

## Minor Injury Guidelines: *Scarlett v. Belair Insurance*, 2015 ONSC 3635

**Kevin S. Adams**  
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On June 5, 2015 the Divisional Court released a decision upholding the decision of Director's Delegate Evans, which overturned the decision of Arbitrator Wilson. The full decision, *Scarlett v. Belair Insurance*, 2015 ONSC 3635, is available through the following link: <http://canlii.ca/t/gjfpn>

### History

In the *Scarlett v. Belair* (FSCO A12-001079) preliminary issue arbitration decision dated March 26, 2013, Arbitrator Wilson found that:

- the Minor Injury Guideline was an informational and non-binding interpretive aid;
- the burden of proof of establishing whether the MIG applies or not rests with the insurer; and
- the word "compelling" was interpreted to not require any enhanced proof, but only demanded "credible" evidence for the claim to fall outside the MIG.

He ultimately concluded that the totality of the claimant's injuries (chronic pain, depression, etc.) entitled him to medical rehabilitation benefits beyond the \$3,500 prescribed in the statutory accident benefits schedule (SABS).

The decision of Arbitrator Wilson was appealed and overturned by Director's Delegate Evans on November 28, 2013. He found that the arbitrator had made several legal errors, and a new arbitration hearing was ordered before a different arbitrator.

In his decision, Director's Delegate Evans found that Arbitrator Wilson:

- improperly reversed the onus of proof onto the insurer;
- did not properly address whether the claimant's injuries (including psychological injuries) were predominantly minor injuries in accordance with the test in the minor injury guidelines (MIG);
- improperly found that that "credible evidence" was sufficient to satisfy the requirement for "compelling evidence" of pre-existing conditions (to satisfy the

- exception in the MIG);
- incorrectly stated that the MIG is only an informational and non-binding interpretative aid, rather than acknowledging that it is a binding provision incorporated by reference into the Schedule; and
  - did not provide counsel with the proper opportunity to respond to the Arbitrator's own independent research and interpretation of the statutory provisions undertaken after the hearing, which breached principles of procedural fairness.

The claimant appealed the findings of the Director's Delegate to the Ontario Divisional Court, citing 6 grounds of appeal. Specifically, the claimant alleged that the Director's Delegate erred in finding that:

1. the \$3,500 limit on medical and rehabilitation expenses contained in section 18(1) was not an exclusion of benefits;
2. the term "compelling evidence" in subsection 18(2) means something more than credible evidence;
3. the Minor Injury Guideline was a binding component of the SABS;
4. there was a breach of the principles of procedural fairness;
5. the Arbitrator failed to address whether or not certain of Mr. Scarlett's injuries were sequelae of his minor injuries, and whether Mr. Scarlett sustained an impairment that was predominantly a Minor Injury; and
6. the issue of whether Mr. Scarlett's impairment was predominantly a minor injury should be determined only after a full arbitration hearing.

### *The Divisional Court Decision*

In its decision, the Divisional Court noted that the correct standard of review is one of reasonableness.

On the first issue, the Court found that the decision of the Director's Delegate (that the MIG limit is not an exclusion) was reasonable and correct. The Court found that s.18 of the SABS creates limits on liability, not exclusions (\$3,500, \$50,000, etc.), noting that there is no coverage created that is thereafter excluded as there is no coverage to begin with. As such, the Court found that the burden remains on the insured throughout to establish entitlement to the appropriate level of benefits.

On the second issue (the meaning of compelling evidence), the Court affirmed the Director Delegate's finding that: "(1) that the word "compelling" is directed at the sufficiency of the evidence required to satisfy the "balance of probabilities" standard and (2) that whether the evidence in a particular case is sufficient to meet the test of

“compelling” must be determined on the facts of each individual case having regard to what is reasonable in all of the circumstances.

On the third issue (whether the MIG is binding), the Court found that the decision of the Director’s Delegate was not reasonable. The Court highlighted that the manner in which the issue is framed is “somewhat misleading”, and the real issue is whether “the Minor Injury Guideline has been incorporated into the SABS by reference, and if so, to what extent.” The Court found that the MIG is a combination of commentary, policy statement, guideline and definitions, and there is no provision in the SABS which expressly incorporates by reference the entirety of the MIG.

It is therefore “necessary to examine each reference to the MIG to determine if it is an express reference thereto, and if so, what part of the MIG is required for the proper interpretation of the SABS provision in question.” The Court ultimately concluded that the Director’s Delegate’s finding that “the MIG...is as binding as the SABS” is not reasonable, and in each instance in which the MIG is expressly referred to in the SABS, one must undertake an analysis of the extent to which, if at all, the MIG is required to enable a proper interpretation of the section in question.

On the fourth issue, the Court agreed that Belair was denied procedural fairness.

On the fifth issue (whether the claimant suffered from a predominantly minor injury), the Court noted that the finding at arbitration must be read in light of the fact that the onus was improperly placed on the insurer. The Court suggested that the proper burden of proof and analysis in the context of ss. 18(1) and (2) will be required when the matter is heard once again before a new arbitrator.

Finally, on the sixth issue, the parties agreed that if the matter were remitted for a new arbitration it will be on a preliminary issue as to the applicability of ss.14(2) and 18, rather than the full hearing (on all issues) ordered by the Director’s Delegate.

Save for the finding as to the binding nature of the MIG, the findings of the Director’s Delegate were found to be reasonable and the matter was remitted to a new Arbitrator for a further preliminary issue hearing.

Overall, this puts to rest the significant concerns that were raised when Arbitrator Wilson’s decision was released over two years ago, and brings clarity to the approach to be used by Arbitrators in deciding whether a matter falls within the MIG.