PERMANENT HEALTH INSURANCE CLAIMS - CAN THE INSURER REQUIRE THE CLAIMANT TO UNDERGO MEDICAL TREATMENT?

By Gordon Cornish, NRG Victory Reinsurance Limited

PHI, both on an individual and a Group basis, provides for income replacement during a period of total disability or incapacity, but one of the perennial problems for both claimants and their insurers is that there is virtually no judicial guidance on the meaning of terms like "totally disabled".

The Ombudsman has in his recent Reports dedicated some space to PHI problems which have been referred to him and so insurers can at least refer to those if a potential dispute or difference of opinion is looming.

One situation which is commonly encountered by insurers when they are dealing with a claim is where the claimant for reasons best known to himself refuses to undergo a course of medical treatment which both the insurer concerned and the treating medical practitioners feel would lead to recovery and thus ultimately a return to work.

It was therefore against the background of this problem area that PHI companies noted with great interest the decision of the Sheriff Court at Stonehaven dated 27th November 1991 in the case of *Porter v NEL Permanent Health Insurance Limited.* Although this is a Scottish decision it nevertheless gives some very useful ideas as to how any court might deal with this type of situation.

In 1985 Mr. Porter had taken out an Index Linked Permanent Health policy, according to which benefits would be paid whilst he was incapacitated as defined in the contract and was not following any other occupation. "Incapacity" was defined as "the insured being wholly and continuously disabled by sickenss or injury which prevents him from performing his normal occupation or any other occupation for which he is reasonably qualified by training, education or experience". This is the standard "own and any other occupation" terminology which one normally finds in PHI policies.

Mr. Porter was a Diving Manager and he claimed that in April 1988 he was suffering from angina which rendered him unfit to pursue that occupation or any other occupation for whch he was reasonably qualified by training, education or experience. He said that the only other forms of employment of which he had any experience were heavy goods vehicle driving and roof maintenance.

His claim for benefits was duly admitted and he received payments up to December

1989. However, his insurers then claimed that as from December 1989 he had not been incapacitated and that, even if he had been incapacitated, the cause was not angina but his refusal to undergo medical treatment which would cure his condition. They thus claimed that he had failed to mitigate his loss by undergoing the said medical treatment.

One prong of the insurer's argument was that Mr. Porter was fit for all forms of work which did not require significant physical exertion. They said that he was fit for clerical work and for supervisory duties and they averred that he had previous experience of work involving supervisory and administrative duties only and that he had been offered employment involving such duties in or about May 1988.

However, the court refused to accept those arguments saying that it simply would not do for the insurers to say, without any specification, that Mr. Porter had some kind of previous experience and they found as a fact that there was no indication of the identity of the potential employer or the job description.

The other prong concerned Mr. Porter's refusal to undergo medical treatment which had been recommended by his consultant cardiologist. Mr. Porter correctly pointed out that there was nothing in his contract which required him to undergo medical treatment and the court held that, if the insurers had wished to limit their liability by excluding conditions which could be cured or alleviated by reasonable medical treatment, they could have inserted a clause to that effect in the policy. The court was not prepared to read into the expression "disabled by sickness" a requirement that Mr. Porter must expose himself to the risks of major surgery before qualifying for benefit.

On the face of it this is a perfectly reasonable decision. There is obviously a difference between a course of minor treatment and major surgery - another frequently encountered problem area is the claimant who refuses to undergo surgery on his back - and, if insurers feel that they should have the right to require a claimant to undergo significant medical treatment, then the burden is clearly on them to make it a term of the contract. Any such contract term would probably need, however, to be restricted to medical treatment which in the circumstances is objectively reasonable and which holds out a pretty strong change of complete recovery and thus a return to work.