

Are Bonuses part of “Earnings” for the Purposes of Calculating Disability Benefits?

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The Ninth Circuit Court of Appeals recently had cause to consider this very issue. Unfortunately, we did not get a clear answer, as the matter was sent back down for the district court to reconsider a whole host of issues before deciding whether the insurance company had the right to calculate benefits based on salary alone.

An employee sustained a spinal cord injury which left him a quadriplegic a few months after starting his new position with the employer. The employee earned a salary, but was also guaranteed a substantial bonus after his first twelve months of employment, and received other benefits, including long-term disability. After his accident, he sought benefits under the long-term disability plan and was advised by the insurance company that he would receive benefits based upon his annual salary. The employee appealed the benefits determination, arguing that his benefits should have been based on the base salary plus the guaranteed bonus. The insurance company maintained their position that the benefits were properly calculated based upon the salary. The employee filed suit, and the parties filed cross-motions for summary judgment. The court upheld the insurance company's determination, and the employee appealed.

[The Ninth Circuit Court of Appeals agreed with the district court](#) in finding that there existed a conflict of interest given that the insurance company was charged with both evaluating benefits claims and paying them, but found that the district court failed to determine what weight the conflict should be given. In order to determine whether the insurance company was correct in its benefits determination, and whether the employee was entitled to receive benefits based upon the substantial bonus, the Court recognized the need to rectify various administrative issues. The Court accordingly remanded the matter back to the district court to ultimately determine whether the insurance company abused its discretion in failing to include the bonus in the benefits calculations.

Another interesting aspect of this case was the admissibility of legal documents prepared by the insurance company's in-house counsel. Though the employee sought discovery of these documents to review and evaluate the policy and to see whether bonus earnings could be or should be counted as “monthly earnings,” the district

court held that the documents requested were created after there existed an adversarial relationship between the employee and the insurance company, so the documents requested were privileged. In examining the fiduciary exception, the Court of Appeals held that it did not here because the documents at issue represented communications relating to the interpretation of the plan, not regarding liability under the plan, and because communications before a final decision on appeal were not made in preparation for litigation, the documents were not privileged and thus could not be privileged and discovery should have been permitted.

For more information read [Stephan v. Unum Life Insurance Co. of America, No. 10-16840 \(Sept. 12, 2012\)](#).

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