compensation, a plethora of claims have surfaced.

The new changes to the *Schedule* that came into effect June 1, 2016 as it relates to non-earner benefits will significantly reduce the exposure for non-earner benefits to an insurer for larger claims; but likely increase the exposure on the more run-of-the-mill claims. There should be no doubt that the quantity of claims for non-earner benefits will increase in the post June 1, 2016 world. Insurers should be on the look-out to assess these claims substantively and procedurally right from the outset.

Claims for non-earner benefits are often very difficult to assess. Since these claims are being advanced by people who were not working at the time of the accident, very often these claimants already have significant health problems prior to the loss. We are left to determine to what extent the motor vehicle accident has impacted the claimant's pre-accident lifestyle. If prior to the accident a claimant spent all of his time watching television on account of a disability, then to what extent would the loss of a limb from a motor vehicle accident impact his daily activities? At the same time, if a claimant with significant pre-accident health problems is no longer able to do the little things that brought her pleasure due the accident, (such as a daily walk because of soft tissue pain), then she may very well meet the test for non-earner benefits.

The Basics

A. Pre-June 1, 2016 *Schedule*

Section 12(1) of the *Schedule* sets out the three requirements for entitlement to this benefit:

(1) an insured must suffer an impairment as a result of an accident;

(2) the insured must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the accident; and

(3) the insured must not qualify for an income replacement benefit.

Section 2(4) of the *Schedule* interprets "a complete inability to carry on a normal life" to require that the person suffer from an impairment as a result of the accident that "continuously prevents the person from engaging in substantially all the activities in which the person ordinarily engaged before the accident".

A claimant is not entitled is to claim for non-earner benefits for the first 26 weeks post loss.

A person under the age of 16 is not entitled to a non-earner benefit.

After the first 26 weeks the weekly claim for the entitlement is $185 until the two year mark. After the two year mark the weekly entitlement increases to $320 if the claimant was enrolled full time in school at the time of the loss.

Unlike claims for income replacement benefit, there is no change to the test at the two year mark and there is no fluctuation in the weekly quantum of benefit.

B. Post June 1, 2016 *Schedule*

There are four substantive changes to the legislation for non-earner benefits as follows:

1. Claims for non-earner benefits are now limited to 104 weeks post loss as opposed to unlimited;

2. There is now a four week waiting period as opposed to a 26 week period;

3. The entitlement age has been increased to 18 as opposed to 16;

4. The entitlement to weekly benefits is $185 / weekly and does not have the potential to increase to $320 / weekly.

The two most significant changes are the first two. Clearly, the fact that the benefits have been limited to two years sharply reduces an insurer's exposure for this benefit for the larger claims. The maximum exposure to an insurer is now 100 weeks of non-earner benefits (there is a 4 week waiting period) for a total of $18,500.

However, the fact that the waiting period has been reduced from 26 weeks to 4 weeks potentially opens the floodgates for more viable claims for non-earner benefits. The 26 week waiting period substantially had the effect of weeding out most of the basic soft tissue pain complaint type cases and even simple fractures. For example, a claimant who suffered an uncomplicated fracture to his leg post loss, who is treated by way of conservative casting, would typically heal within 26 weeks post loss. There would normally not be a viable claim for non-earner benefits in that case. With the new changes, that claimant who is in cast post loss and thereby unable to effectively function would likely be entitled to attendant care benefits for at least a number of weeks / months.

The more difficult case to assess will be the claimant alleging to have suffered from soft tissue pain complaints. Once again, the vast majority of claimants will recover enough from their injuries by the 26 week mark post loss that they do not meet the complete inability test to entitle them to non-earner benefits. However, these same claimants might in fact legitimately be suffering from substantial restrictions for a period of time after the 4 week mark which would entitle them to such benefits. As such, the same claimant who would not have had entitlement to non-earner benefits based on the pre-June 1, 2016 regime, may now be entitled to compensation based on the post June 1, 2016 regime. The new changes have now increased the market for potential smaller legitimate claims for non-earner benefits. As we know, an increase in legitimate claims will also result in an increase of claimants advancing illegitimate claims.

The new changes will also result in an increase in procedural

decision making and quick adjusting. Once an insurer receives a disability certificate it will need to immediately set-up the necessary insurer examinations in order to challenge a claim for non-earner benefits. If these assessments are not scheduled on an expedited basis an insurer may be stuck paying a claimant non-earner benefits in the interim simply due to procedural reasons. While as the maximum exposure is $18,500 per file for claims for non-earner benefits, this would result in a significant amount of pay-outs when extrapolated for each claim made.

The Test For Entitlement

Any contemporary analysis of the test for entitlement for non-earner benefits begins with the Court of Appeal decision of *Heath v. Economical* (2009). The Court of Appeal provided a framework for all further claims for non-earner benefits to follow. In short, the Court of Appeal advised that we must look at the claimant's pre-accident and post-accident activities. When looking at the claimant's pre-accident activities we must do so over a reasonable time frame and not simply a one-time snap shot. Further, when we consider a claimant's pre-accident activities a certain amount of additional weight must be given to those activities that were most important to a claimant. Post-accident we must assess whether the claimant is continuously prevented from engaging in her pre-accident activities. We must also consider if the claimant is engaging in her post-accident activities in a qualitative basis and not simply going through the motions. Finally, the pain that the claimant feels when performing her pre-accident activities is a relevant consideration even if she is functionally able to do so.

In *Barnes v. Motor Vehicle Accident Claims Fund and TTC Insurance Company* (2011) (Arbitration) the Arbitrator applied the test set out above, and commented that "entitlement to non-earner benefits requires a claimant to satisfy one of the most stringent tests in the *Schedule*". In this case the claimant suffered from significant health problems prior to the herein loss. The Arbitrator opined that:

> "When individuals whose health and functionality have already been compromised before an automobile accident apply for non-earner benefits one must compare their normal life before the automobile accident with their normal life afterwards. The difficulty is that the normal life of such an individual may already include a decreased level of functionality, mobility, etc. In some cases even a restriction on one aspect of life activity may be enough to meet the complete inability test due to the qualitative and personal importance of that activity to the specific person."

After conducting a thorough analysis of the claimant's life pre and post loss he found that while the claimant's life had been impacted by the accident, she continued to live "pretty much the same life" as she had prior to the collision. She was found to not pass the test for non-earner benefits.

Similarly, in *Mangallon v. TTC Insurance Company* (2009) (Arbitration) the Arbitrator made the following comments regarding the onus to prove entitlement to non-earner benefits:

> "The test for entitlement to non-earner benefits, as set out in the *Schedule*, is stringent. An impairment sustained in the accident must be one that continuously prevents Mrs. Mangallon from engaging in substantially all of the activities in which she ordinarily engaged before the accident."

In that case the Arbitrator found that the claimant's pre-accident activities had already been impacted on account of her significant pre-accident health problems. The Arbitrator considered the appropriate time period to assess the claimant's activities of daily living to be in the one year prior to the loss and two years post loss. Ultimately the Arbitrator found that the motor vehicle accident "pales into insignificance" when compared to her other health problems. Consequently she was found not entitled to non-earner benefits.

Recently, in *Galloway v. Echelon* (2016) (Arbitration) the Arbitrator conducted her analysis by way of preparing a chart that listed all of the claimant's pre-accident activities, the degree of prevention, and importance to the claimant. The Arbitrator found that the claimant:

> "…suffered from the inability to engage in substantially all of the pre-accident activities which were most important to her, and which defined her as a person and provided the focus points in her family and social life".

The Arbitrator assigned greater weight in her analysis to

those activities which the claimant identified as being most important to her. For instance, in this case the claimant was an avid motorcyclist prior to the loss as this constituted the focal point of her relationship with her husband and their social groups. The fact that she was unable to return to this past time post loss carried more weight to the Arbitrator than the fact that the claimant was able to return to taking care of her own attendant care activities.

Earning Money And Entitlement To Non-Earner Benefits

By virtue of the fact that this head of benefits is called a "non-earner" benefit one would perhaps assume that this benefit was earmarked for people who did not work. Indeed, one of the criteria for entitlement to this benefit is that a claimant does not qualify for an income replacement benefit. This understanding about the distinction about a claimant's entitlement to non-earner benefits compared to income replacement benefits was called into question by the Court of Appeal in two important decisions.

In *Martin v. TD General Insurance Company* (2013) (Court of Appeal) the claimant worked for 4.5 months prior to the accident on a daily basis taking care of her friend's child and was paid $30.00 a day ($150.00 for the week). Instead of pursuing a claim for income replacement benefits, she advance a claim for non-earner benefits. The Court accepted the claimant's argument that her commitment to the workforce at the time of the accident was sporadic, and that she was primarily a homemaker. The claimant did not regard the babysitting to be a job, did not report the money on her income tax returns, and was primarily doing this as a favour for a friend. Her babysitting activity was not considered to be employment.

Post-accident the claimant received remuneration for two activities. First, she worked as a personal assistant to a businessman in which she was paid the equivalent to $100.00 as week for four months. She participated in this activity for therapeutic reasons at the suggestion of her doctor. She quit this position when her employer first verbally abused her. The Court found that she earned less at this position then when she worked as a babysitter and that it was not employment within the meaning of the *Schedule*. She was found entitled to non-earner benefits over the course of her "work" at this position.

Within a few weeks of ceasing to work as a personal assistant, she then obtained employment at a convenience store as a cashier/clerk. She initially worked 16-20 hours a week which was later increased to 25-30 hours a week. She worked there for a total of 2.5 years until she quit. The Court found that the work as a cashier was akin to working. However, despite the fact that the claimant was working as a cashier, her entitlement to non-earner benefits only came to an end once the insurer obtained the requisite medical assessments that found that she did not have a disability. Accordingly, despite the fact that the claimant was working post-accident she was still found entitled to non-earner benefits until such time as the insurer obtained medical assessments that found that she did not meet the test for disability.

In *Galdamez v. Allstate* (2012) (Court of Appeal) the Court seemed to expand the availability of non-earner benefits to earners. In that case, the Court explained that a claimant can qualify for non-earner benefits if they do not qualify for income replacement benefits. For example, if a claimant returns to work immediately post-accident than she does not qualify for income replacement benefits. However, since she does not technically qualify for income replacement benefits, (because she has not missed any time from work), she would qualify for non-earner benefits if she meets the test for disability.

While as it is extremely unlikely that a claimant would be found entitled to non-earner benefits while being able to work, the Court envisioned a scenario where this could occur. The Court of Appeal stated as follows:

> "Although I consider it unlikely that persons who can work at their pre-accident jobs following an accident will often meet the disability standard for non-earner benefits, I do not rule out such a possibility. For example, in jobs where mobility is not a requirement (e.g. department store greeter, telemarketer, etc) and the job was not of great importance in the claimant's pre-accident life, it may be possible for a claimant who returns to his or her pre-accident employment following an accident to satisfy the test for non-earner benefits."

As such, the Court of Appeal raised the possibility that a claimant could be working full time pre and post-accident; and still be found entitled to non-earner benefits. For

instance, if an Olympic bicyclist works as a store greeter at Walmart pre and post loss, and subsequent to the accident can never bike again, then he may be found entitled to non-earner benefits. If it is determined that his biking carried paramount importance in his life, and the job was secondary, then this may pass the test for entitlement as set-out by the Court of Appeal.

The *Galdamaz* decision resulted in a number of claimants attempting to assert a claim for non-earner benefits more than two years after their claim was denied. The crux of their argument was that the insurer erroneously denied entitlement to non-earner benefits to the claimant on the basis that they were working at the time of the loss. Since *Galdamaz* found that the a claimant can both be working and entitled to non-earner benefits at the same time, any insurer who denied entitlement to this benefit based on this reason did so in error. A claimant should not be prejudiced by their ability to pursue a claim for benefits on account of the inappropriate actions of the insurer.

The Courts rejected this argument. In *Bustamante v. the Guarantee Company of North America* (2015) (Court of Appeal) and *Straus et al v. Aviva* (2015) (Superior Court) the Courts found that the limitation period begins to run two year from a clear and unequivocal denial of a benefit; even if the denial was wrong in law. As stated by the Court in *Straus*:

> "The Court of Appeal has repeatedly said that, so long as the insurer provides a valid refusal, the limitation period should be strictly applied. It does not matter if the reason provided by the refusal of the benefit is incorrect or inaccurate at law'.

These were important decisions and it prevented a floodgate of new claims arising on account of an expanded entitlement to non-earner benefits that emanated out of the *Galdamaz* decision.

Claimant May Pursue A Claim For NEBs and IRBs At The Same Time

In *16-000063 v Dominion of Canada General Insurance Company* (2016) (LAT) the Adjudicator found that the claimant may proceed with a claim for non-earner benefits and income replacement benefits at a hearing at the same time. In that case, the claimant completed an OCF-1 which reported that a claimant was not working at the time of the accident. As such, the insurer advised the claimant that he was only entitled to pursue a claim for non-earner benefits. The claimant later completed an OCF-3 and attended medical assessments which reported that he was self-employed at the time of the accident. The insurer thereafter advised the claimant that he was not entitled to pursue a claim for non-earner benefits and that he must advance a claim for IRBs. The claimant never served an election of benefits as per section 35 of the *Schedule*.

By way of a preliminary issue hearing, the issue was whether the claimant may proceed to the hearing to claim one or both of non-earner and income replacement benefits. The Adjudicator relied on *Galdamaz* to support the proposition that the claimant may have entitlement to both benefits. The Adjudicator found that the once the insurer determined that the claimant may have entitlement to both benefits, (i.e. there was evidence that he was unemployed and self-employed), that the claimant should have been provided with the right of an election. Since an election was not provided, the claimant is entitled to proceed with a claim for both benefits; but is not entitled to receive both benefits at the same time.

This creates the awkward situation in which the parties will be proceeding to a hearing to deal with the tests for both benefits at the same time. It also appears that this case absolves the claimant of stating which benefit he wants to pursue unless specifically asked. This case suggests that it is incumbent on the insurer to require the claimant to complete the election of benefits form in virtually all circumstances.

From a procedural basis, there is a real risk that the insurer will be caught flat-footed in which the claimant will switch benefits in mid-stream. For instance, a claimant may appear to proceed with a claim for income replacement benefits resulting in an insurer scheduling the necessary insurer examinations to assess this benefit. After the insurer denies the claim for income replacement benefits the claimant may then advise that he is actually proceeding with a claim for non-earner benefits; and insist that these weekly benefits be paid to date due to the fact that the benefits had never been denied. A claimant may orchestrate and advance a claim for weekly benefits based on his strongest procedural claim and not based on the substance of the disability.

Conclusion

The test to prove an entitlement to non-earner benefits is undoubtedly onerous. However, the actual language of the *Schedule*, in which a claimant must prove a "complete inability to carry on a normal life", is not quite as strong as it may sound. A claimant does not have to prove that she cannot completely do anything, but rather an impairment for a significant amount of quality things that she did prior to the accident. A thorough analysis of the claimant's pre-accident life must be compared to what she has done post-accident. Indeed, a claimant may in fact earn money pre and post-accident and still be found entitled to a non-earner benefit. Further, a claimant may be able to advance a claim for income replacement benefits and non-earner benefits at the same time. This has significant procedural and substantive challenges for an insurer.

The changes to the *Schedule* post September 1, 2010 increased the quantity of claims for non-earner benefits and the recent changes post June 1, 2016 will increase the quantity of claims even further. The post June 1, 2016 changes will cap the entitlement of non-earner benefits to seriously injured claimants but may very well result in an increase in the overall pay-outs of non-earner benefits in the industry as a whole. Claimants with temporary disabilities shortly after the accident will have access to this benefit. Insurers who do not respond quick enough to claims for non-earner benefits will also be forced to pay this benefit due to procedural reasons.

With all that being said, the test for non-earner benefits is still probably the most difficult for a claimant to prove in the *Schedule*. The entitlement to this benefit is reserved for the most significantly disabled of claimants. Claimants are put to the task to prove that they have suffered a complete inability to carry on a normal life. An insurer who is familiar with the law, and properly attuned as to the facts of the particular case, should remain confident that the vast majority of claimants are not entitled to this benefit.

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The Beard Winter Defender Past Issues

Deduction of Collateral Benefits: Matching "Apples to Apples" (Tort)

The question as to what a tort defendant is entitled to deduct in terms of a plaintiff's entitlement to accident benefits is one of the most important aspects of any assessment of a case.

The Upcoming Dramatic Impact Of The LAT On Accident Benefits, "The Times They Are A Changing"

Amid controversy and much consternation among the personal injury bar, the Licensing Appeals Tribunal (LAT) is coming into effect on April 1, 2016. It is clear from a review of the procedures and practices in place that the upcoming changes will be significant from an insurer standpoint.

The Minor Injury Guideline: The Law Now And Into The Future

The enactment of the Minor Injury Guideline ("MIG") in the current legislation is perhaps the most substantive change that we have been dealing with on a day-to-day basis. If a claimant falls within the MIG then the claimant is only entitled to a maximum of $3,500 in medical benefits as opposed to $50,000.

Who Has Priority To Pay In The Rental Vehicle Case?

When defending an insurer in a motor vehicle case involving a rental vehicle some sound investigation may result in significant savings. Knowledge of the law pertaining to rental vehicles is essential to the proper adjusting of such claims; and may result in a reduction or even the elimination of exposure.

Everything An Accident Benefits Adjuster Needs To Know About A Tort Claim But Were Afraid To Ask

There are fundamental differences in the adjusting for an accident benefits claim compared to that of a bodily injury claim.