PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* LANE.

4-3430

Opinion delivered April 2, 1934.

1. INSURANCE—TOTAL DISABILITY—JURY QUESTION.—Whether a brakeman 47 years old engaged in railroad work all his life, being unable to follow any other vocation or profession and sustaining an injury necessitating the amputation of a leg was totally and permanently disabled within the terms of an accident policy *held* for the jury.
2. APPEAL AND ERROR—CONCLUSIVENESS OF VERDICT.—A judgment on a verdict supported by material testimony will not be disturbed.

Appeal from Boone Circuit Court; *J. F. Koone,* Judge; affirmed.

STATEMENT BY THE COURT.

The appellant insurance company issued to appellee, pursuant to the terms of a group policy of insurance to the Missouri & North Arkansas Railway Company, certificate No. 907, whereby it agreed to pay insured the sum of $1,000 if he should become totally and permanently disabled to the extent that he should be rendered wholly, continuously and permanently disabled from performing any work for any kind of compensation of financial value during the remainder of his lifetime.

The insured had originally carried three certificates under group policies, but at the time of the injury he only carried two. He made a claim under his accident policy for the loss of one limb and the company paid him therefor. This certificate was issued at the same time certificate No. 907, sued on herein, was issued, and they were the two certificates in force at the time of his injury.

The answer denied that insured was totally and permanently disabled under the terms of the policy, and that he was rendered wholly unable to perform any work for any kind of financial value for the remainder of his life.

The certificate was introduced in evidence and contained the following provision:

"Total and Permanent Disability.—If the said employee, while less than sixty years of age, and while the insurance on the life of said employee under said policy is in full force and effect, shall become totally and permanently disabled or physically or mentally incapacitated to such an extent that he or she by reason of such disability or incapacity is rendered wholly, continuously and permanently unable to perform any work for any kind of compensation of financial value during the remainder of his or her lifetime, said amount of insurance will be paid to said employee, either in one sum six months after the company has received due proof of such disability or incapacity, or in monthly instalments during two years, the first instalment to be payable immediately upon receipt by the company of due proof of such disability or incapacity, in accordance with the provisions of said policy. * * *"

The group policy itself contained the following provision with reference to total and permanent disability:

"If any person insured under this policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the payment of the first premium on account of such insurance, while this policy is in full force and effect and the said person is less than sixty years of age, the company, upon receipt of due proof of such disability, will grant the following benefits: * * *

"Recognized Disabilities.—Without prejudice to any other cause of disability, the company will recognize the entire and irrecoverable loss of the sight of both eyes, or the use of both hands, or of both feet, or of one hand and one foot, as total and permanent disability under this policy."

Appellee was a brakeman and lost his leg while employed by the railroad company in August, 1932; he lost his job because of the accident and because he was thereafter unable to perform the duties of a trainman. Appellee testified that he was wholly unable because of the effect of the injury to do any kind of work for compensation of any kind after said injury; that he had been engaged in work about and on the railroads since he was 18 years old, and he was 47 years old at the time of the loss of his leg and could no longer perform the duties of a trainman; that he had been unable to procure an artificial limb that he could wear; that the injury required the amputation of his left foot about 9 inches below the knee.

There was some testimony introduced showing an injury to another man who lost his leg and had his foot amputated about half way to the knee when he was 18 years old, and that he was now a barber following this occupation daily.

A physician testified that he was familiar with the use of artificial limbs, and that a man who has had a leg amputated could not wear an artificial limb during the first year with comfort; that he would have to wear it awhile and then rest to get the best results; that the limb is usually sore and tender for six months or a year, as it usually takes the stump that long to become toughtened to the extent of bearing the weight of the body; that as a rule an artificial limb can be worn after a year without much pain; and better results are obtained in cases where the amputation is below the knee.

On cross-examination this doctor admitted that he knew nothing about appellee's condition, never having examined him, but he thought from the position of the amputation that appellee ought to get good results from an artificial limb; that he was only testifying to general conditions. He also stated that there is some difference in the utility of an artificial limb where the leg is lost at the age of eighteen, and where it is lost at the age of forty-seven. The older man has less possibility of success.

The court instructed the jury, refusing a peremptory instruction for the appellant, defining total and permanent disability, and also told the jury that if they believed the insured at any time in the future would be able to engage in any gainful occupation, within the scope of his ability, no matter what occupation it may be, then your verdict should be for the defendant. The jury returned a verdict for the appellee for the amount sued for, with interest, 12 per cent. penalty and attorney's fee, and from the judgment thereon this appeal is prosecuted.

J. Loyd Shouse and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

V. D. Willis and *Shinn & Henley,* for appellee.

KIRBY, J., (after stating the facts). It is not questioned that the certificates were issued under the group policies to appellant and were both in force at the time he sustained the injury which necessitated the amputation of his left leg below the knee. The accidental dis-

memberment policy provided that the loss of one foot, the severance at or above the ankle, should entitle the insured to $500, and appellee presented a claim under this certificate soon after the accident, and the same was paid by the company.

Subsequently, appellee presented a claim under the certificate which provided benefits in the event of total and permanent disability. The appellant denied the claim because it did not consider the insured totally and permanently disabled within the meaning of the provisions of the policy hereinabove set out.

The policy by its terms did not provide occupational insurance, or that the insurer would become liable if the insured became unable to perform the duties of his occupation of brakeman; but provided that insured, to be entitled to recover under said certificate, must show that he "is unable to perform any work for any kind of compensation of financial value during the remainder of his lifetime."

There is no doubt about the injury suffered by the insured being permanent; and appellant's only insistence is that the testimony is insufficient to support the allegation that said injury is total. It will suffice to say, however, that the instructions given by the court are not complained of here, and were in accordance with the doctrines of this court as announced in *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; and *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812.

Insured testified that he was 47 years of age; that his leg was amputated about 9 inches below the knee joint; that he was unable to perform any kind of work for gain or profit; that he had railroaded all his life and had no knowledge of any other vocation nor sufficient education or training to follow any profession.

It is true the disability or injury suffered by the insured did not constitute of itself a total and permanent disability within the express provisions of the policy, but

said policy also provides: "If any person insured under this policy shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, etc., * * * the company, upon receipt of due proof of such disability, will grant the following benefits:" Said policy also recognizes certain injuries to be permanent and total disabilities.

The jury had the insured before it, saw his condition and necessarily knew somewhat about the question of his disability from its own information and experience acquired through association with its fellowmen; and under our Constitution it was exclusively within the jury's province to determine the question under the circumstances of this case. Having done so, and there being material testimony to support its verdict, the judgment thereon will not be disturbed. Affirmed.

SMITH, MCHANEY and BUTLER, JJ., dissent.