

Managing Long-Term Disability Claims

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Overview

1. Long Term Disability Contracts

- ▶ (a) Minimum Qualifying Periods
- ▶ (b) The role of Employment Insurance
- ▶ (c) Employers' Obligations
- ▶ (d) Test for Disability
- ▶ (e) Quantum of Benefit and Common Provisions
- ▶ (g) Obligations

2. Litigating LTD Denials

- ▶ Damages

3. Recent Case Law

- ▶ Fraser v Fenchurch
- ▶ Baker v Blue Cross

4. When to Consult a Lawyer

Qualifying Periods

- ▶ Waiting Periods vary from policy to policy
- ▶ Available benefits during waiting periods:
 - ▶ EI sickness benefits
 - ▶ Short term disability benefits
 - ▶ Income replacement benefits
- ▶ Applications should be made early to ensure that there are not additional delays in processing the application

While You Wait...

The Role of Employment Insurance

- ▶ EI provides for sickness benefits for up to 15 weeks after a 2-week waiting period.
- ▶ EI benefits are equal to 55% of earnings up to a maximum of \$468 per week. This amount is taxable.
- ▶ A Record of Employment is required to apply for EI.



Employer's Obligations



- ▶ Provide Application
- ▶ Issue ROE
- ▶ Health Benefits

The Test for Disability

- ▶ Total Disability
- ▶ Relevant factors include
 - ▶ Age
 - ▶ Degree of training
 - ▶ Education
 - ▶ Income level



The Test for Disability

Own Occupation

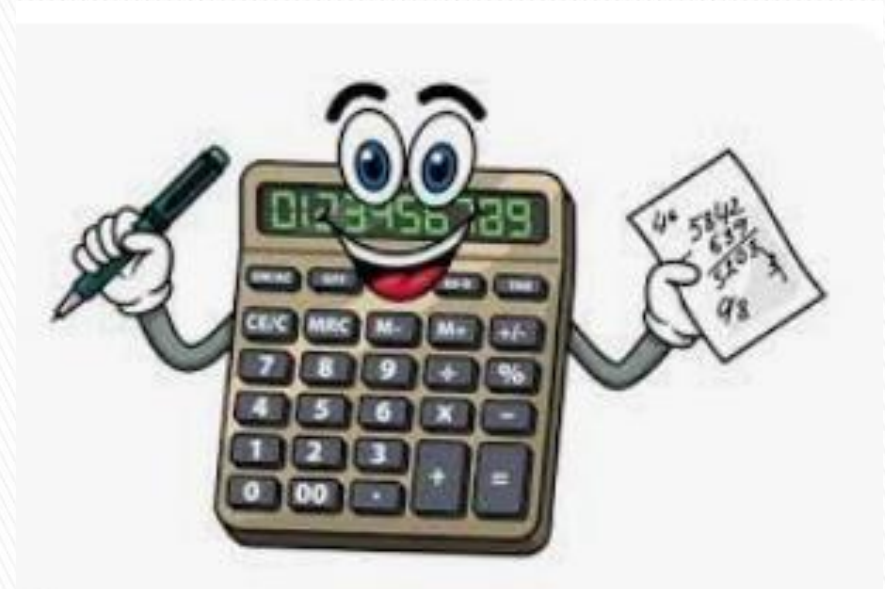
- ▶ As a result of illness or injury (physical or psychological) you are unable to perform the regular duties of your own occupation
- ▶ A person must be unable to perform the duties of the work they were doing at the time they first became disabled

Any Occupation

- ▶ As a result of injury or illness (physical or psychological) you are unable to perform the regular duties of any occupation for which you are suited for (or could become qualified for) by reason of education, training or experience
- ▶ Change of definition is usually 2 years from onset of disability
- ▶ Gainful Employment

Quantum of Benefit

- ▶ Policy dependent
- ▶ Cost of Living Adjustment
- ▶ Typically benefit duration is to age 65
- ▶ Taxable and non-taxable policies
- ▶ Offsets

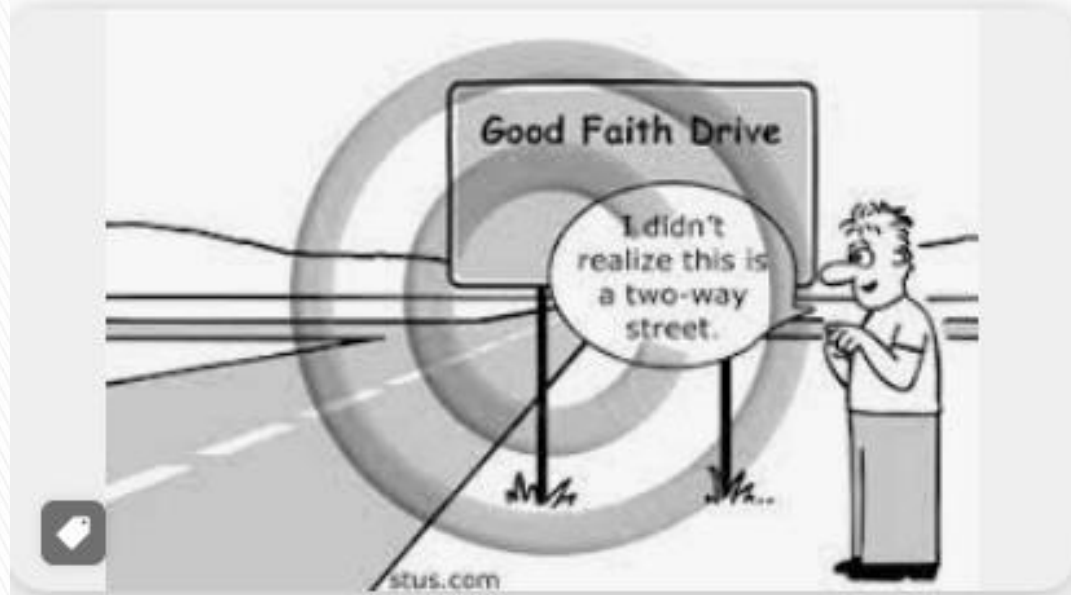


Common Provisions

- ▶ **Offset provisions**
 - WSIB
 - CPP Disability benefits
- ▶ **Recurrent Clause**
 - Typically 6 months
- ▶ **Exclusions and Limitations**
 - Pre-existing conditions
 - Self-inflicted injuries such as substance use disorder or suicide attempts



What is the Insurer Obligated to do?



- ▶ First Party and “peace of mind” contract
- ▶ Obligation to adjudicate in good faith
 - Request and review all medical records
 - Obtain appropriate medical opinions
 - Provide appropriate support

What is the Applicant obligated to do?

- ▶ Comply with Notice Provisions and Timelines
- ▶ Seek out reasonable and appropriate treatment
 - Treatment must be related to the condition
- ▶ Mitigate
 - Follow physician advice



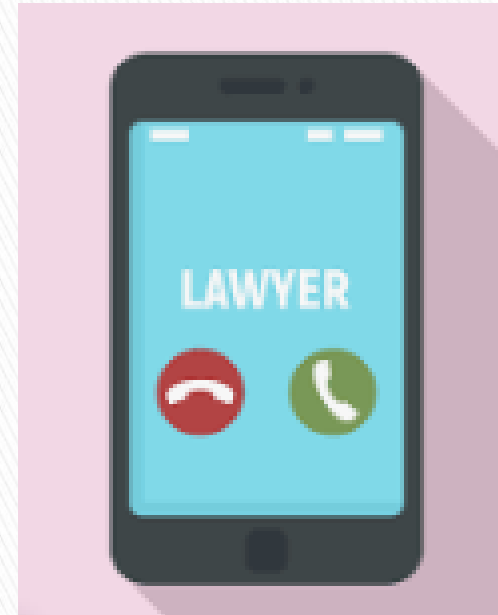
Why Would an Insurer Deny?

- ▶ Insufficient medical information
- ▶ Do not meet the definition of disability
- ▶ The insurance company physicians believe you can work
- ▶ Pre-existing medical conditions
- ▶ Surveillance



Denied. What next?

- ▶ Appeal the decision
 - Timelines
 - Provide further medical evidence
- ▶ Contact a lawyer to commence a lawsuit



Litigating LTD Claims

- ▶ What do you claim for?
 - Claim for past arrears + interest
 - Declaration of entitlement to payment of LTD benefits
 - Damages for mental distress and punitive damages
- ▶ Litigation Strategy:
 - Judge Alone vs Jury Notice
 - Expert Evidence



What are Extra Contractual Damages?

- ▶ Aggravated Damages
- ▶ Punitive Damages
 - Awarded to punish a defendant for particularly bad behaviour
 - Damages not meant to compensate but to punish or deter
- ▶ The exception, not the norm



Fraser v Fenchurch

- ▶ Plaintiff denied LTD benefits based on psychiatry IME who recommended psychological ax
- ▶ No ax was obtained by insurer prior to denial
- ▶ During litigation Plaintiff obtained psych ax and LTD insurer reversed denial and paid retroactively
- ▶ Trial proceeded on extra contractual damages
- ▶ Judge awarded \$10,000 for aggravated damages and \$150K for punitive damages

Baker v Blue Cross

- ▶ Pl was 47 y/o hospital director who had suffered a brain injury caused by a stroke
- ▶ Blue Cross had 375 hours of surveillance video and asserted that this demonstrated the pl's ability to perform at a reasonably commensurate job
- ▶ Defense expert supported this position
- ▶ Treating neurologist testified that ongoing cognitive issues prevented the pl from working in any occupation
- ▶ Jury found:
 - LTD benefits should be reinstated
 - \$40K in aggravated damages
 - \$1.5 M in punitive damages
- ▶ Decision currently being appealed

When to Consult a Lawyer?

- ▶ Early!
 - ▶ Avoid limitation defenses
 - ▶ Ensure appropriate investigations can be completed
 - ▶ Time is of the essence
 - ▶ Each policy varies
- ▶ Lawyers who specialize in disability claims offer a free consultation and do not charge any fees until the case is successfully resolved
 - ▶ Money should never be a concern or barrier to getting legal advice.

Michelle Kudlats

Michelle is a Partner at Neinstein Personal Injury Lawyers LLP. Michelle has successfully advocated before the Superior Court of Justice, Social Benefits Tribunals, Workplace Safety Insurance Appeals Tribunal and the Licensing Appeals Tribunal. Michelle has extensive experience in personal injury litigation including long term disability denials, motor vehicle claims, insurance disputes and medical malpractice.

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