

## **Adjusting the Definition Legal Insight Column**

Own-occupation disability policies generally provide that insureds are totally disabled – and entitled to benefits – if they are unable to perform the substantial and material duties of their occupation due to injury or illness. An insured's occupation is usually defined as the occupation in which he or she was regularly engaged at the time of disability. Thus, under an "own-occ" policy, if a surgeon can no longer perform surgery, the policyholder is entitled to disability benefits – even if that person can still make a living as a doctor.

Increasingly, however, disability insurers argue that their insureds have dual occupations, and that even if they are unable to perform one occupation, they are not totally disabled under the policy because they can perform the other. For example, an insurer may argue that a self-employed physician is not only a physician, but also a "business owner" and that even if the insured cannot perform medical duties such as surgeries, he still can run his medical business and thus is not totally disabled. The courts do not agree.

Recently, in *Hangarter v. Provident Life and Accident Insurance Company*, the Ninth Circuit addressed this issue and ruled that a disabled chiropractor was entitled to total disability benefits even though she continued to perform clerical duties associated with her chiropractic business.

In *Hangarter*, the insured was a hands-on chiropractor in private practice who treated between 30 and 50 patients a day. After nearly 15 years of performing "deep tissue work" and other manipulations on patients, Hangarter developed tennis elbow, cervical disk disease and rotator cuff tendonitis. Although she continued to manage her chiropractic business, Hangarter could no longer perform adjustments, so she hired other chiropractors to treat her patients and filed a claim for disability benefits. After paying benefits for fewer than two years, the insurer terminated Hangarter's total disability benefits and she sued.

After an 11-day trial, a jury awarded Hangarter nearly \$7.7 million, including \$5 million for punitive damages. The insurer appealed, contending among other things, that the district court's jury instruction on the meaning of "total disability" was a misstatement of California law. The Ninth Circuit disagreed, holding that the district court properly applied the definition of disability, and there was substantial evidence to support the jury's finding that Hangarter was totally disabled.

The court held that the policy's definition of total disability meant the insured is eligible for benefits if she is "unable to perform the substantial and material duties of her own occupation in the usual and customary way with reasonable continuity." According to the Ninth Circuit, "California law requires courts to deviate from the explicit policy definition of total disability in the occupational policy context where it is necessary to offer protection to the insured when he is no longer able to carry out the substantial and material functions of his occupation."

The court reasoned that a literal interpretation of the total disability clause would defeat the very purpose of the insurance because it "rarely happens that an insured is so completely disabled that he can transact no business duty whatever." And the "fact that the insured may do some work or transact some business duties

during the time for which he claims indemnity for total disability ... is not conclusive evidence that his disability is not total.”

As to Hangarter’s level of disability, the court held that there was sufficient evidence for the jury to find that Hangarter was totally disabled even though she made sporadic attempts to perform adjustments, continued to perform clerical duties associated with her practice and her practice made a profit. The court reasoned that Hangarter’s handful of attempts to perform chiropractic adjustments were nothing more than “futile attempts” to return to her previous occupation and were insufficient to reverse the jury’s determination of total disability.

The court explained that the performance of clerical duties incidental to one’s practice or the fact that one still earned money from one’s business would not prevent one from being totally disabled. After all, Hangarter had an occupational policy and was insured against losses stemming from her inability to perform her occupation as a chiropractor. Her occasional stints as an office manager did not constitute the practice of chiropractic medicine.

Accordingly, the Hangarter decision effectively dispels any attempt by insurers to argue that self-employed professionals who can no longer perform their professional duties are not totally disabled because they are able to manage and/or perform the clerical duties of their practice.

Frank N. Darras, a Best’s Review columnist, is a partner with law firm Shernoff Bidart Darras LLP, Claremont, Calif. He is a plaintiff’s lawyer representing disabled insureds. He can be reached at [insight@bestreview.com](mailto:insight@bestreview.com).