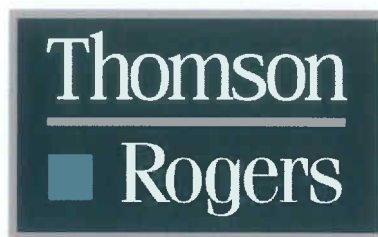


# **STRATEGIES FOR RESOLVING THE CLAIM BEFORE IT BECOMES A CASE**

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## **STRATEGIES FOR RESOLVING THE CLAIM BEFORE IT BECOMES A CASE – CLAIMANTS’ PERSPECTIVE**

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### **1. Introduction**

A claimant’s lawyer taking on a disability claim is usually faced with the task of “getting up to speed” or “playing catch-up”. In most situations, the disabled claimant and the insurer have had an ongoing relationship to which the claimant’s lawyer is a newcomer. In the usual case, a disabled claimant obtains the appropriate claim forms from either his employer or the insurer and then completes and submits those forms. The insurer receives the claim forms and assesses the claim. The insurer may seek further information from the employer, disabled claimant or his doctors. In many cases, an insurer will initially approve a claim and then only later discontinue benefits. It may be months or years from the time of the onset of the disability until a disabled claimant makes contact with a claimant’s lawyer. That first contact is usually to report that the insurer has discontinued benefits. It is now time for the claimant’s lawyer to “get up to speed” or “play catch-up” and discover what has transpired between the disabled claimant, the employer, the insurer and their doctors. This must be done before the claimant’s lawyer can properly advise the disabled claimant of his rights and options and, hopefully, bring the matter to resolution before proceeding with litigation.

In some cases, the claimant’s lawyer may already have the disabled claimant as a client and be bringing a claim against the tortfeasor who caused the accident which triggered the disability. In these cases, the claimant’s lawyer can sometimes “see it coming” and be

prepared for the disability insurer's discontinuation of benefits. Or, alternatively, the claimant's lawyer may be contemplating negotiating an all-encompassing settlement of all of the claimant's claims (tort, no-fault benefits and long term disability benefits, for example) and already be preparing for negotiations with the insurer. In these situations, the lawyer should already be up to speed and caught up with all relevant information.

Whether engaged in getting up to speed on a claim or bringing along a claim for an all-encompassing settlement, this paper will seek to guide the claimant's lawyer in the steps to take to reach a favourable resolution.

## **2. Forewarned Is Forearmed**

The claimant's lawyer will usually not be able to obtain a copy of the particular insurance policy applicable to the claim until later in the development of the claim. Therefore, understanding some of the basic conditions, terms and principles of disability policies will allow the claimant's lawyer to proceed in the correct direction until the policy is obtained. Thereafter, the particular policy provisions should be reviewed in detail and the general principles applied to the particular policy.

Disability policies usually insure against total disability with respect to employment. However, "total disability" is not defined in the Insurance Act. There are two types of total disability in the usual disability policy. Usually, for the first two years of the claim, total disability is defined in respect of the disabled claimant's "own occupation" and thereafter in respect of "any occupation". Examples of "own occupation" definitions from actual policies are as follows:

1. Teacher's Policy – "A member is totally disabled if such a member is in a continuous state of incapacity beyond the waiting period due to sickness or

accident preventing the member from performing each and every duty of the member's regular occupation."

2. Seamstress' Policy – "Total disability, during the elimination period and for the next 24 months, means you are unable to perform substantially the essential duties of your regular occupation because of illness or injury."
3. Administrative Assistant's Policy – "Totally disabled means, for the first 30 months of a period of disability, an employee is wholly and continuously disabled by illness or accidental bodily injury which prevents him from performing the essential duties of his normal occupation."
4. Dentist's Policy – "A participant whose regular occupation is the practice of dentistry . . . is totally disabled for the purposes of this policy when, as a result of sickness or injury, he is unable to perform the essential duties of his regular occupation, is under the regular care of a physician and is not engaged in any gainful occupation."

Examples of "any occupation" definitions from actual policies are as follows:

1. Teacher's Policy – "A member is "totally and permanently disabled" if such a member is in a continuous state of incapacity due to a physical or mental impairment which prevents the member from engaging in any employment for which such an individual is reasonably suited by reason of education, training or experience and not able to earn at any occupation, more than 75% of indexed pre-disability monthly earnings. Such a disability can reasonably be expected to last for the remainder of the member's lifetime."

2. Seamstress' Policy – "After the 24 months, the definition of total disability changes to mean that you must be unable to do any job for which you may reasonably become qualified by training, education or experience."
3. Administrative Assistant's Policy – "After the first 30 months of total disability, totally disabled shall mean he is unable to perform the essential duties of any occupation for which he is reasonably fitted by education, training or experience."
4. Dentist's Policy (own occupation option purchased) – "Total disability and totally disabled shall mean that, as a result of sickness or injury, the participant is unable to perform the essential duties of his regular occupation and is under the regular care of a physician."

In considering the concept of "total disability", the courts have usually held that that condition exists when a disabled claimant is unable to perform substantially all of the duties of an occupation. The leading case in this regard is Paul Revere Life Insurance Co. v Sucharov [1983] 2 S.C.R. 541. In this case, the majority of the Supreme Court held that the disabled claimant was totally disabled because he could not perform his own occupation when viewed in its entirety. In that case, the disabled claimant could separately perform most of the tasks involved in his business but could not effectively put the performance of the those tasks together to run his business.

With respect to total disability for "any occupation", the review of the disabled claimant's level of disability extends beyond his own occupation to other occupations but the same test of total disability is applied. It is not, however, applied to truly any occupation but rather to any reasonable occupation. The reasonableness of an occupation is to be

measured against the disabled claimant's past education and work history and a reasonable occupation should be reasonably akin to the old occupation taking into consideration its status, the level of income provided and the work activities undertaken. Courts have held, for example, that a coding technician who was able to sell makeup on a part-time basis, a security guard who could work part-time as a crossing guard, a self-employed denturist who could work as a taxi driver, and a skilled tradesman who could work as an unskilled labourer were all still totally disabled under the any occupation definition.

A claimant's lawyer should remember that a disabled claimant always has the onus of proving a claim on the balance of probabilities. In that sense, the onus is always on the disabled claimant's lawyer to be able to produce enough evidence to prove a prima facie case for total disability. Once a prima facie case for total disability is established, then the evidentiary onus is on the insurer to produce evidence in response to that case. (See Constitution Insurance Company of Canada v Coombe (1997), 36 O.R. (3<sup>rd</sup>) 308 and Van Allen v London Life Insurance Co. (1999), 15 C.C.L.I. (3<sup>rd</sup>) 63).

### 3. The Initial Contact With The Disabled Claimant

Inevitably, the disabled claimant's first contact with a claimant's lawyer will be over the telephone. A disabled claimant will call and indicate that he has a need for a lawyer and ask for an appointment. Before making an appointment with a disabled claimant, a prudent claimant's lawyer should spend some time speaking with the disabled claimant over the telephone to obtain the basic information necessary to decide if the case should be taken on (or if a meeting is necessary to make that decision). The claimant's lawyer should attempt to obtain the following information before having the potential client in for a face to face meeting:

- Name, Address, Telephone Number
- Age, Occupation, Length of Time in Occupation
- Education/Training/Experience
  - Only a general understanding need be obtained at this point.
- Type of Disability
  - It is also helpful to determine who the treating family doctor is, who the treating specialists are and what prognoses they have provided with respect to the disability.
- Name of Insurer
  - It is also helpful to know the name of the adjuster involved in the file.
- Name of Employer
  - It is also helpful to know if the employer is still holding the claimant's job open and/or if the employer is still in business and/or if the employer is still insured with the insurer.
- Duration For Which Disability Benefits Have Been Paid
  - This information may guide you in determining which definition of disability will apply to the case.
- Monthly Amount of Disability Benefits Paid
- When The Disability Benefits Were Discontinued
  - This information is vital to determine whether expiry of a limitation period is pending.
- Reason The Insurer Discontinued Disability Benefits

- It is vital to determine this to know the fight you will have to fight as early as possible and it is also helpful to know if the disabled claimant has a “ready made” response to the discontinuance (for example, the disabled claimant had his benefits discontinued after an “independent” medical examination and upon hearing of the results of the “independent” medical examination, the disabled claimant’s family doctor and specialist both disagreed with the insurer’s actions).
- Disabled Claimant’s Family Situation
  - It is helpful to know if the disabled claimant has a spouse and dependents and whether the family has other sources of income.
- Is The Disabled Claimant in receipt of Canada Pension Plan Disability Benefits or other Disability Benefits.

If it appears that the disabled claimant has an arguable case, then an appointment should be made to have the disabled claimant come in to meet with the claimant’s lawyer. Very often, the disabled claimant will not have much in the way of a “claim file” but he should be told to bring in any and all documentation that he has regarding the claim, including the following:

- Personal identification, including his social insurance card, health card and driver’s licence card
- Copies of any certificates of qualification, licenses and/or diplomas
- A current curriculum vitae (if he has one – if not, at a minimum, the names and addresses of his past employers)



- All correspondence to or from his insurer and employer (arranged in chronological order)
- A copy of his Insurance Policy (or more likely a copy of his "Benefit Booklet")
- Any medical reports, doctors' notes, hospital records, test results, etc., (arranged in chronological order)
- The names and addresses of all of the doctors, physiotherapists, hospitals, specialists, etc., who have treated or assessed him as a result of his disability or within the two years prior to the onset of his disability
- All information with respect to other benefits received or available (for example, Employment Insurance Disability Benefits, Canada Pension Plan Disability Benefits, etc.)
- His working copies of his income tax returns, together with copies of all attachments to those returns
- Any demonstrative evidence of his disability (photographs or videotapes showing his activities before and after the onset of his disability).

The claimant's lawyer should impress upon the disabled claimant that the more information that can be provided at an early first stage, the better armed the claimant's lawyer will be for the pending discussions with the insurance company.

#### 4. **The Initial Interview**

The claimant's lawyer should realize that the initial interview is the first and best opportunity to understand the nature of the disabled claimant's claim and to prepare that claim for presentation to the insurance company. The claimant's lawyer should anticipate spending at least two hours with the disabled claimant to not only obtain and discuss the

evidence that will be used to present the claim in its best light, but also to discover any information that may be used against the disabled claimant to defeat the claim. The claimant's lawyer who is meticulous in this interview will only on the most rare occasions be "surprised" by any information or evidence that the insurance company may later present.

A basic checklist of topics to discuss and information to obtain at the initial meeting is as follows:

1. PERSONAL INFORMATION – name, date of birth, address, telephone number, Social Insurance Number, Health Card Number, Driver's License Number, family situation (spouse, dependants, family income, financial resources and financial obligations);
2. EMPLOYMENT INFORMATION – name, address and telephone number of employer, name of supervisor, copy of any employment contract, details of any union contract or union representation, detailed job description, dates employed by the employer, rate of pay, past promotions, anticipated promotions (and/or raises);
3. BENEFITS INFORMATION – copy of the Insurance Policy or Benefit Booklet should be reviewed or the disabled claimant's understanding of the terms of the benefits available should be elicited (it is important to remember that provided along with disability income benefits may be health care benefits, pension benefits, or other fringe benefits and the claim may also involve obtaining continuance of these benefits or access to these benefits);

4. INSURER INFORMATION – name, address and telephone number of insurer, contact person or adjuster for insurer, policy number, disabled claimant's identification number (often the Social Insurance Number);
5. DETAILS OF BENEFITS RECEIVED – when the benefit payments began, the rate of the benefits, any increases in the benefits (cost of living allowances, for example), the exact date the benefits were last paid, the dates of any “gratuitous” payments beyond the day of discontinuance, the reason why the insurer discontinued the benefits, details of any failed attempts to return to work or retrain (which courts usually look upon favourably as long as the attempts are honestly made – see, for example, Foden v Co-operators (1978), 20 O.R. (2<sup>nd</sup>) 728);
6. SETTLEMENT DISCUSSIONS – details of any and all discussions with representatives of the insurer (or the employer) with respect to any full and final settlement or lump sum settlement (the client should be advised that from the date of the retainer forward all contact with either the insurer or the employer should be made through the lawyer's office and any inquiries should be referred to the lawyer's office);
7. EMPLOYMENT AND EDUCATION HISTORY – should be obtained in as much detail as possible and if the disabled claimant does not have a formal written curriculum vitae one should be prepared;
8. NATURE OF THE DISABILITY – the disabled claimant should be able to explain what it is about their medical condition that prevents them from working at their own job or at any other job reasonably akin to that job;

9. HEALTH HISTORY – including details of any prior illnesses, accidents or injuries and any prior disability or tort claims and whether there are any concurrent health issues or personal/family issues (for example, divorce, family deaths or illnesses, etc.);
10. TREATMENT HISTORY – the names, addresses and telephone numbers of all treating doctors, specialists, therapists, etc., together with an outline of the treatment provided and the results of that treatment;
11. INDEPENDENT OR DEFENCE MEDICAL EXAMINATIONS – the names and addresses and telephone numbers of all specialists who examined (or treated) the disabled claimant at the instance of either the insurer or the employer and the results of these examinations (or treatment);
12. OTHER AVAILABLE BENEFITS – details of other available benefits, including Employment Insurance, Canada Pension Plan, loan insurance etc.
13. LAY WITNESSES – the names, addresses and telephone numbers of those who can confirm the extent of the disabled claimant's disability (family members, personal friends, and, very importantly, co-workers);
14. CLAIMANT'S FUTURE PLANS – the disabled claimant should be asked what his plans were with respect to employment and/or retirement had he not become disabled and the claimant's lawyer should discuss with the disabled claimant what he sees as his current potential (return to work, further rehabilitation).

After obtaining a written confirmation of the retainer and signed Authorization forms to obtain all relevant records and documentation the disabled claimant's lawyer should provide the disabled claimant with a "homework list" setting out in detail any further

information or documentation that the disabled claimant has to provide to the lawyer which was not available at the initial meeting. Additionally, at this early stage, the lawyer should warn the disabled claimant that all of his evidence (and evidence tendered on his behalf) will be subject to verification and cross-examination, including through means such as surveillance and background checks. The lawyer should impress upon the disabled claimant the vital importance of being truthful not only with his own lawyer with respect to the claim but also with others who are involved in the claim, including his doctors, employer, etc.

#### **5. Opening the File and Writing the Initial Correspondence**

It is vital to remember that there is a one year limitation period with respect to disability insurance claims under the Insurance Act (see either Section 206 or Section 300 – Statutory Conditions). That one year limitation period should be diarized from the first possible date on which the cause of action arose. That date will either be the last day of continuous employment for the disabled claimant or the date for which he last received payment of disability benefits (excluding any period of “gratuitous” or “extra-contractual” payments made by the insurer).

Once the file is opened, the claimant’s lawyer should consider writing the following letters:

- (a) letter to client confirming retainer and “homework list” and lawyer’s “modus operandi” or “plan of attack” (if determined at this point);
- (b) letter to employer seeking the disabled claimant’s complete employment file, including any medical file, the complete disability claim file and a copy of the Disability Policy (consider whether you should write for other

employment files from previous employers – especially if disabled claimant was only in current occupation for a short period of time);

- (c) letter to University, College, Trade School, High School for transcripts (consider writing for more detailed records if employment history is of short duration);
- (d) letter to insurer, advising that the lawyer has been retained to investigate the circumstances surrounding the discontinuance of the benefits and requesting a complete copy of the claim file (including all Application forms, medical reports and records, internal memoranda, adjusters' notes, surveillance reports, etc.), a certified copy of the Application for Insurance and Policy of Insurance, a copy of the underwriting file and copies of any promotional materials provided to the employer or the disabled claimant (including "Benefit Booklets, Explanation of Benefits Summaries", etc.);
- (e) the clinical notes and records of the disabled claimant's family doctor and specialists;
- (f) a decoded O.H.I.P. summary for as far back as available (usually seven years - to ensure that the disabled claimant has provided a correct medical history);
- (g) letter to Customs and Revenue Canada requesting certified copies of disabled claimant's tax returns going back at least several years prior to the onset of disability;

- (h) letter to broker or agent who sold the Policy requesting a complete file, including any promotional materials provided to the employer or the disabled claimant;
- (i) letter to Pension carrier requesting details of any Pension Plan and details of interplay between Disability Plan and Pension Plan.

## 6. **Understanding and Building the Claim**

Over the next months, while the information comes in from the client, insurer, employer, Revenue Canada, O.H.I.P., etc., the claimant's lawyer will have to review all of the information very carefully to determine the exact terms of the particular policy and the exact reason the insurer discontinued paying the benefits. Once this is known, the claimant's lawyer will have to determine what evidence need be compiled to persuade the insurer to reconsider the claim and re-institute the benefits.

The two usual reasons for the discontinuance of benefits are adverse "independent" medical examinations and the change in the disability definition in the policy. Under these common circumstances the claimant's lawyer should obtain reports from the treating family doctor and/or the treating specialist to confirm the disability or the claimant's lawyer should consider referring the disabled claimant to a medico-legal expert to confirm the disability. A family doctor or treating specialist may provide very helpful reports that can carry the day. These experts will have had the most opportunity to observe the disabled claimant (even before the onset of disability) and, as long as they do not become perceived as advocates for their patient, will not be tainted with the stigma of being "hired guns".

In either case, the claimant's lawyer must be scrupulous to ensure that the medical experts receive all of the available medical records and the relevant information with respect to the disabled claimant's employment history, including relevant portions of the employment file, a written job description and a copy of the disabled claimant's curriculum vitae. Also, the disability definition should be set out for the medical specialists and an explanation of the definition (or a judicial interpretation of the definition, if available) should also be provided.

The medical specialist simply cannot make a blanket statement about disability in the abstract, he must address the specific definition of disability contained in the Policy and relate that to the specific job functions of the disabled claimant. Additionally, the medical specialist should be asked to comment upon appropriate treatment for the disabled claimant and a prognosis for the disabled claimant.

**7. Negotiating an Early Resolution to a Claim**

Once evidence has been developed to rebut the reason that the insurer had for discontinuing the benefits, that evidence should be sent to the insurer with a letter requesting payment of all benefits due and owing (not forgetting related benefits, such as medical and rehabilitation expenses, pension contributions, etc.) plus pre-judgement interest, lawyers' costs, disbursements and appropriate G.S.T. This letter should also invite the insurance company's representative to meet with the claimant's lawyer to discuss the request and to discuss either a reinstatement of the benefits or a full and final payment to end the insurer's obligations under the Policy.

The claimant's lawyer must remember that successful litigation can only achieve a judgment for damages for past benefits, interest and costs, plus a declaration of entitlement



under the Policy as of the date of the Judgement (and sometimes punitive damages). However, it is often the case that neither the insurer nor the insured will want to continue with a poisoned relationship and the potential may therefore exist for a full and final settlement.

#### **8. Conclusion**

From the disabled claimant's perspective, there are really only two ways to ensure that a claim is brought to early resolution. A disabled claimant can walk away from the claim and accept the discontinuance of benefits. This is rarely a satisfactory or appropriate resolution for any claim that a claimant's lawyer would see fit to take on.

The realistic alternative is for the claimant's lawyer to fully develop the claim and present it at an early date to the insurer in a manner that will convince the insurer that at the end of the day (in a court of law) the insurer runs a real risk of losing the claim. Hopefully, this will motivate the insurer to reasonably settle the claim at an early stage with the disabled claimant.