

DISABILITY WORKSHOP 29 OCTOBER 2004

**INTERPRETATION OF DISABILITY BENEFIT
PROVISIONS**

EG DE BEER

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1. SOME RULES OF INTERPRETATION

Golden Rule

*“The language of the document is to be given its **gramatical and ordinary meaning**”.*

Application –

Particulars words or phrases are not be interpreted in isolation by itself. The correct approach is to have regard to:-

- ❖ The **context** in which a word or phrase is used with its **interelation to the contract as a whole**, including the nature and purpose of the contract;
- ❖ **Background circumstances** which explains the origin and purpose of a contract, ie to matters probably present to the mind of the parties when they contracted;
- ❖ Extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it **ambiguous**, by considering **previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document**, save direct evidence of their own intentions – Coopers and Lybrand vs Bryant 1995 – 3 SA 761 (A).

Some classical rules of interpretation of ambiguous wording

- ❖ Equitable interpretation – “The court will lean to that interpretation which will put an equitable construction upon the contract and will **not**, unless the intention of the parties is manifest, so construe the contract as to **give one of the parties an unfair or unreasonable advantage over the other**” – Wessels “The Law of Contract in South Africa” 2nd Edition – para 1974;
- ❖ Avoidance of inconvenience – “The **purpose** of the transaction and the dictates of business **efficacy**” – are among the considerations taken into account by our courts;
- ❖ Giving effect to – “When a stipulation is capable of two meanings, it should rather be construed in the sense in which **it can have some operation than in that in which it cannot have any**” – Pothier and Van der Linden;
- ❖ Against tautology – “It is a good general rule...that one who reads a legal document...should be rather at the outset inclined to suppose **every word intended to have some effect or be of some use**” – Wellworth Bazaars Limited vs Chandler’s Limited 1947 to SA 37 (A) 43;
- ❖ General words and expressions interpreted restrictively – “However general the expressions may be in which an agreement is framed, they only include the matters in which in respect of **which it appears that the contracting parties intended to contract and not those which they did not contemplate**” – Pothier and Van der Linden;
- ❖ *Contra proferentem or contra stipulatorem* – “...if the wording is incurably ambiguous, **it’s author should be the one to suffer because he had it in his power to make his meaning plain**” – Cairns Pty (Ltd) vs Playdon and Co Limited 1948 3 SA 99 (A).

2. EXAMPLES OF OCCUPATIONAL DISABILITY DEFINITIONS

Own Occupation.

- ❖ "...prevents the life assured from following his/her own occupation **at the time of disability**".
- ❖ "...unable to perform the **duties of his/her own occupation** through illness or injury and suffers a loss of earned income as a result."
- ❖ "...prevented from performing the occupation **nominated in the application form.**"

Similar Occupation

- ❖ "...unable to engage in the regular occupation which he/she engaged in immediately before the injury or sickness as well as a **similar occupation with due allowance for his education or experience.**";
- ❖ "...unable to perform the duties of the Assured Person (s)' own occupation or a **similar occupation.**"
- ❖ "...prevents the life assured from following **his/her own or a similar occupation** in keeping with his **training or ability**".

Reasonable Other Occupation.

- ❖ "...incapable of engaging in his/her own normal occupation, or any other occupation for and in which in ABC's opinion, he/she **could reasonably be considered capable of** engaging by virtue of his/her **training and general experience** for remuneration profit."
- ❖ "...unable to perform the duties of the Assured Person (s)' own occupation or any occupation which the Assured Person (s) **could reasonably be expected to follow**, taking into account the Assured Person (s)' **education, training and experience.**"
- ❖ "... is rendered incapable of pursuing any occupation for which he/she is **reasonably suited** or may become suited by virtue of **his/her experience, knowledge, training or ability.**"
- ❖ "...unable to perform the duties of his/her own occupation or any other occupation which he/she could reasonably be expected to follow, taking into account his/her **education, training, status and experience.**"

Any Occupation

- ❖ "...incapable of engaging for remuneration or profit in his **own occupation**, or in any other occupation."
- ❖ "...prevents the life assured from following **any occupation of whatever nature**, irrespective of the training or ability of the life assured."

3. INTERPRETATION REGARDING DURATION AND EXTENT

Permanence

“Total disability has been held to be permanent within the meaning of a life policy providing benefits for total and permanent disability, if the disability is shown to be of such character that it is **likely to continue for an indefinite time in the future**, that is, if it is presumably permanent, probably permanent, or presumptively permanent. The view is taken that the words “totally and permanently disabled” contemplate a disability at the time of the commencement of the claim, **which reasonably satisfies a fair and impartial mind in that the insured then is totally disabled and may reasonably be expected to remain in such condition for at least an indefinite period of time**. In order for a person to be permanently disabled, it is not necessary for his disability to be such that he has no hope of recovery. If his disability is such that there is no reasonably probability that he will ever recover or become cured or that he will ever become substantially better, his disability is permanent – Couch on Insurance, 2nd Edition 53:105.

Totality

“The extent of impairment in function is matched with the specific occupational needs. When there is a **significant mismatch**, ie the claimant is **unable to do a significant portion** of his job, disability could be warranted’ – Impairment and Disability Assessment:Guidelines. LOA. Dr P Coetzer et al.

“It is not possible to fix with mathematical exactness the proportion of the assured’s occupation he must be no longer able to perform before he can be classified as totally disabled. In *Hooper* “**a very considerable part**” was sufficient; *Corpus Juris Secundum*. “Any **substantial part**” as sufficient. *Attridge* “inability to earn his living in his profession”; *Tucker* “inability to pursue his ordinary occupation”; *Yorkshire* “what he can still do **does not amount in effect to carrying on his business**”. Taken together, these authorities provide as accurate a test as can be expected – Professor RH Christie QC.

“The test of total disability is satisfied when the circumstances are such that a reasonable man would recognized that he should not engage in certain activity even though he literally is not physically unable to do so. In other words, total disability does not mean absolute physical inability to transact any kind of business pertaining to ones occupation, but rather that there is a total disability if the insured’s injuries are such that **common care and prudence require him to desist from his business or occupation in order to effectuate a cure**; hence if the condition of the insured is such that in order to effect a cure or prolongation of life, common care and prudence require that he cease all word, he is totally disabled within the meaning of health or accident insurance policies – Couch on Insurance 2nd Edition 53:118.

4.1 OCCUPATION

The New Penguin English Dictionary – 1(a) an activity by which one earns a living (b) an activity in which one engages : “*I must admit I smoke*”. “*I am glad to hear it. A man should always have an occupation.*” – Oscar Wilde.

Concise Oxford Dictionary - ...what occupies one, means of passing ones time, temporary or regular employment, business, calling or pursuit.

Ordinary Meaning Within the Context of the Contract

In very general terms occupational disability benefits are perceived to cover **a person’s ability to work in a specific capacity.**

The specific capacity covered in terms of a particular benefit is designated in the policy provisions by the word occupation and more specifically defined by words such as those used in the previous examples, ie. **Own..; similar...;** which he/she could **reasonably be expected** to follow...; **any.**

4.2 ANY OCCUPATION

What is the ordinary understanding of the concept “**an occupation**” in the context of a contractual undertaking to provide monetary benefits on the loss of the ability to perform any such occupation?

Relevant Considerations:

- ❖ Occupation to be distinguished from part time activity and hobby – note that the Afrikaans word used is “**beroep**”;
- ❖ The activity deemed to be an occupation should generate an income – enable the insured to “**earn a living**”;
- ❖ **Salaried positions as an employee** to be clearly **distinguished** from **entrepreneurs or self-employed position;**
- ❖ Occupation should be specifically identified instead of vague and fanciful descriptions such as – “open labour market occupations of a sedentary or light physical demand nature”.

Example of a complaint:-

The complaint was qualified as a fitter and turner and diesel mechanic with experience as welder and spray painter.

In 1994 at age 37 he was employed as a “workshop manager”. His functions were primarily to – delegate tasks to workers/artisans; manage/supervise workers and output/productivity levels; perform quality control. Salary= ±R6000pm.

He was standing next to a diesel tank at work which was being welded when it exploded. His clothes were ignited and he was surrounded by flames. He sustained 30% and 60% first and second degree burns over his abdomen, upper extremities and lower extremities. His uncle with whom he had a close relationship died in the explosion. He was treated in an intensive care unit for one month and was hospitalized for a further period during which numerous and extensive skin grafting procedures to his arms, legs, chest and back were performed. His recovery is described as a “miracle”, a complete file of the management of his case during hospitalization is being used for study and lecturing purposes. Further procedures for release of adhesions were performed after hospitalization and would probably be required in future.

Complications resulting from his injury include – thin skin which will be easily injured and infected. He also developed allergies to analgesics and anti-inflammatories. An occupational therapist found his functional endurance and tolerance poor. A post-traumatic stress disorder complicated by major depressive disorder have been diagnosed. These aspects have been complicated by drawn out criminal case by which he was as foreman accused in a representative capacity of liability for the death of his uncle, but the experience had a severe negative impact.

Prior to the accident, the complainant used spit-braai equipment made by himself for home entertainment and occasional catering purposes. He was encouraged by his therapist to take up spit-braai activities again as a therapy for desensitizing against his fear of fire - involvement in small scale local catering developed from these activities. With the aid of a domestic servant and two friends who would assist with the transport and setting up of the braai equipment, catering for ± 10 to 20 people was undertaken. Spit-braais, salads and sandwiches were provided. The highest monthly profit generated from these activities was just over R1000 during a December holiday.

Issue:

Whether the activities in which the complainant is involved and capable of performing may reasonably be considered to confirm the ability to perform **an occupation**.

4.3 OWN OCCUPATION

By the use of the word “**own**” the particular occupation covered is “personalized”. The actual activity in which the insured was engaged before disablement is relevant for the determination of such occupation.

Relevant Considerations:

- Whether the occupation in which the insured was engaged at the time of the conclusion of the contract or at a later stage (usually immediately prior to disablement) is the applicable standard depends on the wording of the specific contract.
- Provisions requiring notification of change of occupation and/or other indications in the policy documents that the stated occupation is material, may justify an inference that the stated occupation is covered. If not, it might be a justified assumption that the occupation immediately before disability is covered.
- Although the actual activity of an insured is relevant this does not mean that the occupation in question is limited to the particular insured’s actual job description or the specific requirements or circumstances in respect of a particular employer.

Example: The head of a security department of a large concern who had to operate from offices in a basement of the head office building is due to severe asthma not capable of continuing employment with that employer. He is not by virtue of this aspect disabled from performing his own occupation.

- Whether an insured is capable of earning a comparable or even higher income from another occupation or has another source of income is immaterial in this respect.

Example: A director in a family business who is due to severe impairments capable of performing only menial tasks but who is nevertheless still maintained in employment with the same title and salary is nevertheless unable to perform his own occupation.

4.4 SIMILAR OCCUPATION

Full particulars of both the “own” and “similar” occupations are required to evaluate similarity.

- Similarity of **functions** are in the first place relevant to the question as to what occupation is covered in terms of this description
- Income levels and status are further relevant factors.

4.5 REASONABLE OTHER OCCUPATION

The general use of the words – “... or any (other) occupation...”in definitions of these benefits is sometimes interpreted to mean that this is an “any occupation” benefit.

The more correct generalization would be “reasonable alternative occupation”.

Reasonability is a key concept in this respect.

Although applied in a different context the following quotes are useful:

““...reasonably” required, has been interpreted to mean that it must be required in accordance with reason: ”In my opinion the words refer to something which a reasonable man would wish to do.”

“It is, therefore, impossible to postulate an *a priori* or immutable test of what “reasonably requires” means. The standard will differ from lessor to lessor, from locality to locality, and from time to time. It is, therefore, a purely factual test in the end that takes cognizance of the lessor’s station in life, his proven personal circumstances, the size and requirements of his household, and his reason for acquiring better accommodation. Ultimately one must make a balanced and justifiable value judgment.”

Batchelor v Gabie – 2002 (2) SA 51 (SCA) on 54C and H-J.

The authors of the LOA Guidelines for the Assessment of Impairment and Disability produced an excellent summary of some of the relevant factors in this respect. On page 29-30:-

- Age. Generally, a person close to retirement age (>58yrs), should not be expected to adapt to any amount of change in job requirements, unless the work is very similar to his previous one.
- Income. A general guideline should be that a fall in income of more than 25% should be regarded as unfair.
- Years in current position. The lower one’s qualifications, and the longer one is in one specific occupation, the less reasonable will any alternative become. In this regard it is recommended that it should be unfair to expect the following categories to do any alternative work, i.e own/similar definitions should effectively become own occupation:
 - Any manual labourer with qualifications less than Grade 12 at school, and doing manual work for >10 years and
 - Artisans practicing their trade >10 years. Full particulars of what is considered to be a “reasonable other occupation” are required to evaluate reasonability. Availability of such occupation is not as such relevant.

5. UNJUSTIFIED TERMINATION OF INCOME BENEFITS

It has repeatedly been emphasized in our annual reports that provisions in group life policies which provide for reduction of an income benefit does not as such justify termination of payment of that benefit.

Many contracts contain provisions in terms of which the requirement for enforceable entitlement to disability income benefits during a stated period “usually two years” changes after the expiry of that period. Other contracts, however, contain only one definition of disability which does not change but provide that after the expiry of a fixed period, the amount of an income benefit may be reduced. Such provision normally provides for the circumstances under which and the basis on which the income benefits may be reduced.

This distinction is particularly important since the onus to provide sufficient information to substantiate an enforceable claim in terms of the policy provisions rests on an insured. The onus for justification to reduce a benefit on the other hand, rests on the insurer.