

### **CASE 3**

*Permanent Incapacity Benefit – does the complainant qualify for a higher percentage?*

#### Background

1. The complainant is a 59 year old dentist who has had a PPS policy for an extensive period of time. He suffers from:
  - Chronic ischaemic heart disease with previous myocardial infarctions,
  - Angina pectoris,
  - Hypertension,
  - Gout,
  - Hypercholesterolemia,
  - Loss of vision in one eye.

He stopped practising as a dentist and submitted a claim to PPS and they paid his Sickness benefit for two years. Subsequently the insurer considered him for a Partial Permanent Incapacity award and assessed him to be 20% Partially Permanently Incapacitated.

2. To be considered for this benefit the claimant must be “permanently but not totally unable to carry out his own profession as well as any other profession that could be carried out by persons with similar or comparable qualifications.” In terms of PPS’ policy the benefit is paid out as either 20% or 60% of the insured sum.
3. The complainant was dissatisfied with the decision to pay him only a 20% benefit and lodged a complaint with the office.
4. The insurer took the view that the complainant was in fact still practising his profession on a partial basis. This was in response to the complainant

stating that he occupied his day in part by “Developing managed health care programme for African continent.”

5. PPS also contended in response to the complaint that the complainant could practice as a clinical dentist, albeit not on a full day basis.
6. PPS further contended that the complainant had not been on maximum medical intervention as required in terms of the policy.
7. Medical information

- The medical evidence indicated that the complainant had suffered two myocardial infarctions and that he had extensive coronary calcification involving major coronary arteries but that his left ventricular systolic function was in the normal range. He had opted not to undergo repeat coronary angiography with the view to revascularisation, likely in his case to be a coronary bypass operation.
- In the ophthalmic surgeon’s opinion, because the complainant had reduced visual acuity of 6/60 which gives loss of binocular visual acuity and most importantly loss of depth perception, he was effectively functioning with only one eye. According to the ophthalmic surgeon this is a severe handicap in the complainant’s profession as a dentist as “it would be very difficult to position instruments accurately particularly when working at the back of the mouth” and in his view the complainant was totally unfit to perform his professional duties as a dentist.
- According to the report by the occupational therapist and physiotherapist, who could not comment on his visual acuity, the

complainant could cope for three hours with the physical demands of dentistry but only if he should “take regular rest breaks during that three hour period”.

- The complainant presented with Acute Coronary Syndrome followed by triple stent insertion in May 2009.

8. In response to our provisional determination in favour of a 60% benefit for the complainant, PPS confirmed their previous decision that the complainant only qualified for a 20% benefit.

#### Final determination

9. We did not find PPS' arguments convincing.
10. We determined that the complainant could not practice as a clinical dentist due to his medical condition.
11. His voluntary work in a project to make affordable health care available for people across Africa was not regarded by the office as practising his profession as a dentist. There was no indication that this was a money making venture and it was in any event not a profession. It appeared to be an altruistic project which the complainant was pursuing out of interest.
12. In our view the policy did not require maximum medical intervention. On general principles an insurer could not expect a claimant to have undergone anything more than **adequate** medical treatment. In our view the insurer had not shown that the medical treatment the claimant had undergone fell short of this.

13. We were of the view that the complainant could still pursue non-clinical work using his professional qualifications but not on a full-time basis.
14. We determined that the insurer should pay the benefit at the rate of 60% instead of 20%.

## **DETERMINATION IN TERMS OF RULE 3.2.2 OF THE RULES OF THE OMBUDSMAN FOR LONG-TERM INSURANCE**

### Background

1. The complainant is a 59 year old dentist who according to him has had a PPS policy for ± 30 years. He suffers from:

- Chronic ischaemic heart disease with previous myocardial infarctions,
- Angina pectoris,
- Hypertension,
- Gout,
- Hypercholesterolemia,
- Loss of vision in one eye.

He submitted a claim to PPS and they paid his Sickness benefit for two years. Subsequently the insurer considered him for a Partial Permanent Incapacity award and assessed him to be 20% Partially Permanently Incapacitated.

2. The complainant was dissatisfied with the decision to pay him only a 20% benefit and lodged a complaint with the office.

3. The policy provides for the following:

*“Permanent Incapacity shall mean either total permanent incapacity or partial permanent incapacity.*

*Total Permanent Incapacity shall mean that a policyholder is in accordance with PPS Insurance’s permanent incapacity assessment process permanently and totally unable to carry out his own profession as well as any other profession that could be carried out by persons with similar or comparable qualifications.*

*Partial Permanent Incapacity shall mean that a policyholder is in accordance with PPS Insurance’s permanent incapacity assessment process permanently but not totally unable to carry out his own profession as well as any other*

*profession that could be carried out by persons with similar or comparable qualifications.”*

4. In terms of PPS’ policy a Partial Permanent Incapacity benefit is paid at either 20% or 60% of the full benefit.
5. On 24 March 2009 PPS in response to the complaint explained their reasoning for the decision to pay the complainant only a 20% benefit. They took the view that “it is also clear that he still practices his profession, even though it is not on a full-time basis” and that he is “working partially” and that “he was still using his professional qualification and experience.”
6. The complainant had stated on the Occupational Questionnaire in response to the question how he occupied his day that he :

- “1. Handle property Portfolio of wife + children*
- 2. Developing managed health care programme for African continent.”*

This second activity was considered by PPS as indicating that he still practices his profession.

7. On 9 April 2009 the complainant explained why he did not agree with PPS’ decision. He stated that the vision of his left eye had not recovered and that his poor sight made “practicing dentistry dangerous.” His cardiac condition was also of such a nature that his endurance was limited. He stressed that he did not have any professional qualifications “*in any other field outside dentistry*” and in response to PPS’ contention regarding his daily activities he stated:

*“I do acknowledge that since I am at home, I do use my intellect. I spend my time at home looking at issues around health care. I have no professional qualifications in this field or any other field outside dentistry.”*

8. In terms of our procedure we referred the complainant's response to PPS for comment on 30.04.2009. We also suggested to them that they reconsider the "20% Permanent Incapacity Award."
9. On the same day PPS responded and informed us that the complainant "DOES have the ability to practice in his profession, he is only unable to do so on a full day basis." They further contended that "the complainant is in fact still able to practice his exact occupation – being that of a clinical dentist." They took the view that "He is involved in a project to make affordable health care available for people across Africa and while this is not medicine in the clinical sense, it is still medicine."
10. They also explained that "the complainant is not on maximum medical intervention and this is a pre-requisite for a Permanent Incapacity award of any percentage."
11. They were of the view that "If PPS applied its definition of permanent incapacity strictly, the complainant should not have been awarded anything, because he is carrying out an alternative occupation and in order to qualify should not even be able to do that."

#### Medical information

12. The medical information which was submitted to us consisted of the claim forms completed by the complainant's medical practitioner; a report by an ophthalmic surgeon; a report by a cardiologist and a report by a cardiologist practicing as part of a cardiovascular group practice specialising in advanced technology; a report by an independent cardiologist instructed by PPS; a Functional Capacity Evaluation report by an occupational therapist and physiotherapist who compiled the report at the instruction of PPS.
13. From the medical evidence it was gleaned that the complainant had suffered two myocardial infarctions and that he had extensive coronary calcification involving major coronary arteries but that his left ventricular systolic function was in the normal range. He had opted not to undergo repeat coronary angiography with the view to revascularisation, likely in his case to be coronary bypass operation.

14. In the ophthalmic surgeon's opinion because the complainant had reduced visual acuity of 6/60 which gives loss of binocular visual acuity and most importantly loss of depth perception, he is effectively functioning with only one eye. According to the ophthalmic surgeon this is a severe handicap in the complainant's profession as a dentist as, "*it would be very difficult to position instruments accurately particularly when working at the back of the mouth*" and in his view the complainant was totally unfit to perform his professional duties as a dentist.
15. According to the report by the occupational therapist and physiotherapist, who could not comment on his visual acuity, the complainant can cope for three hours with the physical demands of dentistry but only if he should "take regular rest breaks during that three hour period".

#### Provisional determination

16. The matter was discussed at an adjudicator's meeting and the meeting took the view that on the basis of these reports we found that the complainant had proved that he could not reasonably be expected to practise as a clinical dentist.
17. We could not find any reference in the contract to the fact that it "is a pre-requisite for a Permanent Incapacity award of any percentage" that a claimant has to be on maximum medical intervention.
18. We did not find that the available information supported the conclusion that the complainant's involvement "in a project to make affordable health care available for people across Africa", was "still working in his own profession." We took the view that, whilst the complainant may still be using some of his "professional qualifications and experience", it does not follow that in doing so he is practicing a profession, or that this confirms his ability to "carry out any other profession that could be carried out by persons with similar or comparable qualifications." The doing of the voluntary work (i.e. his involvement in a project to make affordable health care available for people across Africa) by the complainant was not, in our view, practising a profession.

19. After investigation of the submissions and the documentation on file, the decision of the meeting was that the complainant's Permanent Incapacity award should be increased to at least 60% with effect from 05.09.2008.
20. In terms of our procedure both parties were given the opportunity to respond to our provisional determination.
21. On 25 June 2009 PPS informed us that they did not accept our decision. They responded as follows:
  - 21.1 *"Firstly, the meeting (of the PPS' Medical Officers Committee) was unable to find any reference that the complainant's involvement in an affordable health care system for Africa does not constitute a profession because it is voluntary. Any person who starts a business for example does so voluntarily and usually invests a large sum of money into the new business. How is this different from the complainant's case?"*
  - 21.2 On our view that the voluntary work is not practising a profession they considered our *"argument (is) absurd. The mere fact that he is actually doing it proves that he can and is carrying out a profession that can be carried out by persons with similar or comparable qualifications..."* PPS stated that *"If one has to follow your reasoning a person who works as a doctor for a not for gain company is therefore not practicing a profession."* The meeting felt strongly that this unanimous finding by your (our) adjudicators meeting does not make any sense."
  - 21.3 PPS referred us to the definition of "Sickness" in their contract, which they stated requires optimal medical treatment. They referred to a report by an independent cardiologist which mentions that *"He is not on full medical therapy and he has indications to undergo repeat coronary angiography and possible revascularization, which could help his symptoms, but he is reluctant to consider this."* They also referred us to the ASISA guidelines regarding cardiac conditions. They further contended that he is "in breach

of the prescriptions of the ASISA guidelines and strictly speaking he is not even to be assessed for impairment until he has proper treatment.”

21.4 The loss of vision was also not considered an obstacle as “the complainant would still be able to pursue non-clinical dental work as an in-house dental advisor to a medical scheme or a medical officer in a company such as Denis...”

21.5 The final decision was that “PPS can unfortunately not agree with the findings of the Honourable Ombudsman’s office and submits that the award of 20% is more than reasonable, for someone who should not be getting an award at all.”

22. On 29.05.2009 the complainant presented with an acute coronary syndrome and was hospitalised as a result of this. PPS was informed of this and copies of the treating cardiologist’s reports were provided to them, together with the complainant’s comments on their response to our provisional ruling.

23. The report from the cardiologist indicates that the complainant presented with Acute Coronary Syndrome followed by triple stent insertion in May 2009. He was discharged on the following medication:

Ecotrin 1 daily

Plivix 75 mg daily

Crestor 10 mg nocte

Cardiocor 5 mg daily.

24. PPS responded to these submissions and confirmed their previous decision.

Final determination and reasons:

25. The matter was again discussed at an adjudicators’ meeting. The following issues were considered.

Whether the complainant is currently practising his profession?

- 25.1 We agree that not earning an income by itself is not necessarily decisive of the fact that a complainant is not practising his profession but where a professional has not been earning an income for a period of time with no immediate prospect of income and he is involved in a venture which is not a money making venture, this would be a factor in assessing whether he is practicing a profession. There is no suggestion that the complainant has embarked on this project as a money making venture. It appears to be an altruistic venture, and not a business concern.
- 25.2 As PPS itself mentioned in the case 2004/PN/4138 "a primary indicator that the policyholder is no longer substantially practicing his profession, is the fact he is not earning any income".
- 25.3 We wish to point out that a person working as a doctor/dentist for a "not for gain" organisation is, of course, practising a profession. This is not, however, what the complainant is doing. He is involved for no remuneration and no prospect of remuneration in a "project to make affordable healthcare available for people across Africa". This is in our view, not practising his profession or "practising medicine" as contended by PPS.
- 25.4 This present venture cannot, therefore, be equated with the situation as described by PPS in 21.1 where a person embarks on a business from which he hopes to derive income in the future but which in the short term requires him to invest capital and not earn income immediately.
- 25.5 In our view it cannot therefore be stated that the complainant is currently practising his profession.

## Proper medical care

- 25.6 According to PPS the complainant is not on maximum medical intervention and that this is a pre-requisite for a permanent incapacity award of any percentage.
- 25.7 In this regard PPS referred us to the definition of “Sickness” which requires optimal medical treatment. The wording in the June 2006 version of the policy states the following:

### *“Sickness”*

*shall mean any significant inability to attend to the Policyholder’s usual professional duties due to disease, injury, accident or other cause or condition, requiring optimal medical or dental treatment or supervision in the form of hospitalisation, surgery, rehabilitation or medication.*’ (my underlining)

In turn Permanent Incapacity refers to the fact that the policyholder must be prevented due to “Sickness” from carrying out his professional duties.

- 25.8 It is quite correct that the definition refers to “requiring optimal medical or dental treatment”. It is not certain exactly what the meaning of the underlined wording is in the context of the definition, as it is not clearly worded. What it does not state, is that the **policyholder** is obliged or **required** to undergo optimal medical treatment, in order to qualify for a benefit. PPS can accordingly not rely on this wording in support of their argument about maximum medical intervention.
- 25.9 In order to impose a condition such as that on a policyholder, the wording of the policy would have to be unambiguous and clear that there is such an obligation.
- 25.10 PPS also refers to the ASISA (previously LOA) Guidelines in this regard. We need to point that the Guidelines are exactly that, guidelines. They are

not part of the contract. The Ombudsman's office uses these Guidelines extensively and regard them as persuasive but they cannot be "elevated" to the status of contractual documents. The specific passage quoted from the ASISA Guidelines refers to "proper" treatment not "optimal" treatment, or, "maximum medical intervention".

25.11 We also wish to add that we are of the view that "adequate" rather than "optimal" treatment is a reasonable requirement and without a specific policy provision that would be the requirement in terms of general principles. Our office is of the view that an insurer cannot expect a complainant to subject himself to invasive medical treatment such as surgery as part of the requirement for "adequate medical treatment". In assessing the issue of "adequate treatment" we will always take the particular circumstances of the complainant into account and these would include the financial and medical risk factors of the particular complainant.

25.12 In any event our office is of the view after obtaining a medical opinion, that the medical intervention which the complainant has undergone is "adequate" medical treatment for his condition. In this regard we refer to the triple stent insertion in May 2009 as well as the prescribed medication. As regards his treatment prior to this, in our view it has not been proven that he did not undergo "adequate" treatment, given his medical history. One would need biometric details such as weights, serial lipid values, exercise programs to determine whether his treatment fell short of being "adequate" and these details have not been provided by PPS.

25.13 PPS had also referred us to clause 9 of their policy which requires the policyholder to adhere to "the instructions of his medical attendant". However, no evidence was presented by PPS that the complainant failed to follow the instructions of his own medical attendant.

25.14 If there are various treatment regimes available and a policyholder chooses to follow the less invasive treatment regime and his medical attendant regards it as viable, the policyholder has not breached this requirement.

### Percentage of Partial Permanent Incapacity due

26. In assessing this complaint our office took into account all of the medical reports on file as well as the correspondence. After having regard to all the evidence we are of the view that the complainant, due to his severe and critically located coronary arterial disease and his critical loss of vision in his one eye, is unable to attend to his usual professional duties, as a clinical dentist.
27. We do agree with PPS that the complainant is able to pursue non-clinical dental work, for instance as an in-house dental advisor to a medical scheme. We are not convinced, however, that the complainant can do this on a full-day basis due to his medical condition. We, therefore, regard a 60% instead of a 20% Permanent Partial Incapacity award as reasonable in the circumstances.
28. The unanimous decision of the meeting was to confirm our provisional ruling that the complainant's Permanent Incapacity award should be increased to 60% with effect from 05.09.2008.
29. PPS is therefore instructed to make the appropriate payments to the complainant within 30 days of this determination.

Please confirm payment before or on 08.10.2009.