IN FACT AND IN LAW

Life and Disability Insurance

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Disability Insurance:
the Right to a Counter Expertise

By Evelyne Verrier and Anne-Marie Lévesque

On October 13, 2005, the Court of Appeal rendered judgment in two cases involving The Maritime Life Assurance Company and its insured, Madeleine Houle.[1]

In the first case, the Court of Appeal stated that the insurer is entitled to obtain a counter expertise by summoning its insured by writ of subpoena (art. 399 C.C.P.) even if it had its insured examined previously. In the second case, the Court ruled on the right of an insurer to have the insured examined by the expert of its choice (art. 399.1 C.C.P.)

The Facts

Houle was employed with CitiFinancial since 1988 and ceased working in February 2000 due to her health condition. The reasons put forward for this work stoppage were cervical pain and depression. Houle claimed disability benefits and the insurer had her examined by its own physicians.

In 2000, the orthopedist concluded that the neck pain was not incapacitating; however the psychiatrist confirmed the incapacity on account of *"adjustment disorder with anxiety vs. a major depression"*. The insurer therefore acknowledged the disability and paid benefits until September 30, 2003.

During 2003, the insurer requested new medical examinations by a physiatrist to assess Ms. Houle's musculoskeletal condition and by an occupational therapist to assess her functional skills. There was no new psychiatric assessment.

Both experts came to the conclusion that Houle was apt to work. The insurer thus notified her that it would cease to pay her disability benefits as of September 30, 2003.

Houle challenged that decision, arguing that she was still disabled on account of fibromyalgia and a depression. The insurer maintained its decision and Houle initiated proceedings in December 2004, claiming benefits retroactively to October 1, 2003 and thereafter for as long as her disability would last.

The insurer then requested another medical expertise through a summons pursuant to article 399 C.C.P. and suggested the name of a rheumatologist who is a fibromyalgia specialist. The insurer also filed a motion pursuant to article 399.1 C.C.P. to obtain a new expert report by a psychiatrist that it designated.

The Matters in Dispute

Houle challenged these two requests on the grounds that the insurer had already obtained many expert reports, including a recent one by a physiatrist, prior to ceasing benefits payments.

Houle maintained that physiatrist or rheumatologist are all the same and that by asking for the expert report, the insurer only aimed at intimidating her and gathering evidence against her for trial.

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[1] *La Maritime, compagnie d'assurance-vie* v. *Madeleine Houle*, 2005 QCCA 930; *La Maritime, compagnie d'assurance-vie* v. *Madeleine Houle*, 2005 QCCA 931.

The insurer argued on the one hand, that the original cause of the disability was not fibromyalgia and that the physiatrist who had examined Houle to decide on the termination of benefits had not really reviewed this aspect since the work stoppage resulted from cervical pain. On the other hand, the insurer claimed that medical knowledge of fibromyalgia had advanced since then and that a rheumatologist was the appropriate expert.

As for the motion for an examination by a psychiatrist, Houle again maintained that the insurer had already obtained an expert report in September 2000 and that another expert report was not necessary.

The Trial Judgments

The Superior Court quashed the subpoena requiring Houle to submit to an examination by a rheumatologist on the grounds that the insurer had already obtained many expert reports and did not need any additional report.

The Superior Court however agreed that a new psychiatric examination had to be carried out since the previous one was done in 2000. However, the Court ordered that such examination be performed by the physician who had done the first examination, who would then update his previous report, rather than to have the examination carried out by the physician which had been designated by the insurer.

The Judgments of the Court of Appeal

The Court of Appeal was of the view that the trial judge erred in refusing the examination by a rheumatologist and stated that article 399 C.P.C. must be interpreted in such a way as to protect the right of each party to obtain any evidence that is relevant and useful for the determination of the issues at trial. In the present case, the examination was both relevant and useful and the fact that the insurer had made Houle submit to four medical examinations prior to the filing of the action did not preclude it from exercising its right under article 399 C.P.C. This conclusion was motivated by the fact that two of the previous examinations occurred in 2000, before the insurer acknowledged Houle's disability, and that the two other examinations, carried out in 2003, had been the basis of the insurer's decision to terminate the benefits.

Indeed, to the extent that Houle seeks that the insurer be ordered to resume the payment of benefits retroactively to the date at which they were terminated and that such benefits be paid for the duration of her disability, that is, potentially until Houle reaches 65 years of age, the relevance of a medical examination for ascertaining her medical condition after 2003, as well as her current medical condition, is obvious. On the other hand, the grounds for disability put forward by Ms. Houle, namely, fibromyalgia and depression, are not static conditions established once and for all. They are complex and subject to change. Therefore, it is important that the medical reports be as current as possible when the judge is called upon to decide the case.

Lastly, Houle, who now alleges fibromyalgia as a cause of her disability (along with depression) has herself filed the report of a rheumatologist who had examined her in August 2004. The insurer certainly has the right to have another examination performed, which will contradict, complete or confirm the diagnosis of the insured's medical practitioner.

The Court of Appeal concluded that it is normal for the insurer, in exercising its right to a full defence, to seek and obtain a new medical examination to ascertain the current health condition of Ms. Houle, confirm the correctness of its 2003 decision and establish the scope of its current obligation.

As to the second motion concerning the psychiatric examination, the trial judge had granted it but required that such examination be carried out by the same physician who had performed the examination at the time of the first claim for benefits. The Court of Appeal was of the view that this constituted a significant error and that, as a matter

of fact, the examination currently requested pertains to the evolution of Houle's medical condition since 2000. It was not a question of repeating the examination but rather to consider another aspect of the problem since Ms. Houle raised the issue of fibromyalgia, which was not the original ground for disability.

The examination being justified, the Court of Appeal ruled that the trial judge could not designate an expert other than the one suggested by the applicant. If, in the Court's view, a physician is not the appropriate person, the judge must then dismiss the motion without designating another practitioner.

The Court of Appeal also noted that nothing indicates that the psychiatrist who had examined Ms. Houle in 2000 was still active or available to carry out such examination or even that he would be willing to perform it. Lastly, the examination carried out under section 399.1 C.C.P. must be done at the expense of the party who requests it. Therefore, it would be unfair to force the insurer to retain an expert that it did not choose. The insurer is entitled to choose the expert it trusts and, in the context of an adversarial system, to remain the master of its own evidence.

Comments

These two decisions are important and complete the principles respecting medical expert reports established by the Court of Appeal in the *Benchimol*[2] and *Lelièvre*[3] cases, in 2002 and 2003; these two decisions recognize:

- the right of an insurer to obtain recent examinations to monitor the evolution of the illness, notwithstanding the fact that it may have done so in the past;
- the right to obtain an order directing the insured to submit to an examination by a physician who is a specialist of the allegedly incapacitating disease;
- that the Court must abide by the choice of the insurer with respect to the designated physician.

These clarifications will be very useful in managing disability files and obtaining current and relevant evidence.

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[2] *Benchimol* v. *la Croix Bleue*, 500-09-012673-026, January 11, 2002, Mr. Justice Baudouin, September 17, 2002, Mr. Justice Chamberland, S.C. Montreal, 500-17-011057-018, December 14, 2001.

[3] *Lelièvre* v. *Great-West*, C.A., July 8, 2003, 200-09-004456-031, S.C. Quebec, 200-17-002915-023, March 31, 2001.

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