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

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. Further, the claimant is not entitled to any attendant care benefits. Not only does this result in significantly less exposure for payment of benefits by an insurer, but it also results in less file handling expenses as the amount of assessments is substantially reduced. The recent case law since *Scarlett v. Belair* has for the most part upheld the fundamental principles that underline the MIG, but has also perhaps provided a guideline for claimants to successfully advance their cases. We must understand what the case law has set-out to date in order to understand what may happen into the future.

The Basics

As set out in the Director's Delegate decision of *Scarlett v. Belair*, the burden of proof rests on the insured on proving that he fits within the scope of the coverage. This is important. It is the claimant's obligation to prove that his injuries take him outside of the MIG; and if he fails to do so he loses his case. The law briefly provides that:

- a minor injury means 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 [Schedule s.3(1)]
- an insured who sustains an impairment that is predominantly a minor injury can receive no more than $3,500 towards medical and rehabilitation expenses (including assessments) [Schedule s.18(1)]
- an exception for pre-existing conditions may apply based on "compelling evidence" [Schedule s.18(2)]

Arruda v. Western Assurance Company (2015)

The decision of *Arruda v. Western Assurance Company* (2015) is an important case that stands for a number of key propositions. It will be interesting to see whether future Arbitration decisions apply the concepts set-out in this case. The claimant had given birth to her daughter just two weeks prior to the motor vehicle accident, was involved in a rather significant collision, and suffered from soft tissue injuries. While as the Arbitrator found that the claimant's testimony was generally consistent with the medical findings, he also had substantial questions regarding her credibility. The Arbitrator concluded that the claimant's injuries initially fell

within the MIG, but that the later diagnosis of chronic pain took her outside of the MIG from that point forward.

First, the claimant argued that she suffered from a pre-existing health condition that took her out of the MIG. The claimant had just given birth two weeks prior to the loss resulting in her health condition being compromised as well as the fact that she underwent an epideral injection on account of her back pain. The Arbitrator concluded that the claimant had failed to meet her burden to prove that her pre-existing health condition constituted "compelling evidence" to take out of the MIG. Had the claimant introduced medical evidence to support that recently giving birth to a child may compromise a claimant's ability to recover from an accident perhaps the Arbitrator may have found otherwise.

Second, during the first 5-7 months post accident the claimant was found to suffer from common soft tissue injuries. The insurer assessments by a physiatrist and psychologist found that there was nothing complicated regarding her complaints and that her injuries fell within the MIG. The claimant's family doctor did not refer her to see any medical specialists or diagnostic testing; the only referral was for physical therapy. The Arbitrator found that the claimant had failed to prove the injury was not "predominantly a minor injury".

The third finding is perhaps the most precedent setting. By 20 months post loss the claimant's injuries had yet to resolve and she obtained an expert report from an orthopaedic surgeon. This doctor diagnosed the claimant from presently suffering from a "chronic pain syndrome" but did not comment on the treatment plans that were in dispute within the first 5-7 months post loss or opine as to when her chronic pain developed. The insurer did not obtain any assessments to respond to this orthopaedic surgeon and did not ask their assessors for an addendum. The Arbitrator concluded that:

> "Given that Western did not respond to Dr. West's report, the report is uncontroverted that as of February 2014, Ms. Arruda has a new diagnosis of Chronic Pain, which in my view, falls outside of the MIG. I accept his report to that extent… Dr. West is commenting on her condition in February, 2014, concluding that it did not resolve, but became chronic".

This finding is important for a number of key reasons.

The Arbitrator concluded that a diagnosis of "chronic pain" falls outside of the MIG. The only apparent difference between her injuries 5 - 7 months after the loss and twenty months later was a diagnosis of chronic pain. It may be argued into the future that as soon as there is a diagnosis of "chronic pain" that the claimant's injuries fall outside of the MIG.

Had the insurer obtained a medical assessment that commented on Dr. West's diagnosis of chronic pain then it is possible that the Arbitrator may have found that the injuries do not fall outside of the MIG. As such, if a claimant obtains a report that diagnoses "chronic pain" an insurer should virtually always obtain a report in response.

Fourth, this case also stands for the principle that a claimant may suffer an injury that initially falls within the MIG, and that sometime thereafter falls outside of the MIG. This may turn out to be a difficult concept to reconcile both for claimants and insurers. A claimant may argue that if she obtained the appropriate treatment within the first year post loss that she may have recovered. If the claimant had been taken outside of the MIG at the outset of the claim that she would not be suffering from chronic pain twenty months later. For an insurer there is a lack of finality and ability to assess the ongoing exposure in a claim. What may legitimately be a MIG injury for a certain time period post loss may then fall outside of the MIG sometime thereafter. It will be difficult to close a file if the claimant is entitled to advance the position that the injuries are outside of the MIG years post loss.

Evidence and Credibility

Much of the case law that addresses the issue of MIG focusses on the evidence introduced by the claimant to prove his case and questions of credibility.

In *Basson v. Royal & Sunalliance* (2014) the claimant failed to adduce compelling evidence from his health practitioner that he had a relevant pre-existing medical condition that would exclude him from the MIG. The Arbitrator also called into question the claimant's credibility and was not prepared to accept his oral testimony without any supporting medical evidence. Accordingly, the Arbitrator found that the claimant had failed to prove that he suffered any pre-existing medical conditions that took him outside of the MIG or that he had alleged "chronic pain". On the latter point the Arbitrator concluded that:

> "… it is arguable that certain types of chronic pain that develop from what originally appeared to be a minor injury might take a person out of the MIG. However, on the facts of this case, given the Applicant's poor credibility and the fact that he has failed to prove that much of his ongoing pain was caused by the 2011 accident, this argument also fails."

In *Gao v. State Farm* (2014) the claimant did not call any of her therapy providers, experts, or family doctor to support the allegation that the claimant suffered from injuries that "were not predominantly minor". The Arbitrator thereby concluded that the Applicant had not satisfied her burden of establishing that her injuries were not predominantly minor, nor had she provided compelling evidence that pre-existing injuries will prevent her from achieving maximal medical recovery.

In *Lo-Papa v. Certas* (2014) the claimant relied on a report from a chronic pain specialist who stated that the claimant suffered from anxiety and depression since the accident but did not specifically address the test for MIG. In response, the insurer obtained medical assessments that concluded that the claimant did not have a pre-existing medical condition that would prevent her from achieving maximum recovery from her minor injuries if she was subject to the $3,500 limit. The Arbitrator concluded that "the burden of proof rests on the Applicant and there is nothing provided by the Applicant which satisfies the test of removing the injuries from being predominantly a minor injury". The fact that there was a finding that the claimant suffers from "lots of anxiety and depression" by a chronic pain specialist did not meet the legal test. Since the expert did not address whether the claimant's psychological injuries took her outside of the MIG she failed to prove her case.

Conclusion

The case law pertaining to the MIG is ever changing and developing. We are reminded by the above decisions that a claimant has the burden to prove her case and that credibility is important. We learn from *Arruda v. Western Assurance Company* that:

1. A diagnosis of chronic pain may take the claimant outside of the MIG;

2. An insurer should obtain a report (or at least an addendum) responding to a diagnosis of chronic pain;

3. An injury that falls within the MIG injury today, may develop into an injury outside of the MIG tomorrow.

It is likely that a claimant will obtain reports diagnosing chronic pain as soon as possible; and possibly on a retroactive basis. Claimants will undoubtedly obtain persuasive medical reports that explain why a pre-existing medical condition (such as a pregnancy) has complicating factors that prevent her injuries from being treated within the MIG. We may see more referrals to specialists, intensive therapy, and diagnostic testing done for the express purpose of taking a claimant outside of the MIG.

While as the cases set-out above provide justification for an insurer's utilization of the MIG, they also provide a roadmap for the claimant to prove otherwise. The key to good adjusting is to understand how the existing law provides us a guideline as to what was a MIG injury in the past, and how it may be applicable to our cases into the future.

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Past Issues

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Slowly but surely the changes to the Statutory Accident Benefits Schedule are being interpreted by the Courts and Arbitrators. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means.

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