880.00 DISABILITY - CONTINUOUS AND TOTAL DISABILITY ISSUE.

> *NOTE WELL: The issue should be framed to conform with the language in the particular insurance policy involved in the lawsuit. There is considerable variation among policies. This instruction is based on the policy language in* Greenwood v. Inter-Ocean Ins. Co.*, 242 N.C. 745, 89 S.E.2d 455 (1955).*[1]

The (*state number*) issue reads:

"Is the plaintiff wholly and continuously disabled so that *he* is unable to engage in any occupation or employment for wage or profit?"[2]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that *he* is unable to engage in any occupation or employment for wage or profit.[3]

An insured, even though permanently disabled, is not wholly disabled within the meaning of the disability clause in this insurance policy if *he* is able to engage regularly in *his* usual occupation or in any occupation for which *he* is physically and mentally qualified.[4] The ability to do odd jobs of comparatively trifling nature, however, does not preclude recovery.[5] But partial disability or disability to a limited degree cannot be construed to mean continuous and total disability.[6]

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff is unable to engage in any occupation for wage or profit, then it would be your duty to answer this issue "Yes" in favor of the plaintiff. If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. Disability policy provisions often key disability to the insured's ability to work. The variety of such provisions is considerable. Some are cast in general terms such as inability "to follow a gainful occupation," *Bulluck v. Mut. Life Ins. Co.*, 200 N.C. 642, 645, 158 S.E. 185, 187 (1931), while others are more particularized such as inability to perform "any and every duty pertaining to the Insured's business or occupation", *Greenwood v. Inter-Ocean Ins. Co.*, 242 N.C. 745, 751, 89 S.E.2d 455, 459 (1955) (noting the distintinction in the policy between partial loss of time and total loss of time). *See* E. L. Kellett, Annotation, *Insurance*: "Total Disability" *or the Like as Referring to Inability to Work in Usual Occupation or in Other Occupations*, 21 ALR 3d 1155. Therefore, it is necessary to frame the issue and instruction in light of the actual policy language involved. *See Greenwood*, 242 N.C. at 751, 89 S.E.2d at 459. This instruction is predicated on policy language in *Greenwood* providing for recovery if injuries "shall wholly and continuously disable the Insured. . . and prevent the Insured from engaging in any occupation or employment for wage or profit," and is offered as illustrative of the approach taken by the Supreme Court. *See id*.

Other issues may be involved such as duration of the disability and even its causal nexus. In *Greenwood*, disability was keyed to loss "resulting solely from bodily injuries effected directly and independently of all other causes through accidental means." *Greenwood*, 242 N.C. at 750, 89 S.E.2d at 458. Such policy language would require, in proper circumstances, consideration of the Accidental Means Definition, N.C.P.I.-Civil 870.20.

2. Although the present tense verb "is" will usually be correct throughout this instruction, a simple past tense (*i.e.*, "was") may be necessary if the insured is suing for a period already past.

3. *See Greenwood*, 242 N.C. at 750, 89 S.E.2d at 458; *Shanahan v. Shelby Mut. Ins. Co.*, 19 N.C. App. 143, 150, 198 S.E.2d 47, 51 (1973).

4. In *Bulluck*, the Court explained, quoting from a Texas decision, "'The term "gainful occupation" is likewise a relative one; the insured's occupation and earning capacity at the time the policy issued was in contemplation of the parties- what would be a "gainful occupation" for one may not be such for another. A prosperous merchant with a constantly expanding business, earning large and continually increasing profits, who because of injuries received is totally disabled from continuing that business, and it becomes bankrupt as a result, certainly cannot be said to pursue a "gainful occupation", compared to the other, if he is fortunate enough to earn something, though out of all proportions to what he had previously earned.'" *See Bulluck*, 200 N.C. at 646, 158 S.E. at 187 (quoting *Great Southern Life Ins. Co. v. Johnson*, 25 S.W.2d 1093 (Tex. 1930) (citations omitted)). Likewise, in *Greenwood*, the Court stated, "each policy must be construed in relation to its particular provisions and each claim must be considered in relation to the particular profession or occupation in which the insured was engaged when injured." *Greenwood*, 242 N.C. at 751, 89 S.E.2d at 459.

5. *See Greenwood*, 242 N.C. at 752, 89 S.E.2d at 459 (1955) (quoting *Bulluck*, 200 N.C. at 646, 158 S.E. at 187; *Shanahan*, 19 N.C. App. at 150, 198 S.E.2d at 51. The Court in *Bulluck* departed from earlier, stricter constructions of such questions. *See Bulluck* 200 N.C. at 646, 158 S.E. at 187; *see also* 21 ALR 3d 1155, 3g (explaining that later North

Carolina cases follow the rule announced in *Bulluck* instead of following the stricter view of earlier cases).

6. *See Fair v. Equitable Life Assur. Soc.*, 247 N.C. 135 (1957).