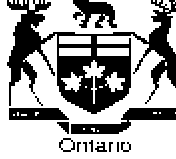
Financial Services Commission of Ontario




Commission des services financiers de l'Ontario

Appeal P04-00017

**OFFICE OF THE DIRECTOR OF ARBITRATIONS**

DEXTER HOWARD

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

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| BEFORE: | Nancy Makepeace |
| REPRESENTATIVES: | Mir F. Kamal for Dexter Howard<br>Eric K. Grossman for State Farm |
| HEARING DATE: | November 1, 2004 |

# APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, **it is ordered that**:

1. The appeal is dismissed and the arbitration decision, dated March 29, 2004, is confirmed.

2. Mr. Howard shall pay State Farm appeal expenses in the amount of $250.

November 19, 2004

Nancy Makepeace
Director's Delegate

Date

# REASONS FOR DECISION

## I. NATURE OF THE APPEAL

Mr. Howard appeals from the Arbitrator's order, dated March 29, 2004, dismissing his claim for weekly income benefits under s. 12 of the *SABS–1990*[1] after January 24, 1997. I am not persuaded the Arbitrator erred. My reasons follow.

## II. BACKGROUND

Mr. Howard was a pedestrian when he was struck by an automobile insured by State Farm on August 13, 1990. His injuries included a fracture of the femur that required surgical insertion of a metal plate. After being discharged from the hospital, he walked on crutches for a time, and had several months of physiotherapy.

At the time of the accident, Mr. Howard was working at two jobs. He worked full-time as a shipper/receiver in a Becker's warehouse, and part-time as a banquet waiter at Howard Johnson's. He never returned to his job as a waiter after the accident. However, he returned to work at Becker's on January 24, 1992, about 18 months after the accident. At some point, he moved to a less demanding job, making up milk orders. State Farm terminated his weekly income benefits in February 1992.

In September 1995, Mr. Howard was laid off from Becker's. In July 1996, he started a sedentary photo processing job at Black's Photography, where he worked until he was laid off in January 1997.

[1] The *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*, Regulation 672 of R.R.O. 1990, as amended.

In July 2000, Mr. Howard asked State Farm to reinstate his weekly income benefits as of January 24, 1997. The Insurer refused, and the parties were unable to resolve their dispute at mediation. Mr. Howard applied for arbitration in November 2001, represented by Mr. Alan Davis, a lawyer.

Three arbitration decisions were issued. On August 29, 2002, Arbitrator Miller dismissed State Farm's time limits motion on the basis that the Insurer's *Assessment of Claim*, issued in February 1992, was not "clear and unequivocal" so as to start time running on the two-year limitation period under section 281(5) of the *Insurance Act* and section 26 of the *SABS-1990.*

Mr. Howard's benefit claim was heard by Arbitrator Renahan in July 2003. After Mr. Howard testified, the parties agreed that the Arbitrator should decide the following preliminary issue:

> Assuming that Mr. Howard was disabled from suitable employment after January 24, 1997 and assuming his disability was caused by the motor vehicle accident of August 13, 1990, does Mr. Howard's return to work at Becker's and Black's disqualify him from benefits under section 12 of the [*SABS-1990*] because his injury did not "continuously" prevent him from engaging in suitable employment within the meaning of section 12(5)(b) of the [*SABS-1990*]?

The Arbitrator released his first decision on August 29, 2003. He summarized the Commission's case law and concluded there was a question of fact that could not be determined until he heard all the evidence.

The hearing resumed on February 27, 2004. Rather than calling any additional witnesses, the parties relied on documentary evidence and submissions.

In his final decision, dated March 29, 2004, the Arbitrator first considered what kind of work was suitable for Mr. Howard, considering his "education, training or experience." He concluded that "any

full-time physical indoor work which pays approximately $40,000 per year is suitable.'[2] Further on in the decision, he found the job at Becker's was "clearly suitable."[3] Mr. Howard claimed his accident injuries continuously prevented him from doing that job. The Arbitrator rejected this. He did not accept that Mr. Howard was laid off from Becker's and Black's because of his injuries. He concluded the layoffs were due to lack of work, and Mr. Howard would still be working if he had not been laid off. As a result, the Arbitrator concluded that Mr. Howard was not entitled to additional weekly income benefits.

Mr. Howard appealed, initially representing himself. On October 25, 2004, a week before the appeal hearing, Mr. Kamal called FSCO to advise that he would be representing Mr. Howard. The Appeals Administrator drew his attention to the rules about representatives in Rule 9 of the *Dispute Resolution Practice Code* and the new rules about paralegals that took effect on November 1, 2003.[4] Because Mr. Kamal, a non-lawyer, has not satisfied the criteria for acting as a SABS representative, s. 284.1 of the *Insurance Act* prohibits him from representing Mr. Howard for compensation in FSCO proceedings. Subsection 19(2) of Ontario Regulation 664, as amended, defines "compensation" broadly:

> a person shall be considered to be representing a party for compensation if the person receives or is entitled to receive, directly or indirectly from any source, a financial benefit in connection with the representation of the party, whether the financial benefit is wages, fees or another form of consideration or remuneration.

On October 27, 2004, Mr. Kamal wrote to advise that he would represent Mr. Howard as a friend.

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[2] Arbitration decision, p. 5.

[3] Arbitration decision, p. 8.

[4] See s. 282(11.2), 284.1 and s. 398 of the *Insurance Act*, ss. 18-19 of Ontario Regulation 664 (Automobile Insurance), s. 4 of Ontario Regulation 7/00 (Unfair or Deceptive Acts or Practices), and the *Code of Conduct for Statutory Accident Benefit Representatives*, issued by the Superintendent of Financial Services. The rules are explained on the Commission's website, at www.fsco.gov.on.ca (click on "Insurance", click on 'Paralegals/SABS Representatives.")

At the outset of the appeal hearing, I explained the paralegal rules to Mr. Howard and Mr. Kamal, and they gave me their verbal confirmation that Mr. Kamal was representing Mr. Howard without compensation. The hearing proceeded in an orderly fashion, with Mr. Kamal speaking for Mr. Howard.

## III. ANALYSIS

Section 281(1) of the *Insurance Act* restricts appeals to questions of law, and Rule 51.2(b) of the *Dispute Resolution Practice Code* authorizes the Director or Director's Delegate to reject an appeal if it does not raise a question of law. However, Mr. Howard takes issue with the Arbitrator's factual conclusions, relying especially on a report, dated January 9, 2003, from Dr. Michael E. Kliman, an orthopaedic surgeon who assessed him at his lawyer's request. The Arbitrator quoted from Dr. Kliman's report at p. 7 of his final decision.

On June 30, 2004, before acknowledging the appeal pursuant to Rule 51.4 of the *Dispute Resolution Practice Code*, I gave the parties an opportunity to comment on whether the appeal raised a question of law:

> Generally speaking, questions of law include questions about interpretation of the *Insurance Act* and the *Statutory Accident Benefits Schedules*, or about fair procedure or the Arbitrator's authority. Disagreements about the evidence, or the factual conclusions drawn from the evidence, are generally not questions of law, unless there was no evidence to support the Arbitrator's findings of fact. Based on Mr. Howard's *Notice of Appeal* and supplementary submission, it is not clear to me that the appeal involves a question of law. Instead, Mr. Howard seems to disagree with the Arbitrator's conclusions. However, I would like to give both parties an opportunity to comment briefly on this point before I decide whether to allow the appeal to go further.

In response, Mr. Grossman submitted that Mr. Howard had not identified a question of law, and had not brought forward any evidence in support of his claim for benefits post-156 weeks. He quoted the Arbitrator's statement, at p. 8 of his final decision: "Mr. Davis conceded that I would find nothing in the

documents that Mr. Howard should not work nor anything that Mr. Howard's returns to work could be construed as failed attempts to return to work." Mr. Howard responded by repeating that the Arbitrator erred in law and failed to give him a fair hearing, but again without identifying any specific error or procedural defect.

Because the decision whether to acknowledge or reject an appeal must be made on limited materials, it is appropriate to be cautious in rejecting an appeal based on its not raising a question of law. Caution is particularly important when the insured person is unrepresented and the issues in dispute (s. 12(5)(b) and s. 16 of the *SABS-1990*) may present some difficulty for an unrepresented appellant. For those reasons, I acknowledged the appeal.

However, Mr. Howard's written submissions and Mr. Kamal's submissions on his behalf at the oral hearing have not persuaded me the Arbitrator erred in law in reaching his conclusions.

The entitlement tests that Mr. Howard had to satisfy are stated in section 12(1) and 12(5)(b) of the *SABS-1990*. Section 12(1) requires the insurer to pay weekly income benefits while the insured person "suffers substantial inability to perform the essential tasks of his or her occupation or employment" as a result of the accident. This is sometimes called the "own occupation" test. Section 12(5)(b) imposes an additional entitlement test: "the insurer is not required to pay a weekly benefit under subsection (1). . . for any period in excess of 156 weeks unless it has been established that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience." This is sometimes called the "any occupation" test or the "post-156 week" test.

The Arbitrator correctly concluded that s. 12(5)(b) began to apply to Mr. Howard's claim on August 20, 1993, 156 weeks after the date of the accident, which was when his disability commenced.[5] The "continuously prevents" requirement posed a significant barrier for Mr. Howard, who was working at Becker's in August 1993, when the s. 12(5)(b) test took effect, and continued to do so for another two years.

Section 16(2) also applied to the claim. The Arbitrator described the law correctly: "subsection 16(2) creates a rebuttable presumption that if, after two years from the date of the accident, the insured returns to work for more than 90 days, it is presumed that he is ineligible for weekly benefits."[6] Because Mr. Howard worked at Becker's for about three years after the two-year point (August 13, 1992), he bore the burden of proving that he could nevertheless claim further weekly income benefits.[7]

The real issue in this appeal is whether the Arbitrator applied the legal principles correctly in assessing the evidence. Mr. Howard focuses on the medical evidence of his experts, and there is no question he suffered a significant right leg injury as a result of the automobile accident. But his ability to work, rather than his injury, was the issue at the arbitration, and his return to work over an extended period of time after the accident provided compelling evidence that the accident did not continuously prevent him from doing suitable work. This was a significant hurdle for Mr. Howard. Ultimately, he lost his case because he could not rebut that presumption with evidence that he failed in his attempts to return to work. His submissions on appeal do not help him on this point, much less suggest an error of law.

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[5] *Coles and Dominion of Canada General Insurance Company*, (OIC P-007416, July 28, 1997), application for judicial review dismissed, [1999] O.J. No. 2927 (Ont. Div. Ct.).

[6] On the rebuttable presumption, the Arbitrator cited *Lafleur and Zurich Insurance Company*, (OIC A-004141, May 11, 1995), at p. 10. See also *Chudy and West Wawanosh Mutual Insurance Company*, (FSCO A96-000924, January 23, 1997), pp. 8 and 10.

[7] At p. 7 of the decision dated August 29, 2003.

Mr. Howard contends that he suffers ongoing injuries as a result of the accident, including a shortened right leg, reduction of hip mobility, and right-sided neck and back pain. He claims that he was able to return to work after the accident because of his determination, but with time and age, his accident-related problems got worse, eventually making it impossible for him to keep working. He claims he cannot do any job that involves extended walking or standing, and his education, training and experience leave him with no other suitable options. He asks for an order that State Farm restore him to the financial position he was in before the accident, considering that he is permanently disabled. He relies mainly on Dr. Kliman's discussion of his injuries in his report of January 9, 2003. Dr. Kliman reported that Mr. Howard has "evidence of significant injury to his right leg." He identified three problems. First, Mr. Howard "suffered a femoral fracture, which has healed with some mild shortening of the right leg. There has been a mild reduction in right hip movement (rotation)." Second, "[h]e has suffered a major ligamentous injury to his right knee. There is some evidence of chronic knee instability. There likely were some articular surface damages to his right knee. . . . He may benefit from a custom knee brace if instability (giving way) is a factor in terms of daily life's activities." Finally, "[t]he right anterior tibial musculature has been injured. There will be some loss of lower leg power and function because of this."

As a result of these injuries, Dr. Kliman stated Mr. Howard would suffer "a permanent reduction in right leg function. He will likely have decreased endurance for extended weight-bearing activities. He would likely have difficulty running and difficulty with certain positionings such as squatting or kneeling." Dr. Kliman drew the following conclusions about Mr. Howard's ability to work:

> In regards to this man's employment, **I think he would have difficulties with a job that involved extended standing or walking. Work that involved short walking or standing intervals and frequent rest periods should be tolerated. A light or sedentary job where he is mostly off of his feet would be tolerated.** The limitations in regards to employment will be lifelong in that he likely will not be able to, over his life time, manage at work involving extended standing or walking intervals. I do not know what this man's specific training or educational capacity is in regards to future employment. It is unclear what his vocational abilities are in regards to alternate employment possibilities. I understand that his previous work did involve almost entire days of standing and walking

> and, if this is the case, then I believe he is significantly disabled for this type of employment and will continue to be so over the years ahead. [emphasis added]

I have not referenced Dr. Kliman's comments about Mr. Howard's increased risk for post-traumatic arthritis because weekly income benefits are paid while the claimant meets the applicable disability test. They do not compensate for future economic loss or loss of opportunity. Nor do weekly income benefits compensate for non-disabling injury or non-disabling pain and suffering. These are real losses, but beyond the scope of the *SABS*. With the 1990 amendments to the *Act*, the legislature chose to restrict access to tort in exchange for an accident benefit scheme that provides prescribed benefits – including weekly benefits for income loss – on a first-party "no-fault" basis, without the risks and cost of litigation. The Arbitrator did not have authority to disregard the legislation, and neither do I. The issue for the Arbitrator was not whether Mr. Howard has pain or suffered permanent injury. The issue was whether the accident-related injuries continuously prevent him for engaging in any suitable work.

Dr. Kliman's report supported Mr. Howard's claim that he suffers ongoing functional limitations as a result of his accident. The Arbitrator quoted from the report, and accepted that Mr. Howard "suffered a serious injury in what his treating surgeon thought was record time."[8] The problem for Mr. Howard was that his extended return to work was strong evidence that he could work, despite his injuries. That evidence could have been met by evidence that he had attendance problems or could not meet his employers' performance expectations, or evidence that his lay-off was motivated by problems on the job. Mr. Howard did not bring forward any such evidence. In fact, the Arbitrator stated,

> He admitted he had no evidence to support the allegation [that he was laid off because of his injuries], he took no action to dispute the layoff and . . . he was one of ten employees who were laid off on the basis of seniority because of lack of work.[9]

Because weekly benefits compensate for lost income, not injury, the lack of any evidence of work problems would have been very hard to overcome, whatever the medical evidence. As it happened, the

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[8] Arbitration decision, p. 8.

[9] Arbitration decision, p. 6.

medical evidence did not provide consistent support for Mr. Howard's disability claim. Even Dr. Kliman, who was the most supportive of the experts, concluded Mr. Howard could work within the recommended restrictions. In any event, his opinion was undermined by his failure to address the entitlement criteria under the *SABS-1990* and his mistaken understanding that Mr. Howard stopped working in January 1997 because of his accident-related injuries.[10]

Dr. Gordon Hunter was the orthopaedic surgeon who treated Mr. Howard after the accident. On May 2, 1991, about ten months post-accident, Dr. Hunter described Mr. Howard's treatment history in a letter to a Zurich Claims Examiner. According to Dr. Hunter, Mr. Howard's fracture "appeared to have healed" by January 30, 1991, and he was encouraged to return to work on March 1 that year, doing light duties for a month before returning to full duties. Dr. Hunter described the speed of Mr. Howard's work-readiness as "most unusual" and attributed it to his motivation, as well as the treatment he received.

In May 1991, Mr. Howard continued to complain of pain. Dr. Hunter suggested he work part-time for two or three months before returning to full duties. In September 1992, Dr. Hunter's resident reported that Mr. Howard was complaining of pain that might relate to the rod; he was advised to come back in six months.

Two years later, Dr. Hunter's resident reported that Mr. Howard was seen in the fracture clinic with "questions about removal of the [intramedullary] nail. He states that he has no pain at the present time and is working at Becker's, lifting heavy milk containers." Mr. Howard was advised to think about having the nail removed, and to return for follow-up in six months. That was his last attendance at the fracture clinic, a year before his lay-off from Becker's and two and a half years before his claim for further benefits. In the interim, Mr. Howard worked at Black's for about six months before being laid off, and again there was no evidence that his layoff was related to his accident injuries.

[10] Report of September 30, 1997, p. 2, Arbitration Exhibit A-1, Tab 1.

Mr. Kamal submits that Mr. Howard should not be penalized for his determination to return to work. Encouraging claimants to return to work is an important policy objective of the accident benefits scheme. It is promoted by s. 16, which allows an insured person to return to work for any period within the first two years, or for 90 days after the two-year point, without affecting his right to claim further benefits should the return to work fail. After this period, there is a presumption against disability, but it is rebuttable. In addition, the Arbitrator and other FSCO adjudicators have followed judicial authorities in holding that a return to work does not necessarily preclude entitlement; indeed, a failed return to work may be the best evidence of disability.[11] The problem was that Mr. Howard presented the Arbitrator with no evidence that he was laid off because of disability or that his returns to work were otherwise unsuccessful. In a system where benefits flow from disability, it is inevitable that the claimant's successful return to work after an accident results in the cessation of benefits. This is not a penalty. It reflects the basic purpose of weekly benefits, which is to replace income lost while the insured person is unable to work because of his accident injuries.

To succeed at the arbitration, Mr. Howard had to prove that his accident injuries "continuously prevent[ed]" him from performing suitable work. This was a factual question. Even if the s. 12(5)(b) test can be satisfied by episodic or intermittent disability,[12] Mr. Howard fell far short of the evidence required to show the required degree of continuity, and he was unable to rebut the presumption arising from s. 16(2). I find no basis for overturning the Arbitrator's decision.

## IV. EXPENSES

Pursuant to s. 282(11) of the *Act* and s. 12 of Ontario Regulation 664, I have authority to order either party to pay the appeal expenses of the other, based on prescribed criteria. In this appeal, both parties sought expenses from the other.

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[11] The Arbitrator accepted this point, citing *Foden v. Co-operators Insurance Association (Guelph)*, 20 O.R. (2d) 728 (Ont. H.C.J.); *Brasseur v. Anglo Canada General Insurance Co.*, [1994] O.J. No. 2235 (Ont. H.C.J.); and *Graper and Liberty Mutual Fire Insurance Company*, (FSCO A00-000133, March 21, 2001).

[12] See *Lanctot and Zurich Insurance Company*, (FSCO P99-00012, November 9, 1999),and *Antunes and Allstate Insurance Company of Canada*, (FSCO P00-00011, November 28, 2001).

Where an insured person brings an unsuccessful appeal, costs generally follow the outcome. There may be exceptions to this rule – for example, an appeal on a novel and important question of law – but I am not satisfied this case is one of them. In acknowledging the appeal, I reminded Mr. Howard that his appeal could not succeed unless he demonstrated that the Arbitrator erred in law. I also cautioned him that he could be ordered to pay State Farm's appeal expenses if his appeal were unsuccessful, as it has turned out to be. The expenses rule was restated at the beginning of the appeal hearing.

Mr. Grossman estimated that he worked about seven hours on the appeal, including the appeal hearing. Both parties dealt with this appeal in a cost-effective manner, limiting their written materials essentially to their pleadings, without filing written submissions. Mr. Grossman prepared a four-page *Response*, to which three leading decisions were appended. The appeal hearing lasted one and a half hours, some of which related to the representation issue and the need to confirm the evidence that was on the record. Mr. Kamal's oral argument was very brief, and Mr. Grossman's submissions restated the argument put forward in his *Response*. Considering all these factors, Mr. Howard shall pay State Farm its appeal expenses in the amount of $250.

| ______________________________ | November 19, 2004 |
|---|---|
| Nancy Makepeace<br>Director's Delegate | Date |