

The background is a collage of four quadrants. The top-left quadrant shows a stack of papers on a purple background. The top-right quadrant shows a clock face on a pink background. The bottom-left quadrant shows a stack of papers on a green background. The bottom-right quadrant shows a clock face on a yellow background. A black-bordered box is overlaid on the top two quadrants, containing the title and date. Another black-bordered box is overlaid on the bottom two quadrants, containing the author's name.

**Litigated Issues in the Occupational Analysis**

**ACI March 3rd and 4th, 2005**

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# Performing the Occupational Analysis

*A multi-step evaluation process*

# Examine the Pertinent Policy Provisions

- How does the policy define *occupation*? –  
**“own” or “regular” occupation.**





# How does the policy define occupation?

provided he is disabled at that time as a result of demonstrable injury or disability (including mental or nervous disorders) which will continuously and totally prevent him from engaging in any occupation whatsoever for compensation or profit, in which he is normally employed during the period an Employee qualifies for Long Term Disability.

- you are limited from performing the material and substantial duties of your regular occupation due to your sickness or injury;
- you have a 20% or more loss in your indexed monthly earnings due to the same sickness or injury; and
- during the elimination period, you are unable to perform any of the material and substantial duties of your regular occupation.

*Prudential determines that:*

- you are limited from performing the material and substantial duties of your regular occupation due to your sickness or injury; and
- you have a 20% or more loss in your indexed monthly earnings due to the same sickness or injury.

**LIMITED** means what you cannot or are unable to do.

**MATERIAL AND SUBSTANTIAL DUTIES** means duties that:

- are normally required for the performance of your regular occupation; and
- cannot be reasonably omitted or modified.

**REGULAR OCCUPATION** means the occupation you are routinely performing when your disability begins. UNUM will look at your occupation as it is normally performed in the national economy, instead of how the work tasks are performed for a specific employer or at a specific location.

**OCCUPATION MEANS:**

1. because of injury or sickness, the employee is completely prevented from engaging in any occupation for which he is or may become suited by education, training or experience; and
2. the employee is under the regular care of a doctor.

**Totally disabled from the employee's own occupation or total disability from the employee's own occupation** means:

1. because of injury or sickness, the employee cannot perform the important duties of his own occupation; and
2. the employee is under the regular care of a doctor; and
3. the employee does not work at all.

"Actively at Work" and "Actively Working" mean that an employee of the Company or Covered Employee is performing each of the material duties of the occupation that he/she regularly performs for the Company at his/her usual place of business or at another location to which the Company's business requires the employee to travel. Although an employee may be absent from Active Work because of a regularly scheduled day off, holiday, or vacation day, he/she will be considered to be Actively Working if he/she was Actively at Work on his/her last scheduled work day before the date of his/her absence; and was capable of Active Work on the day before the scheduled effective date of his/her coverage.

**DISABILITY.** An Employee will be considered Disabled if because of Injury or Sickness:

1. he is unable to perform all the material duties of his regular occupation; and after Monthly Benefits have been payable for 24 months, he is unable to perform all the material duties of any occupation for which he is or may reasonably become qualified based on his education, training and experience.

**RESIDUAL DISABILITY.** An Employee will be considered Residually Disabled while he is Disabled, he returns to any work.

**Material and substantial duties** means duties that:

- are normally required for the performance of your regular occupation; and
- cannot be reasonably omitted or modified, except that if you are required to work an average in excess of 40 hours per week, Prudential will consider you able to perform that requirement if you are working or have the capacity to work 40 hours per week.

**Regular occupation** means the occupation you are routinely performing when your disability begins. Prudential will look at your occupation as it is normally performed instead of how the work tasks are performed for a specific employer or at a specific location.

**Gainful occupation** means an occupation, including self employment, that is or can be expected to provide you with an income equal to at least 80% of your indexed monthly earnings within 12 months of your return to work. But, if you enrolled for Option 2, it means an occupation, including self employment, that is or can be expected to provide you with an income equal to at least 60% of your indexed monthly earnings within 12 months of your return to work.



# Examine the Pertinent Policy Provisions

- How does the policy define *occupation*? – “**own**” or “**regular**” *occupation*.
- How does the policy define ***disability from the occupation***?





## How does the policy define *disability from the occupation?*

- -Inability to perform
  - *the substantial and material duties*
  - *the important duties*
  - *all the important duties*
  - *each and every material duty*
  - *one or more of the important duties*
  - *at least one material duty*
  - *any duties on a full time or part time basis.*

# Examine the Pertinent Policy Provisions

- How does the policy define *occupation*? – “**own**” or “**regular**” **occupation**.
- How does the policy define **disability from the occupation**?
- Does the policy establish any framework for determining an insured’s **occupational duties**?







## Does the policy establish any framework for determining an insured's **occupational duties**?

### ■ *Duties*

- *specialty/subspecialty*
- *in the manner in which you performed them*
- *as they are customarily performed in the industry*
- *as they are normally performed within the occupation without regard to how they were performed in your job*
- *as performed for your employer but without regard to hours worked per/wk*
- *on a full time or part-time basis.*



# Examine the Pertinent Policy Provisions

- How does the policy define *occupation*? – “**own**” or “**regular**” **occupation**.
- How does the policy define **disability from the occupation**?
- Does the policy establish any framework for determining an insured’s **occupational duties**?
- Does the policy as a whole provide the answers? If not, do relevant cases provide the answers? **Total Disability v. Partial Disability definitions**



# Harmonizing the Provisions

## ■ Total Disability:

- Inability to perform the important duties of your regular occupation

## ■ Partial Disability

- Inability to perform one or more of the important duties of your regular occupation





## The next steps

- Applying the facts to ascertain potential issues and arguments with consideration to the policy language & case law.



# Common Occupational Issues

- Job v. Occupation
- Change in Occupation
- Specialty v. General Field
- Total v. Residual Disability Claims
- Legal v. Factual Disability
- Occupation of Unemployed Person
- Active at Work
- VE & FCE evaluations
- Daubert Challenges to VE & FCE testimony





# Informed Decision Making

- Once all the permeations are understood, *then*
- effectively utilize vocational experts and functional capacity evaluators and evaluate your adversary's experts
- Preparation of Experts with Information and Understanding

# The Executive Laborer

- Owner of National Construction Company
- “Executive” during application
- Insured by Preferred Professional Policy – “inability to perform own occupation”
- Most of duties are managerial, sedentary duties
- But job includes doing all the bidding on projects and giving estimates
- Submits claim based on Meniere’s Disease causing vertigo
- R/L no heights, reduced air travel, avoid heavy equipment and machinery.
- No partial disability provision







# ISSUES

- Which duties were material, important, major?
- Framework for evaluating materiality
- Based on facts is Total Disability supported ?

# The Ob-Gyn

- Office practice 25 hr/wk
- Deliveries & Surgery 15-20 hrs/wk
- Hosp. Rounds / On-call varies wkly
- Undisputed that Majority of Income +75% from deliveries/surgery
- Unable to perform deliveries or surgery; but can perform office practice –exams, biopsies,
- Files claim alleging total disability; policy has a residual disability provision





# ISSUES

- Specialist v. Generalist
- Sub-specialties
- Total v. Residual Disability





## The Dentist

- Successful practice 20+ years
- DDD back / neck; surgery recommended
- Prior to claim - investigation unethical conduct - potential loss of license
- Partners see his patient during investigation
- In family business selling and developing real estate
- Months after all the land is sold and developed, he has surgery
- Submits claim alleging disability from his own occupation as a dentist due to DDD then loses his dental license.



# ISSUES

- Did he have an occupation?
  - Regular occupation of unemployed person
  
- What was the occupation(s)?
  - Change in Occupation
  - Dual Occupation
  
- Is he legally or factually disabled from dentistry occupation?



# The Software Sales Executive

- Dir. Nat. Accts.
- Pulmonary Fibrosis; fatigue and SOB
- Definition of disability—
  - Inability to perform material duties of regular occ.; at 24mo - any occ
- *Disabled by SSA*
- *Conflicting vocational reports*
- *FCE documents significant fatigue but also finds capacity sedentary wk*
- *Advances in technology allow him to perform sales presentations without air travel*

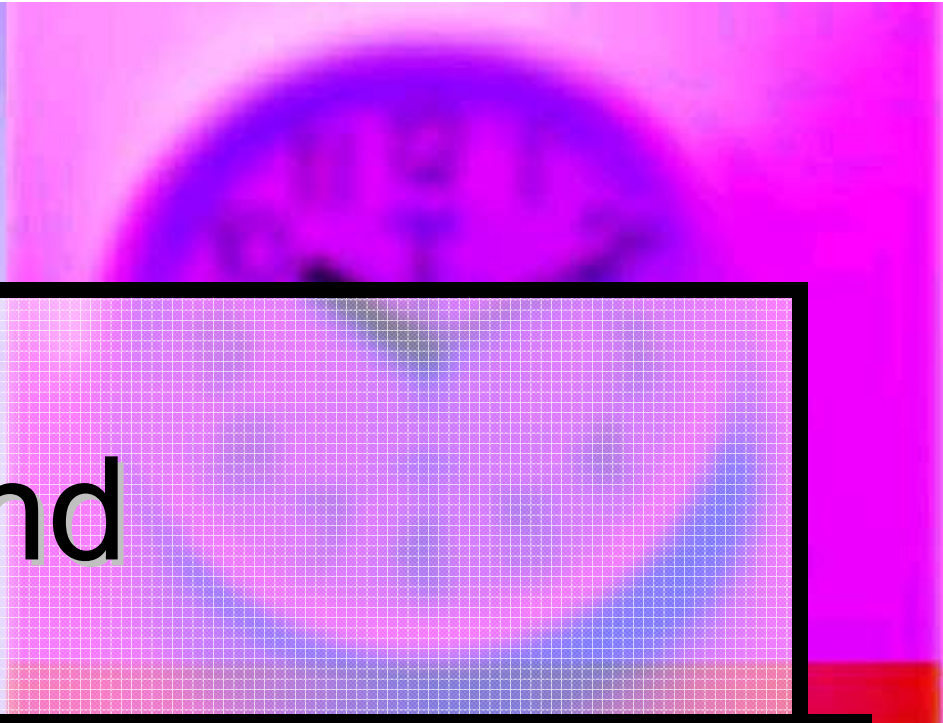
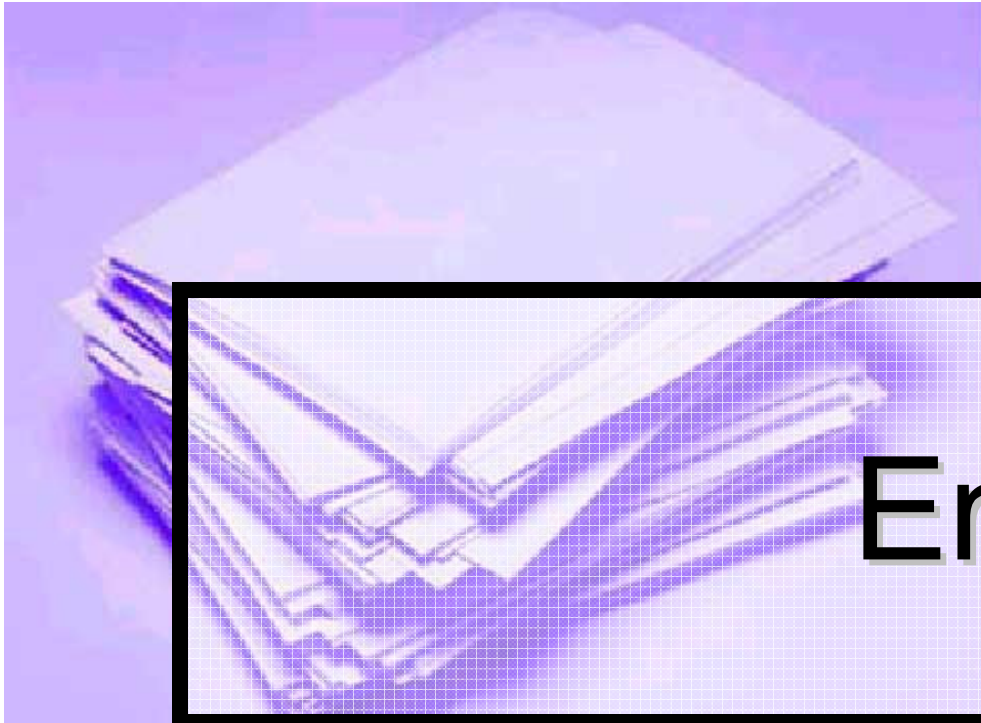




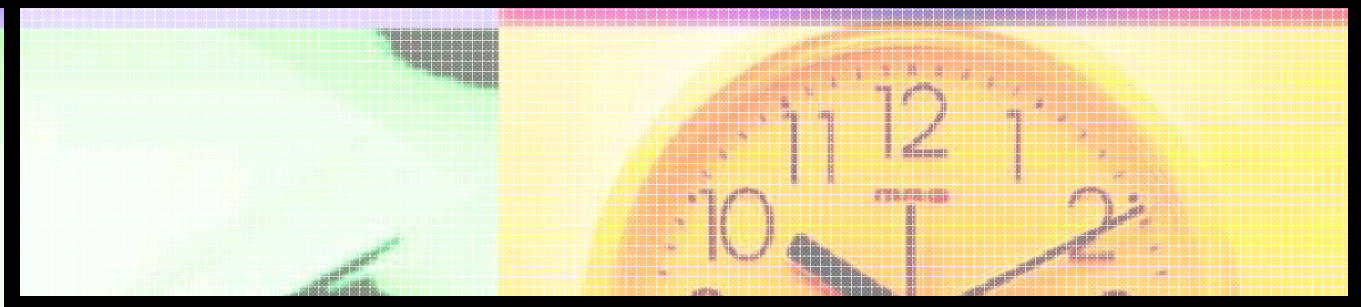
# ISSUES

- Regular Occupation
- Effect of SS award

- Vocational and FCE Reports
  - Credentials
  - Record review
  - Definitions used
  - Sources; DOT / O'Net
  - Reliability
  - Daubert



End



# The Major-Joint Orthopedic Surgeon

- Practice with oversight responsibilities - paid extra 75k/yr
- Pre-disability: +90% of surgeries are major joint procedures; also handles trauma calls
- Post disability: only perform minor joint procedures and oversight duties
- Injury to hand/arm/shoulder
- Initial treatment is doc to doc at hosp & self treatment
- RTW 6 mos to office practice
- Cannot perform b/c fatigue & lack of concentration
- Oversight responsibilities are outsourced; mang eliminated
- Files 2d claim in 6 months







## The “Trial” Lawyer

- Paid 18 mos. benefits for disability due to alcoholism & depression
- 1 yr very aggressive tx; IP hosp.
- On claim completes M.Ed.
- After 18 mos. Dx- Alcohol abuse in remission; moderate depression; moderate to mild cognitive deficits
- TX is supportive psychotherapy and medication management
- trial work too stressful and will cause relapse
- Benefits terminated after RTW teacher