Dynamic Chiropractic

PERSONAL INJURY / LEGAL

Disabled DC Sues Disability Insurance Carrier and Wins

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Many chiropractors own disability insurance policies to insure them against losses related to their potential inability to continue to work due to injury or disease. Overhead insurance, as the name implies, is a separate policy that pays your overhead under similar conditions. Theoretically, you could be disabled by an injury and continue to keep your office open by hiring temporary help. Although these policies are not cheap, without them (or a sizable savings to draw from), a temporary disability and long convalescence could be financially crippling.

I read in Medical Economics a year ago that many companies that previously offered disability policies to doctors no longer write them due to the high losses they suffered. The two "specialties" reported to have the highest claims were chiropractors and orthopaedic surgeons. And when you consider the amount of time the average chiropractor spends bending, stooping, pushing, pulling, and lifting each day, it is not surprising that many of them suffer disabling low back injuries.

On several occasions, I've been called as an expert to testify on behalf of a chiropractor who is suing his disability carrier when they contested the validity of the disability. We have not been universally successful. These cases can be difficult in the face of clever defense strategies that question the significance of MRI findings, pointing, for example, to several recent studies that find protrusions or extrusions of lumbar discs in a large portion of asymptomatic persons. Even after spinal surgery, juries are often unconvinced of the chiropractor's inability to practice, particularly when another chiropractor testifies that alternative forms of therapy (e.g., nonforce methods) are available to the (at least partially) disabled doctor.

The purpose of this editorial is to discuss a recent case that I was involved with here in San Diego. It is fairly typical of these cases in many ways and may prompt some chiropractors to carefully examine their existing policies. For those who are considering buying such policies it may be helpful in guiding you to make the right decision in policy type. And, for those who are counting on a fair shake from their carrier come what may, it may be an eye opener. You might want to put some savings aside for such a crisis in the event you run into trouble with your carrier.

Dr. Garry L. Shohet became disabled after injuring his low back lifting a file cabinet. He later was injured in a skiing accident in which he fractured his femur. He also aggravated his low back injury at that time. During his convalescence, he hired an associate to cover for him. His rehabilitation lasted several months.

During his absence from the clinic, his disability carrier, Paul Revere Life Insurance Company, paid him temporary disability payments in accordance with his policy. Eventually, he returned to work in his primarily diversified style of practice. At that time he notified Paul Revere that he was back in the clinic and a final payment was made. Unfortunately, Dr. Shohet soon discovered that he was not able to continue to practice due to the physical demands of this work which regularly exacerbated his low back pain to intolerable levels. Eventually, he sold his practice to the associate doctor. He continued to receive frequent chiropractic care and notified Paul Revere that he wanted

to reopen his claim.

He was sent by Paul Revere to a retired neurosurgeon here in San Diego for the purpose of defense medical examination. Although he had an MRI that disclosed a minor lumbar disc herniation, the neurosurgeon, in a somewhat ambiguous report, declared Dr. Shohet capable of limited chiropractic work. Although it appeared that the neurosurgeon lacked a clear understanding of the physical demands of chiropractic, and apparently did not understand Paul Revere's definition of "disability," Paul Revere denied Dr. Shohet's claim on the basis of the neurosurgeon's report.

Dr. Shohet had what he had always considered an additional benefit to his policy -- a residual disability policy. But because the neurosurgeon reported that he would be able to do some lighter work (performing examinations, etc.), he became "residually disabled" under this clause and was deemed not disabled under the own occupation clause. The residual disability clause appeared to be a carefully worded back door for the insurance company. Dr. Shohet believes this to be a blatant scam, and he may be right.

This is a common tactic employed by disability carriers to deny disability claims. I've been involved in several of these over the years and, sadly, the doctor often loses. In typical cases, chiropractors have the own occupation policies that guarantee that if they become incapable of performing the usual requirements of their specific job, they will be deemed disabled and entitled to collect disability payments in accordance with the policy. The problem arises in the definition of the doctor's job.

In the Shohet case, as in several others I've been involved with, the focal argument was that even thought the doctor was no longer capable of repetitive bending, stooping, lifting, etc., he could still run his office by hiring associate doctors to provide all the treatments. Moreover, it was argued in this case, Dr. Shohet could find work doing IMEs. Paul Revere hired several expert chiropractic witnesses, including a college dean to testify to this possibility. The secondary thrust of their argument was that Dr. Shohet could use Activator and other non-force methods and continue to treat some patients himself. The college dean testified that some of the students in chiropractic college today are blind and others are in wheelchairs, implying that Dr. Shohet's disability was mild by comparison.

Disabled doctors might rightfully argue however that they are not trained to be managers or independent medical examiners and are in effect disabled from performing their primary jobs as treating chiropractors once they can no longer effectively treat patients. It is one thing to live most of your life with a disability, attending chiropractic school and learning in a nurturing and unhurried setting how to practice within the limitations imposed by that disability. It is quite another thing to become acutely disabled after practicing, without encumberment, for a dozen years and be expected to adapt to a new disability without missing a beat.

I must say that I found it difficult to believe that these chiropractic experts seriously believed that: 1. A family practice practitioner, without any specialty training or IME experience, would have any chance of quickly developing an IME business capable of supporting him here in San Diego (and this is apart from the state requirement that IME doctors have an active practice). 2. A doctor with a diversified practice and an established patient base, persons accustomed to that type of care, could simply change his entire style of management to one of nonforce technique. In addition to the steep learning curve, many of his former patients would probably desert him for someone who "really cracks my back like I like it."

I was hired as the chiropractic expert for the plaintiff, Dr. Shohet, and testified that, as a solo nonspecialist diversified practitioner, Dr. Shohet would neither be capable of performing physical

examinations nor nonforce treatment methods without exacerbating his low back pain; that his ability to attract IME business in this community would be seriously limited. The action came for hearing in Department 45 of the Superior Court on April 29, 1996. Dr. Shohet was represented by attorneys Dennis A. Schoville and Louis G. Arnell of the law firm of Gray Cary Ware & Freidenrich. Defendant Paul Revere Life Insurance Company appeared by and through its attorneys Edwin A. Oster and Eric M. Crowe of the law firm of Barger & Wolen. Several chiropractors acted as experts for the defendant. The matter was tried by a jury.

After deliberation, the jury found that Dr. Shohet was in fact totally disabled under the terms of the policy, but that Paul Revere did not breach the covenant of good faith and fair dealing. (Bad faith claims are extraordinarily difficult to win.) The total gross value of awards to Dr. Shohet was $4.7 million.

This case is, I believe, instructive for several reasons:

1. These insurance companies can be very intransigent and doctors frequently are treated unjustly, believing that they have no recourse.

2. Many policies currently in place are not own occupation and the doctors who own them may have a sense of security that is not really warranted. In these cases, you might not necessarily be considered disabled even if you become completely incapable of treating patients. In those cases you probably won't have much recourse. This article might thus prompt you to examine the wording of your policy.

3. Even for doctors who currently have own occupation policies, this article should prompt you to read the fine print in the policy, with particular attention paid to the company's definition of disability and residual disability.

4). Finally, if you fudged on your income when you applied for insurance, you may have left open a back door for the carrier to nullify your policy in the event you ever make a claim. In the course of the application, the doctor fills out forms dealing with the financial aspects of the practice. Some doctors will tend to inflate their yearly income, particularly since they know that disability amounts/payments are based on the replacement of lost income: higher paid doctors receive more disability money. But policies are often issued without any verification of income. When the claim is made, the insurance company quickly requests copies of the previous several years of tax returns. When the numbers don't jibe, the company uses this as a pretext to void the policy. It was, after all, based on fraudulent information from the doctor. (Of course they will gladly cash those premium checks for years until such a claim is filed.)

From my work with soft tissue injuries, I can certainly appreciate the difficulty in validating pain and dysfunction for which little objective evidence can be found. Similar difficulties are encountered when attempting to validate and quantify a doctor's disability. Don't start out with two strikes against you. Make sure you have the right policy in the first place, and consider having an experienced attorney review the fine print. It could just save your practice.

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