HOLMES v. METROPOLITAN LIFE INSURANCE COMPANY.

4-2903

Opinion delivered April 10, 1933.

1. TRIAL—INSTRUCTION INVADING JURY'S PROVINCE.—In an action on an accident policy, an instruction that, though plaintiff lost his eye entirely, and thereby his efficiency was impaired, it did not follow that "such partial disability" entitled him to recover *held* erroneous both in assuming that the loss of an eye was a partial disability, and not total, and also in singling out the loss of the eye, instead of submitting the loss of an eye with all other physical defects for consideration of the jury.
2. TRIAL—ERROR NOT CURED WHEN.—The error of instructing the jury in an action on an accident policy, that the loss of an eye was only a partial disability, instead of submitting the matter to the jury, was not cured by a subsequent clause in the instruction telling the jury to find for the defendant if the plaintiff was able to perform all the substantial and material acts necessary to be done in the prosecution of his occupation.

Appeal from Pulaski Circuit Court, Second Division; *S. S. Jefferies,* Special Judge; reversed.

STATEMENT BY THE COURT.

On July 27, 1930, appellant, John Holmes, was in the employ of the Chicago, Rock Island & Pacific Railway Company, at its shops, in the capacity of a coppersmith's helper. At that time he was insured under the provisions

of three separate policies of group insurance issued by appellee to the railway company, insuring the employees of said railway company who had qualified themselves for insurance under such group policies. Appellant had qualified under the provisions of said policies, and they were in full force and effect on that date. On the night of July 27, 1930, appellant was struck in the left eye by a rock thrown by some unknown person. This injury resulted in the removal of the left eye. Immediately after receipt of the injury a claim for benefits due him under one of the policies was made, and afterwards claims were filed on the other two policies for certain compensation provided for in the face of said policies, the amounts of which claims is unnecessary to here set out. Liability was admitted on one of the policies, and appellant was paid $1,000 for the loss of his left eye. Afterwards appellee denied liability on the other two group policies, and this suit was instituted for the purpose of effecting a recovery thereon. The appellee filed its answer to appellant's complaint, denying the allegations set forth therein, and the case was tried on the 10th and 11th days of May, 1932, and resulted in a verdict and judgment for the defendant, from which this appeal is prosecuted.

Appellee admitted the execution and delivery of the group policies of insurance, and that they were in full force and effect on July 27, 1930, but denied that appellee was incapacitated to perform his duties as a coppersmith's helper.

It was admitted by appellee's counsel in oral argument that the testimony on behalf of the appellant, if believed by the jury, was amply sufficient to sustain a verdict and judgment in his behalf. Therefore, it will be unnecessary to here set out the testimony in behalf of the appellant.

Among other instructions given by the trial court, it gave to the jury appellee's instruction No. 1, as follows:

"You are instructed that, even though you may find from a preponderance of the evidence that the plaintiff is partially disabled, and even though you may find that he has lost his eye entirely, and that by reason thereof his efficiency in the prosecution of any work or the pur-

suit of any occupation for which he may be fitted by training and experience is thereby impaired, nevertheless it does not follow from this that such partial disability entitles him to recover on the $2,000 certificate and its accompanying group policy; and so, if you find from a preponderance of the evidence that, at the time the $2,000 certificate involved in this suit lapsed, which is shown by the evidence to have been January 31, 1931, by reason of the plaintiff's termination of his employment with the Chicago, Rock Island & Pacific Railway Company, the said plaintiff was able to perform all of the substantial and material acts necessary to be done in the prosecution of his occupation as a coppersmith's helper, or was able to perform all of the substantial and material acts necessary to be done in the prosecution or pursuit of any other work or occupation for which he was fitted by training and experience as shown by the evidence, if any, then your verdict must be for the defendant on said $2,000 certificate and its group policy."

Sam T. Poe, Tom Poe and *Donald Poe,* for appellant.

Moore, Gray & Burrow, for appellee.

JOHNSON, C. J., (after stating the facts). We think the trial court erred in giving to the jury appellee's instruction No. 1, which is copied in the statement of facts.

This instruction told the jury that: "even though you may find from a preponderance of the evidence that the plaintiff is partially disabled, and even though you find that he has lost his eye entirely, and that by reason thereof his efficiency in the prosecution of any work or the pursuit of any occupation for which he may be fitted by training and experience is thereby impaired, nevertheless it does not follow from this that such partial disability entitles him to recover on the $2,000 certificate and its accompanying group policy, etc."

The effect of this instruction was to tell the jury that the loss of appellant's left eye was only a partial disability. This was one of the controverted issues in the case. It was a question for the jury to determine whether or not the loss of an eye constituted total and permanent or partial disability.

Section 23, article 7, of the Constitution of this State provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on request of either party."

The instruction given by the trial court and heretofore quoted was in violation of this constitutional mandate. It told the jury that the loss of an eye was partial disability, when this was a question of fact for the jury to determine.

If the loss of appellant's left eye, or the impairment of the vision of his right eye, or the loss or impairment of any one of the other physical defects complained of by him, either singly or all concurringly, produced or effected a total and permanent disability, he would be entitled to recover. It was therefore reversible error to single out the loss of an eye and tell the jury that this was only a partial disability.

Furthermore, this instruction is erroneous for the reason that it emphasizes to the jury the fact that the loss of an eye is only partial disability under the clauses of the policies sued on, instead of submitting the loss of an eye with all other physical defects for consideration and determination of the jury.

In a long line of decisions by this court it has been held: "It is not the province of the court to instruct the jury upon the effect or weight of evidence. It is the exclusive province of the jury to judge of the strength or weakness of all facts adduced to sustain an issue." *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, and cases therein cited.

It is insisted on behalf of appellee that subsequent clauses in instruction No. 1 cured and made harmless the defect complained of in said instruction. To this we cannot agree. It was impossible for the jury to harmonize the different phrases in said instruction.

Since this case must be reversed and remanded for the error herein pointed out, we deem it unnecessary to discuss other alleged errors because it is probable that they will not occur on a retrial of the case.

For the error indicated, this case is reversed and remanded to the Pulaski County Circuit Court for a new trial in accordance with law.

SMITH and MCHANEY, JJ., dissent.