

**ONTARIO INSURANCE COMMISSION**

BETWEEN:

**FELIX ASIAMA**

Applicant

and

**COMMERCIAL UNION ASSURANCE COMPANY**

Insurer

**DECISION on a PRELIMINARY ISSUE**

**Before:** Deena Baltman

**Heard:** Ontario Insurance Commission, on September 23, 1997,  
with written submissions on October 14 and 29, 1997.

**Appearances:** Mark Addo for the Applicant  
Neil Colville-Reeves for the Insurer

**Issue:**

This case deals with the issue of whether an applicant is precluded from receiving accident benefits when he is entitled to benefits from the Workers' Compensation Board (WCB) following an accident.

The Applicant, Felix Asiamama, was injured in a car accident on March 3, 1995, while working as a courier. Although Mr. Asiamama was eligible for workers' compensation benefits, he instead applied to Commercial Union Assurance Company (Commercial)

for accident benefits under the *Schedule*.<sup>1</sup> Commercial submits that Mr. Asiana is not entitled to accident benefits because he was in the course of his employment when the accident occurred. It asserts that he is obliged to claim benefits from the WCB, in accordance with section 76 of the *Schedule*, which states:

**76.** (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan.

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 10 of the *Workers' Compensation Act* so long as the election is not made primarily for the purpose of claiming benefits under this Regulation.

The issue in this hearing is:

1. Does section 76 of the *Schedule* preclude Mr. Asiana from receiving accident benefits?

**Result:**

1. Mr. Asiana is precluded from receiving accident benefits.

**Evidence and Findings:**

**Facts**

Mr. Asiana, who is now 34 years old, sustained soft tissue injuries to his neck and back in a car accident on March 3, 1995. Then employed as a courier, he was making a delivery when his vehicle was struck from behind. He remained off work until October 4, 1995, when he returned to modified duties. He testified that because of his injuries, his performance is now poorer than before the accident, and he therefore earns less income.

Shortly after the accident, Mr. Asiana applied to the WCB for benefits. The Board sent Mr. Asiana an election form which explained that he could claim workers' compensation

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<sup>1</sup> The *Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996*, Ontario Regulation 776/93.

benefits **or** bring a legal action against those responsible for the accident. When Mr. Asiama failed to sign and return the election form, the Board determined that he had withdrawn his claim.<sup>2</sup>

Mr. Asiama testified that although he knew he was entitled to workers' compensation benefits, he elected not to claim them because he believed that he could recover more benefits from his auto insurer. This is evident from a statement he gave shortly after the accident:

I am entitled to Workers Compensation Benefits. There is not a wage continuation plan or sick benefits. I have applied to Workers Comp. I have received election forms from WCB. These have not yet been returned. I have spoken to my lawyer who advised due to the injuries it is better that I claim the "no fault" benefits as everything would be covered. If I chose W.C.B. I would give up my rights for coverage under the auto policy.

Mr. Asiama testified that he was "concerned about [his] long term health" and thought that accident benefits provided better protection in the long run than workers' compensation benefits.

He first applied for accident benefits on April 10, 1995. At that time he expected that his injuries would resolve and he would be able to return to his full duties. He acknowledged that he then had no intention of bringing a court action. When Commercial denied benefits, Mr. Asiama applied for mediation, which took place in September of 1995. Mr. Asiama testified that at that point he still believed he would recover completely from his injuries, and therefore had no intention of commencing a court action. By June 3, 1996, when he applied for arbitration, he had still not begun a court action, although by then he had an "idea that [he] might need to sue."

Mr. Asiama finally issued a Statement of Claim on March 11, 1997, when the "two-year limitation period was about to be over." He stated that he did so in order to protect his entitlement to accident benefits. As he said, "if I wanted to bring action [in the courts] I would have done that earlier on." He is aware that the defendants in the court action

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<sup>2</sup> Exhibit 1, Tab 3, p. 23

argue that he missed the limitation period, because the claim was commenced eight days after the two-year anniversary of the accident.<sup>3</sup>

### **Analysis and Conclusion:**

The general purpose of section 76 is clear. A person injured in the course of his employment must claim benefits from the WCB, rather than from his auto insurer. One exception is where an applicant, instead of claiming workers' compensation benefits, elects to bring a claim in tort, provided the election is *bona fide*. As section 76 states, the exception does not apply if the claimant brought an action "primarily for the purpose of claiming [accident] benefits."

The evidence indicates that Mr. Asiama brought a court action only so that he could claim accident benefits, believing them to offer better coverage than workers' compensation benefits. He clearly viewed the election as a choice between workers' compensation benefits *or* accident benefits. As his counsel stated in his written submissions, "**he elected for Accident Benefits** solely for his health purposes...he feared that **if he opted for Workers Compensation Benefits** and three (3) years down the road, his pains resurfaced he would not have recourse or would not be able to ask for any more Benefits from Workers Compensation Benefits for his pains." (emphasis added) But this is precisely what section 76 is designed to preclude: the legislation directs that as between the two benefit schemes, regardless of their relative merits, where an applicant is injured in the course of his employment he is obliged to recover benefits from the WCB.

Even without Mr. Asiama's admission that he brought a court action only to support his claim for accident benefits, I find that his court action is not *bona fide*. The claim was likely doomed because it was issued eight days after the two-year anniversary following the accident. Moreover, the medical evidence is scant and unlikely to support the threshold test of entitlement under Bill 164, being "serious impairment of an important

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<sup>3</sup> The action against Commercial has since been dismissed, for reasons which are not clear (Exhibit 1, Tab 9).

physical, mental or psychological function." Finally, even if his injury met this test, his claim is also subject to a \$10,000 deductible.

I conclude that Mr. Asiama's action is not *bona fide* but was brought solely for the purpose of claiming accident benefits. Consequently, Mr. Asiama is precluded from claiming accident benefits.<sup>4</sup>

**Order:**

1. Mr. Asiama is precluded from receiving accident benefits, under section 76 of the *Schedule*.

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Deena Baltman  
Arbitrator

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March 31, 1998  
Date

**Witnesses:**

1. Felix Asiama, the Applicant

**Exhibits:**

- Exhibit 1
- Exhibit 2

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<sup>4</sup> Mr. Asiama did not argue that Commercial had any obligation to "pay pending dispute" under section 76(5). Nor did he suggest any reason why he could not abandon his court action and re-assert his claim for workers' compensation benefits.