



Neutral Citation: 2013 ONFSCDRS 145

FSCO A12-004572

BETWEEN:

MIRKO STOJANOV

Applicant

and

**DOMINION OF CANADA GENERAL
INSURANCE COMPANY**

Insurer

REASONS FOR DECISION

Before: Lloyd (J.R.) Richards

Heard: July 24, 2013, at the offices of the Financial Services Commission of Ontario in Toronto

Appearances: Carlos Pereira for Mr. Stojanov
Neil Colville-Reeves for Dominion of Canada General Insurance Company

Background:

The Applicant, Mirko Stojanov, was injured in a motor vehicle accident on October 9, 2009. At the time of the accident, Mr. Stojanov was a self-employed drywall contractor. He applied for income replacement benefits from his automobile insurer Dominion of Canada General Insurance Company (“Dominion”), payable under the *Schedule*.¹

¹*The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

In addition to the automobile insurance policy with Dominion, Mr. Stojanov was insured under a personal accident disability insurance policy with Manulife Financial. Mr. Stojanov applied for and received \$2,000.00 per month in accident benefits from Manulife Financial.

Dominion's position is that the benefits Mr. Stojanov has received from Manulife, since the date of the accident and ongoing, constitute payments for loss of income under an "income continuation benefit plan" and should be deductible from any income replacement benefits payable to him pursuant to subsection 7(1) of the *Schedule*. Mr. Stojanov claims that Dominion is not entitled to deduct the Manulife benefits. Dominion has not paid Mr. Stojanov any income replacement benefits to date.

For the reasons that follow, I find that Dominion is entitled to deduct the benefit payments that Manulife Financial makes to Mr. Stojanov, as they constitute payments for loss of income under an income continuation benefit plan.

EVIDENCE AND ANALYSIS:

The Law

Subsection (7)1 of the *Schedule* states that the amount of the income replacement benefits payable to an applicant shall be reduced by the net weekly payments for loss of income that are available to or being received by a person as a result of the accident under the laws of any jurisdiction or under an income continuation benefit plan.

Subsection 2(9) of the *Schedule* stipulates certain kinds of payments that are deemed to be payments for loss of income under an income continuation benefit plan. These payments include:

1. Payments of disability pension benefits under the *Canada Pension Plan*.
2. Periodic payments of insurance, if the insurance,

- a. is offered by the insurer only to persons who are employed at the time the contract for the insurance is entered into, and
- b. is offered by the insurer only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment.

Director's Delegate Draper, in *Economical Mutual Insurance Company and Wilcox*,² conducted an extensive review of the history of deductibility of collateral benefits and arrived at the following conclusions which have been accepted at this Commission:

1. The purpose of the deductibility provisions is to prevent double recovery. While injured persons should not be penalized for having access to other benefits, they should not be compensated twice for the same loss.
2. Where non-deductibility of a type of benefit has been established, it would take the clearest legislative language to displace it.³

In addition to these conclusions, there have been many other decisions concerning deductibility of benefits, issued both by the courts and this Commission, that have established how to determine whether benefits are deductible. The determinative question centers on the nature of the payments to Mr. Stojanov and whether the collateral payments constitute payments for loss of income.⁴ In considering whether the collateral payments are payments for loss of income, one must look at the actual policy within the context of the specific wording of the legislation.⁵ Do the collateral payments constitute payments for loss of income or income continuation? In short, what are the payments for?⁶

²(FSCO P99-00015, March 2, 2000), Appeal

³*Bhola and Personal Insurance Company of Canada* (FSCO A06-001473, September 17, 2007)

⁴*Cugliari v. White* [1998] O.J. No. 1628, *Coles and Dominion of Canada General Insurance Company* (FSCO P02-00018, October 8, 2004), Appeal

⁵*Intact Insurance Company and Marianayagam* (FSCO P09-00028V, February 10, 2011), Appeal, *Pallotta and Alpina Insurance Company Ltd. (Zurich Insurance Company)* (OIC A-000808, April 22, 1992)

⁶*Chrappa v. Ohm et al.* 29 O.R. (3d) 222

The Manulife Policy

The Manulife Plan description states that “[i]n addition to a number of other benefits, Manulife’s Personal Accident Disability Insurance plans provide you with monthly payments to replace your income if you become disabled as a result of an Accident.”⁷ The policy is actually made up of three distinct parts.⁸ The “24 Hour Compensation Plan” provides base compensation and has a “rider” attached - the “24 Hour Accident Disability Extension Rider” – that provides additional coverage. The policy’s third component is the “Accidental Death and Dismemberment Rider”. The 24 Hour Compensation Plan provides benefits of \$2,000.00 per month on the event of total disability. Manulife will pay this amount while total disability continues for up to 2 years. The 24 Hour Accident Disability Extension Rider extends the accident disability period under the 24 Hour Compensation Policy from 2 years to age 65 where the policyholder is totally disabled. The entire policy is guaranteed renewable as long as premiums are paid.⁹

The definition of “total disability” under the 24-Hour Compensation Plan is as follows:

Total Disability or Totally Disabled means the Primary Insured, as a result of a medically determinable injury, is under the regular care and attendance of a Physician, is following the recommended treatment and:

- a) if Employed at the time the injury occurred, is wholly and continually unable to engage in his or her own occupation and is not gainfully employed in any occupation for compensation; or
- b) if not Employed at the time the injury occurred, is wholly and continually unable to perform most of his or her routine daily activities.¹⁰

⁷Exhibit A, Tab 1, p. 2 of 6

⁸Exhibit A

⁹Exhibit A, Tab 1, p. 12

¹⁰Exhibit A, Tab 1, p. 6

The Plan defines “Employed” as “actively engaged in an occupation for compensation or profit at least 30 hours per week.”¹¹ The 24 Hour Disability Extension Coverage contains almost identical language as the 24 Hour Compensation Plan, except it specifically extends the benefit coverage beyond 2 years.¹²

The policy also states that if the primary insured’s income on the date of disability has decreased from the amount stated on the application, such that the Total Disability benefit is higher than can be supported by the new level of income, the policy may be amended to adjust the benefit amount and reduce the premium.¹³

The Manulife Application for Personal Accident Disability Insurance¹⁴ requested that Mr. Stojanov disclose a number of details in order to be eligible for benefits. On the Application, Mr. Stojanov chose the \$2,000.00 benefit amount with no waiting period for benefits after disability. Under Part F, “Employment Eligibility”, the Manulife Application requires that an applicant must work 30 hours or more per week to be eligible to apply for benefits. Part G of the Application, titled “Financial Information and Existing Insurance”, requires disclosure of specific income information only if an applicant intends to apply for benefits exceeding \$2,000.00 per month. Mr. Stojanov was not required to, and did not disclose his specific income information when he entered into the insurance contract with Manulife.

ANALYSIS

I find that Manulife’s payments to Mr. Stojanov are payments made under an income continuation benefit plan. In accordance with the requirements under subsection 2(9) of the *Schedule*, Manulife required Mr. Stojanov to be employed at the inception of the plan. In addition, the maximum benefit payable to Mr. Stojanov under the policy is limited to an amount calculated with reference to his income from employment.

¹¹Exhibit A, Tab 1, p 5

¹²Exhibit A, tab 1, p. 8

¹³Exhibit A, Tab 1, p. 7

¹⁴Exhibit A, Tab 2, p. 1

Employment Requirement under subsection 2(9)2(a)

I find that the Manulife policy fits squarely within the requirements of subsection 2(9)2(a) of the *Schedule* in that it required Mr. Stojanov to be working at least 30 hours per week to be eligible for coverage. Mr. Stojanov does not dispute this. However, he argues that he was not required to provide Manulife with any income information at the time he applied for the policy. His point, among others, is that since he did not have to disclose any income or financial information, the plan, in its essence, is not an income continuation plan. I disagree.

First, the overview of the plan, while not determinative of the plan's overall function, clearly states that the purpose is to continue income in the event of a disability. Mr. Stojanov argued at the hearing that the purpose of the plan, as stated in the plan's overview, is for marketing purposes. Further, that I should be careful when using the plain language of the policy to determine a legal test. I agree with Mr. Stojanov to the extent that the plain language overview in the plan, standing alone, cannot be used to determine the legal test in this case. However, the plain language of the overview forms part of the entire policy and the law concerning deductibility requires me to consider the entire policy within the specific wording of the *Schedule*.¹⁵ The overview informs the plan's purchaser of the plan purpose. In this case I find that Mr. Stojanov was informed by the overview of the plan that the plan's purpose is to continue his income in the event of a disability.

Second, the overview also states that sickness disability coverage is available, providing that an individual qualifies. I have no evidence that Mr. Stojanov applied for sickness disability benefits. Rather, he applied for benefits that required him to be working at least 30 hours per week to be eligible for coverage. I find that Mr. Stojanov, when given the choice in this case, applied for benefits to continue his income, rather than benefits to protect him in the event of sickness or disability.

¹⁵*Marianayagam, supra*

Third, while the plan did not require Mr. Stojanov to disclose his specific income when he applied for coverage, the plan clearly required him to have an income to be eligible for coverage. I find that Mr. Stojanov disclosed income information to Manulife when he disclosed that he worked at least 30 hours per week. Employment in the plan is defined as being actively engaged in an occupation for compensation or profit at least 30 hours per week. When Mr. Stojanov disclosed that he was working, he effectively disclosed that he was receiving compensation for the work in which he engaged. I find that this admission amounts to disclosing income information. Mr. Stojanov's entire argument does not rest on this point. However, the fact that he was compelled to disclose income information when he applied for the Manulife policy further persuades me that the policy is designed for income continuation.

Benefit limited to an amount calculated with reference to income under subsection 2(9)2(b)

I find that the Manulife plan also meets the requirements of subsection 2(9)2(b) of the *Schedule* because the maximum benefit payable to Mr. Stojanov is calculated with reference to his income from employment.

Mr. Stojanov argues that the Manulife payments to him cannot be considered payments of indemnity inherent in the definition of an income continuation plan since, as in *Cugliari v. White*¹⁶ as well as in *Wilcox*¹⁷, the benefits payable had no correlation to his income at the inception of the policy nor to his income at the onset of disability. Mr. Stojanov states that the Manulife policy is similar to the policy in *Coles v. Dominion of Canada*¹⁸, in that, while the policy required him to be employed at the time he applied for the insurance, continuation of employment was not a requirement for continued coverage under the policy. His point being that the payments to him are payments upon the happening of an adverse event, namely disability, and not payments for loss of income or income continuation. In addition, the amounts payable to

¹⁶See footnote 4, supra

¹⁷See footnote 2, supra

¹⁸See footnote 4, supra

him could not be reduced to under \$2,000.00 per month, regardless of pre-accident income or payments received from any other source.

I have already found that the Manulife policy required Mr. Stojanov to be employed at the inception of the policy. I also find that the benefits under the policy are calculated with reference to Mr. Stojanov's income from employment.

As I have already stated, the overview of the Manulife Plan clearly states that the Plan is designed to replace income if an insured person becomes disabled as a result of an accident. The overview of the Plan provides the framework under which the Plan should be viewed. As in *Chrappa*,¹⁹ the overriding question is "what are the payments for?". In this case, what purpose does the policy serve for Mr. Stojanov?

The policy is designed to pay Mr. Stojanov a minimum of \$2,000.00 per month. Under the Total Disability policy that Mr. Stojanov chose, the least amount Manulife would pay an insured person is \$2,000.00 per month if the insured person can prove that he is disabled. The maximum amount payable is an amount greater than \$2,000.00 per month. The policy allows for deductions from other sources. However, the amount payable shall not be less than \$2,000.00 per month. Mr. Stojanov was required to disclose that he had an income when he applied for coverage. However, because he chose the \$2,000.00 per month benefit, Mr. Stojanov was not required to disclose his *specific* income when he applied for coverage, or possibly when he applied for benefits.

Had Mr. Stojanov chosen the maximum benefit level under the policy or any benefit level paying him more than \$2,000.00 per month, the policy contemplates adjusting his benefit based on a calculation that refers to his income. The policy refers to an insured person's income at the date of disability and states that if his income at the onset of disability has decreased and does not support the disability benefit, Manulife can reduce the benefit and premium, as well as refund any premium overpayment. This suggests that the policy's benefits are linked to income. If Mr. Stojanov had chosen the maximum benefit payable to him or any benefit amount higher

¹⁹See footnote 6, *supra*

than \$2,000.00 per month, the policy permits Manulife to have required Mr. Stojanov to disclose his specific income at the inception of the policy as well as when he applied for benefits.

I note that Mr. Stojanov did not submit as evidence his application for benefits after the onset of his disability. Such evidence could demonstrate whether Manulife required Mr. Stojanov to declare whether he was working at the onset of disability or when he last worked. The benefit application could also clarify any adjustments Manulife could contemplate, given an insured person's income at the onset of disability. Mr. Stojanov gave no explanation why he provided the policy application form but not the benefit application form.

I agree with Dominion that in this instance, it is only because Mr. Stojanov sought the minimal benefit amount available under the Manulife Policy that he was not required to disclose his income when he applied for benefits. The Manulife application form clearly requires applicants to disclose their gross annual personal earned income as well as any business income when applicants apply for any benefit greater than \$2,000.00 per month.²⁰ Had Mr. Stojanov applied for a benefit greater than \$2,000.00 per month he would have had to disclose his specific income when he entered into the contract for insurance. In addition, to be eligible for a benefit amount greater than \$2,000.00 per month, Mr. Stojanov would have had to disclose his income at the onset of disability in order for Manulife to determine whether his income could support a benefit amount greater than \$2,000.00 per month. In this case, the main plank of Mr. Stojanov's argument would be missing if he had chosen an identical Manulife policy with a higher benefit amount.

It would be an absurd result for benefits under an identical Manulife policy with a higher benefit amount than \$2,000.00 per month to be deductible while benefits under Mr. Stojanov's policy remain non-deductible simply because he chose the \$2,000.00 per month benefit. Such an absurd result should be avoided.²¹

²⁰Exhibit A, Tab 2

²¹*Bhola* supra, Book of Authorities, Tab 6, p. 8

CONCLUSION

In considering Mr. Stojanov's Manulife policy in its entirety and within the context of the legislation, I find that the purpose of the policy is to continue Mr. Stojanov's income.

The Manulife plan offers applicants their choice of coverage. In this case, Mr. Stojanov did not choose a sickness or disability plan, which would pay him benefits on the happening of a specified event. Instead, he chose a plan that is designed to continue his income and that required him to be working when he entered into the insurance contract and pays out a maximum benefit calculated with reference to an applicant's income.

EXPENSES:

The parties made no submissions on expenses. They are encouraged to resolve the issue. If they are unable to do so, they may schedule an expense hearing before me according to the provisions of Rule 79 of the *Dispute Resolution Practice Code*.

Lloyd (J.R.) Richards
Arbitrator

November 14, 2013
Date

Financial Services
Commission
of Ontario

Commission des
services financiers
de l'Ontario



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MIRKO STOJANOV

Applicant

and

**DOMINION OF CANADA GENERAL
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ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Dominion is entitled to deduct the benefit payments that Manulife Financial makes to Mr. Stojanov, as they constitute payments for loss of income under an income continuation benefit plan.

Lloyd (J.R.) Richards
Arbitrator

November 14, 2013
Date