

LEGAL ANALYSIS OF DISABILITIES OF COMMON ORIGIN IN THE PRIVATE SECTOR IN COLOMBIA: EMPHASIS ON REHABILITATION AND REINCORPORATION

LAURA PATRICIA MANJARREZ JAIMES¹, GONZALO JOSÉ LIZARAZO MEJÍA², WALTER GERARDO VALENCIA JIMÉNEZ³
 Universidad Libre¹
 Universidad del Atlántico²
 Universidad San Buenaventura³

Acceptance date: February 19, 2024 **Publication date:** February 29, 2024

Abstract - *The objective of this article is to analyze the procedure established in the legal norms applicable to the private sector when disability of common origin requires rehabilitation and reincorporation in Colombia. The project methodology is oriented from a qualitative perspective, the use of the legal hermeneutics method, as well as interpretation and analysis of the arguments proposed by entities; The Convention on the Rights of Persons with Disabilities (2008), The Ministry of Labor; doctrinaires such as Gloria Stella Ortiz Delgado, (2019), Antonio José Lizarazo Ocampo, (2020 and 2021), among others; did not lead to defining reinstatement as the final phase of the rehabilitation process of the disease of common origin as the beginning of a path of adaptation that the worker will experience, which is guaranteed in a large percentage by the employer and which will depend greatly on the environment or work situation that they have, the challenges in fulfilling the functions of their position that must be accommodated to what their new capabilities allow and the harmony, collaboration and understanding that their co-workers, employer, family, and society offer them.*

Keywords: *disabilities, private sector, rehabilitation, reintegration.*

INTRODUCTION

This article focuses on the legal analysis of disabilities of common origin, the rehabilitation and reincorporation of the worker in the private sector in Colombia, taking into account the process that workers have to go through due to injuries or illnesses that restrict their good performance in the social, work and personal spheres, which will lead us to understand what the worker's situation is like when they are in a state of vulnerability to disability due to their illness, physiological deterioration and functional limitation.

Medical incapacity in Colombia is the recognition by a professional of medicine who is assigned to the health system that a worker acquires during the period of physical or mental inability to carry out his or her work. Health institutions must give him immediate attention for his prompt recovery and with this it can be guaranteed that both, the disabled person and the employer, can continue with the pace of production that is favorable for both parties, and in the psychosocial aspect of the worker, he can feel like a useful individual to achieve his work and personal goals.

The regulations and jurisprudence in force in Colombia indicate that reinstatement must ensure optimal labor, social and mental development. A worker can never be reinstated to their work activities in unfavorable health conditions, this is the most relevant thing when making the reinstatement. This article is approached from the perspective of the interpretive paradigm, the parameters of the qualitative approach, using the general hermeneutics and legal hermeneutics, important to adequately interpret the problem of disability, rehabilitation and reintegration in Colombia.

1 Methodology

This reflection article, carried out with the purpose of studying the disability of common origin in the private sector in Colombia, is approached from the interpretive paradigm where it seeks to understand reality in a dynamic and heterogeneous way aimed at the meaning of human actions, the social practice, understanding and significance. The methodology used in this project was guided by a qualitative perspective and the use of hermeneutics as a general method to elucidate the theory and legal hermeneutics, both important to interpret different jurisprudence, laws and other norms related to the topic of disability, rehabilitation and labor reincorporation in Colombia.



2. Development of the theme.

2.1. Legal norms that regulate disabilities of common origin in Colombia.

This section covers the specific objective that aims to indicate the legal norms that regulate disabilities of common origin in Colombia; This will be approached methodologically from the interpretive paradigm and from a qualitative perspective.

To begin, it is necessary to define incapacity, which according to The Royal Academy of the Spanish Language (2001), it can be said to be “the lack of ability to do, receive or learn something; or understanding or intelligence; or the lack of preparation, or means to carry out an act. (RAE)”

In Colombia, the Constitutional Court, through Sentence T 523 of 2020, refers to the function that work incapacity exercises and what its true meaning is, the reason for being recognized in our legislation, alluding that:

Incapacity for work guarantees the right to a decent life, to health and to the basic minimum wage during the time in which the worker is not able to carry out work, as it allows him to receive the income necessary to satisfy his basic needs (Murillo vs COLPENSIONES, no. T-7,815,828 guardianship ruling/ T-523/20 (Constitutional Court, 2020), There are two types of work disabilities in our regulations, one due to work origin, which is the one derived from the activities that the worker carries out within the functions of his position, and the disability due to common origin, which is the one generated by a general illness that is unrelated to the occupation inherent to his position. In accordance with the provisions of Decree 1832 of 1994 in its article 8, the classification of the disease will be of common origin when there is no cause-effect relationship between the risk factors present in the workplace, current or previous, with the disease. diagnosed. (Art. 8 of decree/1832/94).

Disability due to common origin must be recognized by the EPS, health promotion company, to which the worker is affiliated, by means of a certificate issued by the professional assigned to it. The economic benefit that the disability entails will be recognized in the terms established by Decree 780 of 2016. Article 2.1.13.4. For the recognition and payment of economic benefits for disability due to general illness, in accordance with current labor provisions, contributing members will be required to have made contributions for a minimum of 4 weeks. (art 2.1.13.4, of decree /780/2016).

Law 100 of 1993 in its article 206 determines that the Contributory Regime of the General Health Social Security System - SGSSS, through the Health Promotion Entities, are responsible for recognizing the economic benefit of disability due to general illness to its members, non-pensioned contributors, for the time they are physically or mentally disabled to temporarily carry out their usual profession or trade.

For further illustration, see Table No. 1. Periods and persons responsible for paying disability.

Table 1. Periods and responsables for disabilityv payment

Period of disability	Responsable del Pago
Day 1 to 2	Empleador (100% from full salary)
Day 3 to 90	EPS (66.6% from earned salary)
Day 91 to 180	EPS (50% from earned salary)
Day 181 to 540	Pension Administratrative Fund
Day 541 and so on	EPS

Own creation

In 2018, the Ministry of Labor established the Comprehensive Rehabilitation and Occupational and Labor Reintegration Program in the General Occupational Risk System, within which it defines labor rehabilitation as:

Process by which a person manages to compensate to the greatest possible degree the disadvantages caused by a deficiency or disability that affects their work performance, making it difficult or preventing them from working and having social integration in their workplace and seeks their location or relocation in a productive activity that adapts to their interests, expectations and capabilities, Ministry of Labor of Colombia (Ministry of Labor, 2018, p. 12).

After 540 days of disability and as long as the worker is in optimal conditions, the Employer has the duty to place him in the position he held, this is known as Labor Reinstatement, which is stipulated within our legislation in Article 4 of Law 776 of 2002. When the capabilities and aptitudes of the employee have changed due to the illness they suffer from, they must make the necessary personnel movements and grant them a position in accordance with the physical, psychological and physiological skills they can develop, as stipulated by the same Law in its article 8.

The above leads us to see the regulation of disabilities due to common origin when they develop in the private field, as standards that safeguard the manifest weakness that develops in a worker who

suffers from a pathology, the protection that is provided even when he has undergone a rehabilitation process, and despite not having a qualification greater than 50% to obtain a disability pension, he is maintained in his position even if disabilities continue to occur after 540 days.

2.2. Jurisprudential positions of the Constitutional Court on disabilities of common origin in Colombia.

This chapter aims to achieve the specific objective of establishing a jurisprudential line with the different positions of the courts regarding disabilities of common origin in Colombia. The above is achieved through the application of the qualitative methodological perspective.

Interpreting the above, it can be ensured that, despite the employee's health conditions, he or she enjoys constitutional protection of a life in dignified conditions, at a vital minimum wage to be able to not only carry out his or her vital development, but also to be able to manage of what treatment for a specific health condition entails, even if it has not been caused by an occupational illness derived from the duties of his employment.

Sentence T 434 of 2008 refers to the exercise of work in fair and dignified conditions; that the subordination between employer and employee should not be absolute, and the latter must refrain from issuing orders that put the health or dignity of its workers at risk and also has the duty to relocate them when their health prevents them from performing their work optimally. In this regard, the Court stated:

Regarding the payment of disabilities, reference is made to Sentence T 194 of 2021, which reiterates that the payment of disabilities corresponds to the EPS, leaving the regulations for the periodic disability review procedure by the health promotion company suspended, this is why when Law 1753 of 2015 comes into force, it is understood that they are the ones who must support the values for this concept in favor of the insured.

In ruling T-041 of 2019, the guardianship review is carried out with file number T-6,951,249, where it studies whether the principle of reinforced stability was violated for a worker who suffered from manifest weakness, the employer had full knowledge of this, However, he was removed from his job under the dismissal without just cause, for which the court orders the reinstatement of the employee and is emphatic in establishing that:

In no case may a person's limitation be a reason to hinder a work relationship, unless said limitation is clearly demonstrated as incompatible and insurmountable in the position to be held. Likewise, no limited person may be fired or have their contract terminated due to their limitation, unless authorized by the Labor Office. Díaz against the Unión Temporal Iluminación del Oriente and the Mayor's Office of Lebrija, Santander. File T-6,951,249, Sentence T-041/19 (constitutional court, 2019)


At the jurisprudential level there are countless pronouncements of the Court regarding disabilities of common origin when these are developed in conjunction with a rehabilitation process, which in most cases, if it grants a favorable concept, leads to a labor reinstatement and in light of these aspects the Court has been emphatic in protecting the rights of the worker, guaranteeing that their economic benefit is sustained so that the vital minimum wage is not affected during this process while remaining vigilant regarding the resocialization process within the environment. employment when it is already in the reincorporation stage.

2.3. Process of rehabilitation, reincorporation and labor resocialization in Colombia.

The purpose of this chapter was to evaluate the process of rehabilitation, reincorporation and labor resocialization in Colombia. To achieve what was proposed, a qualitative methodological approach was used, using inductive methods such as analysis and synthesis. The Political Constitution of Colombia in its article 47 delegates to the State the obligation to carry out prevention, rehabilitation and social integration policies for the physically, sensorially and mentally handicapped and in article 54 establishes that it must provide workers with work in accordance with their health condition.

Although Colombian legislation has regulated rehabilitation and return to work when the worker regains the ability to perform the functions of his position in different provisions, this has actually been implemented experimentally according to the company's possibilities. most of the time, without taking into account the health conditions of the employee.

The rehabilitation, reincorporation and relocation processes are governed according to the provisions of Law 100 of 1993, article 153 numeral 3, article 162 of Law 776 of 2002 and Decree Law 1072 of 2017, which emphatically establish the employer as the person most responsible for establishing the program and covering the care and complete rehabilitation processes through the IPS, for workers who suffer from diseases of common origin. Which begins by taking the worker to consult with the occupational physician to carry out a post-disability evaluation and issue recommendations or restrictions that match to these corresponding budgets and in this way analyze the jobs to evaluate which would be the most convenient according to the employee's new performance characteristics.



Once the rehabilitation process yields a positive result, so that the employee returns to his position to perform his duties, he faces a social context that is not easy to deal with when returning to the world of work. Galarza (2020) Iglesias in his article *Quality of life at work in reinstated employees: A view from co-workers*, gives us a very important reflection about how co-workers perceive reinstatement, and it is from an environment of distrust. and great expectations about the worker's health conditions and the restrictions that they present, since they fear being overburdened at work due to their colleague's deficiency in fulfilling their duties.

CONCLUSION

Through this article it was possible to analyze the procedure established in the legal norms applicable to the private sector when disability of common origin requires rehabilitation and reincorporation in Colombia. It was supported by qualitative methodology using inductive, hermeneutic and subjective tools. To achieve the objectives, documents were reviewed, resulting in the following:


Diseases of common origin, in most cases, result in the absence of workers in the performance of their duties and this legally generates a medical disability that in most cases, with respect to the complexity of the pathology suffered, is postponed in time leading to a rehabilitation process in which the worker is subjected to rigorous monitoring of his clinical evolution in order to grant a concept that, if favorable, would order his return to work.

This leads us to highlight the regulation of disabilities due to common origin when they develop in the private field, as standards that safeguard the manifest weakness that develops in a worker who suffers from a pathology, the protection that is offered even when the worker has undergone a rehabilitation process, and despite not having a qualification greater than 50% to obtain a disability pension, he is maintained in his position even if disabilities continue to occur after 540 days.

Reintegration as the final phase of this general illness process, it is the beginning of a path of adaptation that the worker will experience and that will depend a lot on the work environment he has, the challenges in fulfilling the functions of his position that must be accommodated to what his new capabilities allow and the harmony, collaboration and understanding provided by his co-workers, employer, family, and society.

REFERENCES

- [1] ARL Colpatría. (2015). Rehabilitation and return to work. Recovered from <http://prevencionar.com.co/2015/10/21/rehabilitation-and-return-to-work/>
- [2] BALLESTEROS P., SERRA P., MARTINEZ, J., PLANA A. DELCLOS, G., and BENAVIDES, F. (2009). Comparison of the cost of temporary disability due to a common contingency in 2006 between the provinces of Barcelona and Madrid. *Rev Esp Salus Publica*, 83(3), 453- 461.
- [3] Decree 780 of 2016. By means of which the Single Regulatory Decree of the Health and Social Protection Sector is issued. May 6, 2016.
- [4] Decree 2463 of 2001. Which regulates the integration, financing and operation of disability rating boards. November 20, 2001.
- [5] Decree 1832 of 1994. By which the Table of Occupational Diseases is adopted. August 3, 1994.
- [6] Decree 1333 of 2018. By which Title 3 of Part 2 of Book 2 of Decree 780 of 2016 is replaced, disabilities greater than 540 days are regulated and other provisions are issued. July 27, 2018.
- [7] Castro against numeral 15 (partial) of literal A) of article 62 of Decree Law 2663 of 1950, File D-12408, sentence C-200 (Constitutional Court, 2019)
- [8] Díaz against the Unión Temporal Iluminación del Oriente and the Mayor's Office of Lebrija, Santander. File T-6,951,249, Sentence T-041/19 (constitutional court, 2019)
- [9] Daza against Porvenir S.A., Torres against Coomeva E.P.S and Ortega Arévalo against ARP Colpatría S.A. Accumulated files T-2539240, T-2497616 and T-2560721. Sentence T-468/10 (constitutional court, 2010)
- [10] GALARZA Iglesias A. M..2020. *Quality of life at work in reinstated employees: A view from co-workers*.
- [11] JIMÉNEZ R. E., (2019). "Back to work" guide, a business necessity for the proper implementation of rehabilitation, reincorporation and job relocation processes within the occupational health and safety management system.
- [12] Law 100 of 93. By which the comprehensive social security system is created and other provisions are dictated. December 23, 1993.
- [13] Law 1562 of 2012, which modifies the occupational risk system and dictates other provisions regarding occupational health. Official Gazette 48488, June 11, 2012.

- 
- [14] Ministry of Social Protection. (2005). Instrumentation of the Manual Guide to Procedures for Rehabilitation and Occupational Reincorporation of Workers in the General System of Professional Risks. Bogotá D. C., Colombia: GLARP Foundation - IIPD.
- [15] Ministry of Social Protection. (2010). Manual Update Guide on Procedures for the Occupational Rehabilitation and Reincorporation of Workers in the General System of Professional Risks. Bogotá D. C., Colombia: National Printing Office of Colombia.
- [16] Ministry of Health and Social Protection. (2015). National situational room for people with disabilities. Retrieved from <http://discapacidadcolombia.com/index.php/estadisticas>
- [17] Ministry of Labor. (2014). National Safety and Health Plan at Work 2013-2021. Towards a preventive culture. Retrieved from <http://www.oiss.org/wp-content/uploads/2000/01/PlanNacionalDeSeguridadySaludEnElTrabajo.pdf>
- [18] Ministry of Labor. (2017). Resolution 1111, which defines the minimum standards of the Occupational Health and Safety Management System for employers and contractors. DO 50189 (March 28, 2017).
- [19] Min social protection
<https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/DE/DIJ/Concepto%20Jur%C3%ADdico%20201411200028121%20de%202014.pdf>
- [20] Min work rehabilitation program. (2018)
<https://www.mintrabajo.gov.co/documents/20147/59676/PROYECTO+RESOLUCI%C3%93N+RHB.pdf/86e43987-04b4-9b92-8eac-edea27262ca3>
- [21] Royal Spanish Academy. Dictionary of the Spanish Language Volume 6, p- 853 22nd. Spain: 2001.
- [22] SURA. EPS. Concepts and definitions. -
https://www.epssura.com/files/docML_conceptos_definiciones.pdf. Retrieved April 10, 2022.