

CITATION: Dek v. The Manufacturers Life Insurance Company, 2024 ONSC 2071
COURT FILE NO.: CV-19-793
DATE: 2024/04/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Hassan Dek)
)
Plaintiff) Georgiana Masgras, Andrew Franzke, Nidhi
) Vinayak, Counsel for the Plaintiff
– and –)
)
The Manufacturers Life Insurance Company)
)
)
Defendant) Gordon Jermane, Leng Low, Counsel for the
) Defendant
)
)
)
)
) **HEARD:** April 17, 18, 19, 20, 21, 26, 27,
) 2023, November 30, 2023, December 1, 4, 5,
) 6, 7, 2023, March 6, 2024.

2024 ONSC 2071 (CanLII)

M.J. VALENTE J.

REASONS FOR JUDGMENT

Overview

[1] The Plaintiff seeks a declaration of entitlement to long term disability ('LTD') benefits pursuant to a group long term income replacement benefit plan issued by the Defendant to the Plaintiff's former employer, Camtac Manufacturing Corporation ('Camtac'), a division of Linamar Holdings Inc., under Group Policy No. 85030 (the 'LTD Plan') of which the Plaintiff was an insured member. Whereas the Plaintiff had originally claimed LTD benefits on an indefinite basis, he limited his claim for LTD benefits for the period of August 11, 2019, to October 4, 2021 (the 'Claim Period') during the course of this litigation. Calculated at the monthly benefit rate of \$1931,

the Plaintiff's LTD benefit claim is agreed to be in the principal amount of \$49,626.70. In addition, the Plaintiff claims general damages for breach of contract.

[2] The Plaintiff advances his claim for LTD benefits not having made application to the Defendant for these benefits. The LTD Plan policy (the 'Policy') requires that such application be made for LTB benefits to be paid. The Plaintiff seeks a declaration that he is entitled to relief from forfeiture for imperfect compliance with the provisions of the Policy pursuant to s.129 of the *Insurance Act*, R.S.O. 1990, c.I-8, as amended (the '*Insurance Act*') and s.98 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended (the '*CJA*').

[3] The Defendant opposes this court granting the Plaintiff relief from forfeiture on the basis that his failure to deliver an LTD benefit application is a breach of the Policy's conditions, amounting to non-compliance, rather than imperfect compliance, with the Policy provisions. In the alternative, the Defendant's position is that the Plaintiff fails to qualify for LTD benefits because he is not "totally disabled" and does not meet the "entitlement criteria" as stipulated by the Policy.

Issues to be Decided

[4] Therefore, the issues to be decided are threefold:

- (1) Is the Plaintiff entitled to relief from forfeiture?
- (2) If yes, is the Plaintiff entitled to LTD benefits because he is "totally disabled" and satisfies the "entitlement criteria"?
- (3) If yes, is the Plaintiff entitled to damages for the Defendant's breach of contract by reason of its failure to pay LTD benefits?

Procedural Matters

[5] In addition to the declaratory relief the Plaintiff is seeking pursuant to the terms of the Policy and his claim for damages for breach of contract, the Plaintiff had sought aggravated, exemplary, and punitive damages. The Plaintiff failed prior to trial to provide the Defendant with any facts upon which he relied to prove his claim for extra contractual damages in violation of the consent order of this court, dated March 30, 2023, requiring him to do so. For this and other

reasons, I dismissed the Plaintiff's mid trial motion pursuant to *Rule 53.08(1)* of the *Rules of Civil Procedure*, R.R.O. 1990 Reg.194 to proffer evidence at trial in support of his extracontractual damage claim.

[6] Mid-trial, the Plaintiff also brought a motion to amend his statement of claim to include a claim for relief from forfeiture by reason of his failure to deliver to the Defendant an application for LTD benefits. The Plaintiff's motion pursuant to *Rule 26.01* was unopposed and granted by me.

“Totally Disabled” and “Entitlement Criteria” Defined

[7] In order to qualify for short term disability (“STD”) benefits, the Policy provides that the employee must be “totally disabled” and satisfy the “entitlement criteria” as stipulated by the Policy.

[8] The Policy defines “totally disabled” for purpose of STD benefits as a:

“[r]estriction or lack of ability due to an illness or injury which prevents an Employee from performing the essential duties of his own occupation.”

[9] The Policy's “entitlement criteria” for STD benefits requires the employee:

to be totally disabled during the STD Qualifying Period (as defined by the Policy), to provide medical evidence documenting how the employee's illness or injury causes restrictions or lack of ability to perform the essential duties of his own occupation and to be receiving regular, ongoing medical care and treatment appropriate for the disabling condition as determined by the employer.

[10] In order to qualify for LTD benefits, the Policy also provides that the employee must be “totally disabled” and meet the “entitlement criteria” as defined by the Policy.

[11] For purposes of LTD benefits, the Policy defines “totally disabled” as a:

“[r]estriction or lack of ability due to an illness or injury which prevents an Employee from performing the essential duties of:

- (a) his own occupation during the Qualifying Period and the 24 months immediately following the Qualifying Period; and
- (b) any occupation for which the Employee is qualified, or may reasonably become qualified, by training, education, or experience, after the 24 months specified in part a) of this provision.

[11] The Policy provides that the “Qualifying Period” is a period during which the employee is continuously totally disabled starting from the first day of total disability which must be completed by the employee to qualify for benefits. The “Qualifying Period” for LTD benefits is 168 days. It is agreed that for the purposes of the Plaintiff, the first day of total disability was February 23, 2019, and therefore, the Plaintiff’s “Qualifying Period” ended August 10, 2019.

[12] The Policy’s “entitlement criteria” for LTD benefits requires the employee:

to be continuously totally disabled during the Qualifying Period, to provide medical evidence documenting how the employee’s injury or illness causes restrictions of lack of ability preventing the employee performing the essential duties of:

- (i) his own occupation during the Qualifying Period and the 24 months immediately following the Qualifying period; and
- (ii) any occupation for which the employee is qualified, or may reasonably become qualified, by training, education, or experience, after the said 24-month period,

and to be receiving from a physician (as defined by the Policy) regular, ongoing care and treatment appropriate for the disabling condition, as determined by the Defendant.

Burden of Proof

[13] It is settled law that in the circumstances of this case that the Plaintiff bears the legal burden of proof to establish that pursuant to the terms of the Policy he is both “totally disabled” and meets its “entitlement criteria” (see: *Porter v. Metropolitan Life Insurance Co.*, [1984] N.S.J. No 227 (C.A.) and *Barlow v. Citadel General Assurance Company*, 2009 ONCA 106. (CanLII)). It is the Plaintiff who alleges breach of contract, and it is therefore he who has the onus to prove that he is entitled to LTB benefits pursuant to the provisions of the Plan. This is the case even where, as in

this instance, the Defendant paid STD benefits. There is no presumption of continuing disability (see: *Conte v. Canada Life Assurance Co.*, 2005 CanLII 28545 (ON SC) at para. 5).

Background Facts

[14] The Plaintiff is 32 years old. He was married at all material times, is currently separated, and has 3 children aged 9, 6 and 4 years old. The Plaintiff was born in Somalia and moved to South Africa as a refugee in 2010. The Plaintiff immigrated to Canada in December 2016.

[15] The Plaintiff impresses me as a fast learner. While in South Africa he learned the local language, Xhosa, as well as English and acted as an interpreter for Somali nationals living there. In Canada, he testified that he was trained in English to operate machinery to make automotive parts and within a week of his initial training, he operated the machinery without difficulty.

[16] Although the Plaintiff was assisted at trial with a Somali interpreter, he completed a Camtac entrance test in English, admitted he is able to orally communicate in English and the evidence is he is also able to email in English.

[17] At one point the Plaintiff worked as a model and acted in a movie.

[18] The Plaintiff began work at Camtac on February 21, 2017, at an annual gross salary of \$38,616.24. He worked on an assembly line that manufactured automotive parts. The Plaintiff's description of the assembly line process was somewhat vague but what is clear is that pieces of steel were lifted by a crane into a machine, manufactured to certain specifications and the finished parts were lifted by crane into a bin. Once filled with the manufactured parts, the bin was transported away by a forklift or pump truck. The Plaintiff's job was to hook the pieces of steel on and off the crane, position the steel so that it would be manufactured to the required specifications, and ensure the finished steel met those specifications.

[19] Charlene Goodfellow ('Goodfellow'), a Camtac human resource manager, testified that the Plaintiff's assembly line job involved lifting parts of approximately 15 pounds.

[20] When asked by his counsel what made his job at Camtac physically difficult, the Plaintiff was hard-pressed to explain but ultimately stated that the most challenging aspects were bending and twisting to feed and retrieve the steel into and out of the manufacturing machinery.

[21] On July 11, 2018, the Plaintiff reported a workplace injury on the assembly line. The Camtac incident report of the same date states that the Plaintiff had pain in his lower back and was provided with an ice pack and Tylenol by the company nurse.

[22] Two days later, on the Plaintiff's next regular shift, Camtac offered the Plaintiff modified work to accommodate his injury. The modified work provided him with the ability to work at his own pace, sit and stand as he wished, and rest as required. The Plaintiff, however, declined the offer of modified work. The Plaintiff explained he refused the Camtac offer because he was in pain and could not stand up. Instead, the Plaintiff chose to return to his usual position on the assembly line. When asked by his counsel to explain the logic in his decision, he was unable to do so.

[23] From August 19, 2018, to January 20, 2019, the Plaintiff was eligible for and took a parental leave after the birth of his second child.

[24] Within approximately one month after his return to work, on February 23, 2019, the Plaintiff was unable to continue work at Camtac because of his earlier July 2018 workplace injury.

[25] In his STD benefits claim form, dated March 4, 2019, the Plaintiff describes his injuries as low back pain emanating down his left leg. He states that while the pain is limited to his low back and left leg, the pain increases after sitting for long periods and is worse upon waking in the morning and after physical activity. The Plaintiff also states that when the pain starts, he must lay down.

[26] On the basis of the Plaintiff's STD benefit claim, the Defendant authorized the payment of STD benefits from February 24, 2019, in the amount of \$446.00 per week. The maximum benefit

period for STD benefits is 24 weeks, and therefore, in this instance the Plaintiff's maximum entitlement period for STD benefits ended on August 10, 2019.

[27] On or about March 12, 2019, Camtac received a report from the Plaintiff's treating physician, Dr. Kordish of K-W Urgent Care Clinics. In his report, Dr Kordish states that the Plaintiff has some limitations in bending/twisting, climbing, kneeling, sitting, and standing.

[28] In response to Dr. Kordish's report, by letter, dated March 13, 2019, Camtac again offered the Plaintiff modified work. This modified work involved the assembly of small parts weighing ounces with the ability to sit and stand as the Plaintiff required. The Camtac letter describes the modified work as "Light sedentary work."

[29] The Plaintiff rejected the Camtac offer of modified work. Notwithstanding this Plaintiff's second rejection of modified work, the Defendant continued to support the payment of the Plaintiff's STD benefits.

[30] A subsequent note from K-W Urgent Care Clinics, dated April 2, 2019, states in part that the Plaintiff "wants to return to work but needs modified duties i.e., no shoulder level or above work, no pulling or pushing or lifting more than 10 kg."

[31] The Plaintiff returned to work on April 3, 2019, when he was assigned modified duties. The Plaintiff testified, however, that his back pain was so severe, he was unable to work after April 4, 2019.

[32] Based on the K-W Urgent Care Clinics note of April 2, 2019, the Defendant determined that the Plaintiff was not totally disabled, and no longer supported his STD benefit claim. By letter, dated April 23, 2019, the Defendant advised the Plaintiff that his STD benefits were terminated effective April 2, 2019, but it was prepared to consider additional documentation in support of his STD benefit claim.

[33] The K-W Urgent Care Clinics note, dated April 9, 2019, states that the Plaintiff “cannot tolerate even modified duties that require standing, walking, lifting” and records his return-to-work date as “uncertain”. The note also states, however, “...not totally disabled as pt [patient] thinks”.

[34] The treating physician’s April 9, 2019, note recommends that the Plaintiff’s return to modified duties be at the discretion of a physiotherapist.

[35] The Plaintiff did not seek the advice of a physiotherapist as recommended by his treating physician. He did, however, seek treatment from chiropractor, Dr. Jay Mistry. In his report of May 2, 2019, Dr. Mistry opines that the Plaintiff is unable to return to work due to pain and reduced range of movement. Dr. Mistry also states the Plaintiff is suffering from anxiety and depression. On the other hand, Dr Mistry’s clinical notes for the period March to May 2019 record “mild improvement”.

[36] On May 9, 2019, the Plaintiff’s treating physician at K-W Urgent Care Clinics confirms his earlier advice that the Plaintiff should negotiate his return to work with his physiotherapist and workplace and confirms that the Plaintiff “does not want any further pharmaceut[icals]”.

[37] Sometimes in May 2019, the Defendant received the magnetic resonance imaging report (‘MRI’) of Dr. Pantin, dated March 6, 2019. Dr. Pantin opines that the Plaintiff’s lumbar spine reveals: (a) a mild disc bulge L4 - SI; (b) mild facet joint hypertrophy bilaterally L4 - SI; (c) early stenosis lower lumbar levels; and (d) no herniation.

[38] The MRI results of March 6, 2019, did not dissuade the Defendant of its assessment that the Plaintiff was not totally disabled. By letter, dated June 3, 2019, the Defendant confirmed its earlier position that the Plaintiff’s STD benefits were terminated.

[39] On June 18, 2019, the Plaintiff issued his claim for LTD benefits and collateral relief.

[40] On or about July 10, 2019, the Plaintiff began seeing Dr. Michael Stephenson as his family doctor. Dr. Stephenson's intake notes state that the Plaintiff suffers from chronic low back pain and left back sciatica pain radiating down his left leg.

[41] Sometime later, the Plaintiff was treated by family physician Dr. M. Hladio of the Sanctuary Health Clinic who wrote in an undated note received by Camtac on or about January 9, 2020, the following:

“This is to confirm that Dek Hassan can return to work. He suffers from mechanical back pain but can return to work safely on a graduated system that works for both parties.

He should continue to avoid activities that disproportionately stress the lower back such as lifting materials that are >15 kg or operating very heavy machinery. Please note he should avoid prolonged standing or sitting in a bent position for >2 hours at a time”.

[42] On January 27, 2020, the Plaintiff accepted Camtac's proposed graduated work hardening plan, dated January 17, 2020, but requested that instead of working Camtac's normal 3 shift rotation that he works only the afternoon or night shift to accommodate his family childcare responsibilities. The Plaintiff's wife worked during the day and required the family's one vehicle to travel to and from work. Camtac conceded to the Plaintiff's accommodation request on the understanding that the Plaintiff would work his normal shift rotation within 6 weeks of his start date.

[43] The Plaintiff resumed work at Camtac on February 18, 2020, but did not return to work after his March 2, 2020, night shift.

[44] In his note of March 11, 2020, to Camtac, Dr. Hladio wrote that the Plaintiff could not “stand for prolonged periods of time (>1 hr)” and that he and the Plaintiff “would be grateful if [Camtac] could accommodate work functions that alternate sitting and standing to avoid exacerbation of back and leg pain”.

[45] The accommodations requested by Mr. Hladio were contemplated in Camtac's return to work plan of January 17, 2020. Nonetheless, Camtac confirmed that it was prepared to further accommodate the Plaintiff.

[46] On May 21, 2020, the Plaintiff sought medical attention for neck and back pain, including a bump on his throat. The Plaintiff was ultimately diagnosed with tuberculous lymphadenitis which required surgical intervention. The Plaintiff testified that following the surgery, he felt much better with his neck pain having dissipated.

[47] At the same time, however, it is the Plaintiff's evidence that he became increasingly anxious over his chronic back pain, with worsening headaches, insomnia, and depression. The Plaintiff's emotional and psychological complaints are recorded in his family physician's notes along with prescribed medications to address the issues.

[48] Generally, the Plaintiff testified that notwithstanding the Defendant's assessment, he was totally disabled. While at work and at home, when he was assisting with childcare responsibilities in particular, he experienced tingling and pain in his lower back and left leg that would intensify with time and be accompanied by numbness. The pain and numbness required him to take a break by sitting, stretching, and exercising. As his health deteriorated, sleep became elusive, his marriage suffered, and he increasingly became anxious and depressed over his inability to work and support his family. In short, he testified that he was unable to do his essential duties of working on the Camtac assembly line for both physical and emotional reasons.

The Video Surveillance

[49] The Defendant undertook video surveillance of the Plaintiff without his knowledge. The video surveillance depicts the Plaintiff standing, walking, bending, sitting, and generally carrying on with his daily activities without assistance. In particular, the video surveillance of the Plaintiff's activities on August 23, 2019, October 17, 2019, and May 17, 2022 are of some significance.

(a) August 23, 2019

[50] The video shows the Plaintiff bending and sitting on the ground as he waited for a ride. When the Plaintiff's ride arrived, he enters the vehicle as a passenger without holding himself to ease his entry. When shown the video surveillance of this day in cross examination, the Plaintiff admitted he could drive safely.

[51] The vehicle, with the Plaintiff as a passenger, was followed from the Plaintiff's apartment complex in Kitchener to an industrial area in Stratford where it was parked at Dynamig Manufacturing ('Dynamig'), a distance of approximately 47 kilometres, requiring a driving time of some 40 minutes. Once parked, the Plaintiff exits the vehicle without assistance and enters the Dynamig "Associate Entrance."

(b) October 17, 2019

[52] In this video, the Plaintiff walks across the parking lot of the apartment complex in which he lives to a corner of the property. Once there, he reaches above head level to the top of a fence to obtain an item, smokes the item and then returns to the apartment building. On cross-examination, the Plaintiff admitted that he was able to work above shoulder level but only in his right side.

[53] On the next day, October 18, 2019, the video surveillance records the Plaintiff entering a vehicle as a passenger without any apparent difficulty. The vehicle travelled a short distance before parking near the Kitchener Masjid to which the Plaintiff and the vehicle's driver walked. Some time thereafter, the two men re-entered the vehicle and drove to a Tim Hortons where the Plaintiff drinks a beverage on the Tim Hortons patio before entering the restaurant and taking a seat with a male patron. The Plaintiff remained seated in excess of one hour before the surveillance was discontinued.

(c) May 17, 2022

[54] The video surveillance of this day shows the Plaintiff pumping gas, entering the driver's seat of an Acura SUV without the need of support, and driving to Court Galvanizing in Cambridge.

Once there, the Plaintiff and his passenger enter what appears to be the Court Galvanizing employee entrance at approximately 11 pm. The next morning at approximately 7 am, the Plaintiff exits the Court Galvanizing facility at which time he fist bumps other men exiting the factory before giving one man a ride.

[55] In summary, the video surveillance shows the Plaintiff able to walk at an apparently normal speed and gait without any evidence of pain or of favouring his left leg. It also shows him bending, reaching above his shoulders, and sitting for long periods of time. In addition, it shows the Plaintiff's ability to get into and out of a vehicle without issue.

The Plaintiff's Work History

[56] There is evidence that the Plaintiff was employed during the Claim Period and immediately thereafter.

(a) Dynamig

[57] Firstly, in May 2019, the Plaintiff was employed by an employment agency which placed him on a full-time basis at Dynamig where he worked 3 shifts from May 16, 2019, to August 31, 2019.

[58] Rebecca Bester ('Bester'), of Dynamig's human resource department, testified that Dynamig is an automated parts manufacturer and that the Plaintiff worked in its production area where he made engine cradles. According to Bester, this work required the Plaintiff to load and unload steel parts, weighing anywhere from 3 to 20 pounds, into robotic manufacturing machines, check the finished parts for quality control purposes and load the approved parts into a bin. Bester also testified that the bins were of various heights.

[59] For his part, the Plaintiff testified that there was no difference between his job at Camtac and his job at Dynamig. Not only do both companies make parts but each job required standing and a lot of bending and twisting. There is no evidence that the Plaintiff asked Dynamig to

accommodate his low back/left leg injury, however, and nothing to suggest that any accommodation was provided.

[60] The Plaintiff stated that he did not return to work at Camtac in the summer of 2019 because Camtac was unable to find work for him. On the other hand, Goodfellow stated in her evidence that Camtac was always prepared to find work for the Plaintiff and accommodate his needs. Certainly, this was the case in January and March 2020.

[61] The Plaintiff also testified that the work at Dynamig was too physically demanding, and as a result, he decided to stop working there.

[62] The unchallenged evidence of the Defendant is that once it learned of the Plaintiff working at Dynamig and disclosed this information to the Plaintiff, the Plaintiff limited his claim for LTD benefits to the Claim Period.

(b) Empire Stairs and Floors Limited/Solid Wood Components Inc. (collectively, ‘Empire Stairs’)

[63] There was little evidence lead at trial with respect to the Plaintiff’s employment at Empire Stairs other than according to the Plaintiff’s record of employment issued by Empire Stairs, he worked at this entity from October 4, 2021 to December 15, 2021 when he stopped working due to a “shortage of work/end of contract or season”.

(c) Ultra Manufacturing Limited o/a Mitchell Plastics (“Mitchell Plastics”)

[64] The Plaintiff worked at Mitchell Plastics from January 3, 2022, to March 23, 2022. Carrie Borders (‘Borders’), Mitchell Plastics’ human resource manager, testified that the Plaintiff worked as a full-time operator of plastic injection moulding machinery used to manufacture decorative interior car parts. Borders also testified that it was the Plaintiff’s responsibility to operate the machinery, inspect the manufactured parts, pack the approved parts in a tote and place the tote filled with completed parts on a rack. She explained that the job required standing, bending,

and lifting of approximately 15 to 20 pounds. Boarders further testified that the Plaintiff disclosed no health issues, and no work accommodation was afforded to him. According to the Plaintiff's employment file, he was terminated in late March 2022 because of performance issues, including frequent and long unauthorized breaks and his unwillingness to accept direction, particularly from female supervisors.

The Medical Evidence

[65] None of the Plaintiff's treating physicians testified and nor did Dr. Omar Dessouki, who was engaged by the Defendant to provide an opinion with respect to the nature and extent of the Plaintiff's injuries and impairments. Pursuant to the parties' agreement, however, the clinical notes and records of the Plaintiff's treating physicians and the opinion report of Dr. Dessouki were admitted for the truth of their contents. The following is a summary of the clinical notes and records of the Plaintiff's treating physicians not already referenced in this Judgment and the opinion of Dr. Dessouki:

- In Dr. Stephenson's report of July 10, 2019, he opines that the Plaintiff suffers from chronic low back pain and left back sciatica pain, and he notes that the Plaintiff has been off work since February 2019 apart from two days in April due to severe pain.
- The August 28, 2019, K-W Urgent Care Clinic notes record the Plaintiff with presenting problems of back pain.
- The September 4, 2019, clinical notes of the Sanctuary Refugee Health Centre state that the Plaintiff:

“doesn't want to go back to Linamar...but wants to work and support his family...doesn't want this life sometimes wants to give up...really wants to work.”
- In his clinical notes of October 7, 2019, Dr. Stephenson reports that the Plaintiff looked well, had normal lumbar spine to inspection, pain to palpation

on L5 region, paraspinal muscle tenderness, and normal gait. On October 9, 2019, this treating physician records that the Plaintiff complained of continued persistent back and neck pain.

- On March 3, 2020, Dr Stephenson documents a significant decline in the Plaintiff's condition with the Plaintiff having reported ongoing low mood and a worsening emotional state for which antidepressants and pain medication were prescribed. In his March 20, 2020, Non-Occupational Functions Abilities for Timely Return to Work note, Dr. Stephenson opines that the plaintiff is unable to work. Specifically, Dr. Stephenson notes that the Plaintiff can walk a maximum of 100 metres and stand for up to 15 minutes. He also records that the Plaintiff advised that he is unable to climb ladders or stairs and is unable to lift objects from the floor to his waist or from his waist to his shoulder. The opinion of Dr. Stephenson conflicts with that of his colleague, Dr. Hladio, however, who in his report of only 9 days earlier reported that the Plaintiff is able to work subject to the accommodations previously referenced in this Judgment.
- Following the Plaintiff's surgery to address his tuberculous lymphadenitis on June 3, 2020, in his Attending Physician's Statement, dated June 18, 2020, Dr. Michael Stephenson notes that the Plaintiff would require tuberculous treatment for 6 months and could not work at the time "due to infections symptoms".
 - In his letter, dated July 15, 2020. Dr. Mistry writes that the Plaintiff has "developed chronic pain which affects his ability to function and perform his ADLs [activities of daily life]. He continues with pain and reduced ROM [range of motion] to his lower back and legs...At present Mr. Hassan will continue to be off of employment...He also experiences signs of depression and anxiety."

- The following is a summary of the Plaintiff's imaging test results requisitioned by his physicians from April 30, 2020, to July 16, 2020:
 - (i) April 30, 2020 – lumbar spine X-ray: normal x-ray of cervical and lumbar spine;
 - (ii) July 16, 2020 – cervical spine MRI: unremarkable c-spine study;
 - (iii) July 16, 2020 – lumbar spine MRI: unremarkable L-spine study;
 - (iv) July 16, 2020 – cervical spine MRI/lumbar spine MRI: unremarkable c-spine study. Unremarkable L spine MRI study; and
 - (v) July 16, 2020 – cervical spine MRI/lumbar spine MRI: no degenerative changes; no disk herniation; no nerve root impingement at any level; no clinically significant central spinal stenosis or foraminal narrowing; the visualized conus is unremarkable.
- The clinical notes of Dr. Stephenson dated October 7, 2020, state that the Plaintiff remains unable to return to work until January 1, 2020 (sic) at the earliest due to his tuberculous. The notes also record the Plaintiff's ongoing back pain as well as insomnia and emotional distress due in part to the death of his mother.
- Dr. Stephenson's clinical note of two months later on December 7, 2020, records that the Plaintiff continues to experience ongoing back pain with sciatica, making it difficult to walk and causing numbness in his left foot.
- On March 4, 2021, Dr. Stephenson's clinical notes confirm the Plaintiff's continued complaints regarding back and leg pain and recent stomach and kidney pain along with insomnia and increased stress. Dr. Stephenson recommends counselling for the Plaintiff's mental health, and in particular, his anxiety and depression.
- The clinical note of social worker, Matthew Lago, dated May 25, 2021, confirms some improvement in the Plaintiff's mental health and records continued back pain complaints and the Plaintiff's inability to lift more than

10 kgs. The note also confirms that while the Plaintiff does not want to return to Camtac because of the pain associated with his job, Mr. Lago encouraged him to find alternative work tailored to his capabilities.

- Finally, there is the report of Dr. Dessouki, dated January 16, 2023. Dr. Dessouki is currently the chief of orthopaedic surgery at Lakeridge Health in Oshawa. His practice focuses on lower and upper limb reconstruction, trauma, post-traumatic reconstruction, and sports medicine. After reviewing the Plaintiff's diagnostic imaging reports, the clinical notes and records of the Plaintiff's treating physicians, including those of Dr. Mistry, and the various reports prepared by them, along with the surveillance reports undertaken by the Defendant, Dr. Dessouki opines that from a musculoskeletal perspective, the Plaintiff was not totally disabled during the Claim Period and was capable of performing his work at Camtac.

Relief from Forfeiture

[66] The Policy provides that proof that benefits are payable must be submitted by the Plaintiff and received by the Defendants within a prescribed time period before any LTD benefits are payable. There is no dispute that the Plaintiff did not submit a formal application for LTD benefits. It is for that reason that the Plaintiff sought and successfully obtained an order amending his statement of claim to advance a claim for relief from forfeiture.

[67] Section 129 of the *Insurance Act* empowers the court to grant relief from forfeiture where there has been imperfect compliance as to the proof of loss given by the insured or with respect to any matter or thing required to be done by the insured with respect to the loss. Section 129 specifically provides:

Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on

that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

[68] Section 98 of the *CJA* also provides:

A court may grant relief against penalties and forfeiture on such terms as to compensation or otherwise as are considered just.

[69] Relief from forfeiture applies to both statutory and policy conditions (see: *Falk Bros. Industries v. Elance Steel Fabricating Co.*, 1989 CanLII 38 (SCC) (*'Falk Bros.'*)).

[70] The Plaintiff submits that his failure to submit a formal claim for LTD benefits is imperfect compliance with the terms of the Policy as contemplated by s.129 of the *Insurance Act* and relief from forfeiture should be granted pursuant to the *Insurance Act* and the *CJA*.

[71] For its part, the Defendant argues that the Plaintiff's claim ought to be dismissed without consideration of its merits because of the Plaintiff's non-compliance with the terms of the Policy. It is also the Defendant's submission that even if relief from forfeiture were available, it should not be granted on the facts of this case. The Defendant submits that the Plaintiff's failure to provide a proof of claim interfered with its assessment process of a developing medical condition as well as any efforts that might be made to rehabilitate the claimant. The Defendant further argues that based on the facts of this case there is nothing to suggest that before the Plaintiff sued for LTD benefits on June 18, 2019, he provided it with medical evidence that he was to be disabled on August 9, 2019, when the LTD benefits would have otherwise been payable. In short, the Defendant submits that it has been prejudiced by the Plaintiff's failure to deliver a proof of claim for LTD benefits.

[72] It is important to appreciate the difference between non-compliance and imperfect compliance. The Supreme Court in *Falk Bros.* explained the difference in this way:

“The case law has generally treated failure to give notice of claim in a timely fashion as imperfect compliance whereas failure to institute an action within the prescribed time period has been viewed as non-compliance or breach of a condition precedent. Thus, courts have generally been willing to consider granting relief from forfeiture where notice of claim has been delayed.

On the other hand, cases in which failure to meet a time requirement has been held to be non-compliance rather than imperfect compliance have largely been cases in which the time period was for the commencement of an action rather than for giving of notice.”

[73] I am also guided by the Ontario Court of Appeal’s instruction in *Kozel v. The Personal Insurance Company*, 2014 ONCA 130, which provides that in light of the Supreme Court’s ruling in *Marche v. Halifax Insurance Co.*, [2005] 1. S.C.R. 47:

“A court should find that an insured’s breach constitutes non-compliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief against forfeiture will be available.”

[74] There is no dispute that were this court to conclude that there has been non-compliance, the Plaintiff’s action ought to be dismissed, and a consideration of the availability of relief from forfeiture is not warranted.

[75] Whereas in some instances the insured’s failure to file a formal proof of claim for benefits may amount to non-compliance with the policy, this is not one such case. Based on the facts before me, I find the Plaintiff’s failure to deliver a proof of claim for LTD benefits to be imperfect compliance with the Policy. I am of this mind because the Defendant had knowledge of the Plaintiff’s alleged total disability, having previously received, reviewed, and adjudicated upon the Plaintiff’s claim for STD benefits. A short two months before the Plaintiff’s LTD benefits would have otherwise been payable, the Defendant confirmed its earlier decision to terminate STD benefits based on the most current medical information provided by the Plaintiff. Having already concluded in June 2019 that the Plaintiff was not totally disabled and, on that basis, denied him continuing STD benefits, there is no evidence to suggest that the Defendant would have taken any different position had the Plaintiff submitted the prescribed formal claim for LTD benefits. It is therefore my conclusion that the Defendant’s argument is both technical and theoretical with the result that any prejudice suffered by it is of a minor nature.

[76] It is also my opinion that this case is distinguishable from that of *Wiles v. Sun Life*, 2018 ONSC 1090 (*Wiles*), where the court found that the plaintiff’s failure to submit a proof of claim

for LTD benefits prior to her issuance of a statement of claim for LTD benefits amounted to non-compliance with the terms of the policy. In *Wiles*, not only did the plaintiff fail to initiate legal action to recover LTD benefits within the time prescribed by the policy but the court found that the insurer would have taken steps to clarify the Plaintiff's medical condition had a claim for LTD benefits been made. I make no such finding here. Otherwise, the Plaintiff instituted his action for payment of the Policy's LTD benefits well within the prescription period.

[77] Given my finding that there has been imperfect compliance with the Policy terms, the question is should relief from forfeiture be granted in favour of the Plaintiff?

[78] Relief from forfeiture is a discretionary, equitable remedy. In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII (SCC) ("*Saskatchewan River Bungalows*"), the Supreme Court held that the test for relief from forfeiture requires a consideration of the following three factors:

- (i) The conduct of the insured;
- (ii) The gravity of the insured's breach; and
- (iii) The disparity between the value of the property forfeited and the damages caused by the insured's breach (at para. 32).

[79] There is no evidence from the Plaintiff explaining why he did not submit a proof of claim for LTD benefits, having previously submitted a STD formal claim. In submissions, Plaintiff's counsel submitted, however, that a formal claim was unnecessary in circumstances where the Plaintiff's STD benefits were terminated by the insurer. I appreciate that it was somewhat reasonable to conclude that any formal proof of claim for LTD benefits would have been denied by the Defendant given its June 2019 confirmation of its earlier decision that the Plaintiff was not totally disabled. Nonetheless, I am of the opinion that this first factor is neutral at best.

[80] With respect to the second factor, I have already determined that there was imperfect compliance with the Policy terms. I do not view the impact on the Defendant as substantial because by the time the statement of claim had been issued, the Defendant had investigated the merits of the Plaintiff's alleged disability and made a determination. While the Defendant maintains that the

Plaintiff's failure to deliver a proof of claim interfered with its assessment and adjudication of the LTD claim, I find that the Defendant already had a relatively comprehensive appreciation of the merits of the claim. To the extent that the Defendant required additional information, the evidence is that such information was obtained through the discovery process. There can be no dispute that the medical records are voluminous.

[81] The Defendant makes much of the Plaintiff's failure to have advised it of his working at Dynamig and elsewhere. While this failure to advise the Defendant may indeed be germane to the merits of the Plaintiff's substantive claim, I do not consider it as particularly relevant to the second factor stipulated by the Supreme Court in *Saskatchewan River Bungalows*. It is my view that this factor favours the Plaintiff.

[82] With respect to the third and final factor, the Plaintiff's claim for LTD benefits is crystallized at \$49,626.70 and the value of his potential general damage award is left for this court to determine should I find a breach of contract. On the other hand, there is little, if any evidence, before the court that the Defendant has suffered any damages caused by the Plaintiff's failure to deliver a formal claim for LTD benefits. In my opinion, any alleged prejudice suffered by the Defendant because of its inability to further investigate the Plaintiff's medical condition is outweighed by the potential harm to the Plaintiff if he is precluded from advancing his LTD claim. Therefore, this factor favours the Plaintiff.

[83] In the end, I conclude that it is in the interests of justice to grant the Plaintiff relief from forfeiture. Accordingly, the Plaintiff's claim for LTD benefits will be adjudicated on its merits.

Has the Plaintiff Established that He is Totally Disabled?

[84] I am now left to measure the Plaintiff's subjective complaints against the evidence which includes the surveillance and medical evidence as well as the Plaintiff's testimony.

[85] The central question is not whether the Plaintiff has chronic pain, severe anxiety, or some other condition. Those conditions do not individually or in combination necessarily equate to total disability. To be successful in his claim, the Plaintiff must prove on the balance of probabilities

that he is totally disabled as defined by the Policy. In addition, the Policy requires in part that the Plaintiff's disability be supported by medical evidence documenting how his impairment prevents him from performing the essential duties of his own occupation at Camtac and any occupation for which the Plaintiff is qualified or may reasonably become qualified for the balance of the Claim Period (i.e., August 11, 2021, to October 4, 2021). In this respect, the Plaintiff has tendered evidence in the form of medical reports from his treating physicians but nonetheless in deciding this case it is important to view the total body of the evidence and not to focus on one narrow aspect.

[86] I have considered the surveillance videotape evidence. The Plaintiff did not know that he was being videotaped. The videotape evidence shows the Plaintiff carrying out the normal activities of daily life. There is considerable footage of him getting into and out of a vehicle, sometimes as the driver and other times as a passenger, without issue. There is evidence of the Plaintiff walking without favouring his left leg, reaching over his shoulders, and sitting for long periods of time.

[87] The Plaintiff testified that he could not twist or bend, both of which were required of him to do his job at Camtac, and for that matter, his job at Dynamig. The video surveillance, however, demonstrates that the Plaintiff was able to undertake both of those movements without difficulty as he got in and out of vehicles.

[88] The Plaintiff testified that the pain was worse after physical activity, and in that event, he was unable to stand or sit but was required to lay down. Later in his testimony, the Plaintiff stated that when he felt pain, he needed to relax by sitting or stretching. Apart from the inconsistency in the two statements with respect to his ability to sit when in pain, at no time is the Plaintiff observed laying down or stretching in the surveillance. In particular, one would have expected the Plaintiff to have laid down, stretched, or demonstrated some signs of incapacity after spending what appears to be 8 hours at the Court Galvanizing factory, some few months after the Claim Period. Instead the Plaintiff is seen fist bumping other men exiting the facility before getting into his car with apparent ease.

[89] When the Plaintiff was shown in cross-examination the video surveillance of his August 23, 2019 trip to the Dynamig facility in Stratford and it was suggested to him that he was able to get in and out of the vehicle without difficulty, he became combative. Instead of explaining his movements, he questioned why he might need to support himself as he was neither old nor a heavy person.

[90] In response to the same video surveillance depicting him bending and sitting on the ground, the Plaintiff testified that although he was in pain, the pain did not prevent him from sitting, and otherwise, he had learned how to control his body so that he did not experience pain when he stood from a sitting position. In this way he was able to stand and walk without assistance.

[91] Finally, the Plaintiff admitted in the October 17, 2019, video surveillance to reaching above his shoulders to obtain an item on top of a fence but explained in doing so, he needed to maneuver his body so that he did not have pain. The video, however, speaks for itself. In reaching for the item, the Plaintiff did not brace himself or manipulate his body in any way to retrieve the item; rather his movements were free flowing and natural.

[92] The significance of the surveillance evidence and the Plaintiff's evidence respecting it, is in my opinion considerable. The surveillance provides the court with objective evidence as to the Plaintiff's condition on multiple days over a span of several years. The evidence is objective because it is not dependant on the Plaintiff's description of his condition. In addition, because the surveillance was undertaken without the Plaintiff's knowledge, there is no risk of his conduct and activities as depicted being contrived or exaggerated. The video surveillance also provides insight into the credibility of the Plaintiff when juxtaposed to his subjective complaints made to his treating physicians. In my opinion, it is very clear from the surveillance videotapes that the Plaintiff was capable of doing much more than he was reporting both to the Defendant and his treating physicians.

[93] In addition to the surveillance evidence, I have also considered the opinions of the Plaintiff's treating physicians, their clinical notes and records and the opinion of Dr. Dessouki.

[94] Chronic pain cases are difficult cases to adjudicate, particularly as in this instance where there is little to no objective evidence of a disabling condition. Having said that, I have considered the opinions of chiropractor, Dr. Mistry, and family physician, Dr. Stephenson, offered in support of this court finding that the Plaintiff was totally disabled during the Claim Period.

[95] In his report of May 3, 2019, Dr. Mistry opines that the Plaintiff is “unable to return to work due to pain and reduced [range of movement]”. In support of his opinion of total disability, Dr. Mistry states that the Plaintiff has chronic pain and psychological issues. Later, in the Non-Occupational Functional Abilities Form for Timely Return to Work, dated March 20, 2020, Dr. Stephenson opines that the Plaintiff is “unable to return to work at this time”. Although not specifically stated in his report, the suggestion is that Dr. Stephenson is of this opinion because of the Plaintiff’s reported inability to walk for more than 100 metres, stand for more than 15 minutes, sit for more than 30 minutes and his total inability to lift and climb stairs.

[96] Apart from the fact that Dr. Mistry is neither a psychiatrist nor a psychologist, and therefore, is not qualified to opine on the Plaintiff’s reported episodes of anxiety and depression, neither opinion of Dr. Mistry nor Dr. Stephenson is founded on any objective evidence of pathology. Rather both opinions are based for the most part, if not solely, on the difficulties experienced by the Plaintiff as reported by him. This limitation, in my view, undermines the reliability of the opinions proffered by the Plaintiff’s chiropractor and family physician. No where in the clinical notes and records of any of the Plaintiff’s treating physicians is there mention of the Plaintiff’s physical abilities as documented in the surveillance videotapes; and likewise, there is a complete absence of any reference to the Plaintiff’s work history other than his employment at Camtac. The only reasonable explanation for the absence of this critical information to any assessment of the Plaintiff’s abilities is that the Plaintiff was less than truthful with his doctors. I cannot accept that Dr. Mistry would have been of the same opinion in early May 2019 had he known that the Plaintiff was about to start work at Dynamig only a few weeks later without any accommodations for his alleged disabilities.

[97] In short, in my opinion, limited weight can be attributed to the medical opinions relied upon by the Plaintiff to establish that he experienced chronic back and leg pain and a mental

condition that disabled him from working. All of the medical opinions are undetermined by the trial evidence which, when viewed in its totality, conflicts with the limitations as reported by the Plaintiff to his physicians.

[98] Notwithstanding that the Plaintiff was less than forthright with his health professionals, there are many instances where the Plaintiff's doctors document in their clinical notes and records that the Plaintiff is able to work with accommodations, and therefore, is not totally disabled. For example:

- Dr. Kordish's note, date stamped March 12, 2019, states the Plaintiff is able to resume modified duties with limitations of bending/twisting, climbing, kneeling, and sitting.
- The K-W Urgent Care Clinics' physician's note of April 2, 2019, states that the Plaintiff is not as totally disabled as he thinks.
- In Dr. Hladio's undated note received by Camtac on January 9, 2020, the family physician opines that the Plaintiff is able to return to work subject to the modifications to which I referenced earlier.
- In the same physician's note of March 11, 2020, he confirms that the Plaintiff is able to work but requires alternating sitting and standing.

[99] Furthermore, while the Plaintiff did contract tuberculous lymphadenitis, a communicable disease, requiring him to self isolate and recover from surgery for a period of time, the disease did not amount to a total disability during the Claim Period. Not only did the Plaintiff admit to feeling much better following his surgery but he also conceded that by January 2021 his doctor suggested that he go back to work. In his testimony, the Plaintiff stated that his family physician advised, "I think you're feeling better so why don't you go back and try if you can go back and maybe start work again".

[100] Finally, Dr. Dessouki opined that the Plaintiff did not suffer from any musculoskeletal impairment at the relevant time that would prevent him from performing his work at Camtac or impede him from retraining for another occupation.

[101] Apart from considering the surveillance and medical evidence in support of the Plaintiff's claim of total disability, I have considered the Plaintiff's testimony. Several aspects of the Plaintiff's evidence cause me to pause and question his credibility pertaining to the core issue of total disability as defined by the Policy. The credibility of the plaintiff is always an important consideration for the court but particularly so in cases like this where there is no objective evidence of the plaintiff's soft tissue injuries, and the court is dependent to a great extent on the plaintiff's self-reporting.

[102] The Plaintiff admitted that he signed the STD claim form that requires him to advise the Defendant immediately should he start work. At no time, however, did the Plaintiff advise the Defendant of his work at Dynamig, Solid Wood, Mitchell Plastics or Court Galvanizing.

[103] On cross-examination when the Plaintiff was shown the surveillance video of him sitting waiting for a ride, he was initially not prepared to admit that he was on his way to Dynamig. Rather his reaction to the question was combative; he testified that his destination was his business. After being pressed to admit he was going to Dynamig, the Plaintiff attempted to minimize his time at the Stratford factory by stating that he worked there for less than 2 weeks in the summer of 2019. The Plaintiff's Dynamig employment records suggest otherwise; they show that his time there was for some 3.5 months.

[104] The Plaintiff also attempted to trivialize the significance of his work at Dynamig in the summer of 2019 during his examination in chief. The Plaintiff explained to his counsel that he did not advise Dr. Stephenson about working at Dynamig on his July 10, 2019 visit because, in his words, "it wasn't a normal job that I had". "I was trying to test if I could do the job". I reject this explanation without hesitation. The Plaintiff's job at Dynamig was not an experiment. Furthermore, because of the Plaintiff's own admission that his job at Dynamig required the same bending, twisting, and standing as his duties at Camtac, I am compelled to conclude that the

Plaintiff was less than truthful with his attending physicians in the summer of 2019 when he complained of not being able to carry on with his normal daily activities.

[105] It also does not escape me that the Plaintiff failed to claim the income earned at Dynamig in his 2019 tax return. He initially accounted for his failure to report this income by suggesting that he did not receive a T4 statement of earnings. When that explanation seemed improbable, he testified that his earnings were “not significant enough to file”. The Plaintiff strikes me as an individual who is prepared to say almost anything to put his actions in the most favourable light.

[106] Although the Plaintiff admitted to driving to Court Galvanizing in May 2022, entering its employee entrance at approximately 11 pm, exiting its employee entrance at approximately 7 am the next day, fist bumping other men exiting the factory and giving one of the men a ride, the Plaintiff denied working at Court Galvanizing. Instead, he testified that he was merely picking up an individual whom he described as a “friend,” a “high level friend” and an “in-law” whose name he could not recall. He also testified that although he may have fist bumped certain men exiting the Court Galvanizing facility, he did not know them. I find the Plaintiff’s explanation for his activities on that early morning of May 2022 to be incredulous and to undermine his credibility. It is plain and obvious that in May 2022 that the Plaintiff worked at Court Galvanizing, and I so find that as a fact.

[107] Finally, in the summer of 2020 when the Plaintiff insisted that his chronic back and left leg pain as well as his tuberculous lymphadenitis prevented him from returning to work at Camtac, he testified that he was well enough to consider travelling overseas to visit with his ailing mother. The physical demands of overseas travel require protracted standing, walking, and sitting, as well as bending and lifting. These are the very same work activities that the Plaintiff claimed he was unable to do. In my opinion, the Plaintiff’s willingness to undertake these activities for purposes of travel is inconsistent with his position that he was otherwise totally disabled.

Conclusion

[108] In sum, I am not satisfied that the Plaintiff has discharged his onus of establishing on the balance of probabilities that he was totally disabled from performing the essential duties of his job at Camtac during the Qualifying Period and the 24 months immediately thereafter as well as performing the essential duties of any occupation for which he is qualified or may reasonably become qualified during the balance of the Claim Period. I have reached this conclusion based in part on the medical evidence which does not support a finding of total disability as stipulated above and defined by the Policy. The preponderance of the medical evidence proffered by the Plaintiff confirms that he was able to undertake his job at Camtac with modifications, all of which his employer was prepared to accommodate. In addition, I have concluded that the Plaintiff was not totally disabled as defined by the Policy during the Claim Period as a result of his daily activities documented in the surveillance videotapes as well as his ability to work at Dynamig following his STD claim and at other facilities immediately following the Claim Period. Finally, in my view, the Plaintiff's lack of credibility on several significant issues undermines his evidence respecting his alleged total disability.

[109] The clinical notes of Dr. Stephenson, dated September 4, 2019, state the Plaintiff wants to work to support his family but does not want to go back to Linamar/Camtac. Based on the evidence, I find that were it not for the Plaintiff's desire not to return to Camtac because of the imposed work schedule there, or for other reasons, the Plaintiff was indeed able to perform the essential duties of his assembly line manufacturing job at Camtac during the Claim Period.

[110] Accordingly, I find that the Defendant did not breach the Policy and the Plaintiff's claim for both LTD benefits and general damages is dismissed.

Costs

[111] The parties are strongly urged to agree upon costs. If they are unable to do so, the party seeking costs may make written submissions as to costs within 15 days of the release of this decision. The responding party has 10 days after receipt of the initial cost submissions to respond and the party seeking costs has a further 5 days to deliver a reply, if any. The initial and responding cost submissions shall not exceed 4 double-spaced pages, exclusive of offers to settle, bills of costs

and authorities while the reply submissions, if any, are not to exceed 2 double-spaced pages. All submissions are to be forwarded to my attention by email to my judicial assistant linda.kinkasone@ontario.ca with a copy to the kitchener.SCJJA@ontario.ca email address. If no submissions are received within this time frame, the parties will be deemed to have settled the issue of costs.

M.J. Valente J.

Released: April 16, 2024

CITATION: Dek v. The Manufacturers Life Insurance Company, 2024 ONSC 2071
COURT FILE NO.: CV-19-793
DATE: 2024/04/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Hassan Dek

Plaintiff

– and –

The Manufacturers Life Insurance Company

Defendant

REASONS FOR JUDGMENT

M.J. Valente J.

Released: April 16, 2024