



Case: BRENT OSTER v. STANDARD INSURANCE COMPANY

Court: U.S. District Court, Northern District Case No C 09-00851 SBA, Judge Hon. Sandra B. Armstrong

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Pertinent Summary: On January 5, 2011, Judge Armstrong issued a published opinion in *Oster v. Standard Ins. Co.*, -- F.Supp.2d --, 2011 WL 31110 (2011), a rare win for a plaintiff in an ERISA disability insurance case under the "abuse of discretion" standard of review. Generally in ERISA cases, an insured cannot recover disability insurance benefits by simply proving through a preponderance of the evidence his or her inability to work and entitlement to benefits under the policy. Instead, the plaintiff must prove the insurance company abused its discretion - acted arbitrarily and capriciously - in denying benefits. This standard of judicial review, coupled with ERISA's preemption of California's bad faith laws and compensatory and punitive damage remedies,

has resulted in a system whereby insurance companies routinely deny and terminate valid claims, relying on the protections that ERISA offers them instead of plaintiffs.

However, in a stinging and comprehensive opinion, the court found that Standard abused its discretion in numerous ways, including: (1) by using biased reviewing physicians to disagree with the treating physicians' disability assessment; and (2) by ignoring the raw data from its own medical examiner confirming the insured's disability, data that its examiner willfully ignored in his rush to find the insured able to work on a full-time basis.

Facts: Brent Oster was involved in a serious car accident, which tore the driver's seat from its mounting and threw him into the back of the car. He was diagnosed with post-concussive syndrome and mild traumatic brain injury. Before the accident, Mr. Oster was a gifted computer, graphics and game programmer who supervised the design and development of computer games at LucasArts LLC. After his accident, his treating physicians, including nationally renowned neurologist Neil Raskin, M.D. certified his disability due to the vomiting, dizziness, headaches, blurred vision and fatigue he suffered post-accident. Mr. Oster was forced to leave his employment at LucasArts due to his condition and

despite heroic efforts to return to work, remains physically and cognitively impaired from his condition. In 2006, he attempted to return to work at a Canadian game company in a position with less responsibility and greatly reduced pay, but was demoted and terminated because of the fatigue and cognitive issues caused by his condition. In 2008, he again returned to work at another technology company, but continues to struggle with symptoms of fatigue and cognitive impairment; currently he is only capable of working part-time. In 2004, Standard Insurance Company denied his application for long-term disability benefits, relying on a paper review by the notorious Dr. Elias Dickerman, M.D. who is well known for his long-standing financial relationship with Standard as a physician consultant. Without examining Mr. Oster, Dr. Dickerman claimed that he could not have suffered a concussion without a loss of consciousness, even though the medical literature is clear that a concussion does not have to involve loss of consciousness to cause trauma.

After Mr. Oster's internal appeal in 2005, Standard required him to undergo a neuropsychological evaluation in 2006, arranged through its vendor United Health Services. Standard's neuropsych examiner, William J. McMullen, Ph.D. ignored the test results showing "sig-

nificant weakness" in rapid processing speed, and attention and concentration score that was a cause for "some concern". Despite these findings, Dr. McMullen instead claimed that Mr. Oster was no longer disabled because he had just started working for his Canadian employer. When Mr. Oster's counsel provided evidence (including a sworn declaration from his supervisor) to Standard that Mr. Oster had been demoted and terminated from his position at the Canadian company because of his ongoing cognitive issues, Standard ignored it, in violation of its own claims manual that requires it to investigate if an insured remains disabled even if he attempts to return to work.

Despite the discovery limitations in ERISA cases, Plaintiff was able to submit evidence showing that Standard paid Dr. Dickerman a whopping total of almost \$800,000 between from 2003 to 2006 to perform record reviews for 10 hours a week. Plaintiff also submitted evidence that Standard paid United Review Services almost \$400,000 from 2004 through 2006 to arrange for disability reviews, including IMEs like Mr. Oster's neuropsych evaluation. Judge Armstrong's opinion was highly critical of Standard's use of Dr. Dickerman and United Review Services during the claims and appeal.

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process, as well as Dr McMullen's willful disregard of the neuropsych evaluation raw data showing Mr Oster's continued cognitive impairment. In no uncertain terms, Judge Armstrong found that Standard treated Mr Oster "as an adversary during the claims process"

Before trial, the most Standard indicated it would pay in settlement was \$100,000 provided Mr. Oster agreed to waive any right to file a claim for disability benefits under any Standard policy in the future. Standard claimed that Plaintiff's heroic attempts to return to work were proof that he was not disabled, making this a complicated case to litigate under the abuse of discre-

tion standard. Mr Oster turned down the offer as he is currently insured under a Standard policy through his current employer. This proved to be a wise decision, as he was forced in 2010 to apply for partial disability benefits under his current Standard policy due to ongoing

fatigue and cognitive impairment caused by his conditions. While ERISA precludes recovery for emotional distress and punitive damages, a published court opinion like Judge Armstrong's as well as attorneys' fee awards calculated on a lodestar basis that can exceed \$200,000, will often inhibit a carrier from issuing similarly outrageous denials in the future.

Result: Plaintiff was awarded past disability benefits from 2004 to 2008, totaling \$153,973.77. A motion for attorneys' fees, litigation expenses and prejudgment interest totaling over \$200,000, is pending. ■