

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Downey v. Intact Insurance Company 2016 NSSM 9

Claim: SCCH 443507

Registry: Halifax

Between:

Faren Rose Downey

Claimant

v.

Intact Insurance Company

Defendant

Adjudicator: Augustus Richardson, QC

Heard: March 24 and April 7, 2016

Appearances: Jonathan Huges, for the Claimant
Leah N. Grimmer, for the Defendant

Decision

[1] The Claimant Faren Rose Downey (the “Claimant”) was a passenger in a motor vehicle that was involved in an accident on February 28, 2013. The Defendant Intact Insurance Company (“Intact”) was the insurer of the driver. As such, Intact provided what are known as Section B benefits to a passenger such as the Claimant who was injured while an occupant of the car. Intact agrees that the Claimant was an insured under the terms of its policy.

[2] The Claimant claimed Section B benefits from Intact. For our purposes Section B provides two types of payment for people insured under its provisions:

- a. Payment for various types of rehabilitation expenses, and
- b. Weekly Indemnity Payments (“WI”) in respect of income lost as a result of the injured insured person’s inability to work.

[3] Intact paid certain of the Claimant's rehabilitation and medical expenses. There is no dispute, and no claim, in respect of those payments.

[4] The Claimant also submitted a claim for WI. Intact denied the claim, resulting in the within claim for \$25,000.00. Counsel confirmed that his client was waiving any potential claim over \$25,000.00 with respect to WI payments.

[5] The relevant WI provisions of Section B provide that Intact will pay

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 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.

[6] Intact's statement of defence was the unfortunately all-too-standard blanket denial. It lacked any clear explanation of what exactly its defence was grounded upon. However, at the commencement of the hearing counsel clarified that Intact's defence was that

- a. The Claimant had not established that her injuries had rendered her substantially unable to perform the essential duties of her employment, and
- b. The Claimant had not been substantially unable to perform the essential duties of her employment for a at least seven days in the 30 days following the accident.

[7] I heard the testimony of the Claimant and of Karen Lloyd, the Human Resources Co-Ordinator at Bayshore Home Health ("Bayshore"). So far as I could determine from the rather

scanty evidence, the Claimant worked as a “patient attendant” for Bayshore. She would call in to Bayshore and tell Bayshore what days she was available to work. She would be assigned to a patient. Sometimes she would call in and tell Bayshore that she could not make it. Someone else would be assigned to take her place.

[8] The Claimant did not at any point explain exactly what it was that she did. She did say that she always worked night shifts. Ms Lloyd testified that the duties of those assigned by Bayshore involved “patient care and observation ... taking direction from a nurse ... provide assistance with meals or with mobilizing patients.” I should note, however, that Ms Lloyd’s testimony as to the Claimant’s activities was second-hand, and did not appear to relate to the Claimant directly. A Bayshore job description for patient attendant was put into evidence: Ex. D3. Overall, the evidence indicates that a patient attendant sits by one, possibly two, patients “to provide comfort measures as assessed by the RN/LPN as appropriate.” The list of General Physical Demands is slight, and involves infrequent activity of any physical nature.

[9] The Claimant testified that she returned to work after the accident because her doctor told her it was important to keep active. She tried, but found that she was experiencing back pain that caused her to miss a few shifts in March. In the end she said that she found it too difficult to continue, and her last day of work was July 18, 2013: see also Ex. C4.

[10] The onus is on the Claimant to establish on a balance of probabilities that as a result of her injuries

- a. She “suffers substantial inability to perform the essential duties of his occupation or employment,” and in particular
- b. She suffered “substantial inability to perform the essential duties of his occupation or employment for a period of not less than seven days.”

[11] I was not satisfied that the Claimant had met the burden that was upon her.

[12] First, and as noted above, her duties were not clearly defined. As best as I could make out, she played the role of a patient observer and, sometimes, assisted RNs or LPNs assist patients in some limited physical activity, such as feeding a patient. Since she worked the night shift I find, in the absence of any evidence to the contrary, that the physical requirements (already limited) would be even less given that the patient would normally be asleep.

[13] Second, the Claimant’s evidence with respect to what her injury was, or how it impacted on her activities, was vague and general. She did not say how exactly her duties were affected by her injuries.

[14] Third, her employment records make clear that prior to the accident the Claimant did not work much more than seven to ten days a month in any event; and that in normal course she would by times call in to cancel a scheduled shift. When that history is compared to her work schedule for March 2013 I was hard pressed to see any material difference between March and that pre-accident record.

[15] I accept (as did Intact) that the Claimant did sustain some injury in the accident. But “some injury” is not sufficient to trigger WI coverage under the Section B policy. There must be a “substantial inability” to perform “the essential duties” of her occupation. Neither was established on the evidence. Nor did she establish that the days she cancelled were cancelled because of such injuries as opposed to some other reason.

[16] For these reasons I must dismiss the claim.

DATED at Halifax, NS
this 28th day of April, 2016

Augustus Richardson, QC
Adjudicator