

1969

Harry C. Greguhn v. Mutual of Omaha Insurance Company And United Bebenefit Life Insurance Company: Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY C. GREGUHN,

Plaintiff-Respondent,

—VB.—

MUTUAL OF OMAHA INSUR-
ANCE COMPANY and UNITED
BENEFIT LIFE INSURANCE
COMPANY,

Defendants-Appellants.

APPELLANTS' BRIEF

Appeal from the Judgment of the
District Court for Salt Lake County,
Frank Wilkins, Judge.

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IN THE SUPREME COURT OF THE STATE OF UTAH

HARRY C. GREGUHN,
Plaintiff-Respondent,

—vs.—

MUTUAL OF OMAHA INSUR-
ANCE COMPANY and UNITED
BENEFIT LIFE INSURANCE
COMPANY,
Defendants-Appellants

No. 11544

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to collect benefits for total and permanent disability from two health and accident insurance policies, which the Plaintiff-Respondent had with the Defendants-Appellants Companies.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury. From a verdict and judgment for Plaintiff-Respondent, Defendants-Appellants appeal.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants seek reversal of judgment and for judgment in their favor as a matter of law; or, that failing, a new trial; or, that failing, reversal of that portion of the judgment awarding future benefits to Plaintiff-Respondent.

STATEMENT OF FACTS

On May 12, 1962, Plaintiff-Respondent, Harry C. Greguhn, was insured under a Health and Accident policy, with the Defendant-Appellant, United Benefit Life Insurance Company, and on May 8, 1964, was insured under a policy with Defendant-Appellant, Mutual of Omaha Insurance Company. Both policies basically involved health and accident coverage. In both policies, and in his discharge from the service, Plaintiff-Respondent gave his occupation as being a brick contractor, and told the court (R. 68) (T. 21) that he had built homes as a brick contractor "in the thousands."

Plaintiff-Respondent had had some serious health problems prior to obtaining the policies with the Defendants-Appellants companies. He was medically discharged from the service from Letterman General Hospital in San Francisco, California, on June 20, 1941, after having been in the service for only two months. Plaintiff-Respondent stated that the reason for his discharge (R. 78) (T. 31) was "I was a little too high strung." However he told Dr. Tedrow (R. 151) (T. 111) that the Army considered him suicidal, although he disagreed with this diagnosis. Plaintiff-Respondent had also lost his right eye in an industrial accident in 1943.

About a week prior to September 21, 1964, Plaintiff-Respondent was working on a scaffold as a brick mason when a plank on the scaffold fell out from underneath him and he fell against the wall with his

belly and he ended up sitting on the other plank. (R. 55) (T. 8).

On September 21, 1964, while working on the same job, while employed by Western States Masonry, again on a scaffold, he experienced a plank fall out from underneath him, caught himself with one hand on the wall and the other hand on the scaffold. (R. 56) (T. 9). His employer lifted him up and put him on the other plank and told him to sit there for a while. About an hour or an hour and a half later, his back began to bother him and he left work at 4:00 o'clock (R. 57) (T. 10).

The following day the Plaintiff-Respondent saw Dr. Robert Lamb, orthopedic surgeon, who, on examination, found that the Plaintiff-Respondent was overweight with considerable increased lumbar lordosis or swayback (R. 86) (T. 39). Plaintiff-Respondent weighed approximately 218 pounds. Dr. Lamb took X-Rays which showed the Plaintiff-Respondent's back to have what Dr. Lamb called a *pars interarticularis* defect at the L-5, S-1 level. Dr. Lamb stated that this was in orthopedics language a *spondylolisthesis* and "it's a defect between the articulations of the vertebral parts where they articulate with the one above and the one below." This defect, according to Dr. Lamb, might be either congenital or acquired (R. 87) (T. 40). Dr. Lamb also found the Plaintiff-Respondent to have degenerative disc disease in the remaining part of the lumbar spine, as

well as arthritic changes. Dr. Lamb noted that Plaintiff-Respondent has considerable degenerative disc disease and disc changes even in his neck. (R. 97) (T. 50). Dr. Lamb testified that there was no question, based upon the X-Rays taken on September 22, 1964, but that the spondylolisthesis existed prior to the accident (R. 101) (T. 54), and that there was also no question that the degenerative disc disease existed prior to Plaintiff-Respondent's accident on September 21, 1964.

Further, based upon the examination of September 22, 1964, Dr. Lamb felt that the Plaintiff-Respondent, in addition to having the spondylolisthesis and degenerative disc disease, had received some injury causing pressure on the nerve roots at the lower lumbar level. (R. 92) (T. 45). With a spondylolisthesis Dr. Lamb stated that there was a tendency of the vertebral bodies to slip back and forward without any bony connection holding it, and if it slides far enough it gets some stretch on the nerve roots. (R. 88) (T. 41). Dr. Lamb further testified on (R. 93) (T. 46), "now as to whether he had any more slippage after than before, one really can't say." It was mostly an irritation. Dr. Lamb recommended conservative treatment involving physical therapy and the Plaintiff-Respondent continued to complain of pain.

In October, 1964, Plaintiff-Respondent was hospitalized and on October 23, 1964, Dr. Lamb performed surgery on his back and fused the interverte-

bral area between L-4 and S-1 of the sacrum. Plaintiff-Respondent continued to complain of back problems and on February 11, 1966, Dr. Lamb performed a further surgery upon the Plaintiff-Respondent's back, "which consisted of fusing the small amount of motion between L-4 and 5, and also fusing the joint between the third and fourth lumbar vertebra" (R. 96)(T. 49).

The hospital record, Exhibit B-10 of the St. Marks Hospital, indicates that the final diagnosis after surgery in October, 1964 was: -1. Degenerative disc disease lumbar and 2. Spondylolisthesis.

Plaintiff-Respondent was also hospitalized on January 10, 1966, and the initial clinical impression was: 1. Chronic or peptic gastritis and/or ulcer. 2. Chronic back disease, not currently a problem. The final diagnosis was peptic gastritis. (Exhibit P-7).

Dr. Lamb stated that several times he had advised the Plaintiff-Respondent to lose weight. (R. 102) (T. 55). And to improve his abdominal strength. Because of Plaintiff-Respondent's being overweight and because he didn't improve his abdominal strength, his back condition was aggravated and therefore he couldn't participate in employment which would require stooping, bending or sitting or standing in any position for a long time. (R. 103) (T. 56).

Dr. Lamb stated that Plaintiff-Respondent had received traction type injury, (R. 106) (T. 59), and that his present symptoms, at the time of trial were

caused by the degenerative changes in the remaining part of his lumbar spine, together with the problem of keeping his weight down. Dr. Lamb stated excessive weight is hard on the back and adds a little more pain. (R. 97) (T. 50). Dr. Lamb further stated that in the area of the spondylolisthesis which was fused, the Plaintiff-Respondent is better than before (R. 107) (T. 60) and that many of the Plaintiff-Respondent's problems were subjective and not clinically diagnosed. (R. 108). (T. 61). Dr. Lamb stated that the pre-existing, degenerative disc disease and spondylolisthesis, cooperating with the accident, caused the pain and suffering for which the Plaintiff-Respondent sought Dr. Lamb's help, and the pre-existing conditions made him more vulnerable to injury than "had he not had them." (R. 108) (T. 61).

Dr. Lamb further testified that the spondylolisthesis and degenerative disc disease was an independent agency already existing in the back at the time he had the accident (R. 108)(T. 61), and that the accident didn't cause the spondylolisthesis or degenerative disc disease (R. 109) (T. 62). In answer to the question: "But that because of these pre-existing conditions, the injured back was a favorable spot, *cooperating in parallel with the accident to cause him the problems which he has had since the accident?*" Dr. Lamb answered: "Yes." (R. 109) (T. 62). He further testified that if this accident hadn't triggered the problem, then probably some other occurrence

could have produced the same result. Otherwise, Plaintiff-Respondent is in good health. (R. 110) (T. 63).

In giving his opinion as to whether or not the accident that he described on September 21, 1964, probably caused the disability, that he indicated, Dr. Lamb would only say, (R. 99) (T. 52), "Well, according to this man's history, he had worked up until that time, and I never felt that he should be released to go back to that type of work. I don't think he will be able to return to that type of work." Mr. Greguhn had told Dr. Lamb that he was a brick mason. .

In stating his opinion as to the cause of Plaintiff-Respondent's disability, Dr. Lamb stated, "I think that his disability is *related* to that accident." (R. 99) (T. 52). Dr. Lamb further stated the previous existing spondylolisthesis and lumbar disc disease and the arthritic changes in Plaintiff-Respondent's back have a substantial importance in contributing toward his disability. (R. 107) (T. 60). Dr. Lamb also stated that the Plaintiff-Respondent could do sedentary work.

The Plaintiff-Respondent denied being hospitalized for chronic or peptic gastritis and/or ulcer (R. 112) (T. 65), and also denied ever having been hospitalized prior to September 21, 1964. The Plaintiff-Respondent admitted that there were some brick contractors who didn't actually work on the wall (R. 119) (T. 72) and that he could use a telephone, could

write, that he could walk up to about 50 feet without using a cane, that he was not confined to house, and in answer to the question if there were anything about his condition which would prevent him from figuring jobs, he said "Well, there are no jobs." (R. 71) (T. 24). He stated that he enjoyed driving and that it relaxed him.

Dr. Boyd G. Holbrook, Orthopedic Surgeon, examined the Plaintiff-Respondent on August 20, 1965. He found the Plaintiff-Respondent to have medically bizarre symptoms in that the absence of atrophy or signs of nerve damage didn't fit into the pattern of nervousness, shaking, stumbling, and the type of loss of control over his legs. (R 142) (T95). His examination indicated there was displacement of one centimeter of the lumbar bones with the upper part of the sacrum (R 143) (T 96). He examined the X-Rays taken on September 22, 1964 and it was Dr. Holbrook's opinion that the spondylolithesis and lumbar disc disease existed prior to the accident. (R 155) (T 108).

It was Dr. Holbrook's opinion (R 144) (T 97) that the Plaintiff-Respondent had a 20% permanent loss of bodily function as a result of the spondylolithesis and lumbar disc problem and ~~that~~^{the} accident, and found his general health to be good (R 145) (T 98). Dr. Holbrook further testified that the Plaintiff-Respondent exhibited about 75% of what would be normal motion for a man of his age and body build (R 146) (T 99). He further testified that the lack

of motion in the lumbar area, based upon his tests was a voluntary restriction (R 146) (T 99). Dr. Holbrook testified that in his opinion the Plaintiff-Respondent was not totally disabled for gainful employment. He testified that the Plaintiff-Respondent was permanently disabled as a brick mason, working upon the line, handling the bricks and the mortar, but that he was generally familiar with the physical requirements of a building contractor engaged in brick contracting where they were not required to actually do the masonry work themselves, and that if the Plaintiff-Respondent limited his physical work to estimating and supervision, he was not totally and permanently disabled from doing this kind of work. (R 150) (T 103).

Dr. Jack L. Tedrow, Psychiatrist, also examined the Plaintiff-Respondent on October 18, 1967. He took a medical history from the Plaintiff-Respondent and enquired as to the Plaintiff-Respondent's weight, "because I felt that he was considerably overweight for someone who complained of a bad back. He said he weighed about 210 pounds. Dr. Lamb had asked him to diet. Then he said 'Why should I diet? They would then say I have some kind of sickness. They are trying to pull everything under the sun.' * * * He also told me that he felt that his doctor had been influenced against him by the insurance company, and further that— * * * had fired two attorneys so far, and kept on then with this hostile attitude in his discussion, finally saying that if he didn't get what he

wanted from the Industrial Commission, he intended to sue the Western States Masonry Company." (R 158) (T 111). Dr. Tedrow stated, (R 159) (T 112), that the Plaintiff-Respondent had no psychiatric problems which would keep him from engaging in his work as a bricklayer and brick contractor.

Dr. Wallace E. Hess, Orthopedic Surgeon, examined the Plaintiff-Respondent on September 26, 1967. Dr. Hess found the alignment of his spine to be good, except for mild degree of lordosis, that is sway back, which he attributed to obesity. Plaintiff-Respondent could bend forward and reach to within two feet of the floor with his fingertips. He did not complain when doing this. He was able to squat down onto his heels and back six times without difficulty. (R 167) (T 120). The general examination was essentially normal. He moved about the office without apparent difficulty. His nose was crooked from a fracture as a child. (R 168) (T 121).

The X-Rays indicated a grade one spondylolisthesis and Dr. Hess found that the Plaintiff-Respondent in terms of loss of bodily function had a 20% permanent partial impairment. (R 169) (T 122) It was Dr. Hess's opinion that the spondylolisthesis existed prior to the accident which occurred on September 21 1964. It was also his opinion that the lumbar disc disease existed prior to ^{the} accident on September 21, 1964. (R 160) (T 123)

When Dr. Hess was asked what percentage of disability he would assess to the pre-existing condi-

tion as opposed to the condition brought on or aggravated by the accident he stated "My opinion is that perhaps 80 to 90% of the 20% would be pre-existent". (R 171) (T 124)

He further testified (R 172) (T 125) the spondylolisthesis and degenerative disc disease made the Plaintiff-Respondent's back more susceptible to the injury.

Mr. William A. Morton Insurance Company investigator who performed a surveillance on the Plaintiff-Respondent testified as to the Plaintiff-Respondent's varied activities over a period of time and stated that the Plaintiff-Respondent had no difficulty driving on the freeway and in maneuvering the Chrysler Imperial which he was driving while it was being pushed by a Ford Fairlane in a circle to get it started. (R 176) (T 129)

Mr. John R. Richards local manager of the Defendants-Appellants Companies testified that all benefits as called for by both insurance contracts were paid under the accident and sickness provisions except for total and permanent disability from accident alone. The pertinent provision in the Mutual of Omaha Policy is:

"Total Loss of Time' * * * also means that period of time during which you are unable to engage in any other gainful work or service for which you are reasonably fitted by education, training or experience."

And under Part "A":

" 'Injuries' means accidental bodily injuries received while this policy is in force and resulting in a loss independently of sickness and other causes."

And in the case of the United Benefit policy, under Part "A":

"The term 'Loss of Time' * * * means that period of time for which the insured is unable to perform none of his occupational duties." * * *

And in the insuring clause, the policy holder is insured

"against loss of life, limb, or sight resulting directly and independently of all other causes from accidental bodily injuries received while this policy is in force." * * *

Mr. Richards testified that the Defendants-Appellants had paid a total of \$2,346.66 in benefits and that he, personally, explained the rehabilitation provisions of the Mutual of Omaha Policy. Mr. Greguhn, the Plaintiff-Respondent, indicated to Mr. Richards that he did not wish to discuss rehabilitation in view of the fact that the Industrial Commission of the State of Utah had not yet concluded their findings on his loss. (R 185) (T 138).

The jury found the issues in favor of the Plaintiff-Respondent and against the Defendants-Appellants on a general verdict, and the jury was dismissed. The Court, having previously ruled that Defendants-Appellants had repudiated or renounced

the Contract (R 50) (T 3), then determined the amount of future damages based upon Exhibit 15 by multiplying the life expectancy of a male person of Plaintiff-Respondent's age times the yearly benefits under the contracts, discounted to present value. Over the Defendants-Appellants' objection, the Court entered judgment in the sum of \$49,225.78, representing \$15,018.00 for past amounts due, up to the time of trial and \$34,207.03 for future payments. (R 195) (T 148), (R 196) (T 149)

ARGUMENT

POINT NO. I

THERE WAS NOT SUFFICIENT EVIDENCE TO SUBMIT THE CASE TO THE JURY.

In order for the Plaintiff-Respondent to recover, under the language of the policy, it was necessary that: First, he be totally disabled; and secondly, that the disability result from the accident alone, exclusive of all other causes. There was not sufficient evidence on either of these propositions to submit the case to the jury.

The applications for both policies of insurance indicated that the Plaintiff-Respondent was a brick contractor. The Application for insurance became part of the contract and therefore, the Defendants-Appellants insured the Plaintiff-Respondent as a brick contractor in the usual sense of this profession. Therefore, in order for Plaintiff-Respondent to be

entitled to payment under the Mutual of Omaha policy it is necessary that the Plaintiff-Respondent be unable to engage in any other gainful work or service for which Plaintiff-Respondent was reasonably fitted by education, training or experience as a brick contractor, and under the United Benefit Policy it means that the Plaintiff-Respondent is able to perform none of his occupational duties as a brick contractor. The Army discharge of the Plaintiff in June 1941, (Exhibit D-8), also indicates that he was, by occupation, a brick contractor. The Plaintiff-Respondent indicated that he knew of brick contractors who did not work on the wall (R 119 (T 72) and when asked if there was anything about his condition which would prevent him from figuring jobs, his answer was, "Well there are no jobs." (R 71) (T 24). In addition, there was no medical evidence to the effect that Plaintiff-Respondent could not work as a brick contractor, providing he limited his activities to sedentary work. In fact, Dr. Holbrook testified that if he limited his work to estimating and supervising, he was not permanently and totally disabled, and both Dr. Holbrook and Dr. Hess, as of the time of their examinations, found that he only had a 20% permanent loss of bodily function as a result of the spondylolisthesis lumbar disc problem and the accident. (R 144) (T 97).

The Plaintiff-Respondent told Dr. Hess (R. 166) (T. 119) that he could sit in his car and drive all day and this was the only enjoyment he gets.

Dr. Tedrow testified that there was no reason, from a psychiatric standpoint why the Plaintiff-Respondent could not continue engaging in his work as a bricklayer and a brick contractor (R. 159) (T. 112).

The inference from the testimony is that the Plaintiff-Respondent did not wish to work. In fact he had not worked from the date of the fall. He had pursued benefits under the policies with the Defendants-Appellants companies. He had pursued benefits under Social Security and Workman's Compensation. When the rehabilitation provisions of the contract were discussed with him, by Mr. Richards, he indicated that he did not wish to pursue the rehabilitation because the Industrial Commission of the State of Utah had not made their findings in his case, (R. 185) (T. 138), presumably because he felt his case would be prejudiced if he went back to work.

His medical discharge, his bizarre symptoms, as testified to by Dr. Holbrook, indicating an absence of atrophy or sign of nerve damage (R. 142) (T. 95) together with his statements of suspicion that his physician, Dr. Lamb, had been influenced against him by the insurance companies, and his refusal to diet or strengthen his belly muscles, indicated that he did not wish to cooperate in going back to work. Indeed, his statement to Dr. Tedrow (R. 158) (T. 111) "Why should I diet? They would then say I have some kind of sickness. They are trying to pull every-

thing under the sun," indicates his lack of desire to cooperate and is indicative of his attitude. This was born out by his own doctor, Dr. Lamb, who stated that (R. 108 (T. 61) many of the Plaintiff-Respondent's problems are subjective and not clinically diagnosed.

The review of the extent of his activities by Mr. William A. Morton who had him under surveillance, indicated that Plaintiff-Respondent carried on a substantially normal range of activities and he appeared to be able to do substantially all that he wished to do. (R. 174) (T. 127), (R. 175) (T. 128), (R. 176) (T. 129), (R. 177) (T. 130), (R. 178) (T. 131).

Plaintiff-Respondent's own physician, Dr. Lamb, testified that the spondylolisthesis and degenerative disc disease was an independent agency already existing in the back at the time of the accident. (R. 108) (T. 61). He further testified (R. 109)(T. 62) that because of the pre-existing condition, the injured back was a favorable spot, cooperating in parallel with the accident to cause him the problems which he has had since the accident, and that if this accident hadn't triggered the problem, very probably some other occurrence could have produced the same result (R. 110) (T. 63).

Dr. Hess testified that in terms of percent, that it was his opinion, (R. 171) (T. 124), that 80 to 90% of the 20% of Mr. Greguhn's loss of bodily function would be pre-existent. Both of these conditions were

neither inactive, quiescent, nor dormant. They were progressive and getting worse. Dr. Hess found the spondylolisthesis to be grade 1. (R. 169) (T. 122).

Dr. Holbrook testified that as of the date of his examination, the Plaintiff-Respondent exhibited about 75% of what he would consider normal motion for a man of the Plaintiff-Respondent's age and body build. (R. 146) (T. 99).

Plaintiff-Respondent's own physician testified that the spondylolisthesis and degenerative disc disease was an independent agency already existing in the back at the time of the accident and caused the problems for which the Plaintiff-Respondent sought Dr. Lamb's treatment. (R. 108)(T. 61).

Dr. Lamb also stated: "Question: But that because of these pre-existing conditions, the injured back was a favorable spot, cooperating in parallel with the accident to cause him the problems which he has had since the accident?" Answer: "Yes." (R. 109) (T. 62).

The Plaintiff-Respondent denied that he had been previously bothered by his back condition. This statement should be considered in light of other statements he made. For example: He said that he never consulted any doctors for any condition or diseases and that he enjoyed wonderful health and he had no problems of any kind he knew about (R. 54) (T. 7). He forgot to tell about having a broken nose as a child, being in Letterman General Hospital and being

discharged from the hospital and from the United States Army after only two months in the service, and denied being hospitalized for chronic or peptic gastritis and/or ulcer (R. 112) (T. 65), though the hospital records were admitted into evidence (Exhibit P.7).

The final diagnosis sheet, in connection with the surgery, performed the following month after the accident, clearly states what Plaintiff-Respondent's health problem was:

1. Degenerative disc disease lumbar

2. Spondylolisthesis

and makes no reference in the diagnosis to the accident.

The degree to which a previous condition is symptomatic prior to an accidental injury does not determine from a legal sense or medical sense whether it was in fact present. To say that if the previous existing conditions were not bothersome, they were not legally there, no matter how fatal or debilitating medically, is grossly unfair to the insurer. For example: An insured's body may be full of unknown and asymptomatic cancerous growths of terminal consequences, and death may follow soon after a slight injury, but the immutable fact is that the cause in fact of the death was the cancer, or the cancer and the injury, and not the injury, exclusive of all other causes.

A summary of the Plaintiff-Respondent's health problems include the broken nose as a child, psycho-

logical problems, spondylolisthesis, degenerative disc disease, arthritic changes and gastritis and/or ulcers and the loss of one eye. Unfortunate as they are, the long train of consequences of all of these health problems should not end up legally as a result of a fall of a short distance involving traction type injury when he caught himself by his arms. To permit the jury under the Court's instructions to find that this injury is the legal cause of his present condition, and that this condition is in effect totally and permanently disabling from gainful employment as a brick contractor, is error.

The Court, in overruling Defendants-Appellants' Motion for a Directed Verdict, at the end of the evidence, stated, (R. 188) (T. 141) that he was considering this case to be bound by the rule of *Lee vs. New York Life Insurance Company*, 95 U. 445, 82 P.2d 178, rather than the language of *Browning vs. Equitable Life Assurance Society of the United States*, 94 U. 532, 72 P.2nd 1060. The Court, in the *Lee* case, at page 179, states the rule as follows:

"Where an accidental injury sets in motion or starts activity of a latent or dormant disease and such disease contributes to the death after having been so precipitated by the accident, the disease is not a direct or indirect cause of the death, nor a contributing cause within the meaning of the terms of the policy, but the accident which started the mischief, and precipitated the condition resulting in death is the sole cause of death."

The significant language is, "sets in motion, or

starts." It is Defendants-Appellants' contention in the instant case that Plaintiff-Respondent's fall neither started nor set in motion the spondylolisthesis or degenerative disc disease.

Justice Wolfe in his dissent in the Browning case, distinguishes the Lee case from the Browning case, by stating that in the Browning case, the infection or toxemia was operating *in parallel*, rather than *in series*, as in the Lee case. As Justice Wolfe notes, if this is not a valid difference, the only case which apparently would not be covered by the policy would be where the course of the chain leading from the injury and the course of the chain leading from the other cause, be it disease, toxemia, or what not, were shown to be entirely separated, without any interaction, one with the other. If this is so, the language in the policy "independent of all other causes" has been judicially read completely out of the policy.

Assuming, without admitting that as Mr. Greguhn stated, the back condition was asymptomatic prior to the injury, this cannot be controlling. The actual efficient cause was that the lumbar disc disease and spondylolisthesis were two causes which were grinding away, doing their mischief, had been doing so for many years prior to the accident, and continued to do so afterwards. Dr. Lamb noted the disc changes even in Mr. Greguhn's neck. (R. 97) (T. 50). The grinding was inexorable. It was irreversible. It was continuous. It was in parallel. (R. 108) (T 61).

The stage was set. The actors were already present. At most, all the accident did was raise the curtain.

The spondylolisthesis and degenerative disc disease were not produced, nor set in motion by the injury.

Notice how similarly the language of Dr. Lamb (R. 108) (T. 61) was to the language of Justice Wolfe concurring in *Lee vs. New York Life, supra*, explaining that the difference is whether the pre-existing condition and accident are hooked together in parallel or in series:

“The causes are linked together in series, —the accident causing the injury, the injury causing the diffusion of an infection, and the infection causing the appendicitis and the appendicitis causing death. This is not the Browning Case, where the course of the injury was one thing which simply set the stage, whilst the toxemia, an independent, crusading agency, already there, not produced nor set in motion by the injury, but simply using the injured part as a favorable spot for its operation, therefore operating not in series but in parallel, was the efficient, paramount and independent cause of the prolonged inability.”

The principles of law enunciated in the previous Utah cases are followed in the most recent case, *Thompson vs. American Casualty Co.*, 439 P.2d 276, 20 U.2d 418. The primary issue in this case again was whether or not the Plaintiff-Respondent's disability was a result of accidental means, as provided

under the terms of the insurance contract. The trial court in granting the summary judgment held that it was not. The Supreme Court remanded the matter for trial stating that a question of fact had been raised which foreclosed granting of summary judgment. The Court also said:

“A second issue, to be determined by the trier of the facts, is whether Plaintiff’s physical disability resulted from accidental means directly and independently of all other causes. As previously observed, Plaintiff had certain infirmities and disabilities prior to his sustaining his state of alleged complete physical disability. It is Defendant’s contention that even if Plaintiff’s disability were the result of accidental means, he was suffering from prior disabilities which cooperated with the alleged accident; and, therefore, the accident cannot be considered the sole cause or a cause independent of all other causes of his disability.” Citing *White vs. National Postal Transport Association*, 1 U.2nd 5, 261 P.2nd 924; *Lee vs. New York Life Insurance Co.*, 95 U. 445, 82 P.2nd 178; *Tucker vs. New York Life Insurance Co.*, 107 U. 478, 155 P.2nd 173.”

The case at bar is more similar to *Tucker vs. New York Life*, 155 P. 2nd 173, 107 U. 478. In this case the diseased condition had so weakened the aorta of the Plaintiff, decedent, that it could not stand the increased blood pressure occasioned by the insured’s fall and the resulting dissection of the aorta, causing the insured’s death. It was held that the insured’s death did not result from bodily injury effected solely

through external, violent and independent cause within the double indemnity provision of a life policy.

The Court, in the Tucker case, *supra*, reiterated the distinctions as follows, at page 175 :

“The courts, in interpreting the clause in insurance policies like that here involved, to-wit: *An injury effected through violent, external, and accidental means, entirely independent of all other causes*, have made three distinctions or classes of cases: (1) When an accident causes a diseased condition which, together with the accident, results in the injury or death complained of, the accident alone is to be considered as the cause of the injury or death.” Citing cases. “(2) When at the time of the accident, the insured was suffering from some disease, but the disease had no causal connection with the injury or death resulting from the accident, the accident is to be considered the sole cause.”

The appellants in this case contend that it falls within the third category :

“(3) When at the time of the accident, *there was an existing disease which, cooperating with the accident, resulted in the injury or death*, the accident cannot be considered as the sole cause, or as the cause independent of all other causes.” Citing cases.

The Defendants-Appellants contend that under the facts of this case, no reasonable minds could differ on the point that there was existing diseases which cooperated with the accident and therefore cannot be considered as the sole cause or as a cause independent of all other causes.

POINT NO. II

THE INSTRUCTIONS OF THE COURT
DID NOT CORRECTLY STATE THE
LAW.

The Court did not adequately instruct upon the Plaintiff-Respondent's theory of the case.

The Instructions of the Court, in effect, re-wrote the contract.

The Instructions of the Court emphasized what Plaintiff-Respondent had done in terms of employment, more than what he can do.

The Court failed to instruct that it would be necessary to find both that the Plaintiff-Respondent was totally and permanently disabled and from the accident alone, *independent of other causes*, as set forth in Requested Instruction No. 1.

The Court failed to properly instruct upon Defendant-Appellants' theory of the case as set forth in the Defendants-Appellants' Requested Instructions.

The Court refused to give the Defendants-Appellants' proposed Instructions Nos. 1, 2, 3, 4, 7 and 8.

The Instructions did not cover all of the issues.

In Requested Instruction No. 3, Defendants-Appellants requested the Court to instruct that in accordance with the provisions of the terms of both policies, that benefits are not payable for mental disease or disorder. There was evidence in the record

that Plaintiff-Respondent was discharged from the Army because of mental disorders, and Dr. Lamb testified that many of his problems were subjective (R. 108) (T. 61) and Dr. Holbrook testified that the absence of atrophy or sign of nerve damage was medically a bizarre symptom. (R. 142) (T. 95).

The jury, from this evidence could, under proper instructions, make an inference that Mr. Greguhn was totally disabled because of attitude, rather than physical condition. Since mental disease or disorders are not covered under either policy, Mr. Greguhn's disability for this reason would be excluded from coverage. To be entitled to benefits under the policy, Mr. Greguhn would have to be totally disabled from accident, not from a combination of accident and/or mental disorder and/or spondylolisthesis and/or degenerative disease and/or arthritic changes. Defendants-Appellants were entitled to have the jury instructed upon the issue of mental disease or disorder and failure to do so was prejudicial.

The Court's Instruction No. 12 was an attempt to define "latent" or "dormant." The Court said:

"Latent and dormant, as used in these instructions, mean powers or qualities that have not yet come into sight or into action, but may, and suggest inactivity."

The jury could not properly, under this Instruction, from the evidence, find that Mr. Greguhn's condition of spondylolisthesis and lumbar disc disease were

latent and dormant. The X-Rays taken on September 22, 1964 showed that the pre-existing conditions had come into sight and were active and were not dormant. Dr. Lamb, Dr. Holbrook and Dr. Hess who saw the X-Rays all concurred.

Instructions Nos. 14, 15 and 17 are defective and prejudicial. Instruction No. 14 states:

“Total and permanent disability in this case means that the Plaintiff has a condition which disallows him from following his occupation and from doing substantially all the acts that are necessarily and usually performed by one who follows that occupation.”

This Instruction is defective because it is objective in nature. Instructions 15 and 17 apply the same standard and are defective for the same reason. They attempt to instruct on what others do, rather than placing the emphasis upon that which Mr. Greguhn can do. They are further defective because they depart from the language of the policies. The language of the Mutual of Omaha policy is subjective in nature and states under “Total Loss of Time”:

“It also means that period of time during which you are unable to engage in any other gainful work or service for which *you* are reasonably fitted by education, training or experience.”

The same defect applies to Instructions 14, 15 and 17. The Rule, as stated in Instructions 14, 15 and 17 is contrary to public policy, because it encourages in-

sureds to not try to become gainfully employed. This is the reason Mr. Greguhn refused rehabilitation for fear it would prejudice his Industrial Claim. It places a premium on disability rather than on ability. The test should be as stated in the Contract, "gainful work or service for which *you* are reasonably fitted by education, training or experience."

In defining the language in the Mutual of Omaha Policy and Instructions 16 and 17, the Court expands and redefines the language in the Contract, and in effect makes a new contract for the Parties. For the courts to continue to make new contracts for the insurance company, works a hardship on those seeking insurance. In order to compensate for the expanded meaning of the policies, premiums must be computed with the increased liability in mind, and, as Justice Wolfe points out in *Browning vs. Equitable Life Assurance Society, supra*, at page 1071:

"and makes it more difficult for persons of ordinary means who need to be protected against the hazards of accidents, rather than sickness, from obtaining such protection. Moreover, it makes it more difficult or impossible for known sick people to obtain accident policies."

Further, Justice Wolfe noted, at page 1072:

"In this case the existing toxemia attacked an impaired part. It existed independently of the injury. The causes are hooked up in parallel and not in series. The insurer contracted to pay for disabilities solely caused by

an accident and not a disability caused by the localization of toxemia in the body not caused by the accident but which beset the part because the accident has presented the opportunity."

The result reached in this case is that the insurer is required to pay an indemnity for the possession of a spondylolisthesis and a diseased disc condition, rather than an indemnity for disability totally accident caused.

POINT NO. III

THE COURT ERRED IN GRANTING AN AWARD FOR FUTURE DISABILITY UNDER THE DOCTRINE OF ANTICIPATORY BREACH.

In the pleadings, and all through the trial and now, both Defendants-Appellants admitted the validity and binding effect of both policies of insurance.

Both of the policies in the instant case, required the submitting of continuing proofs of loss. To hold that an anticipatory breach of an insurance contract, with an absolute and unequivocal renunciation of liability under it, permits an action upon the entire contract as a matter of anticipatory breach and makes a new contract for the Parties. In the case of *Erreca* vs. ~~ps.~~ *Western States Life Insurance Company, Cal.*, 121 P.2nd 689, the Court stated:

"In a literal sense no one knows whether disability is permanent until the death of the insured, and a disability which at the outset appears to be of lasting and indefinite dura-

tion may be in fact otherwise. Accordingly, in many cases it was held that the insured's probable physical recovery from a totally disabling illness defeated his claim for total and permanent disability benefits."

In the case of *Colovos vs. Home Life Insurance Co. of New York*, 83 U. 401, 28 P.2nd 607, the Court stated the rule correctly :

"As a general rule of law, where an insurance contract is involved, you cannot include in the judgments sums not yet payable under the contract, and the court should have instructed the jury that recovery is limited up to the time of the filing of the amended complaint."

The *Colovos* case, *supra*, is quoted in the annotation which appears at 99 ALR 171, with those cases holding to the view that the right of action is limited to accrued installments, together with the view that action lies upon the entire contract are annotated therein.

It would seem that in the instant cast, the rule set forth in the *Colovos* case is applicable. In the *Colovos* case, *supra*, the Court said that the error in not instructing the jury that the recovery was limited up to the time of the filing of the amended complaint, was not reversible error because the Plaintiff in his complaint and amended complaint asked for recovery only up to the time of filing of the complaint.

A number of Western States seem to follow the rule set forth in the *Colovos* case, *supra* :

Trompeter vs. United Insurance Company,
Wash., 1957, 316 P.2nd 455.

Univ. Life and Accident Insurance Company
vs. Saunders, Texas, 102 SW 2nd 405.

Lane vs. Brotherhood of Locomotive Engine-
men and Firemen, Oregon, 1937, 73 P.2nd
1396.

Smith vs. Mutual Benefit Health and Accident
Association, Oklahoma, 1933, 10 F.S. 110.

Mid-continent Life Insurance Company vs.
Walker, 260 P. 1109, California

Cobb vs. Pacific Mutual Life Insurance Co., 51
P.2nd 84

Erreca vs. Western States Life Insurance Co.,
121 P.2nd 689.

The Trial Court in this case, ruled that there had been a repudiation or renunciation of the contract provisions and ruled that testimony relative to a lump sum payment for future benefits would be admissible (R. 50) (T. 3). The Court so ruled, despite the fact that in Defendants-Appellants' Answers, (T3a), the Defendant-Appellant, United Life Insurance Company stated:

“Answering paragraph 3 of said Complaint, Defendant admits the issuance of the insurance policy referred to in said Complaint, and alleges affirmatively that the only payments for which the Defendant did become obligated would be in accordance with the terms and provisions of the policy.”

In the Answer of the Mutual of Omaha Insurance Company, that Defendant-Appellant stated:

“Answering paragraph 3 of said Complaint, Defendant admits that the policy numbered 76DLSE 385336-64M issued and alleges affirmatively that Defendant agreed to pay the benefits in accordance with the provisions of the policy.”

During the trial, both Defendants-Appellants admitted that they were bound under the policy and that both Defendants-Appellants agreed to pay benefits in accordance with the provisions of the policy, and the Defendants-Appellants still admit responsibility under the policies.

In *New York Life Insurance Company vs. Viglas*, 297 U.S. 672, 56 S. Ct. 615, 80 L. Ed. 971, it was held that refusal in good faith of an insurer which had contracted to pay benefits and waive premiums on a life insurance policy during the total disability of the insured, to pay further benefits on the ground that the insured had ceased to be totally disabled, such refusal to continue the policy in force, unless the premiums were paid, did not constitute a repudiation of the policy, or constitute such a breach of its provisions as to make additional and future benefits a measure of recovery and permit the recovery of damages in excess of benefits in default at the time of the action. In order for the doctrine of anticipatory breach to apply, there must be a repudiation or renunciation, or prevention of performance.

See 17 Am. Jur. 2nd, Secs. 449, 450, 451, under Contracts

See Restatement of Contracts, Sec. 318

There has been no breach of contract policy by the Defendants-Appellants.

In 44 Am. Jur. 2nd, Section 1598, page 486, it states:

“A substantial number of authorities have adopted the view that in case of the breach of contract by an insurer, to pay periodic indemnity of benefits, the right of action is limited to the installments which have accrued to the date of the action, or if the complaint is amended to include the installments accruing during the pendency of the action, to those which have accrued prior to the judgment and that the judgment cannot be rendered in favor of the insured for the installments not accrued at such time.”

Among the cases cited in the footnote are:

Erreca vs. Western State Life, 212 P.2nd 689,
141 ALR 18

Fanning vs. Guardian Life Insurance Co., 59
Wash. 2nd 101, 366 P.2nd 207

In the same section of 44 Am. Jur. 2nd, at page 487, it states:

“It has been held, however, that an insurer’s refusal to continue total disability benefits upon the ground that the insured was not in fact totally disabled, does not amount to such a repudiation and breach as to make conditional and future benefits the measure of recovery. It has also been held that an insurer’s refusal to pay a claim for disability benefits under a policy providing for monthly benefit payments for total and permanent disability, but providing for termination of benefit payments if the

insured ceased to be disabled during that period, on the ground that medical investigation showed that the insured was not disabled within the meaning of the policy, does not constitute a repudiation of the policy so as to entitle the insured, upon establishing disability within the meaning of the policy, to recover judgment for unmatured instalments upon the ground of anticipatory breach of the contract."

As to the use of the life expectancy of the insured, the same text states:

"On the other hand, if an action to recover future instalments may not be maintained, the expectancy of life of the insured does not enter into the question of the insurer's liability for the instalments which have accrued, and if there has been no anticipatory breach by the insurer, the courts do not favor adopting as the measure of damages the expectancy of life of the insured."

POINT NO. IV.

THE COURT ERRED IN TAKING AWAY FROM THE JURY THE DETERMINATION OF THE LIFE EXPECTANCY OF THE PLAINTIFF-RESPONDENT.

Assuming, without admitting that the trial court did not err in granting an award for future disability, based upon the entire contract and the life expectancy discounted to the present values, the finding of fact as to how long Mr. Greguhn would have lived, is a finding of fact for the jury to make. In jury trials, the jury is sole trier of the fact. They were entitled

to determine whether the insured, with all of his health problems would have lived the same years, less or more than the mortality tables for a man of Mr. Greguhn's sex and age.

In this case, the trial court merely made a mathematical computation based upon the life expectancy of a person of Mr. Greguhn's age and sex.

CONCLUSION

The Defendants-Appellants respectfully urge this Court to reverse the Order of the trial court to the effect that there was sufficient evidence to submit this case to the jury; and that this court direct that judgment be entered for the Defendants-Appellants.

In the event that this Court holds that the trial court did not err in submitting the case to the jury, that a new trial be granted because of error in law in the instructions given by the trial court, and because of the failure of the trial court to submit to the jury for a finding on the issue of fact of the Plaintiff-Respondent's life expectancy.

Should this court find that there was sufficient evidence to submit the case to the jury and that there was no error in law, the Defendants-Appellants urge this court to reverse the trial court as to that portion of the judgment entered for future damages and require that the Plaintiff-Respondent receive monthly

benefits upon submitting the proper proofs of medical disability as called for by the policies.

Respectfully submitted,

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Appellants.*