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A Year In Review: How The LAT Has Interpreted The MIG

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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** us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Introduction

The Licensing Appeal Tribunal ("LAT") has been in existence for one year and decisions are being rendered at a fast and furious pace over the past few months. As we know, this is a new system and very much different from what we are accustomed too in many key respects. It is difficult to predict what an Adjudicator will consider important to their decision making in terms of the influence of past law and evidence. For these reasons, it is important to closely review the decisions of the adjudicators to analyze any trends and thought processes. Based on a review of all of the written decisions about the Minor Injury Guideline ("MIG") by the LAT over the past year, a clear trend has developed and must be considered in order to be successful into the future.

It is evident in the LAT decisions that there is a high onus on the claimant to prove their case that their injuries take him/her outside of the MIG. Adjudicators are not accepting at face value assertions that a claimant has "chronic pain", "radiculopathy", or psychological impairments unless this is supported by the facts. A strong emphasis is being placed on tying any such health conditions to the accident. At the present time, insurers are winning the fight over whether the claimant has suffered a MIG injury at a rate of about 75%.

Below are some of the key decisions by the LAT that provide examples of the decision making process by the Adjudicators.

Lack Of Evidence To Prove An Injury Is Outside Of MIG

In ***AP v. Aviva*** (2016) the claimant was complaining of soft tissue injuries and her family doctor diagnosed her with suffering from "evidence of cervical facet joint involvement which has been established as a common contributor to chronic pain symptoms…". The claimant underwent cervical facet joint injections, (which were not successful), and obtained a supportive report from the family doctor. However, the family doctor never defined the term "cervical facet joint involvement" and the report was not entirely clear as to whether the claimant's injuries should be taken outside of the MIG based on medical reasons.

The claimant also argued that she suffered from chronic pain and that accordingly she should be taken outside of the MIG on account of prior case law. The adjudicator noted that the family doctor remarked that cervical facet joint involvement is a contributor to chronic pain but that there is no specific diagnosis in this case of chronic pain or chronic pain syndrome.

It is significant to note that the Adjudicator was referred to three prior FSCO / ADR decisions that supported the contention that a diagnosis of chronic pain syndrome takes the claimant outside of the MIG. The adjudicator stated that these prior decisions are not binding on the LAT. Accordingly,

even if these prior decisions are directly on point there is no requirement for a LAT adjudicator to follow them. As such the adjudicator made two important points: (1) that the claimant did not prove that she suffered from chronic pain syndrome, and (2) even if the claimant did suffer from chronic pain syndrome that an adjudicator is not obligated to follow past precedent regarding how such a diagnosis impacts the determination of the MIG.

This is an important case as it teaches us a number of things. Perhaps most importantly it shows that there is a high onus on the claimant to provide definitive and concrete evidence to prove their case. For instance, a doctor must define what "cervical facet joint involvement" is and how that takes the claimant outside of the MIG. A medical report should address why undergoing injection therapy is important and why this supports that a claimant has suffered a substantive injury. The onus is on the claimant to obtain a persuasive medical-legal report to advance their case.

Since all of the MIG decisions to date rely on written reports from medical doctors there is no opportunity for a witness to explain their report in oral evidence. At an oral hearing, the doctor would presumably have explained what "cervical facet joint involvement" is and set out why he felt that the claimant suffered from chronic pain. A doctor does not simply read his report at a hearing but would be expected to explain his opinion. In a written hearing, the importance of well-written report is essential as this is all that an adjudicator can consider.

This decision also stands as foreshadowing that prior decisions at FSCO / ADR may not be followed. As such, both claimants and insurers have the opportunity to re-litigate prior decisions in the event that an adjudicator can be convinced that the prior law was wrong.

In ***KP v. Aviva*** (2016) the claimant entered evidence of multiple and multi-faceted conditions all throughout his body which included neurological/substantive problems such as radiculopathy, impingement syndrome, decreased sensation, and tingling. However, the adjudicator found that there is no medical evidence that ties any of these conditions to the accident. Further, there is no specific determination that the claimant suffered from diagnosed neurological signs as opposed to simply symptoms. As such, the Arbitrator found that the claimant had not proven that his injuries were anything more substantive than a WAD 2 injury and out of the MIG.

We learn from this case the importance of tying a case together by way of conclusive medical evidence. If a claimant is unable to draw a connection between an accident and diagnosed neurological conditions then this will impact their ability to prove their case.

In ***BU v. Co-Operators*** (2017) the claimant had been involved in an MVA in 2015 and was putting forth a claim that his soft tissue physical injuries and psychological overlay took him out of the MIG. In addition, the claimant had been involved in a prior MVA two years earlier in which the claimant's injuries were very similar to the complaints arising from the herein loss. The claimant had a psychological report generated three months before the 2015 loss that diagnosed him with suffering from various forms of ongoing psychological problems. Following the 2015 MVA, the claimant was relying on a disability certificate from a chiropractor, psychological report, and the clinical notes and records of the family doctor. In short, the claimant's theory was that he either suffered from physical/psychological injuries arising out of the 2015 MVA that took him outside of the MIG and/or that his ongoing injuries emanating from the 2013 loss took him out of the MIG on account of a pre-accident health condition.

The Adjudicator concluded that the claimant had failed to meet his burden to prove that his injuries take him outside of the MIG. The adjudicator was not convinced that the claimant suffered from any direct impairments arising from the 2015 MVA which was in part due to the inability to place much weight on the self-reports of causation. The Adjudicator accepted the opinions of the insurer orthopaedic surgeon and physiatrist that there was no objective evidence of any impairment and noted that there were issues of credibility. Interestingly, there was no insurer psychological assessment to respond to the claimant's psychological reports pre and post the 2015 MVA. The adjudicator concluded that the claimant had failed to prove that he suffered an injury that took him outside of the MIG on account of any accident related injuries or pre-accident health conditions.

In ***MM v. Wawanesa*** (2016) the claimant was reporting to have suffered from soft tissue injuries with cognitive

problems and psychological overlay. The claimant's treating psychologist recommended that the claimant attend for a neuropsychological assessment to address the cognitive issues but such a report had not been generated (this was an issue that was in dispute for the hearing). The adjudicator noted that none of the claimant's treating doctors including the family physician or psychologist found that the claimant's injuries were of a significant severity that she should be taken outside of the MIG.

In the alternative, the claimant argued that her pre-existing health problems should take her outside of the MIG. The accident in question occurred in 2013 and she had been involved in motor vehicle accidents in 2009 and 2012 in which she suffered from back injuries and psychological problems. The adjudicator found that the pre-existing medical records did not document any substantial health problems and that no one concluded that her pre-existing health problems prevented her from achieving maximal recovery within the MIG.

This case stands for the proposition that the mere existence of health problems prior to the accident and the concern about potential undiagnosed significant health problems post-accident do not in itself support that the claimant's injuries are outside of the MIG. The claimant must introduce medical evidence which concludes that a claimant's pre-existing health problems take her outside of the MIG and the reasons why. A concern that a claimant has cognitive problems without any concrete evidence of same is not sufficient to prove one's case. In short, the claimant may be forced to spend the money to generate medical assessments to prove that the MIG does not apply and risk not being reimbursed for such a report.

In ***AW v. The Co-Operators*** (2017) the adjudicator accepted that there was a correlation between the accident and his back pain. There were MRI results that showed degenerative changes and other objective health problems but nothing to establish that these results were correlated to the accident. The Adjudicator indicated that it would have been helpful has there been an opinion to draw such a causal link. Accordingly, the adjudicator found that the claimant had not met his burden and that the injuries fall within the MIG.

The Substance Of The Reports And Credentials Of The Expert Matter

The decision in ***J.S. v. RBC Insurance Company*** (2017) illustrates the importance of a thorough review of the clinical notes and records of the treating doctors. In this case, the claimant relied on a section 25 report from a psychologist and a chronic pain specialist who both opined that the claimant has suffered from major depression, chronic pain, and possible post-concussive symptoms. The problem with their analysis is that they did not review the clinical notes and records of the treating doctors. The claimant assessors relied almost entirely on the self-reporting of the claimant which was inconsistent with the records of his treating doctors. The insurer examination findings were given more credence as they based their analysis both on a review of the records and on their meeting with the claimant. It was found that the claimant had suffered an injury that fell within minor injury guidelines and the total of eight treatment plans in dispute for a cost of about $11,500 was found to be not payable.

In ***SS v. State Farm*** (2016) the claimant obtained a report from a chiropractor who concluded that the claimant suffers from cervical radiculopathy and that this condition takes the claimant outside of the MIG. In response, the insurer obtained a report from a physiatrist and relied on the claimant's family doctor's clinical notes and records to support that the injuries are simple whiplash type complaints. The Adjudicator accepted the opinion of the insurer physiatrist and the records of the family doctor over the conclusion of the chiropractor.

This case reminds us that not all opinions are considered equal. Not only is it important to obtain an opinion in support of one's case but the stronger the medical evidence to support a position the greater the weight it will be given.

In ***SCWH v. The Dominion*** (2017) the claimant relied on a treatment plan to support the contention that the claimant suffered from phobic anxiety orders, sleep disorders, and radiculopathy from a chiropractor to support the contention that her injuries are outside of the MIG. The adjudicator found that there is no evidence to support this contention and that even the clinical notes and records of the family doctor indicate no neurological deficits. Further, the adjudicator questioned to what extent that a chiropractor has the expertise to make many of these diagnoses and the basis for

which he did so. The claimant was not able to prove on a strong evidentiary basis that her accident-related injuries or pre-accident medical history took her outside of the MIG.

A Finding That The Claimant Has Suffered A Disability From Working Is Not Relevant To the Determination Of The MIG

In ***NE v. Waterloo Regional Municipalities Insurance Pool*** (2016) the claimant was relying on the fact that the insurer has accepted that he suffered from a disability that entitled him to receive IRBs to support that he suffered an injury that took him outside of the MIG. The claimant argued, "how can someone suffer a substantial inability to perform the essential duties of his employment yet be told that their injuries fall within the Guideline"? The Adjudicator found that there is no direct legal nexus between a claimant's ability to engage in the essential tasks of his employment and the test for whether the claimant has suffered an injury that takes him outside of the MIG. The Adjudicator found that "[a]t this time these issues are discrete in the legislation. I cannot create a causal link of eligibility for two benefits that is not explicit in the legislation". The adjudicator found that the claimant did not meet the burden of proof required to determine that he did not suffer predominantly minor injuries.

Time Frame To Prove Case Is The Evidence At The Hearing Not When Initial Decision Is Made

In ***NC v. RBC General Insurance Company*** (2016) after the commencement of the application process the claimant saw a neurologist who found that the claimant has some features of a post-concussive syndrome and that there is a possible crush injury with ulnar neuropathy below the right elbow. On the basis of this opinion, which was not in existence before the application for arbitration, the claimant was found to have suffered an injury outside of the MIG. This case supports that a determination of whether the claimant has suffered a MIG injury occurs at the time that the Arbitrator makes a ruling and not the material that was in existence at the time of the original determination by the insurer.

A Psychological Disability That Takes A Claimant Outside Of The MIG Does Not Necessarily Translate To An Entitlement To Physical Treatment

In ***D. J. v. Aviva*** (2016) the Adjudicator accepted the conclusions of the section 25 social worker that the claimant suffered from symptoms of depression, cognitive issues, and anxiety. This was consistent with the clinical notes and records of the family doctor. The Adjudicator found that the insurer psychological assessment was flawed and concluded that the from an emotional standpoint that the claimant's injuries take her outside of the MIG.

However, all was not lost to the insurer in this case. Despite the fact that the claimant was taken outside of the minor injury guideline, she still lost with respect to all five physical treatment plans that were in dispute. The Adjudicator found that the physical treatment plans were not reasonable and necessary as the claimant had reached maximal recovery for her sprain/strain type injuries. Interestingly, there was little to no discussion of the interplay between psychological and physical injuries. Had there been medical evidence introduced to show that her psychological problems are likely to improve on account of physical therapy it is unclear if the physical treatment plans would have been denied.

B.U. v. Aviva (2016) is the only MIG hearing that proceeded by teleconference as opposed to solely in writing. It is unclear to what extent the claimant's credibility was an influential factor but the Adjudicator does note in her decision that "the applicant has proven through the medical assessments and his testimony that he sustained numerous injuries as a result of the accident" (emphasis added). The adjudicator found that claimant was outside of the MIG on account of psychological reasons and not physical ones.

The adjudicator categorized the injuries into two groups that being (1) physical injuries and (2) psychological ones. Similar to ***D. J. v. Aviva***, there was little analysis regarding the interplay between physical injuries and psychological ones. From a physical basis, the claimant obtained a report from a physiatrist that diagnosed her with suffering from chronic pain syndrome which thereby took her outside of the MIG. The Adjudicator, however, found that the claimant "had not sufficiently shown how the diagnosis of chronic pain syndrome is not a sequelae of soft tissue injuries". The

Adjudicator found that from a physical basis that the claimant has not proven that her injuries are outside of the minor injury guidelines.

This is an important finding for two reasons. First, it seems to contrast with a prior ADR decision of ***Arruda v. Western*** (2015) which found that a diagnosis of chronic pain syndrome is not captured by the minor injury guidelines. Second, the analysis of chronic pain syndrome seems to focus on it being a manifestation of physical pain without a substantial interrelating psychological component.

From a purely psychological basis, the Adjudicator found that there was overwhelming evidence to support the position that the claimant suffers from an impairment that takes her out of the MIG. Once again, similar to ***D. J. v. Aviva*** the Adjudicator found that the physical treatment plans were not payable but that the psychological treatment was.

Conclusion

Claimants face a challenging burden to prove that the injuries sustained take him / her outside of the MIG. A simple diagnosis of "chronic pain syndrome" is not necessarily enough to prove that an injury is something more significant than minor. A finding on an MRI of objective abnormalities in a spine does not prove anything unless a connection is established either (1) between this diagnostic finding and the accident or (2) that this condition impacted a claimant's ability to recover from the injuries sustained in the loss. A decision that a claimant suffers from a psychological impairment that takes her outside of the MIG does not necessarily translate into a finding that physical therapy is needed too. A claimant must establish that there is an interplay between one's psychological problems and the need for physical therapy.

Adjudicators are looking behind the mere conclusions reached by the medical experts to determine the substance behind their reports. If the experts have not properly laid the foundation for their opinions by analyzing the clinical notes and records of the treating doctors then the weight given to their reports is curtailed. Adjudicators are comparing and contrasting the credentials of the experts when considering their evidence. Adjudicators are focussing on what the experts do and do not say about the causal connection between the accident and the injuries sustained. Expert reports need to be clear, on point, and substantial.

Prior case law arising from ADR / FSCO may not necessarily be followed. Accordingly, claimants and insurers may have the chance to re-litigate prior existing law on the basis that it is no longer persuasive. For example, the prior case law that drew a connection between a diagnosis of "chronic pain syndrome" and an injury that falls outside of the MIG is ripe for further litigation.

Almost all of the decisions addressing the MIG have been in writing. As such, the credibility of the claimant has not been tested by way of oral evidence and no doctors have testified. Adjudicators are basing their decisions on the written medical evidence in front of them and the written submissions of counsel. Right now insurers have a high success rate but there is certainly no guarantee that this will continue into the future.

As we know, the LAT is new and the case law will certainly evolve over the next year. However, the first set of decisions does provide us guidance as to what is important in the decision-making process. Clear, persuasive, and supportive evidence is essential. Adjudicators are thoroughly analyzing the evidence from experts and treating doctors alike to arrive at their conclusions. There is no doubt that persuasively written submissions backed by influential medical evidence are the underpinnings for success in this new age of litigation.

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The Beard Winter Defender
Past Issues

What You Need To Know About Non-Earner Benefits (Now and Into the Future)

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.

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.