IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK J. LAY,	:	
	:	
Plaintiff,	:	Case No. 2:08-CV-01083
	:	
vs.	:	JUDGE FROST
	:	
GROUP LONG TERM DISABILITY INSURANCE FOR EMPLOYEES OF COLUMBUS NEIGHBORHOOD HEALTH CENTER, INC., *et al.*,	:	MAGISTRATE JUDGE KEMP
	:	
Defendants.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE MERITS

I. INTRODUCTION

The following passage is from Lincoln's brief:

> **When Plaintiff submitted his resignation in 2005, he could have, in his words, "quit working and started collecting disability benefits." (AR 262) At that time Lincoln had not yet issued its Policy to Plaintiff's employer. Plaintiff could have, and possibly should have, submitted a claim to his employer's previous carrier for disability benefits. Lincoln should neither be blamed nor *penalized* for Plaintiff's failure to timely apply to the proper carrier.** (Def. Mot. p. 20, italics added).

The simple fact that Lincoln would choose the word "penalized" to characterize its bargained for, contractual obligation to pay a disability benefit is telling. Whether the product of a mere Freudian slip or unmitigated arrogance, Lincoln's word choice highlights the cynical nature of its arguments and its decision(s) to deny Lay the benefits to which he is rightfully entitled – and for which he has paid, or had purchased on his behalf, since 1998. That's right. Lay was "covered" by disability insurance since he helped found the Columbus Neighborhood Health Center ("CNHC") in 1998. And Lincoln was well aware of that fact when it sold him on

the idea of jettisoning his old carrier with the promise of its so-called "Prior Insurance Credit." But Lay should have known that simple language such as "to prevent the loss of coverage for an Employee because of transfer of insurance carriers" for any employee "who was not Actively at Work due to Injury or Sickness on the Policy's Effective Date" doesn't mean much in Insurance-Land because nothing there is ever simple.

For instance, in Insurance-Land, your attorney can repeatedly send letters telling your disability insurer that you are making a claim for LTD insurance and your insurer can argue to a Federal Magistrate, with a straight face, that you have not made an LTD claim. In Insurance-Land, your insurer can tell you that you have until a certain date to submit your doctor's records and then issue its denial of your claim before that date ever arrives. In Insurance-Land, the evidence you submit will not be enough to prove even the mere existence of your disability at first; but later, when it suits your insurer's interests, that same evidence will not only prove your disability but also pinpoint the exact date that your chronic, gradually degenerative pain condition rendered you *totally* unable to do your job. In Insurance-Land, you can review and execute a contract for group disability insurance in your official, *active* capacity as Chief Executive Officer/Executive Director of your company and then be denied benefits from that disability insurance on the basis that you weren't "Actively at Work" when you executed the contract or when the policy became effective. And by the way, in Insurance-Land, your insurer can apparently keep the premiums paid for your disability benefit even while claiming that you never really had disability insurance coverage because you simply weren't eligible all along. But don't expect your insurer to tell you any of these things until it's too late because the concept of *fiduciary* duty doesn't mean the same thing in Insurance-Land as it does in the real world.

Fiduciary duty -- Lincoln has taken this concept and turned it on its head. From its ever-changing rationales for denial to its refusal to apply the prior credit provision, there can simply be no doubt that Lincoln's chief interest at all times was the furtherance of *Lincoln's* interests. Hence, Lincoln's choice of the word "*penalized*." Paying Lay his benefits certainly doesn't benefit Lincoln. So it should come as no big surprise that instead of feeling *privileged* to serve a paying customer such as Lay, who has a documented disability -- verified by Lincoln's own paid doctor -- Lincoln feels "*penalized.*"

Lincoln was determined to deny Lay's benefits from the beginning as evidenced by the self-serving manner in which it handled his claim. Lincoln's decision should be overturned.

II. FACTS

Both parties agree that Lay suffers from Fibromyalgia and that Lay eventually became fully disabled as a result of this condition. There are several factual areas, however, in which Lincoln's account of events is either misleading or factually inaccurate.

A. Medical and Work History

When analyzing Lay's condition, Lincoln merely notes that it is "continuous." (Def. Mot. p. 7) This is not descriptive, however, of the nature of Lay's symptoms and could easily be interpreted in a way that does not accurately describe Lay's condition. While Lay's condition continues uninterrupted, the condition is also progressive and of waxing and waning severity. (AR 20, 60) It is progressive because over time the symptoms, chronic pain and fatigue in particular, continue to worsen over time. It is waxing and waning because although the condition does grow worse, the severity of the symptoms is volatile and may improve relative to previous days and weeks before becoming worse again.

B. Claim History

Lincoln claims that Lay, his co-workers and some of his physicians all indicated that Lay was fully disabled and was not "actively at work" when the Lincoln policy came into effect. Lincoln does not provide any specific duties that Lay failed to complete, however. Furthermore, Lay, his co-workers, and his attending physicians never relayed their observations of Lay in the context of Lincoln's definition for "Actively at Work" nor is there any indication that they were aware of the policy's definition of "Main Duties." In fact, no specific duties are mentioned at all by Lay or those who provided information on his behalf. Thus, Lincoln could not rely on the statements of these people alone, to the exclusion of other evidence in the record, to determine that Lay was not "Actively at Work" when the Lincoln policy became effective.

In addition, in its final denial of Lay's claim for benefits, Lincoln lists several of Lay's "Main Duties" as CEO and claims that Lay was unable to perform these duties prior to the effective date of Lincoln's policy. (AR 2) This list of "duties" is vague at best and fails to describe Lay's real duties at worst. And Lincoln never provides one specific piece of evidence proving that Lay ever failed to complete any of these duties on a regular basis. In its final denial, Lincoln states that Lay's counsel noted in Lay's final appeal that "by late 2005" Lay was unable to "perform the important functions of his job." (AR 4) It is unreasonable, however, to say that this evidence indicates a specific date sometime in August 2005 – "late 2005" could just as easily, and much more likely, means sometime in December 2005. And it should be remembered that Lay himself executed the contract with Lincoln in November 2005 – nearly three months after Lincoln now claims Lay was totally disabled and thus not "Actively at Work." Based on the information provided above, it was unreasonable for Lincoln to summarily

conclude that "Plaintiff, his attorney, Plaintiff's physicians and co-workers unanimously indicated" that Lay was not performing his main duties of CEO by August 2005.

Last, Lincoln also uses language suggesting that Lay retired in August 2005. This is misleading. In its brief, Lincoln refers to August 2005 as the date when Lay actually retired, by using language such as "upon his resignation in August 2005," and "Plaintiff informed [Beth Alloway] the main reason for his resignation in August 2005…" Although Lay did attempt to resign in August 2005, Lincoln is well aware that Lay was convinced to stay on as CEO until May of 2006. (AR 85)

III. STANDARD OF REVIEW

The standard of review in an ERISA benefits decision is *de novo*. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). This *de novo* standard can only be heightened to an arbitrary and capricious standard of review if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." (*Id.*) The burden of establishing the right to arbitrary and capricious review falls on the party seeking to establish it. *Clark v.Metropolitan Life Ins. Co.*, 19 EBC 2172, 2173 (6th Cir. 1995), citing *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1990) In its Motion, Lincoln failed to established that it is entitled to a higher standard of review, and therefore, this case should be analyzed *de novo*. When an inherent conflict of interest in the fiduciary's role exists, as in this case where Lincoln stands to profit by denying Lay's claim, "[a] narrow view of when a plan document confers discretionary authority is needed to check the potential for biased decisions on the part of ERISA plan administrators." *Guisti v. General Electric Co.*, 733 F. Supp. 141, 147 (N.D.N.Y. 1990). Although Lincoln does have some discretionary authority, the existence of minor discretionary authority over a benefit plan does not make an entity charged

with "ministerial authority" into an administrator or fiduciary. *Livick v. Gillette Co.*, 524 F.3d 24, 29 (1st Cir. 2008) (citing 29 CFR 2509.75-8 (D-2) and holding "a person who performs purely ministerial functions . . . within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary.").

If, in the alternative, this Court determines that an arbitrary and capricious review standard is appropriate, Lincoln's decision can only be upheld if its decision exhibits a "principled reasoning process" and is supported by "substantial evidence." *Smith v.Health Servs. of Coshocton*, 314 Fed. Appx. 848, 14 (6th Cir., 2009). Reviewing a case under the "arbitrary and capricious" standard does not involve mere "rubber-stamping" of the administrative decision. *Id.* As has been demonstrated in Plaintiff's Motion for Judgment on the Administrative Record, and will be shown further in this Reply, Lincoln's decision to deny benefits was not the result of a principled reasoning process nor was there substantial evidence to support Lincoln's conclusions.

IV. ARGUMENT

A. Lincoln's decision is unreasonable under any standard of review, thus Lincoln's decision should be overturned and Lay should be awarded benefits.

In its Motion, Lincoln claims that its decision followed a logical process and was reasonable at every level of review. Lincoln failed, however, to make appropriate use of the evidence and materials provided to it and failed to properly follow its own procedures, resulting in a decision that should be overturned.

i. Initial Denial

Lincoln asks the Court to believe that it conducted a fair review when it considered Lay's initial claim for benefits. But this is not true. During Lincoln's initial review of Lay's claim for benefits, which was submitted in February 2007, Lincoln had access to several of Lay's

physicians' records, including: Dr. Olson (AR 135 – 50, 162 – 64, 176 - 79); Quest Diagnostics (AR 151 – 53); Dr. Elsheikh (AR 154 – 56, 159 – 61, 172 – 75, 187 - 99); and, Dr. Kerr (AR 180 – 83). Lincoln also had personal information relating to Lay, including his application statement, his Vocational Rehabilitation Survey, his resume, and his 2006 federal income tax returns. (AR 207 – 229) Most of this information was provided after Lincoln requested additional documents in order to properly analyze Lay's claim in April 2007. Based on this information, Lincoln determined that if Lay were disabled, and Lincoln did not concede that he was, Lay became disabled immediately after his employment with CNHC ceased. Accordingly, Lincoln opined that Lay was ineligible for benefits because the benefits expired when his employment did. (AR 121 – 24)

But the process by which Lincoln came to this conclusion was seriously flawed. In justifying its denial of benefits, Lincoln determined that Lay was in fact "Actively at Work" according to the definition in the policy (which includes performing the "Main Duties" of his "Own Occupation") based solely on CNHC telling Lincoln that Lay was "at work" on the date his coverage ended. (AR 122) As a threshold matter, Lincoln presents no evidence that CNHC was using Lincoln's definition of "Actively at Work" in its statement. According to Lincoln's records, they made no further inquiry of what duties Lay was completing at that time, and thus allowed CNHC to be the final interpreter of a policy CNHC had never consulted. Of course, Lincoln would later completely dismiss this statement by CNHC in its final denial of Lay's claim, for the same arbitrary reasons that led it to accept that statement without question before – because it was determined to deny Lay's benefits.

And, Lincoln issued its claim denial before it received medical information it knew was material to proving Lay's disability. On July 12, 2007, Lincoln advised Lay that he would have

until July 27, 2007 to provide medical documentation from Dr. Flood before a decision would be made on his claim. Lincoln, however, issued its claim denial on July 19, 2007. Lincoln's own records show that Dr. Flood's records were faxed to Lincoln on July 27, 2007. (AR p. 575) Thus, Lincoln prematurely denied Mr. Lay's claim before it reviewed Dr. Flood's records and before the time Lincoln promised to Lay. Clearly, Lincoln was determined to deny Lay's benefits from the beginning and handled his initial claim with an improper bias, despite the representations Lincoln makes to the contrary in its brief.

ii. First Appeal

Lay instituted his first formal appeal of the denial decision on October 22, 2007. In support of his appeal, Lay included a statement regarding his disability, as well as a number of attachments that further clarify the nature of his work at CNHC, as well as the state of his condition during the relevant time period. (AR 57 – 106) Of particular note are the addition of materials from Dr. Petrovich (AR 104) and Dr. Thomas. (388 – 91) Also, Lay forwarded letters from two of his former coworkers, Pearline Byrd and Michelle Furan-Sullivan, on November 14, 2007. (AR 52 – 55) These letters discussed Lay's worsening condition and his inability to perform the major tasks of his employment prior to his final day at work. Despite this additional evidence, Lincoln upheld its denial decision on a slightly different basis than it had originally denied Lay's benefits. (AR 40 – 42)

Again, Lincoln's approach during this stage of the process further demonstrated a clear pre-disposition to deny Lay's claim. Lincoln selectively relied only on information that tended to bolster its denial. For instance, no reference is made in Lincoln's denial letter to the letters written by Byrd and Furan-Sullivan. Lincoln, however, made its denial decision on December 14, 2007, a full month after the additional letters were submitted. In determining whether an

individual was "Actively at Work," all available evidence provided by coworkers should have factored into any sort of reasonable analysis. As demonstrated during its review of Lay's initial claim, Lincoln was comfortable basing its entire decision on a statement from Lay that he was in fact "at work" when his coverage expired because that bolstered Lincoln's argument that Lay did not become disabled while he was insured. Later, during the first appeal, however, Lincoln ignored the letters from Byrd and Furan-Sullivan because that information ran counter to Lincoln's predetermined decision to deny benefits to Lay by tending to prove that Lay's disability preceded his last day at work.

This is not the only information that Lincoln chose to use selectively in order to deny Lay benefits. In its denial of Lay's first appeal, Lincoln noted that Lay "had similar symptoms dating back several years, and the evidence fails to document a significant change or worsening of your medical status as of May 31, 2006." (AR 41) But there is a vast amount of evidence provided in Lay's first appeal that indicates a significant increase in the severity of Lay's symptoms. Ms. Byrd's letter specifically noted a "decline" in Lay's performance leading up to the end of his employment. She further reported that there was "a complete change from the alert and [vibrant] leader we previously had." (AR 50) Ms. Furan-Sullivan's letter also indicated that there was a specific point and time during which his ability to fulfill his obligations as CEO deteriorated significantly. Lay's own appeal letter described in detail the progression of his condition, specifically noting his increasing inability to perform the functions of his job within the last couple years of his employment. (AR 60 – 61) Beth Alloway, a member of the CNHC Board, also indicated that it was Lay's "worsening medical condition" that led to his attempted resignation. (AR 85) And Dr. Petrovich also indicated that as of September 2007, Lay's condition prevented him from maintaining any type of regular work schedule, which clearly

indicated that the disease had progressed. (AR 104) Last, Lay's spouse also noted her husband's decreased capacity for any sort of activity. (AR 105 – 06)

By stating that Lay's evidence did not indicate any "worsening" of his medical condition, Lincoln had either willfully or negligently ignored much of the evidence Lay provided with his first appeal. With one sentence, Lincoln dismissed the conclusion of several of Lay's coworkers, as well as his treating physicians, which unanimously supported the proposition that Lay's condition did in fact worsen over time, specifically during his final two years of his employment at CNHC. Once again, Lincoln selectively ignored evidence that tended to prove that Lay was in fact disabled prior to the end of his employment with CNHC.

iii. Final Appeal

On January 30, 2008, Lay submitted his final appeal, this time aided by current Counsel. (AR 37 – 38, 264 – 692) Although Lay's counsel submitted several *new* pieces of information, all of the information submitted was available to Lincoln earlier and should have been obtained and considered by Lincoln in the first two stages if Lincoln's intention was to provide Lay with a full and fair benefits determination. For example, Lay's counsel submitted reports from Drs. Dadmehr, Cunningham, Kerr, Blood, Holzaepfel, Brakel, and Montoya. (AR 593 – 639) And Lay's counsel provided the sworn affidavits of Ms. Byrd, Ms. Alloway and Ms. Furan-Sullivan after reading comments in Lay's claim profile, which indicated that Lincoln's claim reviewers didn't like the format in which these statements were first provided. In these affidavits, the individuals provided information nearly identical to that contained in their letters, which were included with the first appeal. (AR 661 – 69) Last, Lay's counsel submitted Mr. Lay's sick time records from January 2004 to May 2006 – information that Lincoln certainly should have asked for if it planned to do a serious, thoughtful review of Lay's claims. (AR 671 – 92)

On June 3, four days after Lincoln's decision was supposed to have been rendered, Lincoln informed Lay's counsel that that a board certified rheumatologist, Dr. Dikranian, had reviewed the claim, and determined that Lay became disabled at some point. (AR 13, 24) It should be noted that this was the first time Lincoln actually had a physician review Lay's case. In his report, however, Dr. Dikranian did not specify a particular date when Lay's condition rendered him totally disabled under the policy. Thus, Lincoln asked Dr. Dikranian for a second report to pinpoint a specific date. *Id*. Then and only then, did Dr. Dikranian, hired by Lincoln, determine that Lay became totally disabled on exactly August 22, 2005.

Lincoln denied Lay's final appeal in a letter dated July 2, 2008. (AR 1 – 5) This time, the rationale for denial was completely changed. Not only did Lincoln finally admit that Lay was disabled according to the terms of the policy during his employment, but Lincoln now claimed that he was disabled as early as August 22, 2005, purportedly making him ineligible for coverage under Lincoln's policy. (AR 4 – 5)

This final denial evidences the lengths that Lincoln is willing to go to in order to deny Lay's deserved benefits. Lincoln completely abandoned several of its previous positions. Most notably, it finally admitted that Lay was in fact disabled under the terms of the policy. Also, the evidence from doctors and co-workers describing the increasing severity of Lay's symptoms, which had been completely ignored by Lincoln previously, now became gospel.

But the contention that Lay was not "Actively at Work" during the effective period of the Lincoln policy completely ignores the realities of Lay's functions as CEO. It is very difficult to pin down any specific duties that a CEO must complete on a daily or regular basis, because the position by its very nature requires versatility and different abilities. This is noted by Lincoln's own final denial letter, which cites a list of CEO functions, none of which are specific, or which

required Lay to complete a specific activity at a specific time. (AR 2) Despite this difficulty, Lincoln nonetheless contends that Lay was not "actively at work" as of August 22, 2005, in December 2005 when the policy took effect, or at any time thereafter.

It is also interesting to note the sequence of events in rendering this final denial. Dr. Dikranian first determined that Lay was in fact disabled. Lincoln did not like this decision because it would cause it to have to pay out benefits to Lay. Instead, it asked Dr. Dikranian to examine the files again, in order to pinpoint a specific date. This of course means that in his initial review, Dr. Dikranian did not specify a date of disability. There are a couple of logical reasons for his failure to specify a date. First, it is well known, and well exhibited in the record, that Fibromyalgia is a degenerative, waxing and waning disease, which makes pinpointing an exact date of total disability impossible. It is likely that the condition itself could render Lay disabled under the terms of the policy for a time and then briefly subside so that Lay would no longer be disabled. And this process likely continued for several years. In any event, it was clear from Dr. Dikranian's first report that Lay was totally disabled under the policy's terms by June 1, 2006 – the day after Lay's last day at work. Second, Dr. Dikranian neither treated Lay nor had any interaction with him whatsoever, which would obviously handicap his ability to make a determination about the exact date Lay became disabled.

Dr. Dikranian was aware from the outset of his employ with Lincoln that he was to provide medical opinions regarding this case. If Dr. Dikranian felt confident that he could pinpoint the date on which Lay became disabled, it stands to reason that he would have done so in his initial decision. The discrepancy in quality between these two decisions is further exemplified by the difference between Dr. Dikranian's first and second reports. Dr. Dikranian's first report, filed on May 20, 2008, was 11 pages, and cited extensively in the record. (AR 14 –

24) Dr. Dikranian's second report, however, was conspicuously sparse. Filed on June 18, 2008, this report is only three pages long, and simply says that the "medical records indicate" that Lay was disabled as of August 22, 2005. (AR 254 – 56) As will be explored in the paragraph immediately below, there are no "medical" records that indicate that August 22, 2005 was the exact date Lay's condition rendered him totally disabled. Further, this hastily prepared report, with little or no evidence supporting its conclusion, is indicative of Lincoln's attempt to control the process in order to obtain a favorable outcome.

The only document in the record that is dated August 22, 2005, the alleged date of Lay's permanent disability status, is Lay's initial resignation letter to the board of CNHC. (AR 385) Interestingly, that letter contains absolutely no information about Lay's medical condition. Quite the contrary, in that letter, Lay agreed to stay on as CEO for at least 90 days from that point. *Id*. Therefore, there is absolutely no evidence within the record to indicate that August 22, 2005 was a date of particular note with regard to Lay's condition and his worsening symptoms. By definition, the use of the August 22nd date is arbitrary and capricious, and wholly unsupported by any evidence found in the record.

B. Lincoln breached its fiduciary duties by reviewing Lay's claim with an extreme bias unfavorable to Lay.

An ERISA fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries…" 29 U.S.C. 1104(a)(1) While the discussion of Lincoln's reviews of Lay's claim demonstrate that the process itself was flawed and therefore invalid, the same evidence indicates that Lincoln has acted with bias against Lay's claim, and that Lincoln violated its role as an ERISA fiduciary. To reiterate the points made above, Lincoln changed its rationale for denial of benefits completely between the beginning and end of the

review process. Also, much of the evidence provided to Lincoln that was favorable to Lay was completely ignored, until Lincoln was able to use it for its own ends. This is best exemplified by the fact that Lincoln did not address Ms. Byrd and Ms. Furan-Sullivan's letters at all during Lay's first appeal, because they provided evidence that seemed to contradict Lincoln's desired outcome at the time: that Lay was not disabled under the terms of the policy. When Dr. Dikranian returned an adverse decision, that Lay was in fact disabled under the terms of the policy, Lincoln switched gears and relied heavily on the previously ignored evidence provided by Lay's coworkers.

Also, as mentioned briefly above, Lincoln has relied on non-qualified individuals in order to interpret the policy in question. The final denial letter cites only Lay, his co-workers, and one of his treating physicians in order to determine that Lay was not "actively at work" when the policy took effect. The final denial letter specifically cites a letter from Mr. Lay, as well as his physician, indicating that he was no longer able to perform the main duties of his job before the Lincoln policy took effect. Dr. Olson's statement clearly indicates that he came to his conclusion based solely on information provided to him by Lay, and that his decision was not otherwise based on "medical" evidence from August 2005. (AR 4) The letter also cites Lay's second appeal letter, wherein he says that he was unable to complete the main duties of his job as of August 2004. (AR 3) However, this statement by its very nature indicates that Lay was unqualified to determine whether he qualified for benefits under the policy. Lincoln's ultimate determination was that Lay was not disabled until August 2005, a full year after Lay claimed he was disabled and unable to perform the functions of his job. Nonetheless, Lincoln relies on this statement to indicate that Lay was in fact disabled starting in August 2005, despite the fact that Lay never indicated that his disabled status began during that month.

The information provided by Lay's co-workers, including Ms. Byrd, Ms. Furan-Sullivan and Ms. Alloway do not provide specific dates on which Lay could no longer perform the main duties of his job as CEO. Although these statements indicate that Lay was disabled and not performing the main duties of his job before he left CNHC in May 2006, they cannot be read as pinpointing a specific date. Lincoln notes that Lay's counsel indicated "that by late 2005, [Lay] was unable to fully perform the functions of his job." (AR 4) But late 2005 could easily mean December 2005, in which case Lay did not become disabled until after the policy took effect. It is unreasonable and arbitrary for Lincoln to rely on that statement by counsel for Lay to determine that Lay became disabled prior to December 1, 2005, the effective date of the Lincoln policy. Importantly, Lincoln never makes any mention of Lay's sick time records, which prove that he took progressively more time off from work, with the greatest number of days being in the second quarter of 2006 – right before his last day at work.

C. *Roeder v. Chemtex*, offered by Lincoln, is inapposite to the matter at hand.

Lincoln relies on *Roeder v. Chemrex, Inc.*, 863 F.Supp. 817 (E.D. Wis. 1994) in order to bolster its position. But the claimant in *Roeder* became disabled *after* he had resigned from his position and then attempted to receive benefits under the theory that he was still employed. The dates of Lay's employment, however, have never been an issue in this case. At the time that Lay became disabled, he was still drawing a paycheck, and came to work in order to fulfill his duty as CEO. *Roeder's* inapplicability was discussed by another court within the same Circuit as that decision. In *Newman v. UNUM Life Ins. Co. of Am.*, 2000 U.S. Dist. LEXIS 16644, 13 – 14 (N.D. Ill. 2000) (Ex. A, hereto), the Northern District of Illinois found that *Roeder* was not applicable to a case where the claimant became disabled while using regular vacation time. As

in *Newman*, *Roeder* is of little, if any use, to analyzing Lay's case because the undisputed facts are simply not the same.

Further, the insurance policy in *Roeder* had a specific requirement of hours worked in order to be considered "actively at work." By contrast, the policy in Lay's case indicates that full-time status only requires that the insured work the hours he was regularly scheduled to work. And the STD and LTD policies in this case even differ on that point – only the LTD policy mentions "full-time" employment as a criterion. (AR 698 (STD), AR 777 (LTD)) Because the disability in *Roeder* occurred after the individual left the company, and due to the differing policy requirements between the two cases, *Roeder* is inapplicable to the matter at hand.

D. <u>An award of benefits is preferable to remand because Lincoln has shown it is determined to deny Lay benefits – but remand is appropriate at a minimum.</u>

At a minimum, this case is appropriate for remand. First, Lincoln failed to review this claim under the prior credit clause contained within its policy. Lincoln argues that it was not required to do so because Lay purportedly only made a claim for STD benefits and only the LTD policy has a prior credit clause. The record is clear, however, that Lay did make a claim for LTD benefits. In any event, by operation of Lincoln's own policies, STD benefits simply roll over to LTD benefits without the necessity of separate claim application. Second, Lay also had a potential Partial Disability claim, which Lincoln never analyzed. Third, in its brief, Lincoln argues that Lay's claim has always been for STD benefits only, thus Lincoln concedes that it has never made an LTD claim determination. Although Lincoln's argument is disingenuous because Lay has repeatedly stated that his claim is also for LTD benefits, remand is appropriate at a minimum to determine Lay's LTD claim. And fourth, Lay should be afforded an opportunity to

offer evidence rebutting Lincoln's latest and newest rationale for denial, which he was not permitted to do during the administrative process.

i. Lincoln argues that it failed to review Lay's claim for LTD benefits.

Several times in its brief, Lincoln argues that Lay's claim was only for STD benefits, and therefore Lincoln did not consider Lay's claim for LTD benefits. This is erroneous for two reasons however. First, Lay specifically requested review for LTD benefits. As noted in Plaintiff's Motion for Judgment on the Administrative Record, Plaintiff's counsel twice informed Lincoln that Lay was seeking review of an LTD as well as STD claim. (AR 32, 262) Second, Lincoln by its own policies considers STD and LTD benefits to be separated only by time. Lincoln's employees refer to this as LTD roll. (AR 247) Indeed, Lincoln acknowledges that Lay's counsel notified Lincoln of Lay's claim for LTD in its brief. (Def's Mot. p. 9)

ii. Lay is entitled to have his claim reviewed under the Prior Insurance Credit clause of the policy because he did make a claim for LTD benefits,

In its brief, Lincoln states that "Plaintiff could have, and possibly should have, submitted a claim to his employer's previous carrier for disability benefits." This completely ignores the fact that under the Lincoln policy, Lincoln is liable for benefits to be paid from a prior policy. In particular, the prior insurance credit clause indicates that "The coverage will be that provided by the prior carrier's policy, had it remained in force," in cases of disability. (AR 804) Furthermore, the contract for the policy clearly indicated that it was a "replacement" policy. And the plain language of the policy promised that it would cover situations like the one at issue now. Under this clause, Lincoln owes Lay benefits even if he truly were disabled prior to the Lincoln policy taking effect. As soon as Lincoln determined that Lay was disabled prior to the

effective date of its policy, it should have examined Lay's potential coverage under the prior insurance credit clause.

iii. Lincoln failed to analyze Lay's claim as a partial disability benefit claim.

According to STD policy, Lay is potentially entitled to Partial Disability benefits. (AR 713) Under this benefit, if an employee is in fact disabled, but still works some amount of time, he is entitled to benefits. However, Lincoln never analyzed Lay's claim as a partial disability claim. When Lincoln determined that Lay was in fact disabled, yet went to work and performed at least some of his duties after that date, his claim should have been analyzed as a partial disability claim.

iv. Lay never had an opportunity to appeal Lincoln's most recent rationale for denial, as required by ERISA.

Pursuant to 29 U.S.C. Sec. 1133(1), when an ERISA benefit is denied, the "benefit plan" shall give specific notice as to why the claim was denied. Furthermore, under Sec. 1133(2), the individual whose claim has been denied will have an opportunity to contest the claim. Lay was never given an opportunity to appeal Lincoln's latest rationale for denial. The final denial of Lay's claim was based on a completely new interpretation of the facts, which Lay had never before been made aware of. The previous denials had been based on the fact that Lay was not actually disabled during his employment, as opposed to the new rationale, that Lay had been disabled before the Lincoln policy took effect. When Lincoln changed its reasoning for denying Lay's claim, it should have permitted him an opportunity to challenge its latest reasoning. Under 1133(1), a denial of benefits must be followed by specific, plain reasons for why the claim was

denied. Following, 1133(2) requires that the affected party have an opportunity to challenge those rationales. In this instance, Lay did not have an opportunity to appeal this new reasoning.

E. Lay's claim for penalties for Lincoln's failure to provide documents as required by 29 USC § 1132(c).

In Count IV of his complaint, Lay made a claim for damages based on the fact that Lincoln has failed to provide documents which Lay requested, pursuant to 29 USC § 1132(c). However, in its Motion for Judgment on the Merits, Lincoln failed to address this issue at all. When a motion to rule in favor of one party as a matter of fact or law remains silent on a particular issue raised in a previous filing, it is considered an effective waiver of that issue. *Cook Inc. v. Boston Sci. Co*rp., 333 F.3d 737, 741–42 (7th Cir. 2003); *Douglas v. Victor Capital Group*, 21 F. Supp. 2d 379, 393 (S.D.N.Y. 1998). Lincoln has therefore, as a result, waived its ability to contest Lay's claim for ERISA penalties related to Lincoln's failure to produce documents.

V. CONCLUSION

Lay should be awarded benefits. Lincoln has exhibited extreme bias in its review of Lay's claim and has displayed a willingness to corrupt the review process in order to achieve its desired outcome. Lincoln's pattern of conduct suggests awarding Lay damages in this forum is the best option, as remand may simply be an exercise in futility. Remand, however, is the second best option.

Respectfully submitted,

/s/ Danny L. Caudill
Robert J. Beggs (0002966)
(*John.Beggs@BeggsCaudill.com*)
Danny L. Caudill (0078859)
(*Danny.Caudill@BeggsCaudill.com*)
BEGGS CAUDILL, LLC
1675 Old Henderson Road
Columbus, Ohio 43220-3644
(614) 360-2044
Fax (614) 448-4544

Trial Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 12TH day of August 2009, I electronically filed the foregoing Response in Opposition to Defendants' Motion for Judgment on the Administrative Record with the Clerk of Court using the CM/ECF system, which will serve this Response upon counsel of record.

/s/Danny L. Caudill
Danny L. Caudill (0078859)