Ontario Insurance Commission

Ontario

Commission des assurances de l'Ontario

Appeal P-006279

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALEXANDER A. BOATENG

Appellant

and

CUMIS GENERAL INSURANCE COMPANY

Respondent

BEFORE: David R. Draper

COUNSEL: Alexander A. Boateng (representing himself)
Thomas J. Hanrahan (for Cumis)

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 order, dated August 29, 1995, is confirmed.

2. No appeal expenses are payable.

July 22, 1996

David R. Draper
Director's Delegate

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Alexander A. Boateng appeals an arbitration decision, dated August 29, 1995, dismissing his claim for weekly income benefits and physiotherapy expenses, and ordering him to pay $1,000 to Cumis General Insurance Company ("Cumis") because his claim was frivolous, vexatious or an abuse of process.

II. PRELIMINARY ISSUES

On September 27, 1995, less than 30 days after the arbitration decision, the Commission received a letter from Mr. Boateng stating that he was appealing the order. The Registrar advised Mr. Boateng that he had to complete a Notice of Appeal form and submit his filing fee. The Notice of Appeal and filing fee were received on October 11, 1995. In his appeal, Mr. Boateng asked for a new hearing.

Cumis submitted that the appeal should not be allowed to proceed because it was not filed within the 30-day appeal period and did not include the information required by the *Dispute Resolution Practice Code*. After asking for written submissions, I dealt with the following preliminary issues in a letter to the parties, dated June 6, 1996.

A. Timeliness of the Appeal

According to section 283 of the *Insurance Act*, an appeal is to be delivered to the Commission within 30 days after the date of the arbitrator's order. However, this time limit is not absolute.

Section 283(3) of the *Insurance Act* provides for an extension if the appeals adjudicator is satisfied that:

(a) there are reasonable grounds for applying for the extension; and

(b) there are apparent grounds for granting the relief sought.

Although I had reservations about the strength of Mr. Boateng's appeal, I concluded that he should not be prevented from proceeding. He attempted to appeal within the appeal period and acted promptly when the proper procedure was explained to him.

B. Adequacy of the Notice of Appeal

Section 42.3 of the *Dispute Resolution Practice Code* specifies what must be included in the Notice of Appeal. Cumis argued that Mr. Boateng failed to comply with the *Practice Code* because he did not provide a detailed statement explaining why the arbitrator's order was being appealed, or a list of the documents on which he was relying.

I concluded that Mr. Boateng's grounds for appeal were sufficient to allow Cumis to respond. Further, there was no indication that he was relying on any documents that were not before the arbitrator. I declined, therefore, to reject his Notice of Appeal as incomplete.

C. Rehearing

According to section 283(4) of the *Insurance Act*, the appeals adjudicator has a broad authority to decide whether the appeal will be done on the record, with or without oral submissions, or by way of a rehearing of all or some issues. Generally, appeals proceed based on the evidence presented at the arbitration hearing. Rehearings are granted sparingly.[1]

[1] See *Calogero and The Co-operators General Insurance Company*, (February 13, 1992, OIC P-000251).

After reviewing the material, I concluded that this appeal would proceed on the record, without oral submissions. The parties were given an opportunity to make additional written submissions in light of this ruling. Mr. Boateng was asked to provide his submissions, if any, by July 5, 1996. Cumis was given 30 days from receiving any further submissions from Mr. Boateng to reply. I did not receive any additional written submissions.

III. THE APPEAL - ANALYSIS

Mr. Boateng's situation is quite unusual. Not only did he present evidence at the arbitration as the injured person, but also as his own employer and therapist.

Mr. Boateng is a physiotherapist. During most of 1992, he was employed by the Niagara Sports & Injury Rehabilitation Clinic. By the time of his accident on December 22, 1992, however, he had left this job and was in the process of opening his own physiotherapy clinic, Ontario Sports & Acute Injury Centre. This new clinic opened on January 5, 1993, despite Mr. Boateng's accident.[2]

The arbitrator found that Mr. Boateng was the principal owner of Ontario Sports & Acute Injury Centre, was employed as the clinic director and only full-time physiotherapist, and was enrolled as one of the clinic's first patients. The material before me suggests there were two other employees, plus a "call-in physiotherapist" who was also a part-owner of the business.

Mr. Boateng claims weekly income benefits from January 5, 1993 to May 30, 1993 because his accident-related injuries affected his ability to do his job. He also claims that during roughly the same period, he had expenses of $6,965 for physiotherapy, almost all of which he performed on himself. As found by the arbitrator, Mr. Boateng claimed 19 physiotherapy sessions in January 1993, one on nearly every day that the clinic was open. In February through May 1993, he claimed 20 to 23 sessions, and eight sessions in June 1993.

[2] Exhibit 1, Wage Loss Questionnaire.

In my view, it was quite reasonable for the arbitrator to view Mr. Boateng's claims with some scepticism and to look for independent verification. I agree with the arbitrator that "claims of health care practitioners who treat themselves are inherently suspect, unless the insurer consents" (p.5). Further, it is difficult to reconcile Mr. Boateng's assertion that he was initially limited to part-time administrative duties with his claim for regular and varied physiotherapy treatments that he performed on himself.

Due to Mr. Boateng's multiple roles as patient, employer and therapist, his credibility was a central issue in the arbitration. He was the only witness in a two-day hearing. The arbitrator found his evidence both internally inconsistent and unsupported by independent evidence. As a result, he rejected the claims for weekly income benefits and physiotherapy expenses. In addition, he denied Mr. Boateng his arbitration expenses and ordered him to pay $1,000 to Cumis.

It is not my role on appeal to second-guess the arbitrator's assessment of the evidence.[3] He was in a better position to evaluate all the evidence and, therefore, I should not interfere unless his conclusions are not supported by the evidence. It is particularly difficult to review the arbitrator's findings in cases, such as this one, where there is no transcript. After reviewing the evidence available to me, I am satisfied that there was sufficient evidence to support the arbitrator's conclusions.

Mr. Boateng made a number of specific submissions that I will now address.

A. Medical Support for Physiotherapy

Mr. Boateng submits that the arbitrator erred in finding that his physiotherapy treatment was self-prescribed. He claims that "physiotherapy treatments were requested by Dr. Ghouse, Strubb [*sic*] and Wooder even from August 1993 onwards," and that he gave the arbitrator a copy of the prescription.

[3] See for example, *Calogero and The Co-Operators General Insurance Company*, cited above; *Lee and Unifund Assurance Company*, (September 14, 1993, OIC P-000078); *Beenan and The Continental Insurance Company of Canada*, (September 8, 1994, OIC P-001239).

In my view, the evidence simply does not support Mr. Boateng's contention that his course of treatment proceeded on the advice of his doctor or doctors. The only medical evidence from the time of the accident is the initial emergency department report of Dr. Stubbe, who diagnosed Mr. Boateng as having bruises to his right knee and left shoulder. Mr. Boateng contends that Dr. Stubbe recommended physiotherapy, but the only follow-up treatment suggested in the report is "home. Ice." It says nothing about physiotherapy.

There is no further medical evidence until early June 1993, more than five months after the accident, when Mr. Boateng finally applied to Cumis for benefits. This is not a case where the treating physicians simply did not prepare reports until a later date. I find no evidence that any of the doctors, other than Dr. Stubbe, had any involvement in Mr. Boateng's care until shortly before he submitted his application. This is critical because by June 1993, Mr. Boateng's claim for benefits was almost over. In his application, he acknowledged being back at work and has not claimed weekly income benefits beyond May 30, 1993. Further, he has not claimed any physiotherapy expenses after June 8, 1993.

In support of his application, Mr. Boateng submitted a medical form completed by his family doctor, Dr. Scott D. Wooder, on June 1, 1993. Although Dr. Wooder recommends that Mr. Boateng continue his "current daily active exercise," there is no indication that he was involved in recommending any treatment that Mr. Boateng had received up to that point. I am also not convinced that Dr. Wooder was recommending that Mr. Boateng treat himself as a professional physiotherapist. Many people do exercises at home designed for their rehabilitation. The fact that Mr. Boateng was a physiotherapist does not turn all of his activities into professional services that can be charged to Cumis.

In August 1993, Dr. Ali T. Ghouse, a specialist in physical and rehabilitation medicine, examined Mr. Boateng on referral from Dr. Wooder. His report is the most supportive of Mr. Boateng's claim. He finds ongoing problems and recommends "continuing physiotherapy particularly with myofascial stretches, stretch and spray techniques, hydrotherapy as well as general flexibility and

endurance exercises." However, given the timing of Dr. Ghouse's involvement, Mr. Boateng cannot claim that the physiotherapy he is asking Cumis to pay for was done at the suggestion of Dr. Ghouse.

I also note that according to his report, Dr. Ghouse understood that in August 1993, Mr. Boateng was only working two hours per day in a mostly supervisory position. This is inconsistent with the information that Mr. Boateng provided to Cumis, to the arbitrator, and to me in this appeal.

B. Dr. Gold's Recommendation

Mr. Boateng submits that the arbitrator erred in finding that "Dr. Gold suggested that the physiotherapy should be discontinued to allow any cervical trauma to heal" (p.6). Mr. Boateng submits that Dr. Gold recommended that physiotherapy be continued at home.

I read Dr. Gold's report quite differently than Mr. Boateng. Dr. Gold felt that a bone scan should be done to determine if the vertebral wedging shown in the x-rays was associated with a fracture. If so, this would help explain Mr. Boateng's ongoing neck pain, and strongly suggest that the problem arose from his automobile accident. With respect to continuing physiotherapy, he wrote:

> As such, one would suggest that the physiotherapy be discontinued on the basis that it would be of no assistance in the healing process of a cervical fracture.
>
> If the bone scan is negative, and his symptom patterns are strictly soft tissue in nature, it appears as though the physiotherapy has been of little help in assisting him, and that at the present time it is only very minimally temporizing, and as such should be discontinued.
> . . . .
>
> It is suggested that home treatment patterns would be as effective as those at physiotherapy utilizing local heat, and intermittent cervical traction if his injuries are soft tissue alone, and strictly local heat

> being utilized if his problems are soft tissue in nature and have not been associated with a fracture.[4]

I find the final paragraph of this excerpt somewhat confusing, but in my view, it was Dr. Gold's opinion that regular physiotherapy was unnecessary whether Mr. Boateng's neck problems were due to a vertebral fracture or soft-tissue injuries. He does suggest some treatment in the home, but other than "intermittent cervical traction," he clearly was not talking about professional home care. Again, it seems that Mr. Boateng feels that because he is a physiotherapist, anything he does toward his rehabilitation constitutes professional services for which he should be paid as a professional.

C. Sequence of Events

Mr. Boateng submits that the arbitrator erred with respect to the sequence of events, and in finding that "Dr. Gold's recommendation for a bone scan and neurological tests to verify the indications on the x-rays and determine the cause of the cervical problem were never followed" (p.6). He contends that the insurance adjuster arranged for him to see Dr. Gold in the first week of June 1993. After receiving Dr. Gold's report, he spoke to his family doctor, Dr. Wooder, who arranged for a bone scan, as suggested by Dr. Gold. As a result of the bone scan, Dr. Wooder referred him to Dr. Ghouse.

I find no basis for Mr. Boateng's assertion that he saw Dr. Gold in the first week of June 1993. Dr. Gold's report states that his assessment was done on July 6, 1993. Further, Mr. Boateng's response to Dr. Gold states a number of times that the appointment was for July 6, 1993.[5]

However, the remainder of Mr. Boateng's submission has merit. Exhibit 1 includes a report from the Henderson Hospital showing that a bone scan was done on July 29, 1993 at the request of

[4] Exhibit 1, Report of Dr. Alan C. Gold, dated July 9, 1993.

[5] Exhibit 1, Undated letter from Mr. Boateng to Dr. Gold.

Dr. Wooder. Dr. Ghouse subsequently considered the results in his report of August 10, 1995:

> I have reviewed the x-rays of his cervical and dorsal spine which do not show any fractures or dislocations. He has early degenerative changes over the mid cervical spine, however, but this is not significant. Bone scan has also been done that show changes compatible with what is seen on the x-rays ie. the osteoarthritic changes.

Although the arbitrator missed the fact that a bone scan was done, I do not believe this compromises his conclusions. He referred to the lack of a bone scan as a reason for accepting Dr. Gold's finding that Mr. Boateng had not suffered a cervical fracture, but only a soft tissue injury. According to Dr. Ghouse, the bone scan supports this finding, rather than undermining it.

D. Mr. Boateng's Business Arrangements

Mr. Boateng contends that the arbitrator erred his negative evaluation of his business practices. In Mr. Boateng's submission, the Ontario Sports & Acute Injury Centre was run legally and properly, and the arbitrator's opinion was based on speculation, not evidence.

I am not persuaded that the arbitrator erred, but even if I had concerns, he makes it clear that this was not the basis for his decision. He rejected Mr. Boateng's evidence because of his "lack of objectivity as a professional witness in his own treatment and the lack of independent support for the duration and frequency of Mr. Boateng's self-treatment" (p.7). I find no reason to interfere with this assessment.

E. Post-accident Income

Mr. Boateng takes issue with the arbitrator's findings about his post-accident income. He submits that the arbitrator erred in finding that "Mr. Boateng admits receiving a $60,000 annual salary plus benefits and commissions from the Centre, which he owns, directs, works at and which billed his

treatments" (p.7). Mr. Boateng submits that this was his pre-accident salary, not his post-accident income. He states that he was employed until November 1992 by another clinic at an annual salary of $60,000, plus a $3,000 bonus every three months.

I accept Mr. Boateng's submission. In his application for accident benefits, he reported that he earned $51,132.10 in the 36 weeks from March 2, 1992 to November 24, 1992. This is consistent with the 1992 T4 form issued by his former employer, Niagara Sports & Injury Rehabilitation Clinic.[6]

In my view, however, this is not critical. The arbitrator's point was that despite his claimed inability to work, Mr. Boateng continued to be paid. In his application, Mr. Boateng reported that he received a monthly draw of $7,000 from his clinic, the Ontario Sports & Acute Injury Centre. He also completed an Employer's Confirmation of Income form on his own behalf. It states that from December 18, 1992 to the present, he had been self-employed, earning $1,750 per week. This is consistent with a monthly draw of $7,000 ($7,000 ÷ 4 = $1,750).

Further, evidence of Mr. Boateng's post-accident income was only one factor in the arbitrator's assessment of his credibility. I am not persuaded that the arbitrator's assessment would have been any different if this factor had been removed from the analysis.

F. Ability to Work

Mr. Boateng submits that his evidence about his ability to work after the accident was consistent. In an attachment to the Notice of Appeal, he explains his position as follows:

> Due to pain I could not work for 2 weeks following the accident, but thereafter I have been working through the pain.

[6] Exhibit 4.

> For the night of the accident in December 22nd, 1992 to January 4th, 1993, I spent most part of my time in bed which is about two weeks after the accident. Thereafter from January 5th, to February 1st, 1992 [*sic*] I worked through the pain for 2 hours doing administrative work and from February 1st to May 30th, 1993 continue to work with the pain.

My review of the documents convinces me that Mr. Boateng provided inconsistent, or at least confusing, information about how much he was working after the accident. More importantly, however, I agree with the arbitrator that "absolutely no independent medical evidence verifies Mr. Boateng's claim that he suffered a substantial inability to perform the essential tasks at OSAIC [Ontario Sports & Acute Injury Centre]" (p.9). Even Dr. Ghouse, who accepted that Mr. Boateng had ongoing problems, did not state that he is or was unable to perform the essential tasks of his occupation as a result of the automobile accident.

IV. CONCLUSION

Mr. Boateng's claim was seriously compromised by his decision to assess his own therapeutic needs and to treat himself. Without independent medical evidence covering the critical period, Mr. Boateng's testimony was critical. The arbitrator concluded, however, that he could not rely on Mr. Boateng due to his conflict situation and inconsistencies in his evidence. For the reasons set out above, I am not persuaded that the errors alleged by Mr. Boateng provide a sufficient basis for rescinding or varying the arbitrator's order.

July 22, 1996

David R. Draper
Director's Delegate