SUPREME COURT OF NOVA SCOTIA

Citation: *McLean v. Portage la Prairie Mutual Insurance Company*, 2018 NSSC 110

Date: 20180508
Docket: Pic No. 457907
Registry: Pictou

Between:

Keith Edward McLean

Plaintiff

v.

The Portage la Prairie Mutual Insurance Company

Defendant

Decision: Rule 12

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	March 19, 2018, in Pictou, Nova Scotia
Counsel:	Jennifer Langille, for the Plaintiff Jillian Kean, for the Defendant

By the Court:

[1] The plaintiff has put forward a question of law pursuant to Civil Procedure Rule 12 for determination prior to trial.

[2] The underlying claim that the plaintiff has filed against the defendant seeks payment of weekly loss of income (Part II) benefits, resulting from a motor vehicle accident. The defendant was the plaintiff's accident benefits insurer at all material times. This claim shall be the subject of a trial at some later date.

[3] The singular question before me on the present motion, involves the proper treatment of the plaintiffs worker's compensation benefits in the calculation of his weekly loss of income benefits, should he be found to be entitled to such benefits following trial.

Facts

[4] The plaintiff was involved in a motor vehicle accident on March 13, 2013.

[5] At the time of the accident, the plaintiff was in receipt of monthly benefits from the Worker's Compensation Board ("WCB"), due to a workplace accident he had suffered in October 2004. While these benefits were deemed temporary when

they first began, they later became “extended”, and were increased after a subsequent diagnosis of cancer.

[6] The plaintiff’s WCB decision dated September 8, 2010, indicates “This is the final Extended Earnings Replacement Benefits review”. That decision granted the plaintiff a total amount of $1,829.61 monthly. More precisely, the calculation sheet attached to the decision shows that the WCB benefits consist of three parts: a largest amount being the “extended earnings replacement benefit” (EERB), a much smaller amount, being the “lifetime permanent impairment benefit”(PIB), and thirdly, a consumer price index (CPI) amount.

[7] The plaintiff has indicated that these WCB benefits are indefinite; that is to say, he is and will be continually entitled to receive them, whether he is employed or not. This will continue to be the case unless the benefit can be shown to be based on a misrepresentation of fact: *Worker’s Compensation Act* R.S.N.S. 1994-95 c. 10, s. 73(1)(d).

[8] At the time of the accident in 2013, the plaintiff was also employed full-time as a driver for Carquest. Following this accident the plaintiff was unable to continue working at that employment; he therefore requested weekly loss of income (Part II) benefits from his insurer, the defendant.

[9] The defendant paid the weekly indemnity benefits from September 2013 until November 2016, but then terminated the plaintiff's benefits, taking the position that the plaintiff was by then capable of part-time work. In response, the plaintiff commenced the present action.

[10] During the course of the litigation, the defendant put forward to the plaintiff their position that, should the loss of income weekly indemnity be reinstated by the court, the plaintiff's WCB benefits should be deducted from the amount payable.

[11] The plaintiff has therefore brought forward this motion, pursuant to Rule 12, seeking a ruling as to the appropriate treatment of the WCB benefits.

Scope of Rule 12

[12] Civil Procedure Rule 12 permits a question of law to be separated from other issues in a proceeding for determination, prior to the trial or hearing. Such an adjudication is permitted where the following circumstances apply:

(a) the facts necessary to determine the question can be found with of the trial or hearing;

(b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

(c) no facts to be found in order to answer the question will remain an issue after the determination.

[13] The parties are in agreement that the question as it is presently framed involves an issue of contractual interpretation, which is an appropriate use of Rule 12. I agree. I believe that I have the necessary facts before me in order to make this decision.

[14] I note that in their original motion and written argument, the plaintiff had also raised the issue of estoppel; that is to say, that since the defendant had originally paid the weekly indemnity benefits without deducting the WCB benefit, the defendant should now be estopped from deducting it. The defendant objected to that issue being put forward as Rule 12 question. During oral submissions the plaintiff agreed to withdraw that issue within the present motion.

Analysis

[15] Contracts for automobile insurance are regulated by legislation. Weekly loss of income benefits in Nova Scotia fall under the *Automobile Insurance Contract Mandatory Conditions Regulations*, subsection 2:

Part II - Loss of Income

Subject to the provisions of this part, a weekly payment for the loss of income from employment for the period during which the insured person suffers a substantial inability to perform the essential duties of his occupation or employment, provided,

(a) such person was employed at the date of the accident;

(b) within 30 days from the date of the accident and as a result of the accident the insured person suffers substantial inability to perform the essential duties of his occupation or employment for a period of not less than seven days;

(c) no payments shall be made for any period in excess of 104 weeks except that if, at the end of the 104 week period, it has been established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience, the insurer agrees to make such weekly payments for the duration of such inability to perform the essential duties.

Amount of weekly payment - The amount of a weekly payment shall be the lesser of,

(a) $250 per week; or

(b) 80 per cent of the insured person's **gross weekly income from employment**, less any payments for **loss of income from employment** received by or available to such person under

(i) the laws of any jurisdiction;

(ii) wage or salary continuation plans available to the person by reason of his employment; and

(iii)subsection 2A;

but no deduction shall be made for any increase in such payment due to a cost of living adjustment subsequent to the insured person's substantial inability to perform the essential duties of his occupation or employment. (emphasis added)

[16] It is the defendant's view that the WCB disability benefits being paid to the plaintiff at the time of his accident, should be deducted from his entitlement for weekly indemnity benefits, as they represent "payments for loss of income from employment". The plaintiff disagrees and submits that his WCB benefits are not "payments for loss of income from employment", since he is entitled to receive

these payments regardless of employment. Therefore, submits the plaintiff, his WCB benefits represent a loss of earning capacity, rather than loss of income.

[17] In *L.M.M. v. Nova Scotia* [2011] N.S.J. No. 273 (NSCA), the Court of Appeal quoted with approval the following statement made by the trial judge:

> 147 There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income". This point was discussed in *Exide Electronics Ltd. v. Webb* (1999) 177 N.S.R. (2d) 147, where Freeman, J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in a situation where a plaintiff can return to work, but with "a disability that restricts the scope of other employment that might become available in the future". By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbott v. Sharpe* 2007 NSCA 6, Saunders, J.A. said, at para. 156: "… this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income."

[18] It would appear that there is no Nova Scotian authority on the issue of the deductibility of WCB benefits from Part II insurance benefits. The defendant has provided me with a number of Ontario cases which have dealt with a similar question; however, the plaintiff points out that the Ontario cases deal with Ontario legislation which, the plaintiff submits, is different from the Nova Scotia legislation.

[19] In *Jensen v. GAN Canada* 1999 CarswellOnt 5721, the plaintiff was injured in an accident while he was already on disability leave from his employment, and

receiving temporary total disability benefits from worker's compensation. The parties disagreed as to how to calculate the plaintiff's pre-accident earnings, which included the question of whether the WCB benefits qualified as "income from employment".

[20] The Ontario version of the weekly loss of income provisions (applicable in *Jensen*) was s. 12 of the *Statutory Accident Benefits Schedule - Accidents before January 1, 1994*, RRO 1990, Reg 672. It provided that the weekly benefit is the lesser of $600 or

> (b) 80 per cent of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income, except Unemployment Insurance benefits,
>
> (i) received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan, or
>
> (ii) received under any sick leave plan.

[21] The court noted the importance of remembering the reason behind the existence of Section B weekly loss of income benefits:

> 20. Income benefits under s. 12 are intended to provide those injured in automobile accidents with speedy, adequate and secure income maintenance when they are unable to work. In *Bapoo*, Justice Laskin identified a number of legislative purposes underlying the rules determining the level of benefit. These included: ensuring a fair or adequate level of income replacement, seeing that applicants are not overcompensated and that automobile insurers pay last by taking other sources of income replacement into account, and ensuring that benefits will be delivered quickly and efficiently by means of a system that is administratively manageable.

> 21. The rules balance those objectives. They make concessions for the sake of administrative simplicity. Unlike fault-based damages in the courts, the rules do not provide an individualized assessment of loss. Income benefits are broadly intended to replace income likely lost as a result of the accident within certain parameters…

[22] Mr. Jensen did not dispute that the WCB benefits he received after the accident were deductible as payments for loss of income. However, it was his submission that the payments should also be included as income from employment, otherwise it would be unfair to deduct them. As to the issue of the deductibility of benefits, it was noted:

> 50 Temporary total disability benefits are in the nature of income replacement. They have been held to be deductible under the terms of s. 12 (4)(b)(i) whether they relate to the automobile accident or to a previous condition. In *Mouawad*, the divisional court confirmed that a future economic loss award under the *WCA* is also deductible. However a permanent disability pension based on the degree of physical impairment, - the pre-1990 system of compensation for permanent injuries - is not, nor is a vocational supplement intended to encourage an injured worker to participate in an authorized rehabilitation program…
>
> 51 In a number of decisions, arbitrators have declined to include sources of income replacement such as worker's compensation in income from employment for the purposes of s. 12(7), in light of these provisions. (emphasis added)

[23] The FSC (Appeal division) in *Jensen* agreed that the WCB temporary benefits were deductible as payments for "loss of income" (as noted, Mr. Jensen had conceded that point); however, those benefits did not constitute "income from employment". Therefore, they were not to be added to the first part of the calculation.

[24] One notes that there are differences with the case at bar. The benefits in the case of the plaintiff McLean are extended disability benefits. Furthermore, as notes the plaintiff, the Ontario legislation (as it then was) provided for the deductibility of payments for "loss of income"; the Nova Scotia legislation provides for the deductibility of payments for "loss of income from employment".

[25] In *Fortin v. Economical Mutual Insurance Co.* [2002] O.F.S.C.I.D. No. 106, the distinction between "temporary" disability benefits and "permanent" disability benefits was explained:

> 15 In determining whether a particular collateral benefit was a payment for loss of income, arbitrators considered the nature and source of the payment, viewed in the context of the program in which it operated. Temporary total worker's compensation disability benefits were intended to compensate for loss of income, and so were deductible under section 12(4)(b) of the SABS 1990, whether they related to the same motor vehicle accident, or to a prior workplace injury.
>
> 16 Permanent disability pensions, on the other hand, were held not to be directly related to the employment income of an individual, because they were not intended to reimburse an injured worker for loss of that income. They were assessed according to the nature and degree of permanent disability and were payable for life, as compensation for permanent injury, regardless of subsequent earnings. They were neither included as employment income, nor deducted from it…

[26] What is the nature of the WCB benefits being received by the plaintiff? The information provided by the WCB, as I have indicated, provides that the plaintiff's benefits consist of two main parts. The first part is the "Permanent Impairment Benefit" (PIB), which is a small amount. The calculation sheet provides that "Mr. MacLean was assessed with a 9.60% Permanent Medical Impairment. The net

weekly value of this benefit, $11.48 will be considered in the calculation…". I note that the defendant has not suggested that these PIB benefits should be deducted from the Part II weekly indemnity benefits.

[27] The second, and greater, part of the benefit is the subject of the debate here: the EERB (Extended Earnings Replacement Benefits). These were calculated by the WCB by taking the plaintiff's net weekly income (at the time of his workplace injury) and multiplying it by 85%.

[28] Earnings Replacement benefits are described in ss. 37 of the Nova Scotia *Worker's Compensation Act* as follows:

> 37(1) Where a loss of earnings results from an injury, an earnings-replacement benefit is payable to the worker in accordance with this Section.
>
> (2) The amount of any earnings-replacement benefit payable to a worker is the difference between
>
> (a) an amount equal to seventy-five per cent of the workers' loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.
>
> (3) The amount of any earnings-replacement benefit payable to a worker after the worker has received compensation pursuant to subsection (2) for a total of twenty-six weeks is the difference between
>
> (a) an amount equal to eighty-five per cent of the workers' loss of earnings; and
>
> (b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.

[29] The expression “extended earnings-replacement benefit” is defined in that same *Act*, at ss. 2(o):

> 2(o) “Extended earnings-replacement benefit” means an earnings-replacement benefit payable to a worker from the later of
>
> (i) The date on which the Board determines the worker has a permanent impairment pursuant to Section 34, and
>
> (ii) the date on which the worker completes a rehabilitation program pursuant to Section 112, where the worker is engaged in a rehabilitation program on or after the date the Board determines the worker has a permanent impairment pursuant to Section 34;

[30] Having reviewed all of the material before me, I return to the question to be answered: do these EERB payments constitute “payments for loss of income from employment”, for the purposes of Part II of the automobile insurance contract/regulations, such that they must be deducted from the calculation pursuant to that Part.

[31] In my view, the material before me supports the interpretation being suggested by the defendant. The EERB benefit is in the nature of income replacement. By its very name, it is an earnings replacement benefit. Section 37 of the *Worker’s Compensation Act* refers to the requirement for a “loss of income” before such benefits are, or can be, paid. The amount is directly related to the worker’s income, and is calculated by taking a percentage of that income. The

benefit is not permanent but is rather “extended”; ending when the plaintiff reaches 65 years of age.

[32] Both the *Act* and the plaintiff’s WCB decision separate the calculation of the EERB benefit from that of the PIB benefit, making a very clear distinction between the two. They are treated differently because their nature is different; they are payable for different reasons. While it appears that the PIB is paid in recognition of a permanent disability (akin to the loss of an asset), the EERB is not.

[33] The plaintiff correctly points out that much of the caselaw I have been given is from Ontario, and that the Ontario and Nova Scotia legislative language are different. The Ontario Part II insurance legislation provides for the deduction of payments for “loss of income”; the Nova Scotia legislation provides for deduction of payments for “loss of income from employment”. However, I do not see that as a significant distinction in the case at bar.

[34] The Ontario legislation (as it then was) went on to provide that “income” meant that which was “received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan, or received under any sick leave plan”; in other words, a specific reference to income related to employment.

[35] Furthermore, in my view, the addition of the words “from employment” in Nova Scotia does not affect the applicability of the logic of the Ontario caselaw to the case at bar. Although the Ontario legislation would appear to be somewhat wider-reaching, in my view the logic from those cases remains applicable.

[36] I conclude that the EERB benefits payable to the plaintiff are in the nature of income replacement. They are not in the nature of a “permanent disability pension based on the degree of physical impairment” (as, perhaps, the PIB benefit might be). In my view the EERB benefits are a “payment for loss of income from employment”, which must therefore be deducted as per the weekly indemnity benefits calculation.

[37] In the alternative, the plaintiff submits that the Court should interpret the contract as limiting the “payments for loss of income from employment” deductions, to only those payments relating to the employment giving rise to the accident benefits claim. In other words, since the EERB benefits are not for loss of income from the Carquest employment (which is the reason for the accidents benefits claim), they should not be deducted.

[38] I cannot agree with the plaintiff on this point. The contract and regulations do not so limit the deductions; they could clearly have done so if that was the

intention. Even giving the written word a large and liberal interpretation, I do not reach this result. Nor do I consider that an ambiguous question, such that *contra proferentem* would be applicable.

[39] This leads me to the plaintiff's further alternative submission, that if the EERB benefits constitute a "payment for loss of income from employment" and are therefore deductible, they should also constitute "income from employment" and should be added to the calculation at the beginning:

> (a) 80 per cent of the insured person's **gross weekly income from employment**, less any payments…

[40] In other words, in the plaintiff's submission, the EERB payment should be first added, then subtracted, to the calculation; leading to a net effect of zero.

[41] The defendant disagrees, arguing that a payment cannot simultaneously be "income from employment" and a "payment for loss of income from employment". They rely on the case of *Jolin v. Jevco Insurance* 1993 CarswellOnt 4789 (Arb.) in support:

> 78 Counsel argued that these "payments for loss of income" should also be considered income from "occupation or employment". He acknowledge that Mr. Jolin had received no income from his employment at Welland Forge during the previous 12 months. This was because he was disabled. However, he submitted that the Applicant did receive income from his "occupation", as a disabled person. Counsel referred to the New Lexicon Websters Dictionary of the English Language, which defines *income* as: "whatever is received as gain, e.g. wages or salary, receipts from business, dividends from investments etc." That dictionary

defines *occupation* as "an activity by which one earns one's living or fills one's time, or an instance of this".

79 Counsel argued that, since the Applicant was filling his time, or occupied, as a disabled person, he was accordingly receiving income (disability benefits) from his occupation as a disabled person. Further, he noted that certain disability benefits are treated as income for the purposes of the *Income Tax Act*, and argued that they should similarly be treated as income for the purposes of the *Insurance Act*.

80 I cannot accept this argument. I find that the term "occupation" in the context of section 12(4)(b), which refers to "*gross weekly income from… occupation or employment*" means "an activity by which one earns one's living", and is not meant to include activities in which one otherwise passes time (since one does not earn income from such activities). In any case, the term "occupation" must refer to an activity in which one engages, and not to a health or employment status such as "disability".

81 Furthermore, section 12(4)(b) provides that the weekly benefit shall be "80% of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income…" Accepting the applicants argument, it would follow that the workers compensation payments, for the purposes of section 12(4)(b), must be considered both "income" and "payments for loss of income" at one and the same time.

82 This is not a logically consistent outcome, and I cannot accept that it was intended by the framers of the legislation. Instead, I find that section 12(4)(b) clearly distinguishes revenue which is treated as "income" from the kind of revenue which is labeled "payments for loss of income", and in respect of which amounts are deductible from the weekly income benefit. (emphasis added)

[42] This conclusion was repeated in the *Jensen* (supra) case:

51 In a number of decisions, arbitrators have declined to include sources of income replacement such as worker's compensation in income from employment for the purposes of s. 12(7), in light of these provisions.

52 *Jolin v. Jevco Insurance* (citation omitted) involved an applicant who had been injured in three accidents over two years. It was agreed that he remain employed and so qualified for benefits under s. 12. The arbitrator held that his temporary total disability benefits and *Schedule C* accident benefits from the first two accidents could not be treated as income from employment in calculating his statutory accident benefits from the third. In her view, the legislative scheme clearly distinguished revenue which is treated as "income" from the kind of revenue characterized as "payments for loss of income", and that treating a benefit as both was "not a logically consistent outcome". She acknowledged that

> the outcome might appear harsh or inequitable but concluded that it was mandated by the regulation…
>
> …
>
> 54 I agree that the regulatory scheme seems to distinguish between income from employment and payments like workers' compensation indemnifying a loss of income from employment or an occupation. While it is not necessarily a compelling indication of legislative intent, the apparent distinction makes it more difficult to read the regulations in the way Mr. Jensen suggests.

[43] The defendant also points out that a similar conclusion was reached in the case of *York Fire & Casualty Insurance Company v. Shearstone* 2002 CarswellOnt 5576:

> 9 Mr. Shearstone argues that the broad definition of "employment" in s. 2(5) of the *SABS-1996* supports his position that "income from employment" includes workers' compensation benefits. Arbitral and appeal decisions have consistently recognized that employment status may persist throughout a period of disability or lay-off. In this case, Mr. Shearstone was a unionized worker who returned to his job following his disability leave, and there is little doubt that his employment relationship with Chrysler continued throughout his leave. York does not dispute that he satisfies the eligibility criteria set out in s. 4 of the *SABS-1996.*
>
> 10 However, Mr. Shearstone's LOE benefits were paid by the Workplace Safety and Insurance Board, not Chrysler, and the core of the employment relationship - the exchange of money for services - is lacking between Mr. Shearstone and the WSIB. Although Mr. Shearstone is entitled to workers' compensation benefits because he was injured while working for a Schedule 1 employer, his entitlement to those benefits did not depend on his remaining an employee, and he would have been entitled to benefits if he had lost his job as a result of his workplace injury, as many workers do. FSCO adjudicators have given "income from employment" a broad definition, but the cases do not extend to including payments from a third party.
>
> …
>
> 17 As a result of excluding workers' compensation benefits from "income", Mr. Shearstone's income replacement benefits undercompensate his income loss resulting from the motor vehicle accident. Nevertheless, I have little doubt this is what the drafters intended. Each of the accident benefits schemes represents a different balance between the legislative objectives of compensation and cost control. In my view, the most natural reading of the *SABS-1996* is one that excludes workers' compensation benefits from "income"….

[44] I have not seen any decisions to the contrary. Although none of the above-noted decisions are binding upon me, I find it persuasive that they have all reached the same, or similar, conclusions.

[45] As I have already noted, the applicable section in Nova Scotia refers to "gross weekly income from employment". In both the *Jolin* and *Jensen* cases, the relevant passage was "gross weekly income from his or her occupation or employment". In the *Shearstone* case, the wording was "gross annual income from employment". In my view, these are not differences which would affect the usefulness of the Ontario caselaw. The reasoning which applied in those cases, would be applicable here.

[46] In the case at bar, I simply see no reasonable way to characterize the plaintiff's EERB benefits as "income from employment". They are not income from employment; they do not come from an employer. They are, simply put, payments being made due to a loss of income.

[47] As a result, I conclude that these EERB payments should be deducted from the calculation of Part II (Loss of Income) benefits, as a "payment for loss of income from employment", and cannot be added as "income from employment".

[48] I also repeat that the present decision does not deal with the issue of estoppel. That question remains to be presented and argued, in its entirety, in another forum, or at the trial of this matter.

[49] Costs for this motion shall be in the cause.

Boudreau, J.