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Bad Faith Update

by Martin E. Rosen, Esq.

STRATEGY, TACTICS AND DEVELOPMENTS IN BAD FAITH LITIGATION

INJURY VERSUS SICKNESS: HOW SHOULD DISABILITY CAUSED BY "REPETITIVE MICRO TRAUMAS" BE CLASSIFED?

Disability policies typically provide coverage to the insured if he or she becomes disabled because of "injury" or "sickness." However, the distinction can be quite important, because often times the policy provides benefits for a longer period of time if the disability is caused by an injury, as opposed to a sickness *(e.g.*, lifetime benefits versus "to age 65" benefits).

Most practitioners recognize that an external force causing a trauma to the insured qualifies as an injury, while processes occurring naturally within the body are considered sicknesses. An interesting question arises when an insured becomes disabled due to what I refer to as "repetitive micro traumas." A disability caused by repetitive micro traumas is the result of a slow or degenerative change in the body due to very small, repetitive body movements. An obvious example would be carpal tunnel syndrome caused by an insured's many years of court reporting or typing. On the one hand, the cause of such a condition may be conceded to be a series of miniature traumas (the repetitive impacts or strains experienced every time a muscle is used to tap a keyboard). On the other hand, the "traumas" are individually *di minimus* and not separately identifiable, and the condition occurs slowly over an extended period of time, wholly within the body, as is typical of a sickness. Different courts have come to different conclusions regarding the classification of such a disability.

In *Provident Life & Accident Ins. Co. v. Hallum,* 276 Ga. 147 (2003), the Georgia Supreme Court dealt with the above issue in the case of an ob/gyn who developed carpal tunnel syndrome as a result of 30 years of "repetitive hand motions" he had made in performing surgeries and examinations. The Court found that the policy's definition of "injury" as an "accidental bodily injury" placed "the focus of the coverage on the injuries, not the means that caused the injury. Accordingly, an unexpected physical injury that disables the insured is covered as an 'injury' under this policy."

In *Carney v. The Paul Revere Life Ins. Co.,* 359 Ill. App. 3d 67 (2005), the Illinois Appellate Court dealt with the same issue in the form of a cardiovascular surgeon who suffered from pronator teres syndrome (which is similar to carpal tunnel syndrome). Carney's doctor testified that "repetitive trauma" in the form of overuse in using an instrument had caused Carney's symptoms. Thus, Carney argued that his condition was caused by "repeated trauma, in effect, a series of injuries." Paul Revere argued that Carney's condition "developed and progressed over Dr. Carney's lifetime as a result of his normal, everyday activities." To resolve the issue, the *Carney* court referred to an Illinois Supreme Court "duty to defend" case, in which the Court found each inhalation of asbestos to be a "bodily injury." Like the court in *Hallum*, the *Carney* court found the policy's definition of "accidental bodily injury" focused on the unexpected nature of the injury, as opposed to the means that caused the injury. Finally, the court noted that the insurer did not contest Carney's doctor's testimony that Carney's condition was not caused by sickness or disease. Thus, the court found that Carney's condition could be classified as an injury.

Most recently, in December 2005, the California Court of Appeal decided *Gin v. Pennsylvania Life Ins. Co.,* ___ Cal. App. ___ (2005). There, a data entry clerk developed carpal tunnel syndrome, which she attributed to "the repetitive trauma of typing at a computer keyboard." The *Gin* court found such a condition not to be caused by an accident. It relied in part on a California Supreme Court property insurance case that distinguished between "a series of specific events, each of which manifested itself at an identifiable time and each of which caused identifiable harm at the time it occurred" [accident] versus "a series of imperceptible events that finally culminated in a single tangible harm" [no accident]. Relying upon this and other California authority, the *Gin* court concluded that "a disability that is the culmination of repetitive stresses caused by the insured's normal everyday activities is not the result of an 'accidental bodily injury' and therefore does not fall within the coverage of the policy." The *Gin* court is one of the few to take a common sense approach to the problem. As the *Gin* court stated: "Typing at a keyboard was an activity in which Gin normally engaged. It did not become an 'accident' merely because the cumulative effect of a long period of typing was the onset of carpal tunnel syndrome." *See also Nehra v. Provident Life & Accident Ins. Co.,* 454 Mich. 110 (1997) (dentist with carpal tunnel syndrome suffered no discrete injury; his disability was thus properly classified as a sickness, not an injury).

The issue presented is one that has received different treatment by different state courts. In presenting the issue to a court in which the state law is unresolved, the claims examiner or defense counsel should attempt to establish that the disability did not occur as the result of events that can be separately and distinctly identified.

(A more detailed version of this article will be published in the Winter 2006 issue of Life, Health & Disability News, a DRI publication. If you would like a copy of that article, please contact me.)

The **Barger & Wolen LLP Bad Faith Update** focuses on issues of interest to insurers subject to bad faith litigation. We appreciate your comments, which can be directed to Martin E. Rosen, Esq. at (213) 680-2800 or mrosen@barwol.com.

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Los Angeles
633 West Fifth Street, 47th Floor
Los Angeles, CA 90071
213-680-2800 (Main)
213-614-7399 (Fax)

San Francisco
650 California Street, 9th Floor
San Francisco, CA 94108
415-434-2800 (Main)
415-434-2533 (Fax)

Newport Beach
19800 MacArthur Blvd., 8th Floor
Irvine, CA 92612
949-757-2800 (Main)
949-752-6313 (Fax)

New York
10 East 40th St., 40th Floor
New York, NY 10016
212-557-2800 (Main)
212-557-2884 (Fax)