IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID E. SHACKLETT, M.D. and NORTHEAST EYE PHYSICIANS, P.A., Formerly Named Holt & Shacklett, P.A. and Formerly Doing Business As Alamo Diagnostic & Surgical Eye Center,

Plaintiffs,

vs.

THE PAUL REVERE LIFE INSURANCE COMPANY,

Defendant.

CIVIL ACTION NO. SA-95-CA-1168

AMENDED ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A case addressing ERISA[1] and contract interpretation issues presents cross-motions for summary judgment by the physician plaintiffs and defendant insurance company, Paul Revere. With apologies and attribution to Mr. Longfellow[2], the Court delivers this opinion and order:

> Listen, you lawyers, and you shall hear
> Of disability policies of Paul Revere.
> On the fifteenth of February, in Ninety-five;
> Dr. Shacklett, then barely alive,
> Sought to collect on his policies five.
> Two surgical hands had he;
> One, if by pain, or two, if by tremors
> Then causing his disability.

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[1] Employee Retirement Income Security Act, 29 U.S.C. § 1132(a)(1)(B).

[2] HENRY WADSWORTH LONGFELLOW, PAUL REVERE'S RIDE (1863), reprinted in BEST LOVED POEMS OF THE AMERICAN PEOPLE, at 194-97 (Doubleday Dell Publishing Group, Inc. ed., H. Freeman) (1936).

Meanwhile, impatient and unwilling to pay,
Revere came to Court filing its answer to say:
Great income in Eighty-nine had you,
But down it went after Ninety-two;
Not notifying us to change our premiums,
We sent you no money nor chrysanthemums.

Then said the Court with a judicial roar,
Contract versus Equity this case involves
and more;
Even whose ox is being gored.[3]

So through the night wrote the Court.
Beneath in Clerk's Office lay as in a fort,
The long crafted judicial opinion,
Collated and filed by clerical minions.

You know the rest, paragraphs below being read,
Of what this federal judge has said:
Contract here trumps Equity,
Though it may not be pretty.
But read it through; and it will be clear
Why payment must be made by Paul Revere.

* * * *

UNDISPUTED FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff David Shacklett, age sixty, graduated from medical school in 1961 and completed his internship in 1962. He served in the United States Air Force from 1961 to 1982, completing a three year residency program in general ophthalmology training in 1970.

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[3] A Farmer came to a neighboring Lawyer, expressing great concern for an accident which he said had just happened. One of your Oxen, continued he, has been gored by an unlucky Bull of mine, and I should be glad to know how I am to make you reparation. Thou art a very honest fellow, replied the Lawyer, and wilt not think it unreasonable that I expect one of thy Oxen in return. It is no more than justice quoth the Farmer, to be sure; but what did I say? -- I mistake -- It is *your* Bull that has killed one of *my* Oxen. Indeed says the Lawyer, that alters the case: I must inquire into the affair; and if -- *And If!* said the Farmer -- the business I find would have been concluded without an *if*, had you been as ready to do justice to others as to exact it from them.

NOAH WEBSTER, THE AMERICAN SPELLING BOOK 101-02 (Hartford, Hudson & Goodwin 1788) (italics emphasis in original; underline emphasis added); see also Exodus 21:28-32; M.H. Hoeflich, Law in the Republican Classroom, 43 U. Kan. L. Rev. 711, 717 (1995).

Upon retirement from active duty, Dr. Shacklett was Professor of Ophthalmology and Deputy Chairman of the Department of Ophthalmology at the University of Texas Health Science Center ("UTHSC") in San Antonio through June 1985.

On July 1, 1985, Dr. Shacklett entered private practice in what is now known as Northeast Eye Physicians, P.A. ("Northeast"). His practice included medical and surgical ophthalmology until February 15, 1995, when he was unable to continue his surgical practice due to tremors, numbing, and pain in his hands and forearms, or what might be called in operating room humor a "Shack Attack." There being no dispute about plaintiff's disability, the Court takes judicial notice that one with trembling hands probably should not perform eye surgery. Dr. Shacklett continued to see patients until March 1, 1996. Thereafter, he discontinued practicing medicine entirely as a result of open heart surgery which was performed eight days later.

This case concerns five disability insurance polices issued to Dr. Shacklett and Northeast by The Paul Revere Life Insurance Company ("Paul Revere"). The first is an individual disability income insurance policy purchased by Dr. Shacklett from Paul Revere in 1985 before he left UTHSC. The second, purchased in 1987, increased his personal disability income coverage.

The third and fourth contracts were issued in connection with Dr. Shacklett's part ownership of Northeast. The first of these is a "business overhead" policy purchased by Northeast in 1989. It requires Paul Revere to pay benefits based upon Dr. Shacklett's

share of certain "covered monthly expenses" in the event he becomes disabled. The other, purchased by Northeast in 1990, is a "corporate buy-out" policy, under which Paul Revere is to pay for Northeast to purchase his interest in Northeast if Dr. Shacklett becomes disabled.

An order approving compromise and settlement of the first four contracts has been entered. The remaining dispute surrounds the ERISA group disability plan, purchased on March 15, 1992, under which Dr. Shacklett is a beneficiary. The employee application, dated December 9, 1991 listed Dr. Shacklett's total earnings for the previous three years: $338,305 (1989); $501,417 (1990); $455,000 (1991). Because of $10,600 monthly individual disability coverage already in force with Paul Revere, Dr. Shacklett requested, and Paul Revere agreed, his maximum monthly benefit would be limited to $9,300 under the group policy. He later increased his individual coverage to a monthly benefit of $11,750.

Northeast paid monthly premiums. In accordance with the administration manual, Paul Revere mailed pre-anniversary notices to Northeast in January of 1993, 1994, and 1995, approximately sixty days prior to each year's anniversary date of March 15. The pre-anniversary notices requested Northeast, among other things, to report any salary or income changes to Paul Revere. Northeast did not respond to the January 1993 or January 1994 pre-anniversary notices. On January 13, 1995, Saundra Zipp, the new administrator of Northeast, returned the pre-anniversary notice to Paul Revere. She reported for the first time a reduction in Dr. Shacklett's

earnings from $455,000 to $180,000. Paul Revere entered the salary change effective for the March 15, 1995 anniversary date, but did not return any portion of the premiums paid.

On May 5, 1995, Dr. Shacklett filed his claim, asserting a disability date of February 15, 1995. In connection with the claim, Ms. Zipp advised Paul Revere that Dr. Shacklett's salary had decreased to $180,000 in January 1993, not during the current anniversary year of 1995. Again, no portion of the premiums paid was returned.

Paul Revere denied Dr. Shacklett's claim. Plaintiffs sued on all five contracts in state court, alleging an ERISA violation under 29 U.S.C. § 1132(a)(1)(B) for benefits due Dr. Shacklett under the group policy. Paul Revere removed the case to federal court based upon diversity and federal question ERISA jurisdiction.

Plaintiffs move for summary judgment arguing Dr. Shacklett is entitled to residual disability benefits calculated under the contractual "Prior Earnings" formula which uses the prior sixty months of an insured's income and total disability benefits calculated under the "Long Term Disability Benefit" provision which uses 60% of an insured's income at the time of total disability.[4] Paul Revere moves for summary judgment arguing the group policy

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[4] Paul Revere notes plaintiffs' summary judgment briefing was limited to their interpretation of the group policy as it applies to residual disability benefits and no reference was made to total disability benefits until Paul Revere's motion for reconsideration was filed. This is not a case, however, where plaintiffs freely relied on one summary judgment theory and, when that theory proved unsound, fought on the basis of some other theory. See Freeman v. Continental Gin Co., 381 F.2d 459, 469-70 (5th Cir. 1967). The Long Term Disability Benefit provision does not change plaintiffs' theory of recovery and Paul Revere's argument remains constant even though plaintiffs cite the total disability language.

permits it to calculate benefits based on changes in income and the presence of individual disability insurance, notwithstanding group policy language providing benefits will not be decreased because of individual disability insurance. Paul Revere pleads Dr. Shacklett "wants to make more money disabled, through insurance benefits, than he made while gainfully employed." On October 28, 1996, the Court entered an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment. This amended order is entered pursuant to review of Paul Revere's Motion for Reconsideration and/or New Trial or To Alter or Amend, plaintiffs' response, and Paul Revere's reply.

SUMMARY JUDGMENT STANDARD OF REVIEW

Judgment shall be rendered if the record demonstrates there is no genuine issue as to any material fact. FED. R. CIV. P. 56. When the parties proceed on the same material facts, a court will grant summary judgment when either party is entitled to judgment as a matter of law. Bricklayers Int'l Union Local No. 15 v. Stuart Plastering Co., 512 F.2d 1017, 1023 (5th Cir. 1975); see also Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247-48 (1986). When faced with cross-motions, the court must consider each party's motion separately. Barhold v. Rodriguez, 863 F.2d 233, 236 (2d Cir. 1988).

WHAT BENEFITS ARE DUE UNDER THE FIFTH CONTRACT?

The policy provides for analysis of disability in three stages. The first is the "elimination period," which is the length of time a disabled insured must wait before benefits begin, in this

case, ninety days. Dr. Shacklett became disabled on February 15, 1995, when he was unable to continue his surgical practice. His elimination period began on this date and, under the terms of the group policy, he was entitled to receive no benefits for ninety days -- from February 15, 1995 through May 15, 1995.

Upon completion of the elimination period, an insured may be eligible to receive benefits under the residual disability provision of the contract, which provides benefits for a disabled insured who continues to work. Because Dr. Shacklett continued to see patients, as opposed to performing surgery, for ten months after the expiration of the contract elimination period, he was residually disabled under the terms of the policy from May 15, 1995 through March 1, 1996, the date he discontinued his medical practice entirely.

A disabled insured who no longer works is entitled to receive total disability benefits. Dr. Shacklett became totally disabled on March 1, 1996, and the record reflects he continues not to work. He therefore remains totally disabled from his occupation under the terms of the group policy.

Dr. Shacklett interprets the group policy to provide for residual disability benefits to be calculated under the Prior Earnings provision of the group plan and total disability benefits to be calculated in accordance with the Long Term Disability Benefit provision. The Prior Earnings provision states:

> Prior Earnings means for the purposes of determining your residual disability benefit, the greater of:

1. your average monthly earnings for the 6 whole calendar months immediately preceding your last regular day of active full-time work; or

2. your highest average monthly earnings for any period of 24 consecutive months during the 60 whole calendar months immediately preceding your last regular day of active full-time work. (emphasis added)

Dr. Shacklett's average monthly earnings for the six whole calendar months immediately preceding his last day of active full-time work were $20,207 per month. His highest average monthly earnings for any period of twenty-four consecutive months during the sixty whole calendar months preceding his last regular day of active full-time work were $38,392 per month. Under the terms of the group policy drafted by Paul Revere, Dr. Shacklett's Prior Earnings are the greater of the two preceding figures -- $38,392. This figure would yield $9,000 per month during the period of residual disability.

The Long Term Disability Benefit provision states the total disability income benefit is "60% of basic monthly earnings." At the time he filed claim for benefits under the group policy, Dr. Shacklett was earning $180,000 per year. Dividing this figure by twelve, his basic monthly earnings at the time of his disability were $15,000. Plaintiffs interpret this to mean Dr. Shacklett is entitled to monthly benefits of 60% of this figure, or $9,000 per month during total disability.

Paul Revere responds by saying the Prior Earnings and Long Term Disability Benefit provisions are overridden by the following provisions:

> Processing the Pre-Anniversary Notice. Each year, just prior to your Plan Anniversary date, you will receive a

> PRE-ANNIVERSARY NOTICE. This notice is used to make changes to your employee's occupation or earnings. The effective date of these changes is . . . the plan anniversary date . . . .
>
> Change in Amounts of Insurance. Benefits may increase or decrease on your employer's plan anniversary date due to a change in class or earnings. Notification of any change in benefits must be provided to us by your employer in writing 30 days prior to his plan anniversary date.
>
> Misstatement. If any important facts about you in relation to your insurance are found to be misstated, we adjust our premium to the correct amount. If the misstatement affects the amount of insurance, the true facts are used to determine the correct amount of insurance.[5]

Specifically, Paul Revere contends: (1) pre-anniversary notices were sent each year to Northeast for the purpose of reporting any changes in Dr. Shacklett's salary; (2) under the terms of the policy, Dr. Shacklett's benefits under the group policy may increase or decrease on each anniversary date in the event of a change in earnings; and (3) if misstatements affected the amount of Dr. Shacklett's insurance, the true facts are used to determine the correct amount of insurance.[6] Dr. Shacklett's salary decreased from $455,000 to $180,000 in January 1993, but Northeast did not

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[5] Although these provisions appear in different sections of the contract, the ERISA group policy -- including the policy and supporting documentation -- must be read as a whole. Trustees of N.W. Laundry & Dry Cleaners Health Welfare Trust Fund v. Burzynski, 27 F.3d 153, 156 n.8 (5th Cir. 1994), cert. denied, 115 S. Ct. 1110 (1995).

[6] Plaintiffs assert this argument cannot be raised because "exception to coverage" is an affirmative defense which Paul Revere failed to specifically plead, as required by the Texas Rules of Civil Procedure. Although state law generally determines whether a matter is an affirmative defense in a removed case, Seal v. Industrial Elec., Inc., 362 F.2d 788, 789 (5th Cir. 1966), ERISA contains a broad preemption provision which supersedes state law, 29 U.S.C. § 1144(a), and makes regulation of employee benefit plans an exclusively federal concern. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

report the change to Paul Revere until January of 1995. Paul Revere concludes Dr. Shacklett's residual benefit calculation is determined as of March 15, 1993, the anniversary date following the actual change in salary based on an annual earned income of $180,000. According to Paul Revere's Income Replacement Chart, a document not part of the group policy, an annual earned income of $180,000 allows a total combination monthly disability indemnity of $12,000, if the employer paid the premiums. Subtracting Dr. Shacklett's monthly inforce individual disability coverage of $11,750 from the Income Replacement Chart's $12,000 per month maximum, Paul Revere determines Dr. Shacklett is entitled under the group policy in controversy to a monthly benefit of $250 while residually and totally disabled.[7] However, the group policy specifically precludes a reduction of benefits because of individual disability insurance coverage.

Paul Revere maintains its mathematical calculation does not ignore the Prior Earnings provision of the contract. But, even if Northeast had reported Dr. Shacklett's decreased income in 1993, his sixty months income record prior to disability was:

Last six months of 1995	$ 90,000
The entire year of 1994	$180,000
The entire year of 1993	$180,000
The entire year of 1992	$455,000
The entire year of 1991	$455,000
First six months of 1990	$250,200

[7] Paul Revere first tries to raise a lack of coverage argument. Next, Paul Revere admits there is coverage, but contends Dr. Shacklett is entitled to only $250 per month in benefits.

Using the highest average monthly earnings for any twenty-four consecutive months, Dr. Shacklett's benefits are $9,000 per month during residual disability under the Prior Earnings formula.

In adopting ERISA, Congress intended to develop a federal common law of rights and obligations under ERISA-regulated plans. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987). Federal law therefore preempts state law. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989). Stated another way, federal common law, rather than Texas state law, governs the construction of the policy provisions. See Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1451 (5th Cir. 1995). To ascertain the applicable federal common law, however, Fifth Circuit precedent allows district courts to seek guidance from analogous state law. Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1325 (5th Cir. 1994), cert. denied, 115 S. Ct. 732 (1995) (quoting McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990)). Nonetheless, in so doing, state common law may be used as a basis for new federal common law only to the extent that state law is consistent with congressional policy concerns. Jones v. Georgia Pac. Corp., 90 F.3d 114, 116 (5th Cir. 1996) (quoting Todd, 47 F.3d at 1451).

In construing contract language, courts must "interpret ERISA plans in an ordinary and popular sense as would a person of average intelligence and experience." Todd, 47 F.3d at 1452 n.1 (quoting Meredith v. Allsteel Inc., 11 F.3d 1354, 1358 (7th Cir. 1993)). Provisions of ERISA contracts should be given their ordinary and generally accepted meaning if there is one. Id. A contract is not

ambiguous merely because the parties disagree upon the correct interpretation or upon whether it is reasonably open to just one interpretation. REO Indus., Inc. v. Natural Gas Pipeline Co. of Am., 932 F.2d 447, 453 (5th Cir. 1991) (applying Texas law); Technical Consultant Servs. Inc. v. Lakewood Pipe, Inc., 861 F.2d 1357, 1362 (5th Cir. 1988) (applying Texas law). Rather, a contract is ambiguous only if it cannot be given a certain or definite legal meaning or interpretation. D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N.A., 957 F.2d 196, 199 (5th Cir. 1992) (applying Texas law).

If plan terms remain ambiguous after applying these principles of contract interpretation, the policy is to be construed strictly in favor of the insured. Jones, 90 F.3d at 116; Todd 47 F.3d at 1451-52. This rule, known as the rule of contra proferentum, applies in ERISA cases involving the construction of insurance documents. Jones, 90 F.3d at 116; Todd 47 F.3d at 1451-52.

> Any burden of uncertainty created by careless or inaccurate drafting of the [policy] must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document.

Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991).

The contract drafted by Paul Revere provides for the amount of residual disability benefits to be determined under the Prior Earnings formula and for the amount of total disability benefits to be determined under the Long Term Disability Benefit provision at the front of the policy booklet. It is also stated, under the

heading Change in Amounts of Insurance, that "benefits may increase or decrease on your employer's plan anniversary date due to a change in class or earnings."

Paul Revere argues the Changes in Amounts of Insurance provision allows it to refer to the Income Replacement Chart to redetermine residual disability benefits each year based on the anniversary date income.

This argument fails for several reasons:

1. A person of ordinary intelligence and experience would likely understand, because the Prior Earnings averaging formula takes into account income fluctuations, residual benefits may increase or decrease on the plan's anniversary date due to changes in income. The Prior Earnings and Changes in Amounts of Insurance provisions can be harmonized. Clardy Mfg. Co. v. Marine Midland Business Loans, Inc., 88 F.3d 347, 352 (5th Cir. 1996).

2. The Change in Amounts of Insurance section states only that benefits may increase or decrease based upon income changes. It does not state benefits will be based only on one year's change or that a separate document will be consulted. Circuit precedent does not allow this Court to write-in a provision which extends the terms of an agreement beyond its original scope. Jones, 90 F.3d at 116; see also Southwest E&T Suppliers Inc. v. American Enka Corp., 463 F.2d 1165, 1166 (5th Cir. 1972) ("[c]ourts cannot read into a contract that which is not there") (applying Texas law); Abilene Sav. Ass'n v. Westchester Fire Ins. Co., 461 F.2d 557, 561 (5th Cir. 1972) ("contract ought not be extended by implication or enlarged beyond the actual terms of the agreement entered into by the parties.") (applying Texas law). While clear and unambiguous statements in the ERISA plan are binding, the same is not true of silence. Wise v. El Paso Natural Gas Co., 986 F.2d 929, 938 (5th Cir.), cert. denied, 510 U.S. 870 (1993).

3. Paul Revere's argument that residual benefits payable are calculated based on one's current income ignores the Prior Earnings provision of the policy. Surely Paul Revere intended the Prior Earnings formula to have some meaning. ERISA plans must be read "like any other contract, as a whole, giving effect to every provision thereof." Trustees of the N.W. Laundry & Dry Cleaners Health & Welfare Trust Fund v. Burzynski, 27 F.3d 153, 156 n.8 (5th Cir. 1994), cert. denied, 115 S. Ct. 1110 (1995).

4. Even if the title Changes in Amounts of Insurance could reasonably be interpreted to mean "redetermination of benefits based on anniversary date income," headings become important only if language contained in the body of the section is itself ambiguous. Skelton v. Lowen, 850 F.2d 200, 202 (4th Cir. 1988) (emphasis added). The Prior Earnings and Changes in Amounts of Insurance provisions are not ambiguous because, read together, the Prior Earnings averaging formula and the Changes in Amounts of Insurance provision modify each other.

Most importantly, Paul Revere advances a confusing patchwork of arguments, relying upon an Income Replacement Chart which is not part of the policy nor referred to in the policy, to support its conclusion that Dr. Shacklett is entitled only to $250 in monthly group disability benefits. At the very best, the language drafted by Paul Revere is ambiguous and ambiguities must be resolved against the insurer and in favor of the insured. Jones, 90 F.3d at 116; Todd 47 F.3d at 1451-52.

With reference to the long term total disability period, benefits are 60% of Dr. Shacklett's $180,000 earnings at the time of disability. Paul Revere would limit total disability benefits to $250 based on Dr. Shacklett's individual policies. However, the

certificate booklet authored by Paul Revere precludes consideration of Dr. Shacklett's other sources of income:

> While you are disabled, you may be eligible for benefits from other sources. . . . Listed below are other income sources which will not reduce our benefit.
>
> 1. Individual disability insurance.
> 2. Social Security cost of living increases.
> 3. Deferred compensation.
> 4. Salary continuation plans, either formal or informal.
> 5. Savings and investment accounts . . . .
>
> * * * *

Finally, Paul Revere presents what appears to be an equitable argument that Dr. Shacklett wants to recover more money disabled than he did while gainfully employed[8] and this perceived windfall somehow vitiates the contract language. The Court rejects this assertion for the following reasons:

If residual benefits are to be based solely on an insured's anniversary date income, Paul Revere could precisely and accurately so state. If group benefits are to be limited because of individually owned policies and other sources of income, Paul Revere could precisely and accurately so state.

> Accuracy is not a lot to ask. And it is especially not a lot to ask in return for the protection afforded by ERISA's preemption of state law causes of action -- causes of action which threaten considerably greater liability than that allowed by ERISA.

Hansen, 940 F.2d at 982. Having sold all of Dr. Shacklett's other policies, Paul Revere clearly knew of their existence and Dr.

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[8] Defendant maintains Dr. Shacklett stands to receive the following monthly benefits and earnings: $29,580 (May 1995); $32,234 (June 1995); $25,234 (July 1995); $24,734 (August 1995 - February 1996); $20,750 (March 1996 - August 1996 and beyond).

Shacklett himself requested his group benefits be limited to $9,300 per month because of the individual policies.

Had Dr. Shacklett's income increased to $60,000 in the one month prior to disability, Paul Revere would no doubt invoke the Prior Earnings averaging formula in order to pay lower benefits. Paul Revere cannot have it both ways. The Court also observes that notwithstanding a desire to pay lower benefits, Paul Revere kept the higher premiums.[9] He who seeks equity must do equity. New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 473-74 (5th Cir. 1961); see also Hermann Hosp. v. MEBA Medical & Benefits Plan, 959 F.2d 569, 575 (5th Cir. 1992).

CONCLUSION

Paul Revere accepted disability premiums from Dr. Shacklett for over eleven years without the necessity of paying a claim. In 1992, Paul Revere placed a bet that Dr. Shacklett would continue to pay premiums and remain healthy. In drafting the group contract as it did, Paul Revere dealt the cards and may have dealt itself a bad hand; but such is the nature of undertaking the insurance risk.

Accordingly, the Court finds Dr. Shacklett's residual disability benefits should be calculated using the Prior Earnings formula, subject to the $9,300 monthly limit agreement between the parties. The Court finds Dr. Shacklett's total disability benefits should be calculated using the Long Term Disability Benefit

[9] Although not brought to the Court's attention in previous briefing, Paul Revere belatedly points out in its motion for reconsideration that it at least tried to return some portion of the premiums paid after denying Dr. Shacklett's claim.

formula, also subject to the $9,300 monthly limit agreement. Plaintiffs' motion for summary judgment is GRANTED. Defendant's motion for summary judgment is DENIED. Defendant's Motion for Reconsideration and/or New Trial or To Alter or Amend is DENIED.

It is so ORDERED.

SIGNED and ENTERED this 13th day of December, 1996.

FRED BIERY
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH