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FSCO Arbitrator Dismisses Truck Driver's Claim for Caregiver Benefit

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A recent FSCO decision in *Kaneshan vs. Coachman Insurance Company*¹ offers interesting insights into how an accident benefits insurer may respond to a claim for a weekly caregiver benefit by a person who continues to work after a motor vehicle accident.

Section 36 of the SABS provides that only one of the weekly benefits (non-earner benefits, income replacement benefits, and caregiver benefits) is payable to an insured person. Accident benefits insurers often face situations where it may be in the interests of the insured person to claim the caregiver benefit – even if the claim is somewhat implausible – rather than claim one of the other benefits. In Mr. Kaneshan's case, he returned to work immediately as a long-haul transport truck driver. Had he made an income replacement claim, the benefit would have been nil based on the receipt of post-accident employment income. By contrast, post-accident employment income is not deductible from the caregiver benefit.

Mr. Kaneshan disputed Coachman's termination of the caregiver benefit. During the arbitration proceeding, he gave evidence that he was able to continue with his self-employment as a transport truck driver, with this work taking him across the U.S. border and away from home six or seven nights per month. Despite his ability to maintain that self-employment, he claimed he was substantially unable to resume his pre-accident caregiving duties. His primary duty as caregiver was to "supervise" his children, something he claimed he could not do because they would "try to climb on him" and he "feared that he would not be able to handle that." Mr. Kaneshan's claims were dismissed for a variety of reasons, including that surveillance evidence contradicted the written documentation submitted in regards to purported attendances of his service provider at his home. Beyond this, the arbitrator found it was reasonable to infer that because Mr. Kaneshan was able to do his job as a transport truck driver (getting in and out of the truck regularly, doing daily circle checks, engaging in logistical work), he was capable of his child care duties.

The arbitrator noted that there was no necessary logical connection in every case between an insured person's ability to work and a claim of being unable to resume

child care. In theory, it was possible for a person to continue working, but be disabled from providing care. However, each case turns on its specific facts, and in this case, Mr. Kaneshan's admitted ability to continue truck driving seriously undermined his caregiver claim.

By analogy, accident benefits insurers should carefully examine claims for the caregiver benefit by a person who has, nevertheless, been able to return to paid employment outside of the home. Insurers may consider asking for documents such as post-accident pay stubs, T4 slips and tax returns, so as to understand the extent and type of employment. Human resources files may contain formal job descriptions or even a Physical Demands Analysis. Although paralegals and lawyers may resist these inquiries on the basis of relevance, *Kaneshan* is a precedent that such documentation could be considered relevant if the claim went into litigation or arbitration.

Additionally, entitlement under section 13 to caregiver benefits is only available to a "primary" caregiver. In Mr. Kaneshan's case, the arbitrator found that he was not the primary caregiver, in any event, because of his unvarying driving schedule which had him away from home regularly. The arbitrator found it much more likely that Mr. Kaneshan's wife (who did not have paid employment outside the home) was the primary caregiver.

Caregiver claims are sometimes orchestrated by paralegals or lawyers in scenarios where the insured person would not be able to collect an income replacement benefit. Entitlement can be suspect where the insured person has maintained employment outside of the home. The *Kaneshan* decision confirms that there may be sufficient relevance between the circumstances of the employment and the inability to perform caregiving duties that the insurer should attempt flag such claims and attempt to obtain all relevant employment documentation, preferably at an early stage.

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¹ FSCO file A07-002011, decision of July 30, 2008