

The complaint

Mr A complains because Wakam hasn't paid his personal accident insurance claim.

All references to Wakam include the agents appointed to handle claims and complaints on its behalf.

What happened

Mr A was insured under a motor fleet insurance policy, provided by Wakam. The policy provides for the payment of a personal accident benefit in certain circumstances.

Following an accident in April 2021 during which Mr A was injured, Mr A made a personal accident claim with Wakam. Wakam arranged for Mr A to be examined by an orthopaedic surgeon who I'll call 'Dr S' and subsequently said Mr A's claim wasn't covered under the terms and conditions of the policy.

Mr A disputed some of the information which Dr S had relied on in his report and complained to Wakam. Mr A later sent Wakam further evidence in relation to his claim, including his own medical report provided by a consultant orthopaedic surgeon who I'll call 'Dr M'. Wakam maintained its decision that Mr A's claim wasn't covered, so Mr A brought the matter to the attention of our service.

One of our investigators looked into what had happened and said he didn't think Wakam had acted unfairly or unreasonably in the circumstances. Mr A didn't agree with our investigator's opinions, so the complaint was referred to me. I made my provisional decision about Mr A's complaint earlier this month. In it, I said:

'I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.'

Dr M's report was obtained after Wakam issued its final response letter to Mr A. However, Wakam has consented to our service considering the events that happened up until the time Mr A's complaint was brought to us in January 2024 as part of this complaint.

When making my provisional decision I've taken into account relevant industry rules and guidance – including the 'Insurance: Conduct of Business sourcebook' ('ICOBS') – set out by the regulator, the Financial Conduct Authority. ICOBS says, amongst other things, insurers must handle claims fairly and shouldn't unreasonably reject a claim.

The policy which Mr A is insured under provides for a benefit for 'Permanent Total Disablement' and/or 'Permanent Partial Disablement' to be paid in certain circumstances. Mr A doesn't dispute that he is capable of carrying out work of some kind and is, as I understand it, currently working in a self-employed capacity. This means that Mr A doesn't meet the criteria for a 'Permanent Total Disablement' claim to be paid to him.

The issue in dispute, and for me to determine, is whether Mr A meets the criteria for a 'Permanent Partial Disablement' benefit. The policy terms and conditions define 'Permanent

Partial Disablement' as:

'An injury which has a significant impact upon, but does not prevent entirely, the user carrying out any business or occupation and is likely to last continuously for one year, and at the end of which period is without prospect of improvement.'

It's for Mr A to demonstrate that he meets the criteria for a benefit to be paid to him. This means Mr A must provide evidence to show that his injury had a significant impact on his ability to carry out any occupation, lasted (or was likely to last) continuously for one year, and at the end of that year the injury didn't have any prospect of improvement.

My interpretation of the policy terms is that any improvement in Mr A's injury during the one-year period following his injury wouldn't prevent him from making a successful claim for 'Permanent Partial Disablement'. Instead, what's relevant is whether the injury was still impacting his ability to carry out any occupation and the injury didn't have any prospect of further improvement at the end of that year [emphasis added].

In reaching this provisional decision, I've taken into account the available medical evidence to decide what I think, on the balance of probabilities, Mr A's situation was most likely to have been at the one-year point after his accident (so, in April 2022). It's not my role to make medical judgments or to substitute expert medical opinion with my own. Instead, I must decide whether I think Wakam acted fairly and reasonably in the circumstances when relying on the medical evidence.

I understand Mr A suffered a number of injuries in the accident, and I have no doubt that these other injuries have also impacted Mr A's life and abilities. However, in making my provisional decision, I've confined myself to considering Mr A's ankle injury as this has been the focus of most of the medical evidence and is the key issue in dispute between Mr A and Wakam.

Wakam's position is that Dr S's report dated 2 September 2022, based on an examination of Mr A on 16 February 2022, didn't confirm that Mr A's injuries were without any prospect of improvement. Having considered Dr M's report dated 7 August 2023 (based on an examination of Mr A carried out on 14 July 2023), Wakam's position is that a reference to improvement over a period of 24 months means that Mr A doesn't meet the policy criteria for a 'Permanent Partial Disablement' claim.

I've given careful thought to the content of both of these reports.

Wakam initially told Mr A that his claim could only be assessed one year after the accident – which would have been in April 2022. But Dr S examined Mr A two months prior to this date and noted that treatment was not yet complete. And Dr S's report is specifically noted to have been carried out without the results of a February 2022 referral to a surgeon for his ankle injury.

On examination of Mr A, Dr S reported 'Dorsiflexion 10 degrees, plantar flexion 30 degrees...' in relation to his ankle. By way of opinion and prognosis, Dr S relied on the content of a physiotherapy discharge letter dated 29 October 2021 and said:

'In the ... ankle he [Mr A] clearly had developed near normal function by the time he was discharged by the Physiotherapists as noted above, functional recovery would be expected at twelve to eighteen months from this type of injury.'

However, Mr A later provided evidence directly to Wakam relating to his NHS complaint about the accuracy of the physiotherapy discharge letter. This evidence acknowledges the lack of recognition of the impact of Mr A's injuries and highlighted that the relevant

physiotherapy team would be reminded of exploring, discussing and making clear records of patient discussions within medical notes.

While I accept the terms and conditions of this policy say Wakam and Mr A are bound by the content of Wakam's medical opinion, I'd expect Wakam to take any subsequent clarification of the accuracy of medical reports into account when considering its position on the validity of a claim that has been made.

So, although I don't think Wakam acted unfairly or unreasonably when it initially declined Mr A's claim based on the content of Dr S's report, it's not clear why Wakam arranged for Mr A to be examined by Dr S as early as it did. And I think the subsequent evidence provided by Mr A relating to his NHS complaint about the physiotherapy records impacts the persuasive weight of Dr S's conclusions in his report of 2 September 2022.

Dr M's report dated 7 August 2023 was based on an examination of Mr A carried out approximately 15 months following the first anniversary of his accident. So, this report is less contemporaneous to the relevant one-year date (April 2022) set out in the policy terms than Dr S's. However, given the clarification which was obtained by Mr A in March 2023 about his NHS complaint relating to his physiotherapy records, I'm satisfied that Dr M's report is based on more accurate and reliable information than that of Dr S's. So, I find Dr M's report to be more persuasive.

Dr M's report notes that Mr A initially presented at hospital with 'significant limitation to his range of motion' in his ankle. The report states that, as of 3 February 2022, Mr A still had ongoing problems with his ankle and still used a crutch. Notes of a hospital consultation on 29 March 2022 – within three weeks of the one-year anniversary of Mr A's accident – record Mr A as having 'neutral dorsiflexion and plantar flexion of 20°'.

Dr M's findings on examination of Mr A in July 2023 were as follows:

'Range of motion of the ... ankle showed dorsiflexion of up to 10° beyond neutral and 20° plantar flexion. The total range of motion of the ... ankle is 30° of motion.'

Dr M went on to say that Mr A 'has got residual symptoms in the ... ankle consistent with the comminuted complex injury' and 'ongoing limitation in the range of motion in the ... ankle'.

Dr M concluded:

'In my opinion, the claimant reached maximum improvement in the ... ankle within 24 months from the date of the index accident. In my opinion, I do not expect any further improvement in the ... ankle and the current limitation will be permanent.

The claimant will have limitation of range of motion in the ... ankle and he will require to adapt his life around the persistent symptoms in the ... ankle.

...

Generally, following such a complex ankle injury, patients do not regain their existing level and function. The claimant will require to adapt to his current range of motion and function.

In my opinion, the current symptoms in the ... ankle will disadvantage the claimant on the open labour market and affect his working capacity and he will not be suitable for jobs with high physical demand or jobs that require him to be on his feet for long periods of time. The claimant will be more suited to less physical type jobs with less

physical demand.'

Dr M's report doesn't confirm what the position was with Mr A's ankle in April 2022, on the one-year anniversary of the accident. I accept that Mr A didn't obtain his own report closer to the time of the one-year anniversary of his accident through no fault of his own (in part, because of the delay between Dr S's examination of Mr A in February 2022 and the issuing of Dr S's report in September 2022, and the issuing of the NHS complaint letter in March 2023).

However, I'm satisfied that Dr M's report indicates it's likely there was some improvement in Mr A's ankle movement at some point between 29 March 2022 and 14 July 2023. And, given Dr M's reference to a period of 24 months from the accident date within his report, I can't fairly conclude it's likely that Mr A's ankle had no prospect of improvement in April 2022 (one year after the accident). This means I don't think Mr A has demonstrated that he meets the policy requirements for a benefit to be paid to him.

I appreciate Mr A will be very disappointed with my provisional findings, but I need to reach an outcome that is fair and reasonable for both parties. I have no doubt that the effects of Mr A's ankle injury are ongoing and are likely to be permanent, and Wakam has said it doesn't doubt the severity of Mr A's injuries either. But a benefit is only provided under this policy in very specific circumstances where there is no prospect of improvement of an injury at the one-year point after an accident, and I don't think Mr A has provided medical evidence which demonstrates this was the case.

For the avoidance of doubt, I have also considered Dr M's second report dated 4 October 2023 but I don't think the content of that report changes my findings as they relate to the prospect of improvement of Mr A's ankle injury in April 2022.

I've taken into account Mr A's comments about the various state benefits and aids that he is in receipt of. But the criteria for obtaining such benefits and aids aren't necessarily the same as the criteria which Mr A needs to meet in order for a 'Permanent Partial Disablement' claim to be paid to him.

In response to our investigator's opinions, Mr A sent us some additional evidence. For the sake of completeness, I've attached this additional evidence to the provisional decision which is being sent to Wakam. But I don't think this evidence demonstrates that Mr A's ankle injury had no prospect of improvement in April 2022. I understand Mr A has since fallen and is experiencing further side-effects as a result. While I'm very sorry to hear this, I don't think this is relevant to whether Mr A's ankle injury had no prospect of improvement on the one-year anniversary of his accident either.

As a final point, Mr A has complained about various delays by Wakam, as well as Wakam's overall handling of his claim. Overall, while I can understand Mr A's frustration at how matters unfolded, I'm satisfied that Wakam generally dealt with things in the way I'd expect it to.

This means I don't intend to direct Wakam to do anything further.'

So, my provisional decision was that I didn't intend to uphold Mr A's complaint.

Wakam accepted my provisional findings. Mr A responded with additional comments and new evidence.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've taken into account all of the recent submissions which Mr A has made but, in line with my remit, I've addressed only those which I think are the key complaint points.

Mr A has raised further reasons as to why he considers Dr S's report to be unreliable. My provisional decision explained why I thought Dr M's report carried more persuasive weight than Dr S's, and, for the avoidance of doubt, I didn't rely on the content of Dr S's report when reaching my provisional findings.

I understand that Wakam previously questioned the permanency of Mr A's injuries. However, Dr M said the limitations in Mr A's ankle as at the date of his first report were permanent and my provisional findings were that, based on the available medical evidence, Mr A's ankle injury is likely to be permanent. The permanency of Mr A's ankle injury isn't the reason why I don't think his claim is payable. Instead, I don't think Mr A's claim is payable because he hasn't provided medical evidence to demonstrate that his ankle injury had no prospect of improvement after April 2022.

I understand Mr A feels there has been a misunderstanding about Dr M's comments regarding the 24-month period. However, I can only make my decision based on the available medical evidence and, based on the content of Dr M's report, I still think it's more likely than not that there was some improvement in Mr A's ankle injury after April 2022.

I've taken into account what Mr A has said about his business and the products he sells, and my provisional decision acknowledged Dr M's comments about Mr A's working capacity. But this policy doesn't operate to provide cover just because Mr A's ankle injury is permanent and his work has been impacted. Mr A also needs to demonstrate that there was no prospect of his injury improving at the one-year point after his accident.

I appreciate Mr A feels the policy definitions are unfair but Wakam is entitled to decide what level of risk it is prepared to accept in return for the payment of a premium by the policyholder. This isn't a standalone personal accident insurance policy taken out for the primary purpose of covering a claim for injuries, where I might expect to see broader definitions of insured events – it's a motor fleet policy taken out by a third-party policyholder covering a number of different insured perils and, as such, the personal injury benefit provided is a limited one. Any individuals seeking to make a personal accident claim under this policy would need to demonstrate that they meet the same definition of 'Permanent Partial Disablement'.

In response to my provisional decision, Mr A provided new medical evidence – a medical report from a Dr who I'll call 'Dr G' dated 16 September 2024. This didn't form part of the original complaint which Mr A asked our service to look into, and it's not possible for Mr A to submit new evidence to our service directly for our consideration at this stage in his complaint.

Under the rules that govern us, I cannot consider or comment on evidence unless the business involved has been given the opportunity to consider and comment on that evidence first. If Mr A wants the medical report from Dr G to be taken into account, then he'll need to present this to Wakam directly in the first instance to see whether the new evidence changes Wakam's position on his claim. If Mr A remains dissatisfied then he has the right to bring a new complaint about Wakam to the attention of our service.

Mr A has mentioned that his back condition has significantly worsened and I'm sorry to hear this. But Mr A's back condition wasn't in dispute as a reason for this claim decline and Mr A didn't, for the most part, present medical evidence relating to his back in connection with this complaint. The medical evidence presented and disputed all relates to Mr A's ankle injury.

Mr A has pointed to poor online reviews about Wakam, but this isn't relevant to the individual circumstances of Mr A's complaint, which is all I have the power to consider.

I have every sympathy for the position which Mr A has found himself in, but I don't think Wakam has acted unfairly or unreasonably in the circumstances.

For these reasons, as well as the reasons set out in my provisional decision, I won't be asking Wakam to do anything more.

My final decision

My final decision is that I don't uphold Mr A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 23 October 2024.

Leah Nagle
Ombudsman