INSURANCE

What Is Permanent Disability?

The plaintiff held an insurance contract containing a clause requiring the insurer to pay monthly benefits upon proof, three months after beginning of a total disability, that the insured's disability was total and permanent. Plaintiff submitted a written statement by his doctor to that effect. The insurance company, acting on the advice of their physician, refused to make any payments, claiming that the disability of the plaintiff was temporary. Plaintiff's petition showed that at the time of suit the disability had ceased and he had resumed a gainful occupation. *Held*, the insurer is liable for the stipulated payments from the date of inception of the injury to the date of recovery, even though the insured recovered completely before any payments were made. The court concluded from a provision in the contract calling for payments only during the continuance of the disability that both parties had in contemplation a period of disability less than life. The decision is based on the idea that the date of filing proof must be made the pivotal date in determining the probable duration of the disability in order to eliminate the strong incentive for an insurer to resort to dilatory tactics and litigation in the hope that lapse of time may convert the seemingly permanent disability into a temporary one. *Wright* v. *Metropolitan Life Ins. Co.*, 58 Ohio App. 83, 15 N.E. (2d) 970 (1937).

In an almost identical fact situation the court in another Ohio case allowed the plaintiff to recover on the ground that "permanent" in such a policy means indefinite and for an indeterminate time. *Equitable Life Ins. Co. of Iowa* v. *Gerwick*, 50 Ohio App. 277, 3 Ohio Ops. 572, 18 Ohio L. Abs. 152 (1934). Prior to these two cases the law of Ohio on the meaning of permanent in such a clause was embodied in *Rose* v. *New York Life Ins. Co.*, 127 Ohio St. 265, 187 N.E. 859 (1933). That case was decided on the ground that proof was not submitted during the continuance of the disability. The court stated by way of *dictum* that if cessation of disability prior to payments can be shown, no payments need be made.

While the question of whether total permanent disability is to be confined to a disability lasting until death depends very largely upon the phraseology of the policy involved in the particular case, the tendency in recent cases is to give the word "permanent" a construction favorable to the insured. In accord with the principal case it has been decided that probable duration of the disability must be determined as of the date of

claim. *Metropolitan Life Ins. Co.* v. *Noe*, 161 Tenn. 335, 31 S.W. (2d) 689 (1930). Hence, the disability must be present at the time of claim. *Rose* v. *New York Life Ins. Co.*, *supra*; *Mackenzie* v. *Equitable Life Assur. Soc.*, 140 Misc. Rep. 665, 251 N.Y. Supp. 528 (Sup. Ct. 1931). Courts which make the date of claim the focal point say that a subsequent recovery even before trial will not destroy the cause of action. *Maze* v. *Equitable Life Ins. Co.*, 188 Minn. 139, 246 N.W. 737 (1933); *Penn Mutual Life Ins. Co.* v. *Milton*, 160 Ga. 168, 127 S.E. 140 (1925); *Grafe* v. *Fidelity Mutual Life Ins. Co.*, 84 S.W. (2d) 400 (Mo. 1935). *Contra: Ginell* v. *Prudential Ins. Co.*, 237 N.Y. 554, 143 N.E. 740 (1923); but notice that in that case the plaintiff was asking substantial benefits under a disability provision for which the stated premium was only forty-four cents. That the amount of the premium will be considered in determining the extent of the liability contemplated by the parties is evidenced by *Lewis* v. *Metropolitan Life Ins. Co.*, 142 So. 262 (La. App. 1932); *Hawkins* v. *John Hancock Mutual Life Ins. Co.*, 205 Iowa 760, 218 N.W. 313 (1928). Another evidence that the parties used the word "permanent" in its strict sense is a provision calling for payment of a lump sum by the insurer on proof of a permanent disability. *Home Benefit Ass'n.* v. *Brown*, 16 S.W. (2d) 834 (Tex. Civ. App. 1929); *Paul* v. *Mo. State Life Ins. Co.*, 228 Mo. App. 124, 52 S.W. (2d) 437, 440 (1932). On the other hand a clause calling for the payment of benefits only during the continuance of the disability carries the implication that the parties considered a "permanent" disability one which might cease at some time in the future. *Equitable Life Insurance Co.* v. *Preston*, 253 Ky. 459, 70 S.W. (2d) 18 (1934). Such a clause is said to qualify the provision limiting indemnity to permanent disability, *Wenstrom* v. *Aetna Life Ins. Co.*, 55 N.D. 647, 215 N.W. 93 (1927), so that permanent could not be said to be used in the extreme sense of lifelong, *Jefferson Standard Life Ins. Co.* v. *Hurt*, 254 Ky. 603, 72 S.W. (2d) 20 (1934); *Plummer* v. *Metropolitan Life Ins. Co.*, 132 Me. 220, 169 Atl. 302 (1933), but is intended to mean a condition which will in all probability continue for a long and indefinite period of time. *Gardon* v. *New Eng. Mutual Life Ins. Co.*, 218 Iowa 1094, 254 N.W. 287 (1934); *Equitable Life Ins. Co.* v. *Preston*, *supra*; *Adamson* v. *Metropolitan Life Ins. Co.*, 42 Ga. App. 587, 157 S.E. 104 (1930).

Where the insurance contract calls for a presumption that a disability continuing for a specified time is permanent, a claim against the insurer arises for the period from the date of disability to the date of recovery on the expiration of the prescribed period. *Losnecki* v. *Mutual Life Ins.*

Co., 106 Super. Ct. 259, 161 Atl. 434 (1932). The presumption so provided for is not rebuttable by proof of later recovery. *Heralds of Liberty* v. *Jones*, 142 Miss. 735, 107 So. 519 (1926); *Dietlin* v. *Mo. State Life Ins. Co.*, 126 Cal. App. 15, 14 Pac. (2d) 331 (1932). *Contra: Mitchell* v. *Equitable Life Assur. Soc.*, 205 N.C. 721, 172 S.E. 497 (1934); *Graham* v. *Equitable Life Assur. Soc.*, 221 Iowa 748, 266 N.W. 820 (1936). The usual requirement that total disability must exist for sixty days prior to submission of proof of a total and permanent disability does not raise a presumption of permanence on the expiration of that period. *Paul* v. *Mo. State Life Ins. Co.*, *supra*. Such a clause is generally construed to provide "days of grace" to allow investigation by the insurer. *Lewis* v. *Metropolitan Life Ins. Co.*, *supra*; *Ginell* v. *Prudential Ins. Co.*, *supra*; *Job* v. *Equitable Life Ins. Co.*, 133 Cal. App., Supp. 791, 22 P (2d) 607 (1933). But *cf. Laupheimer* v. *Mass. Mutual Life Ins. Co.*, 224 Mo. App. 1018, 24 S.W. (2d) 1058 (1930).

PAUL W. BROWN

LABOR LAW

EMPLOYER ASSOCIATIONS AND TRADE DISPUTES

Plaintiff corporation was engaged in the business of selling and repairing automobiles. At one time it had a contract with the defendant union, but the contract had not been renewed and had terminated more than two years before the present dispute. None of plaintiff's employees belonged to any union and in fact all had voted not to join the defendant union, stating that they had no differences with the plaintiff. Just before the vote was taken, defendant had begun picketing plaintiff under a plan to picket successively one of thirty such auto dealers each year. The facts stated by the court do not clearly show the exact purpose of the picketing, but the opinion indicates that the court felt the object was a closed shop. The Common Pleas Court of Montgomery County held there was no labor dispute, and therefore issued a temporary injunction restraining defendant union from all picketing, and from passing out copies of a paper containing statements tending to create the false impression that trouble existed between plaintiff and his employees. *White-Allen Chevrolet, Inc.* v. *Auto Mechanics Local Union No. 314 et al.*, 27 Ohio Abs. 273, 12 Ohio Op. 288, 3 L.R.R. 205 (Nov. 19, 1938).

In another recent decision, plaintiff corporation, a dealer in new and used cars, was a member of an association originally composed of one