**MANAGING LONG-TERM DISABILITY CLAIMS**

From the moment a potential long-term disability claimant contacts your office, you must be analyzing and strategizing on the appropriate management of the file. Most of the claimants seeking representation have coverage under a group disability policy. Most of my comments below in this paper address the typical terms of a group disability policy. Policies may vary from company to company and employer to employer, however, many of the terms are similar.

# Disability Test

In order to qualify for long-term disability benefits, the policy usually requires that the claimant be “totally” disabled from their own occupation (known as the “own” occupation test). This test usually applies during the first 24 months of disability payments. Thereafter, the policy usually stipulates that payments are only made to the claimant if they are “totally” disabled from performing any occupation within their training, education or background (known as the “any” occupation test).

# Own Occupation Test

The term “total” disability has been defined in *Sucharov v. Paul Revere*, *[1984], I.L.R. 1-1732 (S.C.C.).* In this case, the owner/manager of an insurance brokerage had to perform all tasks of the business including sales, negotiation with insurers, marketing and bookkeeping. The claimant suffered from hypertension and anxiety and could not perform all of the tasks. The claimant could perform most of the tasks on a limited basis. Justice Laskan, speaking for the Court, determined that in order to define “total” disability, one must look at the job as a whole. He went on to determine that the insured is disabled so long as he or she could not perform “substantially” all of the normal duties of their occupation.

Although the *Sucharov* case interpreted the “own” occupation test, this logic has been applied to “any “ occupation test.

Furthermore, the Courts have often stated that the insured should be considered disabled unless he or she can perform their regular duties on a consistent and continuous basis. In other words, the insured may still be considered disabled, even if they are able to work in a sheltered/non-competitive type of environment. *Dale v. Commercial Union* *[1980], I.L.R. 1-1271 (O.C.C.).*

# Onus

The claimant has the responsibility to prove on a balance of probabilities that he or she qualifies for the disability benefits. The best way to prove that the claimant is unable to perform their duties is to have them attempt return to work. In fact, there is an often quoted paragraph from the case of *Foden v. Co-Operators (1979), 88 D.L.R. (3d) 750* as follows:

“No one…should be discouraged from attempting to take up their former employment or any work out of fear that the attempt might be held against them. Far from necessarily proving that an insured has capability of performing his task, it may … prove the reverse. There is no better evidence of incapacity to perform a task than the failure of honest and sustained attempt to do it.”

Even if the claimant manages part-time or modified return to work, the individual still may qualify for disability benefits. *Kohoe v. Safeco Insurance [1993], I.L.R. 1-2951 (O.G.D.)*. If the claimant is unable to make an attempt at a return to activities, then you must obtain very strong medical evidence to support total disability. In this paper, I cannot specifically address the concerns with respect to the use of particular experts. In general, it is preferable to obtain medical-legal reports from treating doctors. However, if you are at all unsure about whether or not the treating physicians are appropriate, then do not hesitate to retain your own experts.

# Any occupation test

After receiving long-term disability benefits for 24 months, the claimant normally must demonstrate that he or she is disabled from any occupation within their training, education or background (“any” occupation test).

In order to determine whether a new job is within the claimant’s training, education or background, we must look at reasonably comparable alternatives to the pre-disability employment. The alternative work must be reasonably comparable to his or her former job in terms of “status and reward”. *(Rutherford v. Crown Life (1996) 38 C.C.L.I. (2d) 260 Alta. Q.B. affirmed A.C.A.)*.

Comparing the nature and status of different types of work is difficult. It appears from most of the cases to be a subjective analysis. Much will depend on the individual’s background, including the length of time they had trained for their career, the length of time they had worked in a particular career, transferable skills, etc. For example, if the claimant had been working as a welder for 20 years and had only done this type of work then it would not be reasonable to suggest that this claimant is not disabled because they could be a parking lot attendant.

Remuneration is the most significant issue in determining whether or not the new alternative work is reasonably comparable to the claimant’s previous employment. There have been cases which suggest that someone who only makes 60% of what they did prior to their disability, may not be eligible for ongoing long-term disability benefits. *Millward v. Maritime Life (1989), 38 C.C.L.I. 184 (Alt. C.A.)*. However, in my experience, if there is greater than 20% differential between the pre and post disability income, then it should be viewed as a serious factor in determining whether the alternative employment is, in fact, reasonable.

# Resolution of LTD Claims

Whenever you have a long-term disability claim, it is in my view advisable to issue a Statement of Claim immediately. In my practice, I dictate the Statement of Claim when I open the file. The advantage of long-term disability claims as opposed to motor vehicle accident claims is that there life cycle is much shorter. However, individual counsel must be proactive in managing these claims.

Before issuing the Claim, one must decide whether or not to use the Simplified Rules. It will likely take up to two years from the time of being retained on a long-term disability file to the time that you are able to get to the doors of the Trial. If the claim in that period of time is likely to be worth, less than $50,000, then you should make the claim under the Simplified Rules. Assuming that you are successful at Trial, the Court can only award you damages from the initial denial of the insurance company to and including the time of Judgment.

One should also consider whether or not there is really a claim for bad faith. In truth, only about 5% of claims actually have a viable bad faith component. Thus, if bad faith is not a real concern and the claim is likely to be worth less than $50,000 by the time of Trial, then Simplified Rules make sense. If, on the other hand, you are in doubt, then you should proceed under the general Rules of Civil Procedure and be assessed as appropriate.

As with most civil cases, long-term disability claims are usually settled prior to Trial. There are really two ways to resolve a long-term disability matter. Firstly, the insurance company can decide to pay the claimant everything that is owed to date, including interest and an amount for costs (assuming punitive damages are not seriously an issue). In this case, the insurer will agree to continue to pay the claimant so long as they meet the relevant disability test. I often tell clients that in this scenario they continue to be “married” to the insurance company. In other words, the claimant has an ongoing right to make claims for long-term disability benefits, however, the insurer also has a right to ongoing assessments and updated information to determine future entitlement.

The alternative method of resolving these files is to come up with lump sum settlements which are the second method of resolution. If this method is chosen, one must also consider how the settlement effects the individual’s entitlement to pensions, medical, rehabilitative or other benefits which may be attached to the group policy.

Assuming that a lump sum settlement is the preferred route to resolve the claim, you should obtain a chartered accountant or economist to quantify the claim.

It is important to remember that you must address collateral benefit issues. Usually, the most significant collateral benefit is CPP disability. Every group policy that I have seen, requires deduction of CPP disability benefits. Private policies are a different matter and thus it is important to refer to the terms of the individual contract. However, in most cases, if you obtain CPP, it will lower the amount of long-term disability benefits. In turn, it will also lower the amount of any settlement that can be obtained. However, it is in your client’s best interest to obtain the CPP disability. Firstly, it is always better not to put all your eggs in one basket so to speak. By obtaining part of the disability benefit from CPP and the other part from the long-term disability carrier, you spread risk. Secondly, insurers often appreciate Counsel and claimants who take an aggressive approach to obtaining CPP disability. The group contracts often make it the responsibility of the claimant to obtain collateral benefits. Certainly, if the claimant cannot mitigate their damages in any other way, it is useful to demonstrate compliance when it comes to obtaining CPP disability benefits.

# Taxation

Before settling any long-term disability benefit’s claim, you must determine whether your client’s settlement of long-term disability benefits will be taxable. If he or she paid the entire premium for the policy prior to making the claim, then the benefits paid on the policy are not taxable. If it is unclear, simply ask the defence lawyer or adjuster to provide a written confirmation. If the client’s benefits are not tax-free, then the next step is to determine what portion of the settlement is taxable.

In the case of *Tsiaprailis v. Her Majesty the Queen [2005] 1 S.C.R. 113 (S.C.C.)* the Court decided that the portion of the settlement that reimburses long-term disability benefit arrears is taxable. Those amounts paid for non-pecuniary general damages, punitive/exemplorary/aggravated damages, medical and rehabilitation benefits or **future long-term disability benefits** are not taxable.

It is our responsibility as Counsel to minimize the claimant’s tax liability. During negotiations, we must make it clear to defence counsel and the adjuster what portion of the settlement shall be for past benefits and what portion shall be for future benefits. In fact, this should always be spelled out in your Minutes of Settlement.

Once you have determined the amount to be paid in arrears for long-term disability benefits, then you must take every step to minimize tax payable on the benefits. There are two important strategies to consider for minimizing tax liability. Firstly, in the Minutes of Settlement, you should agree that the insurer will fill out and sign a T1198 form (attached as a Schedule herein). The form will apportion the long-term disability arrears into the year for which they are actually being paid. This can make a significant difference the overall tax liability. For example, suppose that the insurer is going to repay your client $30,000 (which represents LTD arrears for the past three years):

Scenario 1: If the entire arrears are taxable in one year - $30,000.00 for arrears, less personal exemption of $9,000.00 (approximately) taxed at approximately 25% - $21,000 to be taxed at 25% = $5,250.00 in tax paid.

Scenario 2: If the T1198 is filled out and the payments are being disbursed over three years, $30,000 turns into $10,000 per year for three years. The personal exemption is $9,000, so only $1,000.00 is taxable each year, the tax rate is 25%, thus the claimant only pays $250.00 per year, for a total of $750.00 over the three years.

In the example noted above, by distributing the tax liability over three years, you have saved the client a total of $4,500.00.

The second strategy for tax savings is to determine whether or not legal fees paid by the client are deductible from income earned. It is possible for clients to deduct legal fees for services rendered to recoup loss of income. As a practice, in these cases I will give clients a letter stating how much they paid for legal services in order to recoup their loss of income so that they may include it with their tax returns.

Often when people obtain these settlements, I very clearly instruct them to have a chartered accountant do their tax returns and, if necessary, re-do, past tax returns.

It is our responsibility to minimize tax liability within the confines of the Rules.

If you know that a client’s benefits are taxable, then it is incumbent upon you to advise the client to obtain the advice of a financial advisor prior to settling. In addition, it may be wise for Counsel to obtain some advice from a chartered accountant before entertaining settlement negotiations.

# Conclusion

Long-term disability benefit claims can be a rewarding part of personal injury lawyer’s practice. It is hoped that this paper provides some basic guidelines to managing present and future claims.