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PERMANENT AND TOTAL DISABILITY IN COLORADO

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This article deals with the interpretation the Colorado courts have given to total and permanent disability insurance clauses. Consideration will not be given to the application of the clause to any specific type of disease or injury, except insofar as it pertains to the general problem. Because of the variations in the clauses themselves and in the circumstances of the individual cases, it is impossible to reduce the Colorado decisions upon this subject to a definite formula. The type of policy provision to be considered is usually termed a non-occupational or general disability policy. It indemnifies against total and permanent disability which prevents the insured from working. He is insured as a man, not as a particular workman. He may recover only upon proof that he is disabled from engaging in any gainful occupation. This type of coverage may be included as an adjunct to life insurance entitling insured to waiver of premiums and to benefit payments. There is also a general accident and health policy written by casualty insurance companies. The courts, in dealing with the question, make no distinction between disability clauses in accident policies and life insurance policies, so no such distinction will here be attempted.

A typical disability clause which has been before the Colorado Supreme Court on several occasions is the following: [1]

> Benefits will be paid when insured has become totally disabled as the result of bodily injury or disease occurring after the issuance of this agreement, so as to be prevented thereby from engaging in any business or occupation and performing any work for compensation, gain or profit . . . .

Colorado follows the liberal rule, and weight of authority, that the total disability contemplated by an accident policy, or a life insurance policy containing a disability clause, does not mean a state of absolute helplessness. The total disability contemplated means inability to do all the substantial and material acts necessary to the prosecution of the insured's business, in his customary and usual manner.

In considering this subject, full regard must be had for the fact that the actions involved were not in tort for damages but were brought on the policy as a contract containing certain specific terms and provisions and will be construed strongly against the

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[1] This clause was found in policies issued by the Guardian Life Insurance Company prior to 1950. The clause presently used by that company together with reasons for the modification are set out later in this paper.

insurer. The courts have recognized the fact that the purpose of the policy is to indemnify the insured against disability and subsequent loss of wages and have construed the policy liberally toward that end.[2]

In the type of policy under consideration the most frequent problem is the meaning of "total and permanent" disability. If this phrase were to be construed strictly, it would mean that the insured must be reduced to a state of coma or absolute paralysis. In *United States Casualty Co. v. Hanson*,[3] the Colorado court held that neither party would intend such an interpretation.

In one of the first Colorado cases on this subject, the insurance company maintained insured was not disabled because he was able to make visits to his doctor and go out doors. The could held [4] that "the plaintiff might have been able to walk, he might have been able to ride on the cars to his physician's office, and still be entirely incapacitated for work or business." In that case insured didn't carry on any part of his business. Going a step further, there is presented the situation where insured is physically able. to attend to a very minor part of his affairs.

EXTENT OF DISABILITY REQUIRED

In *United States Casualty Co. v. Hanson, supra,* insured traveled about the U. S. looking for medical aid to treat his ailment. Insured was also able to give some attention to his business correspondence. The court held that since insured could not do "all the substantial acts necessary to be done" in prosecuting his business insured was "totally" disabled within the terms of the provision.

Two of the leading cases in Colorado construing a disability clause interpret the clause of the Guardian Life Ins. Co., previously set forth. In the first case, *Guardian Life Ins. Co. v. McMurry*,[5] insured was suffering from multiple sclerosis. The evidence showed he was fifty per cent efficient, that he could still drive a car and do various odd jobs, and had done such jobs although not for remuneration. Insured had operated a farm for a corporation, of which he was a stockholder, that held and operated several farms. The court split into two parts the clause providing benefits to be paid if insured has "become totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work *or* from following any occupation whatsoever for remuneration or profit." The court said that the phrase preceding the word "or" is conditioned on absolute helplessness.

[2] Jennings v. Brotherhood Accident Co., 44 Colo. 70, 96 P. 982 (1908).
[3] 20 Colo. App. 393, 79 P. 176 (1905).
[4] The Mutual Benefit Association v. Nancarrow, 18 Colo. App. 274, 71 P. 423 (1903).
[5] 105 Colo. 11, 94 P. 2d 1086 (1939).

The phrase subsequent to the word "or" is to be determined by what a reasonable man would believe to be a disability to follow any occupation.

Construing what disables insured "from following any occupation whatsoever for remuneration or profit," the court said that consideration must be given to whether insured had training or education to fit him for any other type of employment. Insured was disabled within the meaning of the policy if he was unable to obtain work "he was fitted to do."

If insured was a lawyer, and because of illness unable to practice law but able to sell apples on a street corner, a strict construction of the disability clause would bar his recovery. In the *McMurry* case, there may be seen the first indication of a construction of the clause to mean a disability to perform the occupation for which insured is trained and educated: "He had no training to fit him for anything other than farming or some kind of mechanical work." As will be later demonstrated, the amount and kind of work insured is able to do is an important factor in determining if insured is permanently and totally disabled.

PARTIAL ABILITY TO WORK

The leading and probably the most well-known case on disability insurance in Colorado is the case of *Guardian Life Ins. Co. v. Kortz.*[6] Kortz was a jeweler and suffered a heart and arthritic condition for which he claimed disability benefits. Conflicting evidence was introduced showing the length of time Kortz was able to work in his store. As in the *McMurry* case, the court, before considering if Kortz was disabled, considered the conditions constituting disability. The court said that the words "so that he is and will be permanently, continuously, and wholly prevented thereby from performing any work for profit" are not a limitation on the preceding words, "totally and permanently disabled by bodily injury or disease." Within such clauses disability occurs if it wholly prevents one from performing any work *or* from following any occupation for remuneration or profit.

Even though Kortz was able to do down to his store for a few hours a day, he was sufficiently disabled to collect benefits of the policy. The court said: "Since utter helplessness need not be shown to bring plaintiff within terms of the policy, testimony that he could not perform, *all the duties* of his former employment, was admissible to show a disability." (Italics supplied.)

The court goes on to say that the California case of *Erreca v. Western States Life Ins. Co. et al.,*[7] has "sound reasoning and supports our conclusion."

Because of the significance which the Colorado court, in the *Kortz* case, gives *Erreca v. Ins. Co.,* and because Colorado has

[6] 109 Colo. 330, 125 P. 2d 640 (1942).
[7] 19 Calif. 2d 338, 121, P. 2d 689 (1942).

probably adopted the "sound reasoning" expressed therein, extensive quotation therefrom seems justified. The case shows the significance of disability to perform the occupation for which insured is trained and educated.

Insured was a farmer who directly supervised his farms. He personally tested the soil, rode a horse over the land inspecting it, worked with his farm hands in the fields, and carried on secretarial functions of making contracts, leases, etc. His accident policy provided for benefits "whenever the insured becomes wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation, or performing any work whatsoever for remuneration or profit." Insured was thrown from a horse and severely injured. His legs were injured but after partial recovery insured was able to drive a car to his fields and do secretarial farm work. He was unable to ride a horse, walk over his fields inspecting them, or work with his men. The insurance company claimed that because he could drive a car and carry on the secretarial work of making leases and contracts that he was not permanently and totally disabled within the meaning of the policy. The court held otherwise:

> The courts have held that total disability exists, within the meaning of the term "any occupation" as contained in a general disability clause, whenever the insured is incapacitated from following any substantial or remunerative occupation for which he is fitted or qualified, mentally or physically, and by which he is able to earn a livelihood. The authorities supporting this rule define total disability which prevents the insured from engaging in any occupation or performing any work for compensation, as a disability which prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity.
>
> This construction of the words "any occupation" is based upon the theory that it is unreasonable to deprive an uneducated laborer, disabled from performing any manual work, of the benefits of his policy, because he might notwithstanding those disabilities, with training and study, pursue a profession at some future date, or become an accountant or banker. And it would be equally unreasonable to hold that a doctor, lawyer, or business executive is not totally disabled from engaging in "any occupation" or performing "any work" because he is able to run a news stand or work as a day laborer.
>
> The disability clause explicitly conditions insurance company's liability upon a total disability which prevents

> him "from engaging in any occupation, or performing any work whatsoever for remuneration or profit." Nevertheless, and although respondent is a shrewd farm executive and a successful grain operator, the testimony discloses that he has had little formal education and is neither trained nor qualified for any other occupation. And because of his age and experience in life, he probably could not prepare himself for other remunerative employment. Accordingly, the respondent must be deemed to be totally disabled if he is no longer able to pursue the occupation of farmer or farm supervisor.
>
> . . . recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business.

It is interesting to note that in the *Kortz* case the disability was brought about by disease, while in the *Erreca* case, which the Colorado case seems to follow, the disability was brought about by accident. It seems that, regardless of its cause, the elements constituting disability are the same.

So far we have only considered cases where the court held that the disability incurred came within the total and permanent clause. *Denton v. Prudential Insurance Co.*[8] is a case in which the court found that the disability of the insured was not total and permanent. In that case insured suffered a heart attack on April 30th. He returned to work the following day but did not feel well and only worked until May 3rd. He returned to work on May 16th. He was weak and short of breath. On several occasions he had fainting spells. It was frequently necessary for him to sit down and rest during his work. Following his illness his employer took some of his territory away and some of his associates helped him with minor parts of his work. Insured continued working with no decrease in compensation. He sued to recover under the terms of his policy, alleging permanent and total disability. The court held that the insured was not so disabled as to be able to claim benefits. "The rule is that the insured may not be regarded as totally disabled as of a time when, although sick, diseased, injured or otherwise afflicted, he continues to do his ordinary work or is regularly performing his usual and customary duties." Although insured wasn't literally performing his "usual and customary duties," since his employer took some of his territory away and his colleagues helped him, the insured was undoubtedly performing a substantial part of his duties. Unquestionably the court was also influenced by the fact that insured continued to receive the same compensation during the time of his alleged disability as he had received prior to his illness. It

[8] 100 Colo. 293, 67 P. 2d 77 (1937).

will be made apparent that this compensation factor does affect the problem of whether insured is considered disabled.

HOUSE CONFINEMENT

Before going into that problem, however, it might be well to consider the house confinement clause that appears in some policies. In the case of *Jennings v. Brotherhood*,[9] the policy provided that: "A disability, to constitute a claim for indemnity for sickness only, shall be continuous, complete and total, requiring, absolute, necessary confinement to the house . . . ." As in the clause requiring total and permanent disability, the courts have construed this house confinement clause liberally. If construed strictly it would require that insured never, under any circumstances, leave his house. The courts have allowed recovery of benefits where insured left his house to visit his physician or to gain the benefit of the sunshine and fresh air.

OTHER INCOME

The purpose of disability insurance is to provide necessities, not income. Most insurance companies only allow an amount of insurance based on a percentage of his net income, usually fifty percent. Doctors and dentists are not considered as good risks and are usually only eligible for an amount up to one-third of their net income. Some companies pro-rate the benefits they will pay based on the amount insured receives from other health and accident policies he holds. The problem arises as to whether insured may receive insurance benefit payments if he is disabled but receives income from other sources, such as investments or sick leave pay. Colorado seems to hold that such private income makes no difference, if insured is in fact disabled. In *Denton v. Prudential Ins., supra,* the insured still continued to receive his full salary. In construing the policy the court considered this salary factor and said that the compensation or profit received must be remunerative and not merely nominally so. That if it is remunerative insured is not totally and permanently disabled within the meaning of the contract.

In *Guardian Life v. Kortz, supra,* the defendant insurance company contended that because plaintiff, during the period for which he claimed disability benefits, received wages or remuneration from his company (Sixty per cent of the stock was owned by him. The remainder was owned by a brother-in-law whom plaintiff had taken into the business and trained from boyhood.) was proof that during such period insured was not disabled. The court was unable to agree with the company's contention, saying:

[9] 44 Colo. 70, 96 P. 982 (1908). See also Mutual Benefit Assoc. v. Nancarrow, 18 Colo. App. 274, 71 P. 423 (1903) and Mutual Benefit Health & Accident Assoc. v. McDonald, 73 Colo. 308, 215 P. 135 (1923).

> Under some circumstances where employer and employee are strangers, such fact might be very strong evidence of no disability. It is pertinent to note that the policy does not provide indemnity if plaintiff does not receive a salary, but if he is disabled to the extent therein specified. Receiving a salary from a stranger, who had no personal or sentimental reason for paying him except for services that were of value, would be one thing; that he was paid by a corporation owned principally by himself and partly by his brother-in-law, who was under obligations to him, is quite another.

And in *Erreca v. Western States Life, supra,* which the *Kortz* case said used "sound reasoning and supports our conclusion," the court there said that the magnitude of insured's enterprise and income therefrom have no proper place in the determination of whether insured is totally disabled from performing remunerative work.

SURGERY

In certain types of injuries or sickness the disability can be corrected by surgery. Is insured required to undergo surgery to correct the disability? Under Colorado state decisions insured is not required to undergo an operation if corrective surgery is not made a condition precedent in the policy. If the operation is a minor one, involving little risk, and was suggested as a normal procedure by insured's own physician, it might be held that insured could not collect benefits. The leading Colorado case on this subject is *Pacific Mutual Life Ins. Co. v. Matz.*[10] The company there contended that, in aid of recovery, insured should be required to submit to a surgical operation which, seemingly, he had declined to undergo. The company offered to prove, by two reputable physicians of its choosing, that insured was suffering from osteomyelitis of the tibia, that the indicated method of treatment was an operation. The company said that both doctors would testify that the operation was recognized as the correct treatment for osteomyelitis, that the operation was not inherently dangerous to life or health, that the operation was not extremely painful, and that an operation offered better than a ninety per cent chance of complete recovery. The offer was rejected by the trial court. The supreme court upheld the trial court saying that insured "is under no contractual obligation to so submit and thereby incur expense and risk his life so that insurer might be relieved of its liability to him."

In *Roderick v. Metropolitan Life,*[11] cited in the *Matz* case, the doctrine of estoppel is considered. There the insured was suf-

[10] 102 Colo. 587, 81 P. 2d 775 (1938).
[11] 25 Mo. App. 852, 98 S.W. 2d 983 (1936).

fering from a bladder condition which insured's attending physician said rendered insured unable to work. The physician did admit the possibility of a cure through a serious but not necessarily dangerous operation. The physician had not suggested such operation to insured. The court held that the doctrine of estoppel would not apply. Estoppel was said to be applicable only when it is shown that the disability might be cured if insured would be willing to comply with the course of treatment prescribed for him by his own doctor. In this case, however, there was no showing that the doctor or any other physician had ever suggested to plaintiff that he should have an operation for his bladder trouble, so there was no proof of a refusal on his part and thus no grounds to claim estoppel.

The federal case of *Home Life Ins. Co. v. Stewart,*[12] (reversing the Colorado case *Stewart v. Home Life Ins.*[13]), also deals with the subject of surgery as a prerequisite to recovery of benefits. This case may be authority for arguing that in some instances possible correction of disability by surgery may disqualify insured from benefits. In this case insured suffered a cataract condition. The lens of both eyes were removed by surgery. Without the use of glasses the plaintiff had no useful sight in an economic or industrial sense. With glasses he had normal vision and became engaged in an occupation for compensation and profit. The plaintiff underwent an operation and wore glasses by his own volition. He sought recovery under a policy which read: "The *irrecoverable* loss of sight in both eyes . . . . shall constitute total and permanent disability within the meaning of this contract . . . ." The court held that because insured had recovered his sight he couldn't recover benefits, saying that the coverage was limited to loss of function and did not embrace the loss of any part of the physical eye and that the loss must be irrecoverable.

DUTY TO CORRECT DISABILITY

This case can be distinguished from the preceding cases in that the policy here stipulated "irrecoverable loss." Would insured be able to recover benefits if his policy stipulated "permanent and total disability," instead of "irrecoverable loss"? The *Matz* case holds that insured, under such a clause, is under no duty to undergo an operation to correct his disability. What if insured voluntarily underwent surgery, as in the *Home Life* case? It would seem unjust to deprive insured of benefits because he had "commendable coverage" and voluntarily submitted to surgery when it was not required. Yet, the *Home Life* case seems to hold that insured would be disqualified from benefit payments if surgery corrects his disability.

[12] 114 F. Rep, 2d 516 10th Cir., (1940).
[13] 29 F. Supp. 834, Dist. Colo. (1939).

In the *Home Life* case what would be the decision if insured had refused to undergo surgery? The course nicely sidesteps this problem by saying, "we do not explore that question because with commendable courage he voluntarily underwent two operations." However, the court cites *Southland Life v. Dunn*[14] as being in accord with its opinion. In the *Southland* case insured had refused to undergo surgery for his cataract. The court there held that because minor surgery, under little danger, could correct his disability he could not recover benefits even though he was physically disabled, since this disability could be corrected with little difficulty. It would thus seem that in the Federal District Court for Colorado, the *Matz* case has, to an extent, been nullified.

ARTIFICIAL CORRECTION

Closely akin to the problem of whether insured must undergo surgery to, if possible, correct his disability, is the problem of corrected disability by artificial means. When a man loses a hand and has it replaced with an artificial hook can he still receive benefits under his policy? Although there are few Colorado cases on the subject, it would seem that he could continue to receive benefit payments. Two out of the three cases on this subject concern themselves with the Workmen's Compensation Act. It is recognized that such decisions are an interpretation of a statute but it would seem that they can be used for arguing similar situations occurring under a disability clause of a health and accident policy.

In *Mark Mfg. Co. v. Industrial Comm.*[15] (cited in *Great American Indemnity Co. v. Industrial Comm.*, post), the plaintiff sued for disability benefits under workmen's compensation. He had suffered the loss of a hand but an artificial hand with which he was able to continue working at the same job performing similar acts. The court there held that because he was able to some extent perform the same work with the artificial hand was no reason to deny him benefits. "It is enough that the normal use . . . . has been taken entirely away."

Would an eye disability corrected by glasses disqualify insured from benefit payments? This question has not been directly answered by the Colorado courts. It has not been directly decided because in one case the Federal court is dealing with a clause stipulating "irrecoverable" loss of sight, *Home Life Ins. v. Stewart, supra.* In the other case the Colorado supreme court is dealing with the Workmen's Compensation Act. *Great American Indemnity Co. v. Industrial Comm.*[16]

In comparison with artificial limbs, glasses are not an unusual part of a person's habiliment. In *Home Life Ins. v. Stewart,*

[14] 71 S.W. 2d 1103.
[15] 286 Ill. 620, 122 N.E. 84 (1919).
[16] 114 Colo. 91, 162 P. 2d 413 (1945).

the court pointed out that "glasses are worn by a substantial proportion of people of all ages. Many of them have very little vision in the natural eye, but with the use of glasses their vision is substantially normal for all practical purposes. They pursue their business and professions with success. They meet in competition those with normal vision in the natural eye, and they are not seriously handicapped.

In *Great American Indemnity Co. v. Industrial Comm., supra,* the problem arose as to whether the effect of corrective lenses should be considered in awarding compensation for impaired vision under the Workmen's Compensation Act. The court held that the effect of glasses in correcting vision should not be considered in awarding the statutory allowance.

In the *Great American* case the court gives an analogy between a disability corrected by an artificial limb and corrected by glasses. The Federal court in the *Home Life* case says that no such analogy exists, that the loss of both feet or both legs and the use of cork or wooden substitutes, on one hand, and the loss of sight in both eyes resulting from a cataractous condition and its restoration through surgery and the use of glasses, on the other, cannot be regarded as closely akin to respect to disability. In general concept they are so widely apart that they do not bear any reasonable analogy. The difference is too plain to call for elaboration.

Whether insured, under a total and permanent disability clause, could continue to receive benefits if his eye disability was corrected by glasses, cannot be determined from these cases. If Colorado is going to continue to hold that insured need not undergo surgery to correct a disability, it can be argued that insured need not wear glasses to correct his disability. But if insured voluntarily wears glasses, which correct the disability, may he continue to receive benefits? If corrected disability by surgery may be compared to correction by artificial means, then under *Home Life Ins. v. Stewart* if insured wore glasses correcting his vision he could not continue to receive benefits. On the other hand, in the *Great American* case the Supreme Court of Colorado held that it would not even consider the effect of glasses in relation to receipt of benefits under workmen's compensation. Would the court consider glasses in regard to health and accident insurance? It is possible that Colorado would follow its reasoning in the *Great American* case and consider the Federal case of *Home Life* a black sheep, both as to correcting disability by surgery and corrected disability by glasses.

An interesting case would be an attempt to collect disability benefits for an injury to an artificial limb. If insured had an artificial limb when he took out his policy and this limb were subsequently destroyed, could insured collect benefits for his disability until another limb could be manufactured? It is doubtful if such

recovery could be had. Colorado has no decisions on this point. However, another Industrial Commission case, *London Guarantee and Accident Co. v. Industrial Comm*,[17] would seem good authority for supporting a conclusion of no recovery. The district court gave judgment affirming an award of the Industrial Commission for accidental injury to a wooden leg. In reversing the decision the supreme court said:

> Compensation can be awarded for personal injuries only, which means injury to the person. A wooden leg is a man's property, not part of his person, and no compensation can be awarded for its injury.

It is interesting to note the effect that the foregoing decisions have had upon The Guardian Life clause. Compare the clause cited at the beginning of this article with the clause that the Guardian Life Insurance Company has used in its policies since 1950. It has changed its clause to read:

> Total disability is defined as incapacity of the insured, resulting from bodily injury or disease which prevents him from performing substantially all of the work pertaining to his occupation or any other occupation for which he is or may be suited by education, training or experience. The entire and irrecoverable loss of the sight of both eyes, or the use of both hands, or both feet or of one hand and one foot, is considered to be total disability.

In the years to come another law student may have occasion to write an article on this "new" clause and the court's construction of it.

INVITATION TO YELLOWSTONE MEETING

All Colorado lawyers and their families are invited to attend the first regional meeting of the American Bar Association to be held in this area. All facilities of Yellowstone National Park will be surrendered to the legal profession on June 17 to 21, 1952, and attorneys from Colorado, Idaho, Montana, Oregon, Utah and Wyoming will participate.

In conjunction with this convention, there will be Institutes on Oil and Gas, Taxation, Legal Draftsmanship and Trial Tactics and there will be meetings of the Junior Bar Conference and Sections on Administrative Law, Labor Law, Judicial Administration, Insurance Law and Mineral Law. On the lighter side, there will be dancing and other entertainment every night, and sightseeing tours and boat rides during the day to complete your family holiday.

For further literature, registration forms or other information, contact the Bar Association Secretary, Terry J. O'Neill, 1726 Champa Street, Denver.

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[17] 80 Colo. 162, 249 P. 642 (1923).