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*FRANKEL & NEWFIELD, P.C. is a boutique law firm focusing on assisting individuals with disability claims, and individuals whose disability claims have been wrongfully denied or terminated. Our experience in recognizing issues before they become problems has helped guide many claimants through this difficult process at a time in their lives when they most need the benefits of these protections.*

Welcome to “**LTD Management**,” Frankel & Newfield, P.C.’s newsletter for the Firm’s clients and professionals who routinely consult with the Firm, updating them on our practice, as well as important new developments in the law of disability insurance.

## Firm Updates

The firm has launched its next generation web site, [www.longtermdisabilityclaim.com](http://www.longtermdisabilityclaim.com). The new site offers greater navigation and links to other helpful sources of information concerning disability news and medical information.

Justin Frankel and Jason Newfield were invited speakers at the recent International Association of Chronic Fatigue Syndrome (“IACFS”) conference in Fort Lauderdale, Florida.

Jason Newfield will be lecturing at the Greater Long Island Dental Meeting in April 2007. The lecture is entitled “Understanding the Disability Claim Process - Avoiding the Landmines that Could Sink Your Claim”.

In May, 2007, Jason Newfield has been invited to be part of the faculty at “Advances in Understanding & Treating Chronic Fatigue Syndrome and Fibromyalgia”, a conference sponsored by the Department of Veterans Affairs. He will be educating physicians about advocating for patients suffering from these conditions.

The firm regularly speaks to medical groups concerning issues concerning disability insurance and recent events of note that involve the field.

Justin Frankel’s article “Disability Insurance - A Primer for Lawyers” will appear in the April 2007 issue of Nassau Lawyer.

Frankel & Newfield also continues to contribute to Podiatry Management and Chiropractic Economics magazines, the most recent article a helpful Q&A about the disability claim process and potential problems seen by claimants.

## Practical Concerns-Disability Caused by Carpal Tunnel Syndrome

Many surgeons, dentists, and podiatrists suffer repetitive stress conditions, resulting from the nature of the work performed. An issue being seen with greater regularity in disability claims of medical professionals is whether a disabling condition is appropriately classified as a sickness or an injury.

The issue is of tremendous importance, since most private insurance policies differentiate on the maximum benefit period available between sickness and injury. Disabilities resulting from a sickness are generally only payable until Age 65, while many policies afford lifetime benefits for a disability as a result of accident or injury. And contrary to popular belief, several conditions fall

into a gray area leading to disputes with the insurer on the maximum benefit period.

Insurers argue that this condition is a sickness, because it happens over time, because no one incident led to the disability, and perhaps even because one could argue that it is an “occupational disease” process, that is akin to traditional sicknesses.

The response argument is that the condition is an injury - notwithstanding the fact that there is no one single and specific onset or event. We advocate that the condition was the result of repeated insults (accidents/injuries) and thus, was an unintended result of intentional behavior. Several courts throughout the country have addressed the issues - and have utilized a variety of legal concepts to reach decisions.

Thus, if a claim should arise from a repetitive type condition, careful thought must be given to how to frame responses to the insurer, who will likely look to develop claim responses that could lead to finding an insured disabled from sickness, rather than injury, and greatly shortchange the duration of benefit payments.

### Success Stories

We recently secured benefits for our client, a podiatrist, whose claim had actually accrued several years prior to engaging the firm. During our initial fact investigation, we determined that a claim for partial disability was appropriate even before the onset date of a total disability claim. We aggressively pursued this prior claim, resolved the issue of late notice of the claim, and secured the client significant money that was unexpected when he initially contemplated his claim.

The firm also recently resolved a litigation for our client, a neuro-radiologist, whose partial disability claim was challenged by the insurer. During litigation, we were able to position the claim so that the insurer paid almost full value and secured a finite resolution to a lengthy process.

The firm also secured a successful resolution for a client suffering from Chronic Fatigue Syndrome, where the insurer sought “objective” evidence of the disability, despite the lack of such evidence for this condition. The insurer agreed to pay benefits, legal fees and continue to evaluate further claim eligibility for our client.

For more information about results we have secured, go to [www.longtermdisabilityclaim.com](http://www.longtermdisabilityclaim.com) and click to success stories.

### Disability Insurance Coverage Definitions

In our ongoing effort to educate policyholders, we once again provide some insight into definitions contained in many disability insurance policies.

One important provision is the **Notice of Claim** provision. Ordinarily, the policy will have language such as "proof of loss" be provided shortly after a claim occurs (typically 30 to 60 days). While those are requested time frames, these policies also usually contain language stating that proof is to be provided as soon as reasonably possible, but in no event, more than one year after the period in claim.

As a practical matter, what does this mean? Can you actually file a claim over one year prior to the date of disability? The answer is yes, but perhaps the issue becomes one of whether you can actually receive benefits for these subject periods. One strategy to employ would be to utilize some of these otherwise “disqualified” periods to accrue the elimination period - that period of time which must be satisfied before benefits are payable. By using this period to satisfy the elimination, your benefits become compensable within the notice period.

Many insureds do not even appreciate the potential to back date the prior partial disability claim to cover a period of loss that occurred prior to the onset of a total disability claim, or even a continued partial disability. Consulting with experienced counsel could result in a significant recovery of benefits that would otherwise have never been considered.

**Trends/Decisions on Disability Cases**

There have been a number of interesting decisions from the Courts that decide these claims. There are also a few trends that we have noticed from the recent cases that have been decided.

From the perspective of the claimant, it is clear that the courts are moving toward an appreciation of the improper and biased conduct of insurers, and are more receptive to arguments by claimants of biased conduct. Nonetheless, many decisions still favor insurers, particularly those where a claimant can be shown to have inconsistencies between statements made to the insurers and information gathered from the investigation performed by insurers. Thus, working with the treating physician is of paramount significance.

One court recently found that the insurer acted in an arbitrary and capricious manner when it failed to have a medical doctor review the claimant's medical documentation, relying instead upon a nurse to review the materials. This was an important factor supporting the court's decision. One trend seen in many cases has been the insurer's usage of "peer reviews", a situation where the claimant is not seen, but, rather, a paper review of the file is conducted. This approach has been approved by many courts, but is also assailable

Another court found that an insurer acted in an arbitrary matter where the claim review was focused upon claimant skepticism rather than reasoned decision-making. The insurer essentially minimized or refused to acknowledge the severity of the claimant's conditions (much of which was self reported pain), and the court was not satisfied that the conduct of the insurer was appropriate.

Another court recently found that a claimant, with a history of serious cardiac problems, which required medical intervention over a long time period, was disabled, even without immediate and current heart symptoms. The court found that the claimant should not be forced to "take the risk that continuing to work could generate" and was found to meet the definition of disability.

This case is of significance to claimants in similar situations, since we can utilize the rationale of the court to persuade courts and insurers in other matters.

Another court found that the insurer's conduct was improper where the decision relied upon the results of a Functional Capacity Evaluation ("FCE"). This is a test that is designed by insurance companies for the claimant to "fail", in one of two ways. Either the insured pushed themselves during the test and then suffers for days after, without any consideration of the insured's post testing condition, or the insured limits its efforts to avoid significant pain and is accused of "self limiting" behavior - which the insurer then uses against the insured.

One court reviewing a claim that relied upon the FCE thus held that the bias of the evaluating company who performed the testing was readily apparent from the report, and from information gleaned from its web site, which led the court to conclude the company was an extension of the insurer.

On the other hand, courts have been ruling against claimants whose alleged conditions have been refuted or called into question by other materials developed during the insurer's investigation. Where the insurer develops surveillance of the claimant engaging in certain activity, or where the claimant advised his treating physician as to certain activities which were inconsistent with the claimed restrictions or limitations, the insurers have succeeded in terminating the claims, and having the courts uphold these claim determinations. In these cases, the courts have been largely unpersuaded by the argument that surveillance only depicted a limited amount of functionality. This recalls the adage "a picture is worth a thousand words."

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