

**CITATION:** Nasab v. Sun Life Assurance Company of Canada, 2024 ONSC 6921  
**COURT FILE NO.:** CV-19-00616549-0000  
**DATE:** 20241211

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** SALOOMEH NAZARY NASAB, Plaintiff  
-and-  
SUN LIFE ASSURANCE COMPANY OF CANADA, Defendant

**BEFORE:** Jane Dietrich J.

**COUNSEL:** *Shahram Bahmadi*, for the Plaintiff  
*Stephen H. Shantz*, for the Defendant

**HEARD:** December 5, 2024

**ENDORSEMENT**

**Introduction**

[1] The defendant, Sun Life Assurance Company of Canada (“Sun Life”) brings a motion for summary judgment pursuant to rule 20.04(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the “*Rules*”). The defendant seeks an order dismissing the claim by the plaintiff, Saloomeh Nazary Nasab, for short-term disability (“STD”) and long-term disability (“LTD”) benefits, against it.

**Background**

[2] In the underlying action, Ms. Nasab alleges she suffers from totally debilitating chronic back pain and should be entitled to an additional 15 weeks of STD payments as well as LTD payments from Sun Life.

[3] At the time of Ms. Nasab’s initial claim for STD benefits in 2017, she was 45 years old and had been employed as a sales manager at Nordstrom. She began that position in September of 2016 and her coverage with Sun Life commenced three months later in January of 2017.

[4] Her last day of work was on March 11, 2017. In her initial claim documentation, she noted that she was experiencing pain, numbness and weakness in her lower back and leg. She also indicated that she had ‘the same or similar illness or injury’ and noted that she experienced weakness and pain in lower back and also numbness about 2 years ago.

[5] Her attending physician statement from that time indicates the issues had been ongoing since 2014.

[6] Sun Life had a contract of group insurance with Nordstrom Canada Retail, Inc., being Policy No. 101245 (the “Policy”), providing, among other things, certain STD and LTD benefits to eligible employees. To qualify for, and be entitled to receive, STD and LTD benefits pursuant to the Policy an eligible employee must provide satisfactory proof that she is “totally disabled” within the meaning of the Policy.

[7] Sun Life first received notice of a claim for STD benefits on behalf of the plaintiff on or about March 20, 2017. On about April 7, 2017, Sun Life notified the plaintiff that STD benefits were approved and would be payable effective March 20, 2017, through to April 30, 2017. The STD benefits were eventually extended until June 11, 2017.

[8] On June 11, 2017, Sun Life advised Ms. Nasab that Sun Life had decided, based on further medical evidence, that a further absence from work was not supported. The Plaintiff was advised that she could appeal the decision to deny further STD benefits if she disagreed with it. She did not do so at that time.

[9] On about October 12, 2017, Sun Life received a note from Dr. Naghdi dated September 27, 2017, indicating that the plaintiff had undergone a nerve block procedure a few weeks prior. She needed to be off work until November 2017 and had been advised to start modified hours (4 hours per day) from November 1st until further notice.

[10] Following that, Sun Life asked Ms. Nasab for further medical information relating to the June 11, 2017 – September 27, 2017, period. The evidence provided by Sun Life’s case manager was that Ms. Nasab advised her that during that time period she had been out of the country, in Iran, for a family emergency.

[11] At the hearing, counsel for Ms. Nasab indicated that potentially Ms. Nasab was out of the country during a different period, however, Ms. Nasab did not swear an affidavit for use on this summary judgement motion and no evidence was before me to contradict that she was out of the country during June – September of 2017.

[12] STD benefits were not reinstated by Sun Life. No application was made by Ms. Nasab for LTD benefits.

[13] The plaintiff issued the underlying statement of claim on March 20, 2019 seeking both the remaining 15 weeks of STD benefits and LTD benefits.

## **Issues**

[14] Rule 20.04(2)(a) provides: “The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence”.

[15] The issues on this motion are whether the claims by Ms. Nasab for the additional 15 weeks of STD benefits and for LTD benefits raise a genuine issue requiring a trial.

## Analysis

[16] In the original factum the defendant sought an order dismissing the action because:

- a. There is no genuine issue for trial regarding STD benefits as the plaintiff was not entitled to the balance of the STD benefits by reason of the out-of-country exclusion in the Policy; and
- b. There is no genuine issue for trial regarding LTD benefits because (i) the statement of claim does not disclose a cause of action in relation to any claim for LTD benefits; and (ii) in any event, any claim for LTD benefits would be barred by the policy exclusion relating to pre-existing conditions.

[17] At the hearing, counsel for Sun Life advised it was not proceeding with the argument set out in 16(b)(i) – that the statement of claim does not disclose a cause of action for any claim for LTD benefits. This was based on the Ontario Court of Appeal’s decision in *Shawluk v HSBC Bank of Canada et al*, 2023 ONCA 538. In that case, the Court of Appeal held that the proper path forward, in the circumstances, was for the plaintiff to seek to amend her claim to add a request for relief from forfeiture relating to her failure to apply for LTD benefits. Counsel to Ms. Nasab agreed that should the claim for LTD benefits otherwise survive this motion for summary judgment, the plaintiff intended to seek to amend their statement of claim accordingly.

[18] There is no genuine issue requiring a trial when the court is able to reach a fair and just determination on the merits of the motion. This will be the case where the process (1) allows the court to make necessary findings of fact, (2) allows the court to apply the law to the facts, and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hyrniak v Mauldin*, 2014 SCC 7 [2014], 1 S.C.R. 87 at para. 49; *Moffitt v. TD Canada Trust*, 2023 ONCA 349, 483 D.L.R. (4th) 432, at para. 39.

[19] While Sun Life bears the onus on this motion of establishing that there is no genuine issue requiring a trial, the plaintiff has an evidentiary burden and must put her best foot forward with respect to the existence of material issues to be tried – she must lead trump or risk losing: see *1061590 Ontario Ltd v. Ontario Jockey Club*, 1995 CanLII 1686.

### Short-Term Disability Benefits and the Out of Country Exclusion

[20] The Policy provides that STD benefits end on the earlier of certain dates. The relevant date for purposes of this proceeding is “the end of a maximum benefit period of 26 weeks of payment”. However, the Policy goes on to say that Sun Life will not pay benefits for any period:

- You are not receiving appropriate treatment.
- That you do any work for wage or profit except as approved by Sun Life.
- You are not participating in an approved rehabilitation program, if required by Sun Life.

- You are on a leave of absence, strike or lay-off except as stated under *Maternity/parental leave of absence*. However, if you become totally disabled before a notice of separation is given, payments continue while you are totally disabled, but not beyond the end of the maximum benefit period.
- You are absent from Canada longer than 4 weeks due to any reason, unless Sun Life agrees in writing in advance to pay benefits during the period.
- You are serving a prison sentence or are confined in a similar institution.  
(emphasis added)

[21] Sun Life takes that position that Ms. Nasab was out of the country from June to September of 2017 and therefore is captured by the exclusion underlined above for the remaining 15 weeks of STD benefits.

[22] Ms. Nasab takes the position that her benefits are only suspended during the time she was out of the country and the remaining 15 weeks should recommence once she returned to Canada at the end of September of 2017.

[23] Counsel for Ms. Nasab could not point me to any language in the policy which ‘suspends’ payments. Rather he argues that Ms. Nasab is entitled to 26 weeks of payment and nothing in the Policy says that those 26 weeks must be consecutive.

[24] Counsel for Sun Life takes that position that the interpretation suggested by Ms. Nasab is absurd. The concept of ‘short-term’ disability benefits is that they cover the initial ‘short-term’ and if they were simply ‘suspended’ during the periods referred to in paragraph 20 above, the result may be absurd. For example, if a claimant refuses treatment for two years, it would be absurd to say that her short-term disability benefits would commence two years after she was first disabled. Similarly, if a claimant received a week of STD benefits and was then confined to prison for 10 years, they would not be entitled to short-term disability benefits following their release from prison 10 years later – those situations he says show the absurdity of Ms. Nasab’s interpretation.

[25] To determine the meaning of the out of country exclusion, the court is required to read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47

[26] In this regard, I agree with Sun Life that the Policy provides that the period for which Sun Life will not pay benefits under the out of country exclusion does not ‘suspend’ the 26-week maximum period for which STD benefits may be paid. Rather the STD period is a maximum period of 26 weeks of payment, and for any period the claimant is out of country without pre-approval from Sun Life during that 26 weeks the benefits will not be paid.

[27] Accordingly, as the evidence before me is that Ms. Nasab was out of the country from at least June 11, 2017 until September 27, 2017 (which is 16 weeks), she is not eligible for STD benefits past the 11 weeks already paid to her by Sun Life.

## Long-Term Disability Benefits and the Pre-Existing Condition Exclusion

[28] The Policy also provides that LTD benefits (which are intended to commence following the initial 26 weeks of STD benefits) will not be available in certain situations. The relevant exclusion is referred to as the pre-existing condition exclusion and reads: “*We do not pay benefits if your disability results directly or indirectly from a condition which existed on or before the date your coverage began*”. There are certain exceptions, which are not relevant for the current proceeding.

[29] The pre-existing condition exclusion only applies to LTD benefits and not STD benefits.

[30] The evidence before me contains numerous references to Ms. Nasab experiencing low back pain for a number of years prior to her coverage beginning on January 1, 2017. This evidence was summarized in paragraph 43 of Sun Life’s factum and includes references to medical notes from June 30, 2014, September 18, 2015, September 25, 2015, October 30, 2015, November 2, 2015, November 19, 2015, December 2, 2015, May 30, 2016, June 3, 2016 and June 24, 2016.

[31] The evidence referenced above includes multiple notes of low back pain, treatment and time off work from 2014 – 2016. The initial note related to low back in 2014 indicated the duration as 6-7 years with a diagnoses of early degenerative disc disease of lumber spine and cervical spine resulting in chronic neck pain and chronic low back pain.

[32] Sun Life obtained two experts to review this evidence, Dr. Woolsey (who is consultant to Sun Life) and Dr. Skeyi-Otu (who is independent of Sun Life). Both experts concluded that Ms. Nasab had prior pre-existing difficulties with chronic low back pain.

[33] Ms. Nasab does not dispute that she had previously experienced low back pain for many years. Rather she takes the position that the low back pain was not as serious previously as it became after March of 2017.

[34] Ms. Nasab retained an expert, Dr. Wong who provided an opinion as follows:

Ms. Nasab had pre-existing back pain problems and problems with neck pain, but she was able to perform her job duties.

The pain did not get worse to the point before March of 2017 that it prevented her from working. Therefore, I believe she is eligible for the long-term disability benefit despite her pre-existing condition as she can now no longer perform the duties of her work.

[35] Mr. Wong’s interpretation of Ms. Nasab’s benefits under the Policy is not determinative. That is a legal issue that it is to be determined based on the wording of the Policy.

[36] Mr. Wong does agree however, that Ms. Nasab had pre-existing back pain problems. He clarifies to say that the pre-existing problems were not as severe as compared to those Ms. Nasab experienced following March of 2017. As counsel to Ms. Nasab submitted, the pain is now a completely different level, previously she had only been off work for seven days and did not require injections to treat the pain, but now requires regular injections.

[37] The question then, is based on the wording of the Policy, is the severity of Ms. Nasab's pre-existing back problems relevant.

[38] In *Hartmann v. Sun Life Assurance Company of Canada* [1994] O.J. No 1089 (Ont Gen Div) [*Hartmann*] the court addressed a similar situation. In that case, the relevant pre-existing condition exclusion provided: "*Payment will not be made... (b) in respect to total disability resulting directly or indirectly from any illness which existed on the date of commencement of the employee's insurance*".

[39] The primary difference between the policy at issue in *Hartmann* and the current Policy is the use of the word 'condition' in the current policy vs 'illness' in the *Hartmann* policy. The court, in *Hartmann* found that the evidence disclosed the plaintiff had a significant psychiatric history prior to the relevant date, which continued and became more acute subsequent to the relevant date. The court in *Hartmann* found that Hartmann "was suffering from a minor illness on June 10, 1981, which became a major illness on June 21, 1981" see para 11 of that decision. As a result, the court found that her total disability was the direct or indirect result of the previous illness (although it was minor previously) and the pre-existing condition exclusion applied such that Hartmann was not entitled to receive benefits.

[40] I agree with the court in *Hartmann* that the language of the pre-existing condition exclusion does not depend on how serious the illness which existed on the date of commencement of the coverage was. To interpret the Policy otherwise (i.e. to say that the exclusion covered only pre-existing illnesses which are equally as severe as the eventual condition at issue) would render the wording in large part meaningless. If the pre-existing condition was required to be totally debilitating, the individual would not have been working. Many chronic conditions wax and wane. Simply because an individual is capable of working for a period of time, and later becomes unable to tolerate the pain or the condition becomes exacerbated does not negate the fact that the disability resulted indirectly or directly from a pre-existing condition.

[41] Accordingly, I find on the evidence before me that Ms. Nasab's chronic low back pain disability results directly or indirectly from a condition which existed on or before the date her coverage began and she is therefore not entitled to LTD benefits based on the terms of the Policy.

## **Disposition**

[42] For the reasons set out above, I grant the defendant's motion for summary judgment.

[43] At the hearing, the parties both provided cost outlines to the Court. The amounts claimed by both parties on a partial indemnity basis were similar.

[44] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43. In exercising my discretion, I may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in Rule 57.01. These factors include but are not limited to: (i) the result in the proceeding; (ii) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer; (iii) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed; (iv) the amount claimed and the amount recovered in

the proceeding; (v) the complexity of the proceeding; (vi) the importance of the issues; and (vii) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Rule 57.01(1)(f) provides that the court may also consider “any other matter relevant to the question of costs.”

[45] In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 26 and 37.

[46] For these reasons, I fix the costs of the motion at \$7,500 inclusive of disbursements and Harmonized Sales Tax and order the plaintiff to pay that amount to the defendant within 30 days of the date of this order.

Jane Dietrich J.

**Date:** December 11, 2024