

USDC SCAN INDEX SHEET



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3:99-CV-02705 MCREYNOLDS V. STANDARD INSURANCE

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CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 DONLEY G. McREYNOLDS, M.D.,  
12 Plaintiff,  
13 vs.

14 STANDARD INSURANCE COMPANY, et  
15 al.  
16 Defendants.

) Case No.: 99 CV 2705 IEG (JAH)  
)  
) DEFENDANT STANDARD INSURANCE  
) COMPANY'S REPLY IN SUPPORT OF  
) ITS MOTION FOR SUMMARY JUDGMENT

) Date: February 5, 2001  
) Time: 10:30 AM

) Before the Hon. Irma E.  
) Gonzalez

17  
18 Standard uses this Reply to analyze the issues under abuse  
19 of discretion and de novo review and demonstrate its entitlement  
20 to summary judgment. Standard responds in the Nelson Reply  
21 Declaration and Objections to Evidence, filed herewith, to the  
22 McReynolds, Rasmussen and Vavoulis Declarations.

23 A. Standard wins if review is for abuse of discretion.

24 • Dr. McReynolds (DGM) was a Member insured under the Policy  
25 Standard issued to North Coast and claimed disability as of  
26 February 24, 1997. 1<sup>st</sup> Am Compl ¶¶ 6, 10. Standard repeatedly  
27 advised DGM that the North Coast coverage had terminated as of

1 March 1, 1997. ND ¶ 2 Ex 1-58, 71, 142, 149 (00113, 00217,  
2 00301, 00322). DGM never questioned this before now.

3 • DGM was always represented by lawyers and accountants,  
4 including Edwards, Sooy, et al., Glen Rasmussen, Edwina Sparks,  
5 CPA, and Mr. Gilmore. ND ¶ 2 Ex 1-100, 147, 148, 157(00247,  
6 00312-00313, 00400). At no time has DGM offered evidence from  
7 an accountant to support his claim.

8 • DGM worked at all times up to May 15, 1998, thus the  
9 Partial Disability Definition applied to his claim:

10 [Y]ou are partially disabled if you are working in your own  
11 occupation but, as a result of Sickness, Injury or  
12 Pregnancy, you are unable to earn more than the Own  
Occupation Income Level. ND ¶ 3 Ex 2-265 (00580).

13 Thus, a decrease in the Own Occupation Income Level is not  
14 sufficient to establish disability—the decrease must be caused  
15 by Sickness, Injury or Pregnancy. PlsRespDefsSepStmt, filed  
16 01/22/01, ¶¶ 11,13.

17 • During the Policy's 90-day benefit waiting period (BWP) the  
18 claimant must be "**continuously** Disabled before LTD Benefits  
19 become payable [and] **[n]o LTD Benefits are payable** during the  
20 BWP." ND ¶ 3 Ex 2-250, 277 (00568A, 00592) (emphasis added).  
21 Because the Policy terminated as of March 1, 1997, DGM either  
22 met the requirements during the BWP, February 24 to May 25,  
23 1997, or was not entitled to benefits.

24 • The administrative record reflects that DGM told Standard  
25 that as of August 4, 1997, more than five months after alleged  
26 disability, he had been working full-time. ND ¶ 2 Ex 1-235  
27 (00489). Thus, even if DGM suffered an earnings decrease, it is  
28

1 not the "result of . . . Injury", and DGM did not meet the  
2 partial disability definition of disability during the BWP.

3 • Standard advised DGM in writing that ". . . you indicated  
4 that you had been working full time right up to that point  
5 (August 1997)." ND ¶ 2 Ex 1-139 (00298). DGM did not before  
6 now claim that this statement was false or a fabrication.

7 • In Standard's November 13, 1997 letter, Standard advised  
8 DGM that his predisability earnings (PreDE) were "most likely  
9 \$20,364.83" per month, 1/12 the sum of two 1996 W-2s that he had  
10 provided. ND ¶ 2 Ex 1-151, 177 (00324, 00422).

11 • As of November 13, 1997, Standard also did not have, but,  
12 prior to the end of the review process, did acquire, North  
13 Coast's record of salary paid to DGM between March 1, 1996 and  
14 February 28, 1997. He received an average of \$17,118.00 per  
15 month, i.e., 1/12 of the annual total of \$205,410.00. NOL-1 Ex  
16 AR 00166. This is **lower** than Standard's November 13, 1996  
17 estimate of PreDE. Thus, the estimate was in DGM'S favor.

18 • At no time in the entire claim handling and review process,  
19 did Standard have DGM'S 1997 W-2s. Standard based its post-  
20 disability earnings (PostDE) determination on a document that  
21 DGM provided. The document stated that certain "Payments"  
22 totaling \$210,238.02 were received in connection with DGM'S  
23 work. ND ¶ 2 Ex 1-152, 176 (00325, 00419). Standard totaled  
24 these for the listed months, March-August 1997, and calculated a  
25 monthly average of \$26,183.32. This figure was a computational  
26 error in DGM'S favor, the actual average being \$35,039.67.

27 Either calculation, however, is **above (not less than 80% of)**,  
28 DGM'S PreDE, either as estimated by Standard (\$20,364.83 per

1 month) or as reflected in North Coast's records (\$17,118.00 per  
2 month). Further, DGM claims that his collections are delayed  
3 for at least 45 days and up to three months after billing. MCR  
4 Decl, filed 01/22/01, ¶ 13. Thus, the "Payments" shown, which  
5 are higher for the months May - August 1997, reflect that DGM  
6 was working full time during the BWP, which had begun in late  
7 February 1997. ND ¶ 2 Ex 1-176 (00419).

8 • DGM disagreed with the use of the "Payments." He wrote  
9 that the Payments represented total collections on his  
10 receivables. He stated that "[a]fter our overhead is paid there  
11 is NOTHING left for the doctors." ND ¶ 2 Ex 1-146 (00311). DGM  
12 had told Standard that he was working full-time in August 1997.  
13 Standard did not credit his claim that he was working full-time  
14 but earning nothing and did not change its decision.

15 • On December 2, 1997, UNUM advised Standard that it had  
16 concluded that DGM suffered no loss of earnings prior to July  
17 1997. ND ¶ 2 Ex 1-135 (00294). Without loss of earnings of at  
18 least 20% during the BWP (February 24-May 25, 1997), DGM was not  
19 entitled to benefits.

20 • Between 10% and 20% of DGM'S earnings and work activity  
21 cannot be captured by analyzing hospital surgical logs alone.  
22 ND ¶ 2 Ex 1-277 (00224). Further, DGM did not provide Standard  
23 with his surgical logs or any record of his activity at Mission  
24 Bay Hospital where he did 10% of his surgery.

25 DGM admits that on abuse of discretion review conflicting  
26 information or evidence that he presents does not create a  
27 factual issue, the sole question being whether Standard acted  
28 arbitrarily and capriciously. PlsMemOppDefMotSJ, filed January

1 22, 2001, 9:9-10:1, n. 5-6. Standard did not abuse its  
2 discretion or act arbitrarily or capriciously in (i) estimating  
3 PreDE at a figure that turned out to be higher than they were,  
4 (ii) recording DGM'S statement that he was working full time for  
5 months past the end of the BWP, or, (iii) determining that DGM  
6 was not working full time for nothing or simply to cover  
7 overhead and did not meet the partial disability definition  
8 during the BWP.

9 DGM insists his claim must be assessed on an alleged  
10 decrease in production, which, he says, is the same as earnings.  
11 Despite claiming that earnings and production are the same, the  
12 Policy refers to "earnings" not "production." His own expert  
13 and the very employment contracts he now introduces as evidence,  
14 do not support the assertion that "production = earnings." The  
15 North Coast contract provides that 25% of compensation is shared  
16 equally by all and thus not based on individual production. Pl  
17 NOL-3 Ex G-3. The McReynolds & Sedwitz (McR&S) contract and Mr.  
18 Vavoulis, DGM's expert, specifically refer to compensation based  
19 on "profitability" not just production. Pl NOL-3 Exs I-3, N at  
20 p. 2. As to records and his chart referring to number and  
21 duration of surgical procedures, DGM wrote that these ". . . are  
22 actually meaningless numbers [and] . . . really have nothing to  
23 do with one's level of work activity." ND ¶ 2 Ex 1-66 (00204).

24 B. Standard wins if review is de novo.

25 • DGM knew of the North Coast Policy, as he twice requested  
26 amendment of it (ND ¶ 3 Ex 2-253, 255 (00568D, 00570)). And, as  
27 an officer of North Coast, he was charged to know of it.

1       • The North Coast coverage terminated effective March 1,  
2 1997, because North Coast did not pay premiums when due. DGM's  
3 statements that there was no termination notice are false.  
4 Endicott Decl ¶ 2 Ex 1-8, 10, 11. Further, DGM cannot claim  
5 that he is entitled to waiver of premium as of his alleged  
6 disability date of February 24, 1997. Even assuming the fact of  
7 disability, premium would have to have been paid through May 25,  
8 1997, the end of the BWP, because waiver of premium is only  
9 applicable "**while LTD benefits are payable**" and "**[n]o LTD**  
10 **Benefits are payable during the BWP.**" ND ¶ 3 Ex 2-271, 277  
11 (00586, 00592).

12       • In March 1992, Standard had sent North Coast 23 Summary  
13 Plan Descriptions (SPDs). Endicott Decl ¶ 2 Ex 1-14. One of  
14 the subsequent notices effecting a Policy change that DGM  
15 requested was to be attached to the SPDs and was sent directly  
16 to DGM in June 1995. Endicott Decl ¶ 2 Ex 1-15. The SPDs were  
17 received by North Coast, because they were given to an employee  
18 who later made a claim on the Policy and advised that s/he had  
19 received the SPD. 2dND ¶ 4 Ex 3-44. So, DGM had a copy of the  
20 SPD long before 1997, when he made his claim. DGM admits there  
21 is no variance between the SPD and the Policy. PlSepStmt ¶ 49.  
22 DGM always thus had and knew the Policy terms.

23       • The UNUM file and DGM's deposition testimony demolish his  
24 credibility. His claim that a Standard analyst fabricated his  
25 statement about full-time work is false—DGM made the same  
26 statements to UNUM. 2dND ¶ 2 Ex 1-13. DGM told UNUM that Mr.  
27 Gilmore was his "personal accountant" and available to help UNUM  
28 with disability issues (2dND ¶ 2 Ex 1-26), but tells this Court

1 that Standard's letter to Mr. Gilmore was misdirected. He is a  
2 multi-millionaire (2dND ¶ 3 Ex 2-32B (McR Dep I 90)). He  
3 decided to sell his house before Standard had considered his  
4 claim (2dND ¶ 2 Ex 1-16), not as he later stated, because of  
5 Standard's adverse claim decision (Pl NOL-1 Ex AR 00314). He  
6 misrepresented the facts when he stated that he did not work at  
7 all between February 25 and March 2, 1997. DefRespPlSepStmt,  
8 filed 01/22/01, ¶ 50. DGM did not tell Standard that 10% of his  
9 surgical procedures were performed at Mission Bay Hospital but  
10 told UNUM this and provided UNUM with records of this activity  
11 that were not provided to Standard. Case Decl ¶ 2; Sabo Decl ¶  
12 2; Selid Decl ¶ 3; 2<sup>nd</sup>ND ¶ 2 Ex 1-17 to 23, 26 (01514, 01538-  
13 01543, 01742), ¶ 3 Ex 2-35, 39 (McR Dep II 54-55, 126:26-  
14 127:13). He did not tell Standard about his 12-hour, six times  
15 monthly post-disability trauma shifts and post-disability  
16 stipend income of \$3,000.00 per month, but did tell UNUM about  
17 this work. Case Decl ¶ 3; Sabo Decl ¶ 3; Selid Decl ¶ 4; 2<sup>nd</sup>ND ¶  
18 2 Ex. 1-26 (01742), ¶ 3 Ex 2-39 (McR Dep II 127:14-128:14).

19 • As shown on a 1997 W-2, DGM earned \$170,000.00 between  
20 March 1, 1997, and December 31, 1997 from McR&S. Pl NOL-3 Ex K-  
21 1. Thus, his November 19, 1997 statement to Standard that he  
22 had no PostDE was false. Also false is the current testimony of  
23 Mr. Vavoulis (Vavoulis Decl, filed 01/22/01, ¶ 9) and DGM in his  
24 Opposition Declaration, filed 01/22/01, ¶ 32, that DGM'S 1997 W-  
25 2 from McR&S contains PreDE. DGM has stated:

26 A new billing service was started on March 1, 1997 and there  
27 were no carry over charges, so any billing they have done is  
28 post disability production. **There is no contamination of pre  
and post disability production.** NOL-1 Ex AR STND/97 00059.



1 • His McR&S 1997 W-2 earnings create an average of \$17,000.00  
2 per month, 10 months, March-December 1997. An average of his  
3 1997 W-2 income from McR&S is not appropriate, but, if it were,  
4 80% of his PreDE as determined by Standard would be \$16,291.86  
5 (i.e., 80% of \$20,364.83) and the \$17,000.00 PostDE monthly  
6 average is greater than that.

7 • DGM worked only half time after July 1, 1997. McR Decl ¶  
8 28. Thus, far more of the \$170,000.00 he earned from McR&S in  
9 1997 must fairly be attributed to March through June 1997 than  
10 to half time efforts after July 1, 1997. Adjusting for the fact  
11 that far more of his work activity for McR&S occurred prior to  
12 July 1, 1997, DGM earned an average of \$24,166.67 per month from  
13 March through June 1997. DefOppPlMotSA 7:23-8:26.

14 • DGM also alleges that his personal responsibility to pay  
15 off a McR&S loan reduces his 1997 W-2 earnings of \$170,000.00  
16 from McR&S. First, the Policy contains no provision that allows  
17 for credit against PostDE for business loan paybacks. Second,  
18 even were there such a credit, it would not be applicable to  
19 amounts earned at higher rates during the BWP and the month  
20 thereafter (March through June 1997), when DGM was **working full-**  
21 **time**. It would be applicable to months in which DGM worked less  
22 than full-time, but nevertheless got paid. Third, if 1997 W-2  
23 earnings could be offset against loan paybacks, they would not  
24 have been reported as taxable income by DGM in 1997. DGM now  
25 claims, years after the fact, that "it is my understanding" that  
26 the 1997 and 1998 W-2s are being corrected. McR Opp Decl ¶ 36.  
27 This proves nothing. Fourth, neither DGM nor Mr. Vavoulis, an  
28 economist (not accountant), can competently explain the credit

1 for alleged loan paybacks. See Nelson Reply Decl (3dND) ¶ 3 Ex  
2 2-14 (McR Dep II 100-101) (accountant would have to explain DGM's  
3 theory/no declaration from accountant on plaintiff's motion).


4 • DGM's arguments about offsets in his Opposition brief and  
5 Opposition Declaration, ¶¶ 46-64, are misguided. DGM sues to  
6 enforce a contract, not rescind it. If he obtains benefits, he  
7 must abide by the other terms of the Policy, and no authority to  
8 the contrary is cited. The Policy required him to seek all  
9 deductible income he might be eligible for. ND ¶ 3 Ex 2-269  
10 (00584). He was thus required to apply for Social Security  
11 disability benefits. DGM is correct that worker's compensation  
12 benefits for **permanent** disability are not deductible income.

13 • Finally, the alleged changes in the provider productivity  
14 reports, based on the so-called "vascular lab" issue, that were  
15 received after close of the administrative record, are  
16 irrelevant, because the Policy measures partial disability by  
17 "earnings" not production. They concern DGM, because he  
18 recognizes that they demolish the case on the faulty production  
19 approach that he argues must be used to assess his claim. In  
20 any event, the altered reports are useless--DGM simply  
21 instructed an employee, who was not an accountant or a  
22 bookkeeper, to create new reports backing out the charges. 3dND  
23 ¶ 3 Ex 2-13, 16, 17 (McR Dep II 42-44, Romero Dep 19, 24-26).

24 In Tremain v. Bell Industries, Inc., 196 F.3d 970, 974, 977  
25 (9<sup>th</sup> Cir 1999), the plaintiff's W-2s were relevant to a conflict  
26 claim on a partial disability definition issue. Here, since DGM  
27 alleges that his conflict claim reaches the merits, the W-2s and  
28 credibility evidence are also relevant to the merits. Standard

1 is entitled to present the foregoing evidence to rebut and has  
2 rebutted the conflict claim. Thus, review is for abuse of  
3 discretion. Standard has shown above that it did not act  
4 arbitrarily or capriciously. If review is de novo, the 1997 and  
5 1998 W-2s and Standard's credibility evidence are "necessary."  
6 Mongeluzo v. Baxter Travenol, etc., 46 F.3d 938, 944 (9<sup>th</sup> Cir.  
7 1994). This evidence does not go to a new claim—it shows that  
8 Standard made the right decision. This evidence was not  
9 available during the claim handling and review process. But  
10 DGM, by contrast with Standard, also seeks to introduce  
11 voluminous new evidence without specifying what is "necessary."  
12 Thus, even under de novo review, these submissions should not be  
13 considered. Kearny v. Standard Insurance Company, 175 F.3d  
14 1084, 1091 (9<sup>th</sup> Cir. 1999). Plaintiff notes that on de novo  
15 review, he cannot get summary "adjudication" of his medical  
16 disability claim as the evidence is disputed. Kearny, 175 F.3d  
17 1093-1094. Standard's summary judgment motion, however, does  
18 not rest on whether plaintiff is medically disabled, the issue  
19 identified in Kearny as preventing summary judgment. Standard  
20 has shown that, even if DGM suffered disability, he did not meet  
21 the partial disability definition within the BWP. Standard is  
22 entitled to summary judgment on de novo review.

23 Dated: January 29, 2001

24   
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Attorney for Defendant  
STANDARD INSURANCE COMPANY

DOCKET No. 99 CV 2705 IEG (JAH)

PROOF OF SERVICE BY HAND

I, Eddie R. Chance, the undersigned, hereby certify and declare under penalty of perjury that I am over the age of 18 years and am not a party to this action. My business address is Warren H. Nelson, Jr., A Professional Corporation, 7400 El Cajon Blvd., Suite 302, La Mesa, CA 91941, telephone (619) 466-9400 and facsimile (619) 466-9402. On the 29<sup>th</sup> day of **January 2001**, I served a true copy of the foregoing documents titled exactly:

DEFENDANT STANDARD INSURANCE COMPANY'S REPLY IN SUPPORT

OF ITS MOTION FOR SUMMARY JUDGMENT

by personally delivering it to the following offices of the following persons:

Glen M. Rasmussen, Esq.  
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I declare under penalty of perjury that the foregoing is true and correct. Executed this 29<sup>th</sup> day of **January 2001** at San Diego, California.

  
Eddie R. Chance