

DISABILITY--CONSTANT CARE OF A LICENSED PHYSICIAN ISSUE.

NOTE WELL: *This instruction applies when an insurance policy requires the continuing care of a qualified physician as a condition of receiving benefits. There is considerable variation among policies; therefore, the issue must be framed according to the specific policy involved in the controversy. The following is based on the policy language in Duke v. Mutual Life Ins. Co., 286 N.C. 244, 210 S.E.2d 187 (1974).)*<sup>1</sup>

The (state number) issue reads:

"Is the plaintiff under the regular care and attendance of a licensed physician?"

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 under the constant care of a licensed physician.

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<sup>1</sup>Some disability insurance provisions limit additional payments to periods during which the insured is under a doctor's care. The terminology of such provisions varies. See D. C. Barrett, Annotation, *Provision of Accident or Health Insurance Policy That Insured Shall Be Under Care of Physician or Surgeon*, 84 ALR 2d 375. This instruction is based on policy language in *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974), which required the insured to be under "the regular care and attendance of a legally qualified physician..." and should be regarded as illustrative. If policy language varies, the instruction should be adapted accordingly.

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

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(Continued.)

To recover for *his* disability, a person must be under the regular care and attendance of a licensed physician. If *his* condition has improved or stabilized such that further treatment would not be useful, *he* cannot recover for *his* disability.<sup>2</sup>

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 under the regular care and attendance of a licensed physician, 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.

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<sup>2</sup>See Duke, 286 N.C. at 248, 210 S.E.2d at 189; see also Durant M. Glover, *Disability Insurance--Too Disabled to Come Within the Coverage of One's Policy*, 53 N.C.L. Rev. 1051 (1975) (criticizing the Court's decision to deny recovery based on a literal reading of the physician's-care clause).