PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* DUPINS.

4-3248

Opinion delivered December 18, 1933.

1. INSURANCE—TOTAL DISABILITY—EVIDENCE.—Evidence *held* to support a verdict finding that insured was totally and permanently

disabled from tuberculosis during the life of a disability insurance policy.

2. INSURANCE—TOTAL DISABILITY.—Total disability may exist although the insured is able to perform occasional acts if he is unable to do any substantial portion of the work connected with his occupation.

3. INSURANCE—NOTICE OF DISABILITY.—Whether insured gave notice of his total and permanent disability as soon as reasonably possible, as required by a disability policy *held* under the evidence a question for the jury.

4. INSURANCE—FALSE REPRESENTATIONS—JURY QUESTION.—Whether insured made false statements in an application for disability insurance *held* a question for the jury.

Appeal from Prairie Circuit Court, Northern District; *W. J. Waggoner,* Judge; affirmed.

STATEMENT BY THE COURT.

On July 15, 1930, appellant insurance company issued to appellee its policy of insurance, by the terms of which appellant agreed to pay appellee the sum of $50 per month for twelve months, and $12.50 per month thereafter for such time as the appellee was totally disabled and under the treatment of a legally qualified physician. All premiums were paid by appellee up to July 15, 1931, or for a period of one year. On August 31, 1930, appellee filed a claim with appellant for disability, which covered a period of three weeks, and appellant paid him therefor $57.36. Thereafter, on November 1, 1930, appellant paid another claim for the sum of $24.03. Thereafter, on May 1, 1931, appellant paid a third claim aggregating $31.66. Thereafter, on June 20, 1931, appellee filed a fourth claim with appellant asserting disability from a piece of steel striking him in the right eye. This claim was not paid, and appellee employed an attorney to prosecute a suit against appellant therefor. Thereafter this claim was paid. On September 11, 1931, appellee's present attorneys notified appellant that appellee was suffering from a total disability, which began prior to July 15, 1931, and within the life of his policy. Appellant ignored the last-asserted claim, and this suit was instituted to enforce it. The suit was defended by appellant upon the following theories:

First, that appellee suffered no total disability during the life of the policy; second, that the policy was obtained through misrepresentations and fraud; third, that appellee failed to give notice to it of his alleged total disability, as required by the provisions of the policy.

The policy of insurance issued by appellant and accepted by appellee contains the following clauses:

"Written notice of injury, or of sickness on which claim may be based, must be given to the company within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness. In event of accidental death, immediate notice thereof must be given to the company. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the company at its home office, 501 West Sixth Street, in the city of Los Angeles, California, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible. "* * * Any failure to comply with the provisions of this policy shall render invalid any claim under this policy."

The jury was warranted in finding the following facts: That on July 15, 1930, the date on which the policy was issued, appellee was a machinist's helper in the Missouri Pacific Railroad shops in North Little Rock; that appellant's agent approached appellee to write him insurance; that the only questions answered by appellee in the application was his name, where he was born, his age and his wife's name and age; that he did not read the application after it was written by appellant's agent, and was given no opportunity to read it; that all other answers contained in said application were inserted therein by appellant's agent without his knowledge or consent. The testimony further tended to show that appellee continued his work in the railroad shops until September 1, 1930, when he was forced to lay off because of sickness. This attack lasted for four weeks and four

days, and his physician diagnosed his ailment as neuritis. On October 1, 1930, appellee suffered a malarial attack, but was able to return to his work on October 26. After this date a general decline was noted in appellee's health; he lost weight and worked less than half the time on account of his health; he was favored by his co-employees, and was required to do only light work. On March 3, 1931, appellee suffered a serious attack of diarrhea, and was confined to his home for three weeks. On July 24, 1931, appellee took his bed and has been confined therein practically ever since. On August 7, 1931, appellee consulted a physician, and, after a complete examination, running over several days, appellee was informed that he was suffering from tuberculosis, arthritis, kidney trouble and other ailments; that appellee knew nothing of his tubercular condition until advised to this effect after this examination. When appellee was advised of his serious ailments, he immediately employed counsel, and notified the company of his total disability.

The verdict and judgment were in favor of appellee, and against appellant, from which this appeal is prosecuted.

Owens & Ehrman and *John M. Lofton, Jr.*, for appellant.

Emmet Vaughan, Sam T. & Tom Poe and *McDonald Poe*, for appellee.

JOHNSON, C. J., (after stating the facts). It is first contended on behalf of appellant that the uncontradicted facts show that appellee was not totally and permanently disabled within the lifetime of the policy. We cannot agree with this contention. The testimony tended to show, and the jury was warranted in finding that, at the time the policy was issued to appellee, he was a strong able-bodied negro man, weighing about 185 pounds, enjoying good health and able to perform any kind of labor. After the execution and delivery of the policy, he contracted shortness in his breath, his heart action weakened, and a general decline in his health, to the extent that on July 24, 1931, he became totally exhausted. The physical tests applied to appellee on August 7, 1931, by his physician disclosed that appellee was suffering from active tuber-

culosis. From this very short summary of the evidence, it is perfectly apparent that the jury was warranted in finding that appellee contracted tuberculosis after the issuance of the policy of insurance, and prior to its date of expiration. Also, the jury was fully warranted in finding that appellee was totally and permanently disabled within the purview of the policy prior to July 15, 1931.

Appellant insists, however, that the testimony does not show a total disability prior to July 15, 1931, because appellee was engaged in light work in the railroad shops on and prior to that date. This is not a conclusive test of total and permanent disability, as has many times been held by this court.

We held in *Industrial Mutual Ind. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, that: "Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation."

Again we held in *Mutual Benefit H. & A. Association* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812, that, although the insured endeavored to do some work, this was not the exclusive test to be applied. The true test seems to be that total disability exists where the injuries are of such character and degree as to wholly disable the insured from doing all the substantial and material acts necessary to be done in the prosecution of his business, and when common care and prudence would require a man in his condition to desist from the kind of labor he had performed prior to his injury. When the rule is thus stated and analyzed, it will be seen that the mere fact that the insured performs certain labor, when common care and prudence require otherwise, does not of itself demonstrate a lack of total disability. This exact question was again before this court in *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 522, 54 S. W. (2d) 407, wherein the doctrine, as heretofore stated, was reannounced and approved.

The next insistance for reversal is that appellee did not furnish to appellant notice of his total disability within the time specified in the policy of insurance. The requirements of the policy appear in the statement of

facts. By reference thereto, it will be seen that "failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice, and that notice was given as soon as was reasonably possible." The question as to whether or not appellee gave the notice as soon as was reasonably possible was submitted to the jury as a question of fact, and its findings in behalf of appellee should be sustained, if supported by substantial testimony. On this question appellee testified that he did not know that he had tuberculosis until immediately prior to the institution of this suit; that the first information he had came from his physician at that time.

On the question here under consideration, appellant insists that this case is governed by *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. (2d) 640. The Selvidge case is easily distinguishable from the instant case. There the insured lost one of his eyes on August 12, 1932, and gave no notice to the insurance company until the 12th of November, 1932. Selvidge well knew on August 12, 1932, that he had lost an eye. In the instant case, the insured did not know that he was suffering from tuberculosis until immediately prior to the filing of this suit. Thus it will be seen that there is a broad difference between the Selvidge case and the one here under consideration.

We think this case is controlled by the doctrine announced in *Pacific Mutual Life Insurance Co.* v. *Smith,* 166 Ark. 403, 266 S. W. 279. In the Smith case, the appellant there was the same appellant as here. Also, in that case, similar, if not identical, provisions of the policies appear. There, as here, it was contended that notice was necessary within a certain number of days, and a prerequisite to recovery. This court, in disposing of the contention there, said, "That the requirement for immediate notice is sufficient, if notice be given as soon as is reasonably possible to give it."

It is self-evident that appellee could not notify appellant of something he did not know. At no time within the specified period did appellee know that he was suffering from the disastrous disease afterwards made

known to him by his physician. This is the reason for the exception contained in the policy, which requires notice as soon as is reasonably possible to give it. *Employers' Liability Assur. Corp.* v. *Roehm,* 99 Ohio St. 343, 124 N. E. 223, 7 A. L. R. 182.

We conclude that the trial court was correct in submitting the reasonable possibility of giving notice in the instant case, and that no error was committed in so doing. It is next contended that the court erred in giving to the jury certain instructions relative to the execution of the application for the policy of insurance.

Appellant interposed the defense that appellee had made false statements in his application for insurance. This was denied by appellee. Therefore it became a question of fact for the jury to determine. After a careful consideration of all the instructions given on this issue, we conclude that the question was properly submitted and under correct instructions. In the main, the instructions here given followed the doctrine of this court announced in *Missouri State Life Ins. Co.* v. *Witt,* 152 Ark. 153, 237 S. W. 698; *American Life & Accident Association* v. *Walton,* 133 Ark. 348, 202 S. W. 20.

No reversal error appearing, the judgment is affirmed.

McHaney, J. I dissent. It is a strange doctrine that a sane person may be totally and permanently disabled and not be aware of that fact. The policy had lapsed long before any notice of disability was given, and there does not appear to be shown any good reason for failure to give the notice within the time provided in the policy. Mr. Justice Smith agrees with this dissent.