

ACCIDENT BENEFITS AND THE WSIB-COVERED CLAIMANT

Tanya Zigomanis

When looking at an insured's claim, it is important to consider the circumstances in which he or she was injured. If the insured was employed and was injured in the course of his or her duties, there may be entitlement to benefits under the Ontario worker's compensation scheme. The insurer must immediately turn its mind to subsection 59(1) of the *Schedule* which provides that an insurer is not required to pay accident benefits to an insured who is entitled to receive workers' compensation benefits.

Section 59 also states that an insured is entitled to elect out of workers' compensation benefits and collect accident benefits, so long as the election is not made primarily for the purpose of claiming benefits under the *Schedule*. Under subsection 59(5), an insurer is required to pay full benefits to the insured if a "dispute" can be established as to whether workers' compensation benefits apply.

These interim benefits are payable by the automobile insurer pending resolution of any dispute pertaining to the applicability of the exclusion as long as there is an approved assignment of Workplace Safety and Insurance Board ("WSIB") benefits on file. In addition once this form is on file, the insurer will have an opportunity to be reimbursed from the WSIB, if it is determined that the insured is entitled under the workers' compensation scheme to receive benefits.

In accordance with section 32 of the *Schedule*, and as set out in the leading FSCO appeal decision of *Primmum v. Totic* (FSCO Appeal P03-00033, July 26, 2004), the Director's Delegate found that the application process as set out in section 32 of the *Schedule*, is threefold:

1. A person seeking statutory benefits shall notify the insurer of his or her intention to apply for a benefit.
2. The insurer must provide the person with, among other things, information to assist the person in applying for benefits.
3. The applicant shall submit an application for the benefit within 30 days after receiving the application forms.

In adjusting a new claim, an insurer must keep these principles in mind in order to ensure that they are complying with their duty to inform.

Part of the insurer's duty under section 32, is to provide the insured with all the information necessary to assist them in completing their application. The decision of *Primmum* found that just because further information is needed to determine a claim, this did not mean that the application process was incomplete. In addition, the insurer has a positive obligation to assist the insured person in this process.

The insurer's obligation continues under subsection 59(5) as it is found that the insurer must provide the insured with an Assignment of WSIB benefits form. Once this form has been completed, approved by the WSIB and returned to the insurer, an insurer must then make full payment of all accident benefits that an insured is entitled to receive at the time. These actions are all part of the insurer's positive obligation to adjust the claim.

In the FSCO decision, *Basdeo v. The Citadel General Assurance Company* (FSCO A04-001585, March 7, 2005), the arbitrator found that the provisions of s. 59(5) applied and that The Citadel ought to have been dealing with the insured's claims pending the resolution of the dispute, which can only be resolved by the WSIB and the WSIAT. However, the arbitrator noted: "I find the pre-conditions for the application of section 59(5) have been met – there is a dispute concerning Mr. Basdeo's entitlement to WSIB benefits; he has executed an assignment to The Citadel as requested; and that assignment has been approved by the WSIB". In other words, unless an approved Assignment of Benefits form has been received by the insurer, there is an argument that an insurer does not have to pay accident benefits pending resolution of the dispute. It should also be noted that in *Basdeo*, the arbitrator found it imperative that Citadel continue to actively adjust the insured's claim and an example of this was found when The Citadel sent Mr. Basdeo an assignment of benefits form.

Therefore, it may be that an insurer has a duty to pay benefits to an insured once an approved Assignment of Benefits form has been received. Further, under section 32 of the *Schedule*, the insurer has a duty to provide the insured with information to assist them in applying for benefits. This information would include the WSIB Assignment of Benefits form.

In a situation where entitlement to workers' compensation benefits is a potential issue and where an insurer decides to sit back and have the insured provide the necessary information and paperwork, the insurer may face future negative consequences. Where further investigation or active adjusting of a claim has not occurred, as required by section 59 of the *Schedule*, the insurer will inevitably find itself in a position of increased exposure for failing to undertake its statutorily set out duties.

Additionally, if the insurer does neglect such a claim and it therefore remains dormant, the WSIB may have a persuasive argument against honouring an assignment of benefits submitted late, having been prejudiced by the passage of time.