



FSCO Allows Insurer's Appeal over WSIB Issues

September 27, 2011

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A FSCO Director's Delegate has allowed an insurer's appeal of an arbitrator's decision, which allowed the claimant to pursue accident benefits despite an unsettled WSIB claim.

In *Balendra v. Security National*, the claimant was working as a parking lot attendant when a car hit his booth. Since section 13 (1) of the *Workplace Safety and Insurance Act* provides that a worker who "sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the [worker's compensation] insurance plan," the claimant applied for workers' compensation benefits to the Workplace Safety and Insurance Board, claiming personal injury.

The Board opened a claim file and investigated. However, the Board adjudicator wrote to the claimant on October 31, 2007 and disallowed his claim because she had no medical documentation showing he sustained a personal injury in the accident. She was prepared to review any additional information he wished to file and make another decision regarding entitlement, and noted he had six months to advise her if he wished to appeal the decision.

The claimant took no further steps to pursue the WSIB route. Instead, he maintained a claim for accident benefits against Security National. The insurer denied his claims based on section 59 of the SABS, arguing that he was entitled to receive benefits under the WSIA (and therefore not entitled to receive any accident benefits under the SABS).

A FSCO arbitrator disagreed with the insurer and found that the claimant was entitled to claim accident benefits. More specifically, the arbitrator found that the WSIB's October 31, 2007 letter to the claimant was "a final appealable order denying Mr. Balendra's entitlement to workers' compensation benefits." Accordingly, the arbitrator found that section 59(1) of the SABS did not apply, and he could claim statutory accident benefits from Security National.

On appeal, the Director's Delegate found that the claimant was engaged in multiple proceedings. Having failed to satisfy the WSIB that he sustained personal injuries because of the accident, he was now trying to establish at FSCO that he had sustained personal injuries. The Director's Delegate wrote:

[T]he Arbitrator erred at law in failing to consider the meaning of "entitlement" as defined in s. 13(1) of the *WSIA*, quoted above. To reiterate, entitlement to workers' compensation benefits turns on whether a worker "sustains a personal injury by accident arising out of and in the course of his or her employment." What matters is the circumstance of the accident, not the degree of resulting personal injury, so Mr. Balendra qualified for workers' compensation benefits or nothing. Mr. Balendra argues that, now that the Board has found he is not entitled to workers' compensation benefits because he failed to prove he sustained any personal injury, he is now entitled to claim statutory accident benefits because he sustained an impairment. I disagree. Subject to the tort exception mentioned above, insureds who are in a work-related accident do not qualify for statutory accident benefits, whether or not they meet the disability requirement in s. 13(1) of the *WSIA*. Indeed, insureds can only recover statutory accident

benefits if they sustained an impairment. Mr. Balendra could not possibly have sustained an impairment but no personal injury. The Board decided that Mr. Balendra sustained no personal injury, which leaves nothing for this tribunal to decide. Regardless, from the moment of the accident, which it is agreed occurred during the course of Mr. Balendra's employment, the Board had exclusive jurisdiction.

The *Balendra* decision provides a good example of how the accident benefits scheme under the SABS interacts with other benefit systems. It will also likely add some teeth to the WSIB provisions under the SABS, in matters that appear to involve a workers' compensation component.