

## Can disability insurer force doctor to have surgery?

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### Curbside Consult

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**Q:** *I'm an orthopaedic surgeon who has paid my disability insurance policy premiums on time, every month, for nine years. I recently developed carpal tunnel syndrome and filed a claim. To collect benefits, my insurer is requiring me to have surgery. Is this legal?*

**A:** In a similar case of mine, an orthopedic surgeon ("Dr. Smith") filed a claim for the same condition under the "own occupation" provision of his disability policy (meaning that by reason of disability, he couldn't perform the "usual and customary" duties of his actual occupation).

As a result of his degenerative condition, the insurance company paid Dr. Smith benefits for a few months, but then took the position that: carpal tunnel syndrome can often be corrected by surgery; the surgery is routine and relatively risk-free; and the doctor has a duty under the "appropriate care" provision of the disability income contract to have the operation.

The doctor did not want surgery; he believed conservative treatment would eventually resolve the problem. Additionally, he questioned whether the risks of surgery outweighed the benefits. And like

many people, he fears surgery.

Still, the insurance company not only threatened to cut-off Dr. Smith's monthly disability income benefits if he didn't have surgery, but also threatened to possibly sue him for reimbursement of benefits previously paid.

So, is Dr. Smith obligated to have surgery? In short, the answer is no.

Under the provisions of the doctor's policy (which are similar to those in many "own occupation" individual and group disability insurance contracts), the insurance company is obligated to pay disability benefits, if due to injury or sickness the insured is:

- unable to perform the substantial and material duties of his own occupation; and
- receiving care by a physician that is appropriate for the condition causing the disability.

Like many disability policies, Dr. Smith's does not define "appropriate care" and does not contain language suggesting that the insured has a duty to undergo surgery or other corrective treatment. Under the laws of most states, the language in an insurance contract is interpreted as that which a reasonable person would expect it to mean.

Moreover, ambiguities in a contract must be interpreted in favor of the insured. Thus, if a carrier wants to insure the policyholder only against "incurable disability," it must do so via express policy language. A majority of courts, including the Florida Supreme Court, hold the following view cited by the Federal Dis-

trict Court of Appeals:

"In the absence of a clear, unequivocal and specific contractual requirement that the insured is obligated to undergo surgery to attempt to minimize his disability, we refuse to order the same. To hold otherwise and to impose such a requirement would, in effect, enlarge the terms of the policy beyond those clearly defined in the policy agreed to by the parties."

Therefore, an insured's choice to undergo conservative treatment, despite the fact that certain doctors may have felt that surgery was the best treatment, is not a breach of the appropriate care provision of the policy or of the insured's duty to mitigate (should a duty to mitigate be explicitly stated in the policy).

I advised Dr. Smith of the law and then asked him to discuss all appropriate treatment options with his physician and ask his doctor to state in her medical records and communications with the insurer that the treatment he was receiving was appropriate for his condition.

Ultimately, the doctor's insurance company agreed that he remained eligible for benefits under his disability contract. Furthermore, in addition to securing his future disability benefits, the insurance company agreed to pay the attorney fees incurred by this doctor as a result of its unjustified actions.

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