SUPREME COURT OF NOVA SCOTIA

Citation: Keddy v. Blue Cross Life Insurance Company of Canada, 2012 NSSC 1

Date: 20120103
Docket: Hfx No. 323543
Registry: Halifax

Between:

Shaun Keddy

Plaintiff

v.

Blue Cross Life Insurance Company of Canada

Defendant

Judge:	The Honourable Justice Michael J. Wood
Heard:	December 14, 2011 (in Chambers), in Halifax, Nova Scotia
Decision:	January 3, 2012
Counsel:	Colin D. Bryson, Q.C., for the plaintiff Ian R. Dunbar, for the defendant

By the Court:

[1] This is a motion for summary judgment on evidence made on behalf of the defendant, Blue Cross Life Insurance Company of Canada ("Blue Cross") which is brought pursuant to *Civil Procedure Rule 13.04.*

[2] In support of the motion, Blue Cross filed the affidavit of its counsel, Ian R. Dunbar, attaching as exhibits various documents and correspondence from the litigation productions.

[3] In response to the motion, the plaintiff filed his own affidavit which included as exhibits two letters from his former physician, Dr. D. A. (Gus) Grant.

[4] Both parties agree on the law which is applicable to this motion which is set out in the motion brief filed by Blue Cross. The test to be applied can be found in the Supreme Court of Canada decision in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997 2 S.C.R. 165 (S.C.C.) at para. 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991) 4 O.R. (3d) 545 (Ont. C.A.) at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success". *Hercules, supra,* at para. 15.

[5] As this passage indicates, the initial burden is on the applicant, Blue Cross, to show that there is no genuine issue of material fact which would require a trial. If they are able to do so, then the respondent, Mr. Keddy, must demonstrate that his claim has a real chance of success.

[6] Based upon the affidavits filed and the submissions of counsel, it is clear that the following facts are not in dispute for purposes of this motion:

l. Shaun Keddy was employed by Volvo of Halifax as an automotive technician from June, 2001 to December 12, 2005, at which time he was laid off for lack of work.

2. Volvo of Halifax was part of the Steele Auto Group Inc. which had secured as part of its employee benefit package a group disability policy issued by Blue Cross (the Policy).

3. While he was an employee of Volvo, Mr. Keddy was insured under the Policy.

4. Up until December 12, 2005, Mr. Keddy continued to perform his job responsibilities as an automotive technician on a full-time basis.

5. In October, 2005, Mr. Keddy attended a medical appointment with Dr. Grant complaining of pain and numbness in his hands and wrists. Dr. Grant referred him for electromyography (EMG) studies in order to determine if Mr. Keddy might be suffering from carpal tunnel syndrome (CTS).

6. The EMG studies were done in late December, 2005, after the termination of Mr. Keddy's employment had taken place. In early January, 2006, Dr. Grant advised Mr. Keddy that the studies indicated that he was suffering from CTS and that surgery was the recommended treatment.

7. Mr. Keddy underwent surgery for CTS in April, 2006.

8. In January, 2008, Dr. Grant provided a letter which included the following opinion:

> It is my opinion that Mr. Keddy's symptoms on October 6, 2005 were caused by CTS. It is my opinion that Mr. Keddy was disabled from his work as a motor vehicle technician prior to December 11, 2005 because of his CTS. I cannot provide a precise date of when he became disabled.

9. On November 25, 2011, Dr. Grant provided a further letter which included the following opinion:

> As I mentioned in my initial report, the ideal intervention would have been to have a functional capacity evaluation (FCE) upon the arrival of his symptoms. This, of course, is not realistic. I cannot precisely advise when his symptoms rendered him unable to work but, with the benefit of retrospection, I am confident it would have been before December of 2005. Looking back on this matter, had I had the EMG results sooner, I would have placed Mr. Keddy off-work. Without the EMG, I was uncertain of the diagnosis and felt there was considerable risk to putting Mr. Keddy off work. I encouraged him to continue working, despite the persistence and progression of symptoms, when he was, it now appears, disabled.

10. In May, 2008, counsel for Mr. Keddy contacted Blue Cross and advised that his client wished to make a claim for long term disability benefits pursuant to the terms of the Policy.

11. Mr. Keddy filed a wrongful dismissal claim against Volvo, which was partially settled in June, 2009. Excluded from the settlement was any claim for damages for long or short term disability benefits.

Policy Terms

[7] The provisions of the Policy relied upon by the parties are as follows:

> **SECTION 5A - EMPLOYEE GROUP LIFE INSURANCE BENEFIT PROVISIONS**
>
> 5A.3 TOTAL DISABILITY WAIVER OF PREMIUM BENEFIT
>
> In this section "total disability" shall mean that the Employee is, as a result of accident or sickness, unable to engage in any occupation for which he is reasonably qualified by education, training or experience and is not performing any work for remuneration or profit. However, if the Employee is disabled and qualified to receive any Long Term Disability benefits under this policy, he shall be deemed to be totally disabled with respect to this benefit.
>
> **SECTION 5E - LONG TERM DISABILITY BENEFIT PROVISIONS**
>
> 5E.1 8. Total Disability means:
>
> a) The complete and continuous inability of the insured Employee to perform the regular duties of his own

> occupation as a result of illness or injury, during the Elimination Period and for the following 24 months; and
>
> b) Thereafter, "Total Disability" means a state of continuous incapacity, resulting from illness or injury, which wholly prevents the insured Employee from performing the regular duties of any occupation for which he:
>
> - would earn 60% or more of his pre-disability Earnings; and
>
> - is reasonably qualified, or may so become, by training, education or experience.
>
> Regular duties are defined as those work related activities which are considered essential to the insured Employee's performance of the occupation and which proportionately take the majority of time to complete.
>
> The availability of such occupations, jobs or work will not be considered while assessing the insured Employee's disability.
>
> The loss of a professional or occupational license or certification does not, in itself, constitute disability.

Position of the Parties

[8] Blue Cross says that on the undisputed facts Mr. Keddy was not totally disabled within the terms of the Policy since he continued to perform his job function on a full-time basis up to the time that his employment was terminated.

[9] Mr. Keddy's position is that he was, in fact, disabled prior to December 12, 2005 despite continuing to perform his job. He relies significantly on the opinion of Dr. Grant that he was suffering from CTS and would have been put off work had this condition been diagnosed in the fall of 2005.

Analysis

[10] Both parties referred the Court to a number of judicial decisions in support of their respective positions. Although these decisions can be helpful in illustrating how courts have approached disability insurance claims, one must always

remember that such claims will generally succeed or fail based upon the application of the contractual insurance provisions of the relevant policy. For this reason, it is important to understand the policy language under consideration in each case.

[11] Blue Cross placed great emphasis on the decision in *Northrup v. Mutual Life of Canada*, 2002 NBQB 238, which involved a summary judgment motion by a defendant in an action for disability benefits. The policy included the following definition:

> "Totally disabled" means that the member has a medically determinable physical or mental impairment due to injury or disease which prevents him from performing the duties of any occupation for remuneration or profit within the range of his education, training, or experience.

[12] Mr. Northrup was laid off on December 27, 1996; however, prior to the termination of his employment, he had been diagnosed with gastric intestinal disorder. Subsequent to the termination of his employment, the plaintiff was diagnosed with heart disease. He alleged that this condition had existed since the fall of 1996, and that his prior illness had been mis-diagnosed. As in the present case, the plaintiff did not miss any time from work due to illness and was employed full-time until being laid off.

[13] The Court in *Northrup* concluded that summary judgment should be granted as there was no merit to the allegation that the plaintiff was disabled within the meaning of the policy prior to the termination of his employment. The decision does not indicate what medical evidence, if any, was before the Court. The New Brunswick Court of Appeal dismissed the plaintiff's appeal by way of oral decision without reasons (2002 NBCA 97) .

[14] The Trial Court in *Northrup* relied on the Nova Scotia Court of Appeal decision in *London Life Insurance Co. v. Baker*, [1987] N.S.J. No. 38, as does Blue Cross in the present case. In *London Life* the issue was whether the claimant was disabled within thirty-one days of being laid off from his employment. The layoff took place on August 20, 1982 and on September 1, 1982 he was diagnosed as suffering from a gastro-intestinal problem. On September 2, 1982 the claimant began part-time employment with a new employer, and on October 12 he was hospitalized due to a heart attack. His cardiologist testified that the September 1,

1982 incident was, in fact, heart related and that he was totally disabled as of that date and should have been hospitalized.

[15] The long term disability policy under consideration in *London Life* included the following definition:

> (a) Total Disability - An employee shall be totally disabled, or total disability shall exist, when the employee is suffering from a state of bodily or mental incapacity resulting from injury or disease as would wholly prevent the employee from, for compensation or profit, engaging in any occupation or performing any work for which the Company considers the employee to be reasonably qualified by education, training or experience; provided that *an employee shall not be totally disabled and total disability shall not exist if the employee is, for compensation or profit, engaged in any occupation or performing any work. [Emphasis added]*

[16] The Court concluded, without much analysis, that the claimant was not disabled within the meaning of the policy until the heart attack of October 12, 1982. This is not surprising, given the qualification that a disability shall not exist if the employee is engaged in any occupation or performing any work. In this case, Mr. Baker was employed from September 2, 1982 until after the expiry of the thirty-one day qualification period.

[17] In my view, neither the *Northrup* or *London Life* cases are particularly persuasive. *London Life* is clearly distinguishable based upon the policy provisions and *Northrup* follows *London Life* without much analysis. There is also no indication what medical evidence may have been available to the trial judge in *Northrup*.

[18] As noted previously, the affidavit filed by Mr. Keddy in response to the summary judgment motion attached two letters from Dr. Grant. In addition, it included the following paragraph:

> In the fall of 2005, I started experiencing significant pain, numbness and tingling in my hands. My hands tired easily when I worked and I found work very difficult and painful, but I persevered because I felt that I had no choice.

[19] The plaintiff argues that this statement in combination with the opinion of Dr. Grant is sufficient to show that his claim has a chance of success and ought to

proceed to trial. Mr. Keddy relies primarily on two decisions in support of his position, and these are *Paul Revere Life Insurance Co. v. Sucharov*, [1983] 2 S.C.R. 541 and *Asselstine v. Manufacturers Life Insurance Co.*, [2005] B.C.J. 1152 (C.A.) upholding [2003] B.C.J. No. 1692.

[20] The Supreme Court decision in *Sucharov* is relatively brief and does not set out all of the underlying circumstances. A review of the Manitoba Court of Appeal decision (131 D.L.R.(3d) 379) provides the complete factual framework for the decision. Mr. Sucharov was the president and general manager of an insurance brokerage firm. He alleged that as a result of hypertension and anxiety he was unable to discharge his duties as the general manager of the business despite the fact that he was able to perform many of the individual functions of the position. He quit work in May, 1976, although he continued to attend the office to check on files and make sure that client premiums were properly collected. The Court of Appeal concluded that Mr. Sucharov was not totally disabled within the meaning of the policy which provided:

> Total disability means that, as a result of such injury or sickness, the Insured is completely unable to engage in his regular occupation.

[21] The Supreme Court of Canada allowed the appeal on the basis that the majority of the Court of Appeal applied the wrong legal test to the determination of total disability. The Supreme Court decision includes the following comments:

> 8 ... The insurer contended that the proper test was whether the insured was unable to perform the material duties of his occupation. It would segment the duties and put particular assessments upon them. This, however, ignores the medical evidence, which is not disputed, and which clearly shows that his attempts to carry on as owner-manager have brought on attacks of stress and nervousness bordering on hysteria (to use the words of Hall J.A.).
>
> 9 To put the matter another way, an owner-manager is totally disabled from performing his work as such when he is unable to perform substantially all of the duties of that position.
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> 10 In Couch on Insurance (1983), vol. 15, there is the following relevant paragraph (53:118).
>
> > The test of total disability is satisfied when the circumstances are such that a reasonable man would recognize that he should not engage in certain

> activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but rather that there is a total disability if the insured's injuries are such that common care and prudence require him to desist from his business or occupation in order to effectuate a cure; hence, if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence will require that he cease work, he is totally disabled within the meaning of health or accident insurance policies.

[22] Mr. Keddy argues that this passage supports the proposition that a person can be performing their job function and still be disabled if they are doing so contrary to common care, prudence and medical advice. With respect, I do not agree. The facts under consideration were that Mr. Sucharov had ceased working, although he regularly attended the office for limited purposes. On balance, it was clear that Mr. Sucharov was unable to perform his job as a result of stress, nervousness and hysteria, even though he could carry out many of the individual components. I believe that the Supreme Court decision indicates that the assessment of disability claims needs to be approached in a somewhat holistic fashion, and not broken down into an analysis of a series of specific functions.

[23] In *Asselstine*, the plaintiff was a registered nurse, employed at the University of British Columbia, and as such was insured under a long term disability plan which was described in para. 104 of the trial decision ([2003] B.C.J. no. 1692):

> The plan itself is with Confederation Life, UBC being the contract holder and Manulife administers the plan. Under the definition of "totally disabled employee", Ms. Asselstine, a division 4 employee, would come under subsection C which reads: "For divisions 3, 4, 5 and 7 employees, an employee who is wholly and continuously disabled due to illness or accidental bodily injury and, as a result, is unable to perform the duties of his normal occupation or the duties of any occupation for which he is fitted by education, training or experience."

[24] In addition, the plan required an employee to continue to be totally disabled during the six month qualifying period.

[25] In March of 1997, Ms. Asselstine was put off work by her family doctor as a result of a variety of symptoms that she was experiencing. She was diagnosed as

suffering from multiple sclerosis; however, she returned to work on April 21, 1997 on the advice of her neurologist who felt she was capable of working. She was placed on modified duties as she was unable to perform her regular job functions. Her employment was terminated on May 1, 1997 and she received salary continuation until July 31. On August 18, 1997, Ms. Asselstine began work as a clerk/receptionist at a doctor's office. In the fall, her work hours were reduced from five to four days, and she stopped work in December as a result of ill health.

[26] At trial Ms. Asselstine presented evidence of two neurologists to the effect that she was disabled as of the spring of 1997 and should have been taken off work. After reviewing the evidence, the trial judge quickly concluded that the plaintiff had established her entitlement to disability benefits within the meaning of the policy, and then proceeded to award aggravated and punitive damages for the manner in which the defendant had dealt with the claim.

[27] On appeal ([2005] B.C.J. No. 1152), the Court focussed on the issue of aggravated and punitive damages; however, made the following comments with respect to liability on the policy:

> 12. The judge made no clear finding that Ms. Asselstine was totally disabled before her employment with the University ended, or that she was totally disabled for the qualifying six weeks. She made no determination of when Ms. Asselstine became totally disabled. The judge did say that during April and May 1997 Ms. Asselstine "could not function" so it can be accepted that she was totally disabled then, but the qualifying period is said to be significant because from mid-August until December 1997 Ms. Asselstine was working as a receptionist such that she could not be said to be totally disabled within the meaning of the policy.
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> 13. However, the judge did conclude that Ms. Asselstine had established eligibility for total disability benefits. It is implicit in that conclusion that she found Ms. Asselstine to be totally disabled prior to the end of her employment with the University and totally disabled for the requisite six months qualification period even though Ms. Asselstine was working as a receptionist. Total disability does not mean that a person cannot physically perform an employment function, but only that he or she should not be performing the function when a physical condition renders it unreasonable that it be undertaken: Paul Revere Life Insurance Co. v. Sucharov, [1983] 2 S.C.R. 541. There was evidence in the opinions of Dr. Hooge and Dr. Hashimoto that support the conclusion that Ms. Asselstine was totally disabled as required to establish eligibility for long term benefits in the sense that she ought not to have been working after March 1997 when she was diagnosed with MS.

[28] Although it is not completely clear from the decision, it appears that the British Columbia Court of Appeal may have relied on *Sucharov* to justify a finding of eligibility under the policy, despite the fact that Ms. Asselstine worked for a number of months as a receptionist during the qualifying period. That is precisely what Mr. Keddy says this Court should do in the present case.

[29] Neither the trial nor appellate courts in *Asselstine* explained in any detail why they concluded that working as a receptionist did not preclude the disability claim. There is no discussion about the degree to which the duties of the receptionist position overlapped with those of the research nurse position held by the claimant prior to her disability. There is also no indication of the degree of impairment which may have existed while working as receptionist. This may well have been a case where Ms. Asselstine was able to perform some, but not all, of the functions of any occupation for which she was "fitted by education, training or experience" and therefore entitled to disability benefits under the policy.

[30] With deference to the able submissions of counsel, I do not think that any of the authorities to which I have been referred are determinative of the issues before me. I need to consider the language of the Policy, as well as the particular circumstances of this matter. I need to do so, recognizing that this is a summary judgment motion and keeping in mind that the limited burden on Mr. Keddy is to satisfy me that his claim has a real chance of success should it proceed to trial.

[31] Mr. Bryson argues that this burden has been met through the opinion of Dr. Grant to the effect that Mr. Keddy was disabled by CTS in the fall of 2005 and, had this been known, would have been put off work. He also notes that the affidavit of Mr. Keddy states that he found work very difficult and painful but persevered because he felt that he had no choice.

[32] Mr. Dunbar, on behalf of Blue Cross, says that there is no evidence before me to suggest that Mr. Keddy was incapable of performing any of the functions of his job as an automotive technician. He notes the complete absence of any suggestion in Mr. Keddy's affidavit that he could not perform his work. He was not placed on any modified duties, nor did he miss any time prior to his termination on December 12, 2005.

[33] Mr. Bryson points out the difference in language found in clauses 5A.3 and 5E.1(8) of the Policy. In the former the definition of disability includes the phrase "and is not performing any work for remuneration or profit". Those words do not appear in the latter clause and Mr. Bryson says this is an indication that performing work is not a bar to a finding of disability under 5E.1.

[34] The two clauses in question contain very different definitions of disability and serve different purposes. 5A.3 provides a waiver of premiums where the insured is disabled from any occupation. In that context it makes sense that performing work for compensation should prohibit the waiver. 5E.1(8) applies to a disability from one's own occupation only and so work in another occupation should not be prohibited. There are provisions to adjust benefits in those circumstances to avoid overcompensation.

[35] In my view the differences in language between clauses 5A.3 and 5E.1(8) are quite understandable and do not affect how the latter clause should be interpreted and applied in this case.

[36] In order for Mr. Keddy to succeed with his claim, he must satisfy the trial judge that prior to December 12, 2005 his CTS resulted in the "complete and continuous inability" to perform the regular duties of his job. Regular duties are defined as those essential to the performance of the position and which take the majority of the time to complete. Mr. Keddy has not provided any evidence to suggest this to be the case. In fact, his affidavit essentially concedes that he continued to perform all aspects of his work, albeit with significant difficulty.

[37] It is important to note that Dr. Grant's opinion is being given as a health professional who was responsible for the care and treatment of Mr. Keddy. He is obviously of the view that it would have been beneficial to Mr. Keddy to have stopped work earlier than he did, and Dr. Grant would have recommended this had he diagnosed the CTS in the fall of 2005. Dr. Grant's opinion that Mr. Keddy was disabled in the fall of 2005 is clearly not the same as a determination of whether the Policy definition of total disability has been met. At most, it is a statement about what ought to have happened from a medical perspective if the CTS had been diagnosed earlier. This does not change the fact that Mr. Keddy continued to perform his job up to the date of termination.

Disposition

[38] For the reasons outlined above, I am satisfied that this is an appropriate case in which the motion for summary judgment ought to be granted and the plaintiff's action dismissed. Mr. Keddy has not demonstrated that his claim has any real chance of success at trial in light of the provisions of the Policy and the undisputed fact that he continued to perform the essential functions of his occupation. I see no basis on which he could show that he was completely and continuously unable to perform his employment duties prior to December 12, 2005.

[39] If the parties are unable to reach an agreement on costs, I will receive written submissions from them, which must be provided no later than January 27, 2012.

Wood, J.