A Selection of

Jones Act Cases

Handled by The Young Firm

Real Cases, Real People.

Actual court opinions addressing Jones Act and maritime laws that could benefit your situation.

THE YOUNG FIRM

A LAW FIRM FOCUSED ON MARITIME LAW

TABLE OF CONTENTS

(1) Michael Rayborn v. Diamond Offshore –

Exhibit 1-Mr. Raybom sustained injuries to his left eye when a hose burst, spraying hydraulic fluid into his eye when he was working on an oil rig for Diamond Offshore. Although there was no medical problem diagnosed with Mr. Raybom's left eye, he continued to experience blurred vision and light sensitivity in his left eye. It was ultimately determined that this physical problem with the vision in his left eye was due to the severe emotional stress that he suffered during the accident. A jury ultimately awarded him $1,000,000.00 which was reduced by the appellate court. The decision from the appellate court is attached and you can read the appellate court's decision.

(2) Charles Norris v. Bertuzzi Contracting –

Exhibit 2-Mr. Norris suffered an injury to his ankle when he was working on a crane barge and an oxygen tank tipped over, striking his ankle. Bertuzzi refused to offer more than $200,000.00 as settlement prior to trial. At trial the jury awarded more than $2,000,000.00 in damages which was reduced for Mr. Norris' assigned comparative fault. Ultimately, the trial judge lowered the Award finding that it had been excessive. The attached decision is from the trial judge when he reviewed the jury's Award.

(3) James Lindsey v. Diamond Offshore –

Exhibit 3-The attached decision from James Lindsey v. Diamond Offshore is an Order from the Magistrate Judge compelling Diamond Offshore to produce various documents in the case. Diamond Offshore refused to produce the Incident Investigation Report which contained important information regarding the accident and why it occurred. We were successful in filing a motion to compel and having the court order Diamond to produce the Incident Investigation Report as well as other critical documents in the case. The decision is a typical example of how companies will often refuse to produce critical documents which can greatly assist in proving liability or fault on the part of the company.

(4) Jury Form From Federal Court –

Exhibit 4-The attached is an actual jury form completed by the jury at the conclusion of the case. This document is typical of the instructions and jury form given to a federal court jury in regard to a Jones Act and general maritime law claim. It is the jury's responsibility to deliberate and complete the jury form at the conclusion of the case.

(5) Larry Naquin v. Elevating Boats, LLC (EBI) –

Exhibit 5-Mr. Naquin was awarded $2,500,000 by a Federal jury in New Orleans after suffering severe injuries to his heel when a dockside crane he was working in collapsed off of its pedestal. Exhibit 1 is the trial judge’s denial of various motions filed by EBI seeking to reverse or lower the jury’s verdict. It is a well written opinion that explains (1) how a maintenance worker assigned to numerous different vessels in a fleet, and not one specific vessel, can be a seaman, (2) how an injured seaman may collect damages even if his injury occurs on land, and (3) the latitude that a jury has in deciding the amount of damages to award in a case.

C

Court of Appeal of Louisiana,
Fourth Circuit.
Michael S. RAYBORN
v.
DIAMOND OFFSHORE COMPANY and Walter Oil & Gas Corporation

No. 2002-CA-0084.
Nov. 13, 2002.

Worker who suffered eye injury in accident on offshore oil rig brought negligence action against rig operator and holder of lease. After defendants admitted liability, the Civil District Court, Orleans Parish, No. 99-8462, Division "G," Robin M. Giarrusso, J., entered judgment on jury verdict awarding $829,000 in general damages, $46,000 in past lost wages, and $125,000 in future lost earnings. Defendants appealed. The Court of Appeal, Love, J., held that: (1) general damages of $50,000 for conversion disorder and $250,000 for eye injury were warranted; (2) evidence supported $35,453 award for past lost wages; and (3) $125,000 award for future lost earnings was reasonable.

Affirmed as amended.

West Headnotes

[1] Appeal and Error 30 1004(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(1) k. In General. Most Cited Cases

The standard of review for damages awards requires a showing that the trier of fact abused the great discretion accorded in awarding damages.

[2] Appeal and Error 30 1004(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(5) k. Mistake, Passion or Prejudice; Shocking Conscience or Sense of Justice. Most Cited Cases

To warrant reversal, a damages award must be so high or so low in proportion to the injury that it shocks the conscience.

[3] Appeal and Error 30 1002

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1002 k. On Conflicting Evidence. Most Cited Cases

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.

[4] Appeal and Error 30 999(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k999 Conclusiveness in General
30k999(1) k. In General. Most Cited Cases

When findings are based on determinations regarding the credibility of witnesses, the manifest-error standard of review requires that great deference be afforded to the trier of fact's findings.

[5] Damages 115 127.15

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.12 Head and Neck Injuries in General; Mental Impairment
115k127.15 k. Brain Injuries in General; Mental Impairment. Most Cited Cases
(Formerly 115k130.1)

Damages 115 ⚿127.16

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.16 k. Eye Injuries and Loss of Vision. Most Cited Cases
(Formerly 115k130.1)

General damages of $50,000 for conversion disorder, and $250,000 for eye injury were warranted, rather than $829,000 awarded by jury, where oil worker suffered extreme stress from being hit in the eye with high-pressure hydraulic fluid, and continued to suffer pain and restricted field of vision.

[6] Appeal and Error 30 ⚿1151(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(C) Modification
30k1151 Modification as to Amount of Recovery
30k1151(2) k. Reducing Amount of Recovery. Most Cited Cases

After deciding that a trial court abused its discretion in awarding damages, an appellate court is constrained to lower the award to the highest point reasonable, within the discretion of the trier of fact.

[7] Damages 115 ⚿5

115 Damages
115I Nature and Grounds in General
115k5 k. General and Special Damage. Most Cited Cases

General damages do not have a common denominator, but are decided on a case-by-case basis.

[8] Damages 115 ⚿186

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k186 k. Loss of Earnings, Services, or Consortium. Most Cited Cases

Lost earnings need not be proven in every case with mathematical certainty; however, the law requires such proof as reasonably establishes the claim.

[9] Damages 115 ⚿186

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k186 k. Loss of Earnings, Services, or Consortium. Most Cited Cases

Damages for past lost earnings may be proved by the plaintiff's own testimony.

[10] Appeal and Error 30 ⚿1004(8)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(6) Particular Cases and Items
30k1004(8) k. Personal Injuries. Most Cited Cases

The Court of Appeal applies the manifest-error standard to judge the fact finder's conclusions respecting lost wages.

[11] Damages 115 ⚿127.49

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.45 Loss of Earnings
115k127.49 k. Eye Injuries and Loss of Vision. Most Cited Cases
(Formerly 115k133)

Evidence supported award of past lost wages of $35,453 to worker who suffered eye injury; expert calculations supported this amount.

[12] Damages 115 ⇦127.61

115 Damages
115VII Amount Awarded
115VII(B) Injuries to the Person
115k127.57 Impairment of Earning Capacity
115k127.61 k. Eye Injuries and Loss of Vision. Most Cited Cases
(Formerly 115k134(1))

Damages for future lost wages in the amount of $125,000 were reasonable for worker who suffered eye injury, where worker previously made $37,000 per year, but would not be able to return to work on offshore oil rig, and available work would bring eight dollars per hour.

***1053** Timothy J. Young,Robert J. Young, Jr., Young, Richaud & Myers, New Orleans, Counsel for Plaintiff/Appellee.

Nelson W. Wagar, III, Jason P. Foote, Chopin, Wagar, Cole, Richard, Reboul & Kutcher, LLP, Metairie, Counsel for Defendant/Appellant.

(Court composed of Chief Judge WILLIAM H. BYRNES III, Judge TERRI F. LOVE, Judge MAX N. TOBIAS, Jr.)

****1** LOVE, J.

This case involves an accident on a Diamond Offshore Company rig, where Michael***1054** Rayborn was hit in the face and eyes with hydraulic fluid from a hose that burst near where he was working. Michael Rayborn filed suit against Diamond Offshore Company and Walter Oil and Gas Corporation, to determine the amount of damages for the injury to his right eye. The jury awarded Michael Rayborn $829,000 in general damages, $46,000 in past lost wages, and $125,000 in future lost earnings/earning capacity. For the following reasons, we amend the judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On September 16, 1998, Michael Rayborn ("Rayborn") was employed by Diamond Offshore Company ("Diamond") as a floor hand aboard the MODU OCEAN TOWER. Rayborn was injured when a hose containing hydraulic fluid ruptured, spraying him in the face and eyes. He filed this action against the defendants, Diamond, and Walter Oil and Gas Corporation, the owner of the offshore lease.

****2** Rayborn was treated immediately after the accident by the crew medic, who rinsed his eyes with saline and then transported him to the University of Texas Hospital-Galveston Branch for additional treatment. Dr. Dawn Buckingham attended to Rayborn's eye injuries. She flushed his eyes with saline for two hours, applied an eye patch and prescribed pain medication. Rayborn returned to the rig for the final day of his hitch but rested the entire time. He was scheduled to report back to Dr. Buckingham the next day for a follow-up treatment, but instead Rayborn drove home to Mississippi. Rayborn did not follow up with a doctor during the entire two-week period that he was ashore after the accident. Rayborn continued to work his normal schedule offshore and was promoted to the position of derrick man when he returned after this incident. He continued to work fourteen-day hitches offshore until January of 1999.

Since the accident, Rayborn has seen numerous doctors regarding his right eye; however, none detected any damage to the eye that would explain Rayborn's complaints of pain, sensitivity to light, blurriness, or partial vision loss. In September 2000, Rayborn was referred to Dr. David Mielke, a psychiatrist. Dr. Mielke diagnosed Rayborn with conversion disorder, a psychological disorder where a patient believes and experiences the effects of damage to a specific body part even though there is no physical evidence of the injury. Dr. John Thompson, another psychiatrist that evaluated Rayborn's condition in January 2001, attributed Ray-

born's complaints to malingering or exaggeration.

Defendants admitted liability for the injuries Rayborn sustained due to the ruptured hose, and offered judgment to the plaintiff prior to trial. The nature and extent of Rayborn's eye injuries and the amount of his damages were the only issues at trial.

****3** A three-day jury trial was held. The jury returned a verdict in favor of Rayborn, awarding him $829,000 in general damages, $46,000 in past lost wages, and $125,000 in future loss of earnings/ earning capacity, for a total award of $1,000,000.

DISCUSSION

In its first assignment of error, Defendants argue that the jury committed manifest error by awarding Rayborn $829,000 in general damages.

The various doctors who evaluated the condition of Rayborn's eye provided, at trial, extensive testimony as to their findings.

Dr. Dawn Buckingham FN1

FN1. A portion of Dr. Dawn Buckingham's deposition was read into the record in lieu of testimony.

Dr. Dawn Buckingham was the first physician to attend Rayborn after the accident***1055** offshore on the morning of September 16, 1998. At the time Dr. Buckingham was a resident in ophthalmology at the University of Texas Hospital at Galveston. Dr. Buckingham noted that Rayborn had an elevated pH level of 8.0-8.4 in his eye, and realizing that further damage could occur, she flushed his eyes out for two hours with saline, after which his eye pH was found normal; she applied medication and an eye patch. She found his visual acuity at 20/80 that pin holed to 20/60, normal pressure, normal papillary reaction, and two areas of patching with a slight amount of corneal edema in the right eye and diffuse swelling in the left eye cornea, but the remainder of Rayborn's exam was normal. Dr. Buckingham testified to the following:

Q. In simple English, what was wrong with his eye when you saw it?

A. It was a little red, and he had a slight corneal abrasion and a little bit of swelling of his right cornea.

****4** She further testified that she felt that it was superficial damage, and found that the abrasion was not directly in Rayborn's line of slight. Dr. Buckingham found no injury to optic nerve or other part of the eye. She testified that she did not feel it was a serious injury. Dr. Buckingham requested that Rayborn return to the hospital after his hitch. Rayborn testified that he did return for the appointment but that he could not get in to see Dr. Buckingham, so he left and drove home to Mississippi with one eye. Dr. Buckingham never saw him again.

Rayborn complained to his safety supervisor, Herb Preteus, Jr., that his eye was bothering him in October of 1998. According to Preteus this was the only occasion that Rayborn made a formal complaint about his right eye while working for Diamond. Preteus made a report of Rayborn's complaints to David Ellingburgh in Diamond's claims department on October 19, 1998. Ellingburgh sent Rayborn to see Dr. Richard Wei at the Westbank Surgical Clinic.

Dr. Richard Wei

Dr. Richard Wei, an occupational medicine specialist, met with Rayborn on October 20, 1998. Dr. Wei in his examination found no physical abnormality in Rayborn's right eye. Dr. Wei found the extra-articular muscles intact, the pupils reactive to light, clear cilia and cornea, and no damage or swelling to fundus area. Nevertheless, Rayborn complained to Dr. Wei that he was experiencing a decreased field of vision in his right eye. Puzzled as to why Rayborn was complaining of visual field loss when his external components were normal, Dr. Wei referred Rayborn to Dr. Owen Leftwich.

Dr. Owen Leftwich

Dr. Owen Leftwich, a specialist in ophthalmo-

logy, also met with Rayborn on October 20, 1998. Rayborn complained again of irritation and poor vision. When ****5** Dr. Leftwich asked Rayborn to read the eye chart, Rayborn stated he was unable to see the large "E" on the board with his right eye. Dr. Leftwich then conducted a complete eye exam. He also found Rayborn's pupil response equal. In a split lamp examination, he found no abnormality in the cornea or the back of the eye. Dr. Leftwich testified Rayborn's depth perception test was abnormal but that it did not indicate a problem that would prevent Rayborn from seeing the big "E". Dr. Leftwich further testified:

> Q. Were you able to explain, at all, from a medical scientific point of view, the complaints that the patient had of not being able to see?
>
> ***1056** A. Not on an organic basis, which means a chemical or anatomical basis.

Dr. Leftwich stated, "[H]e did have some redness to the eye. And, so, I treated him with some topical anti-inflammatory drops." Dr. Leftwich elaborated that the redness he observed in Rayborn's eye was not specific, and could have been from a variety of causes. Further, he could not relate the accident in September to the redness he observed that day.

Dr. Larry Parker FN2

> FN2. Dr. Larry Parker's deposition was read into the record in lieu of testimony.

Dr. Larry Parker, a neuro-ophthalmologist evaluated Rayborn on January 26, 1999. Dr. Parker found Rayborn's cornea had healed. Rayborn's subjective visual acuity was 20/200 in his right eye and 20/20 in the left eye. Upon examination Dr. Parker found Rayborn's pupils normal and reactive, his eyes were tracking together, and found no optic nerve problems. Dr. Parker observed that Rayborn had tunneling of the visual field, indicating a functional or non-organic problem. He performed a Goldman Field test and found Rayborn showed a "bizarrely constricted field" not similar to physical problem. Dr. Parker also found that ****6** Rayborn's degree of visual field loss varied with different tests, which to him suggests a functional disorder, not related to any actual damage of the eye.

Dr. Andrew Lawton FN3

> FN3. Dr. Andrew Lawton's deposition was read into the record in lieu of testimony.

Dr. Andrew Lawton attended Rayborn on March 8, 1999. Dr. Lawton is an ophthalmologist and a specialist in neuro-ophthalmology. He found using a four-diopter vertical prism that Rayborn had visual acuity of 20/20 in his right eye. Dr. Lawton stated, "I found that when he had both eyes open and he wasn't aware of it, but was using both eyes independently, he could read 20/20 with his right eye." Dr. Lawton found Rayborn's pupils reacted normally and equally.

Dr. Howard Katz FN4

> FN4. Dr. Howard Katz's deposition was read into the record in lieu of testimony.

Dr. Howard Katz, a specialist in physical medicine and rehabilitation, saw Rayborn on May 9, 1999, for his first visit. Rayborn complained to Dr. Katz of constant headaches that were continuous for seven months, right eye matting during sleep, seeing purple spots with a yellow ring surrounding it, shadow movement, photophobia, and a lack of vision in his right eye.

Dr. Katz found Rayborn's right eye did not blink on confrontation, but found "pupils equally reactive to light and accommodation." He also performed an MRI that was normal. Dr. Katz then gave Rayborn an injection of Imitrex for his headaches. On September 21, 1999, Rayborn had a second visit with Dr. Katz. He was still complaining of headaches but said they were better. Dr. Katz assessed Rayborn "did have right eye problems, that it appeared to be functional in nature, that he has post traumatic headaches and chronic daily

headaches."

****7** *Dr. David Mielke*

Dr. Mielke, a psychiatrist, had three sessions with Rayborn, each lasting an hour, in September, October, and December of 2000. Dr. Mielke ordered various psychological tests, including a MMPI, to be performed on Rayborn. The psychologist administering the tests, Dr. Griffen, found Rayborn suffered from a conversion or adjustment disorder. Dr. Mielke took these results and concluded Rayborn was not malingering. He asserted the psychological stressor that caused a conversion ***1057** reaction in Rayborn was getting sprayed in the face, pain, not being able to see, the boat ride to the hospital in Galveston, and hearing his colleagues talking about his possible third degree burns while he was incapacitated. Dr. Mielke said for most people conversion reaction is short lived, and after two years it is considered severe, and may never go away.

Dr. John Thompson

Dr. John Thompson, a psychiatrist who specializes in forensic psychology and addiction psychology evaluated Rayborn in January of 2001. He described somatic disorders where the "patient manifests physical signs and symptoms, but the medical evidence for those physical sign and symptoms and limited or absent." Malingering, Dr. Thompson describes, as when a patient in essence makes symptoms up. Dr. Thompson's opinion was that Rayborn's situation was "more consistent with exaggerating the symptoms, or making the symptoms up, than it would be with an actual conversion disorder, where he really didn't understand why he was having these symptoms or what was the driving force behind them."

[1][2][3][4] The standard of review for damage awards requires a showing that the trier of fact abused the great discretion accorded in awarding damages. *Sommer v. State of Louisiana, Dep't of Transp. and Dev.*, 97-1929, p. 17 (La.App. 4 Cir. 3/29/00) 758 ****8** So.2d 923, 934-935. In effect the award must be so high or so low in proportion to the injury that it "shocks the conscience." *Id.* (citing *Moore v. Healthcare Elmwood, Inc.* 582 So.2d 871 (La.App. 5th Cir.1991)). Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). Moreover, when findings are based on determinations regarding the credibility of witnesses, the manifest error standard requires that great deference be afforded to the trier of fact's findings. *Id.*

[5] The jury was presented with evidence from various doctors about the condition of Rayborn's eye, two psychiatrists who differed in their opinions as to whether Rayborn's complaints about his eye had a psychological basis, and Rayborn himself. The jury, hearing the testimony of Dr. Mielke and Dr. Thompson reasonably made the credibility determination that Dr. Mielke's opinion was more accurate with regard to Rayborn. We cannot, therefore, find that the jury committed manifest error in finding that Rayborn suffered an injury.

We find the general damages award is so high in proportion to the injury that it shocks the conscience. There is no evidence that Rayborn suffered permanent injury to his eye, even crediting the jury's apparent determination that he suffers from conversion disorder, to justify an award of $829,000 in general damages.

[6][7] After deciding that the trial court abused its discretion, this Court is constrained to lowering the award to the highest point reasonable, within the discretion of the trier of fact. *See Clement v. Griffin*, 91-1664, p. 42 (La.App. 4 Cir. 3/3/94), 634 So.2d 412, 442. General damages do not have a common denominator, but are decided on a case-by-case basis. *Coscino v. Wolfley*, 96-0702 (La.App. 4 Cir. 6/4/97), 696 So.2d 257. Therefore, for the purposes of this case ****9** only, we must construe the highest award reasonable. Considering the facts and circumstances particular to Rayborn, we conclude that an award of $50,000 in general damages is the highest amount the jury could have reas-

onably awarded Rayborn for the conversion disorder. We further conclude that $250,000 in general damages is the highest amount the jury could have reasonably awarded Rayborn for the initial injury to ***1058** his eyes, taking into account the extreme stress he experienced as a result of being hit in the eye with high pressure hydraulic fluid and the fear associated with the possibility of permanent blindness. Therefore Rayborn is entitled to a total general damages award of $300,000.

In its second and third assignments of error, Defendants argue that the jury committed manifest error by awarding Rayborn $125,000 in future loss of earnings/earning capacity and $46,000 in past lost wages.

[8][9][10] Lost earnings need not be proven in every case with mathematical certainty; however, the law requires such proof as reasonably establishes the claim. *Ploger v. Reese*, 2001-2243, p. 9 (La.App. 4 Cir. 5/22/02), 819 So.2d 1114, 1120. This may consist of the plaintiff's own testimony. *Id.* This Court consistently applies the manifest error standard to judge the fact finder's conclusions respecting lost wages. *Id.* at p. 12, 819 So.2d at 1121.

Nathaniel Fentress [FN5], a vocational rehabilitation counselor, testified that after reviewing Rayborn's various medical records in his opinion Rayborn should not continue to work offshore. He further testified that given Rayborn's educational level, combined with his condition, he would be extremely limited in his employment options. Nathaniel Fentress was the only vocational rehabilitation counselor to testify at trial.

FN5. Nathaniel Fentress's video deposition was presented at trial.

****10** Dr. George Randolph Rice, a professor of economics at LSU, made an calculation of Rayborn's projected past and future lost earnings and benefits based on Rayborn's pre-accident wages of approximately $37,000 per year, and Rayborn's testimony that he could only get employment paying $8 per hour, assuming that Rayborn could not return to work offshore. He estimated Rayborn lost $35,453 in past earnings and would sustain $250,063 in future lost earnings.

[11] Our review of the record reveals no evidence to support the jury's award of $46,000 to Rayborn for past-lost wages. We find that the jury committed manifest error in its determination. Our review of the record reveals the evidence supports Dr. George Rice's estimation that Rayborn lost $35,453. Therefore we reduce the jury's award of $46,000 for past-lost wages to $35,453.

[12] Given the medical evidence presented at trial, and the uncontroverted testimony of Nathaniel Fentress and Dr. Rice, we find the jury's conclusions on Rayborn's future lost earnings/earning capacity were reasonable. The jury could have reasonably found that the injury to Rayborn's eye and subsequent conversion disorder would prevent him from working offshore again, and as such he would never be able to earn again what he did while working offshore. We find, therefore, the jury did not commit manifest error in awarding Rayborn $125,000 in future lost earnings/earning capacity.

CONCLUSION

We find that the jury was unreasonable in its award of general damages. We award Rayborn $300,000 in general damages, and affirm the jury's award of ****11** $125,000 for future loss of earnings/earning capacity and reduce the jury award for past lost wages to $35,453, for a total award of $460,453.

AFFIRMED AS AMENDED.

La.App. 4 Cir.,2002.
Rayborn v. Diamond Offshore Co.
832 So.2d 1052, 2002-0084 (La.App. 4 Cir. 11/13/02)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2006 WL 4571327 (E.D.La.)
(Cite as: 2006 WL 4571327 (E.D.La.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.
Charles Steven NORRIS
v.
BERTUCCI CONTRACTING CORP.

No. Civ.A. 05-0795.
July 31, 2006.

Timothy J. Young, Nolte H. Derussy, Robert J. Young, Jr., The Young Firm, New Orleans, LA, for Charles Steven Norris.

Randolph J. Waits, Louis G. Spencer, Emmett, Cobb, Waits & Henning, New Orleans, LA, for Bertucci Contracting Corp.

ORDER AND REASONS

DUVAL, J.

***1** Before the Court is a Motion for New Trial or, Alternatively, to Alter or Amend Judgment (Doc. 62) filed by Bertucci Contracting Corp. ("Bertucci"). Having reviewed the pleadings, memoranda, exhibits and the relevant law, the Court finds some merit in the motion.

Whether circumstances justify the granting of a new trial is a decision left to the sound discretion of the trial judge. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996). In this instance, the Court is of the opinion that the interest of justice would be served by granting a remittur, instead of a new trial, with the condition that if the remittur is not accepted, a new trial is granted.

Standard Under Rule 59 of the Federal Rules of Civil Procedure

A trial court has discretion to grant a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. Although Rule 59 does not specify the grounds for new trial, case law demonstrates that a new trial may be granted if the district court finds that the size of the verdict is against the weight of the evidence, the damages awarded are excessive or inadequate, or the trial was unfair or marred by prejudicial error. *Dunn v. Consolidated Rail Corp..*, 890 F.Supp. 1262, 1287 (M.D.La.1995), citing Wright & Miller, Federal Practice and Procedure, § 2807 (1973); *Scott v. Monsanto Company*, 868 F.2d 786, 789 (5th Cir.1989). In making its determination, the lodestar is whether the verdict is against the great weight of the evidence or would result in a miscarriage of justice.

The defendant has moved for a new trial solely on the issue of damages on the basis that the jury verdict is excessive and against the weight of the evidence. The jury made the following awards:

Past, present and future physical pain and suffering	$550,000.00
Past, present and future mental pain and suffering	$ 75,000.00
Future medical expenses	$100,000.00
Past loss of wages and fringe benefits	$ 60,000.00
Future loss of wages and fringe benefits	$1,600,000.00
Total	$2,385,000.00

Remittitur

The proper standard to review the quantum awarded is set forth in *Brunnemann v. Terra International, Inc.*, 975 F.2d 175, 178 (5th Cir.1992). The court stated:

In determining whether a new trial or remittitur is the

> appropriate remedy, this Circuit has held that when a jury verdict results from passion or prejudice, a new trial, not remittitur is the proper remedy.... Damage awards which are merely excessive or so large as to appear contrary to right reason, however are subject to remittitur, not a new trial....

Id. If the Court finds that a remittitur is appropriate, then the Court should decide the amount of the remittitur in accordance with the 'maximum recovery rule'-which mandates that the jury's verdict be "reduced to the maximum amount the jury could properly have awarded." *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1428 (5th Cir.1992).

***2** The Court listened carefully to the evidence, observed plaintiff during the entire trial, carefully listened to the testimony of plaintiff as well as all of the other witnesses, including the physicians and economists. Plaintiff is an intelligent young man who was employed at the time of the trial earning $12 per hour. The Court is of the opinion that the weight of the evidence is that he is capable of earning substantially more than that amount with appropriate training performing a sedentary job. The Court will thus take up each category of award seriatim.

Past, present and future physical pain and suffering

A claim of excessiveness is reviewed by comparing the awards at issue with rulings in other factually similar cases decided under controlling law. *Dileo v. Davis*, 1999 WL 143531, *6 (E.D.La 1995). Additionally, while the adequacy of a jury verdict should be reviewed in light of the facts and circumstances of the individual case, prior awards may be useful in framing the range of damages awarded for comparable types of injuries. Plaintiff has an ankle injury which required surgery and the wearing of an ankle support device through the date of trial, and he apparently has permanent nerve damage in his ankle. The evidence demonstrates that he will walk with a limp, and is restricted in lifting, standing and walking. Nonetheless, after observing plaintiff and reviewing the case law, the Court reduces the award in this category to $250,000.00.

Past, present and future mental pain and suffering

The Court will reduce this award to $75,000.00.

Future medical expenses

The evidence to future medical expenses was at best ephemeral. There was certainly no evidence in the record to justify the jury verdict of $100,000.00. The Court reduces this award to $2000.00. Plaintiff has reached maximum medical improvement and no future surgery is required. He will have some follow-up visits with his treating physician and may need some prescription medication.

Past loss of wages and fringe benefits

This award is reduced to $57,019.00 as it was the amount provided by plaintiff's expert witness using assumptions most favorable to plaintiff-i.e. based on his work history of one month rather than three years.

Future loss of wages and fringe benefits

The Court reduces the loss of earnings award to $425,801.00. This award is indeed generous as it again is based a work history of one month rather than a three year work history; indeed, in the event that a three year work history were used, plaintiff would experience no future loss of wages and fringe benefits.

Finally, using the comparative negligence percentage of 40% found by the jury, the verdict is remitted to the amount of $485,892.00. Accordingly,

IT IS ORDERED that defendant's Motion for New Trial or, Alternatively, to Alter or Amend Judgment (Doc. 62) pursuant to Fed.R.Civ.P. 59 is DENIED in part and GRANTED in part only insofar as the Court grants a conditional new trial on the issue of damages should plaintiff not consent to the remittitur in the amount of $485,892.00.

***3** IT IS FURTHER ORDERED that counsel for plaintiff will notify the Court no later than August 10, 2006, with respect to plaintiff's decision regarding the remittur.

E.D.La.,2006.
Norris v. Bertucci Contracting Corp.
Not Reported in F.Supp.2d, 2006 WL 4571327 (E.D.La.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JAMES LINDSAY	**CIVIL ACTION**
VERSUS	**NO: 09-6437**
DIAMOND OFFSHORE MANAGEMENT COMPANY	**SECTION: "B" (4)**

ORDER

Before the Court is a **Motion to Compel Defendant's Responses to Plaintiff's Interrogatories and Request for Production of Documents (R. Doc. 18),** filed by the Plaintiff, James Lindsay ("Lindsay"), seeking to compel Defendant, Diamond Offshore Management Company ("Diamond"), to respond to Lindsay's First and Second sets of discovery requests. Diamond filed a response opposing the motion. (R. Doc. 20.) The motion was heard with oral arguments on July 28, 2010.

I. Background

In his Complaint, Plaintiff, James Lindsay ("Lindsay"), claims that he was employed by Diamond. (R. Doc. 1, ¶ III.) Lindsay further claims that on December 6, 2008, he was working for Diamond aboard the M/V OCEAN CONFIDENCE, which is owned and operated by Diamond. (R. Doc. 1, ¶¶ III-IV.) Lindsay claims that he suffered an accident in which he injured his shoulder and other parts of his body on December 6, 2008, while working for Diamond. (R. Doc. 1, ¶ V.) He claims that his accident was the result of Diamond's negligence and therefore seeks damages against Diamond for his injuries. (R. Doc. 1, ¶ VII.)

As to the instant motion, on September 24, 2009, Lindsay propounded his first set of discovery requests on Diamond. (R. Doc. 18-1, p. 1.) On February 11, 2010, Lindsay propounded his second set of discovery requests on Diamond. (R. Doc. 18-1, p. 1.) Lindsay claims that Diamond has refused to provide some or all of the information he sought in certain Requests for Production, and therefore seeks an Order compelling the production of those documents. (R. Doc. 18-1, p. 2.) Diamond opposes the motion. (R. Doc. 20.)

II. Standard of Review

Rule 26(b)(1) provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1). The Rules specify that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials. *Herbert v. Lando*, 441 U.S. 153, 176 (1979). Nevertheless, discovery does have "ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). Furthermore, "it is well established that the scope of discovery is within the sound discretion of the trial court." *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir.1994).

Under Rule 26(b)(2)(C), the Court must limit discovery if: (1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another more convenient, less burdensome, or less expensive source; (2) the party seeking discovery has had ample opportunity to discover the information during the proceedings; or (3) the burden or expense of the proposed discovery outweighs its likely benefit. Fed.R.Civ.P. 26(b)(2)(C). The balancing of the burden and expense or the likely benefit of the proposed discovery requires the Court to consider: (1) the needs

of the case; (2) the amount in controversy; (3) the parties' resources; (4) the importance of the issues at stake in the action; and (5) the importance of the discovery in resolving the issues. *Id.*

III. Analysis

A. Lindsay's First Set of Requests for Production

1. Incident Investigation Report

Lindsay claims that Diamond has refused to produce documents responsive to Requests for Production 1[1] and 7[2] of his first set of discovery requests. (R. Doc. 18-1, p. 2.) Specifically, as to Request for Production 1, Lindsay claims that Diamond has refused to produce the "Incident Investigation Report" that was created following his accident. (R. Doc. 18-1, p. 2.) Lindsay claims that he knows that this document exists because several witnesses referenced it in their depositions, and that this document is discoverable and contains important evidence regarding Lindsay's accident. (R. Doc. 18-1, p. 2.)

In response, Diamond claims that any incident investigation reports were prepared by Diamond representatives with the purpose of evaluating Lindsay's alleged injury in preparation for the instant litigation. (R. Doc. 20, p. 2.) Diamond argues that discovery of documents reflecting the mental impressions of its representatives should be conditioned on a showing of hardship or injustice similar to the burden to overcome the qualified immunity from discovery of an attorney's work product. (R. Doc. 20, p. 3.) Diamond argues that Lindsay has not made a substantial showing that he needs this

[1]Request for Production 1 in Lindsay's first set of discovery requests seeks all documents regarding Lindsay's accident and injuries sustained on December 6, 2008. (R. Doc. 18-2, Exh. A, p. 1.) Diamond agreed to produce some injury reports and Lindsay's statement regarding the accident, but refused to produce statements taken from any person other than the Plaintiff, claiming that the statements were taken in anticipation of litigation after the lawsuit was filed. (R. Doc. 20-1, Exh. A, p. 1.)

[2]Request for Production 7 in Lindsay's first set of discovery requests seeks all reports and video surveillance taken of Lindsay to determine the extent of his injuries. (R. Doc. 18-2, Exh. A, p. 3.) Diamond refused to produce the reports, stating that they contained mental impressions of Diamond attorneys or representatives, but offered to make the video available to counsel for Lindsay for private viewing. (R. Doc. 20-1, Exh. A, p. 3.)

report or that he cannot obtain the underlying facts from other sources. (R. Doc. 20, pp. 3-4.)

At the hearing, counsel for Diamond submitted the Incident Investigation Report for the incident in question to the Court for *in camera* review. Counsel for Diamond further stated that the report was prepared by Diamond's safety representative. Counsel for Diamond further argued that *Thorton v. Diamond Offshore Drilling, Inc.*, No. 07-1839, 2008 WL 2315845 (E.D. La. May 19, 2008) (Vance, J.), is directly applicable to this matter, and that the Court held that some of the report should be redacted in that case. Counsel for Diamond further stated that *Bross v. Chevron U.S.A., Inc.*, No. 06-1523, 2009 WL 854446 (W.D. La. Mar. 25, 2009), was relevant and supported Diamond's claim that the Incident Investigation Report should not be produced. Counsel for Diamond claimed that the report was prepared in preparation for litigation and was covered by the work-product doctrine. However, counsel for Diamond conceded that the Incident Investigation Report was not created at the direction of counsel.

Rule 26(b)(3) protects against the discovery of "work product," defined as documents and tangible things that have been prepared in anticipation of litigation or for trial by or for a party or a party's representative, including the party's consultant. The burden of demonstrating applicability of work product protections rests on the party invoking it. *Hodges, Grant & Kaufmann v. U.S. Gov't, Dep't of the Treasury, I.R.S.*, 768 F.2d 719, 721 (5th Cir. 1985).

A court must initially determine whether the documents were prepared in anticipation of litigation; the mere fact that litigation eventually ensues does not, alone, protect all documents related to the subject matter of the litigation. *Binks Mfg. Co. v. Nat'l Presto Indus. Inc.*, 709 F.2d 1109 (7th Cir. 1983). A document is only considered work product if it is primarily concerned with legal assistance. *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 582 (7th Cir. 1981). Furthermore, work product protections only apply to materials prepared in anticipation of litigation which set "forth the

attorney's theory of the case and [his] litigation strategy." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975).

Rule 26(b)(3) regulates the scope of the allowable discovery of work product and instructs the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B). A party may only obtain discovery of documents prepared in anticipation of litigation or for trial upon showing that the party seeking discovery has (1) substantial need of the materials to prepare for his or her case and (2) that the party cannot obtain the substantial equivalent of the materials by other means without undue hardship. Fed.R.Civ.P. 26(b)(3)(A)(ii).

First, the Court finds that neither *Thorton* nor *Bross* is applicable to the issue presented to the Court. In *Thorton*, the Court was dealing with a question of the admissibility under Federal Rule of Evidence 407, which deals with subsequent remedial measures, *at trial* of an Incident Investigation Report. 2008 WL 2315845, at *4. The Court held that the Incident Investigation Report was admissible except for the portions that contained evidence of subsequent remedial measures. *Id.*

In *Bross*, the Root Cause Analysis ("RCA") report was created at the direction of counsel for the defendant, who expressly stated that the purpose of the RCA report was to investigate the defendant's possible legal exposure as a result of the incident in question. 2009 WL 854446, at *1. Here, counsel for Diamond conceded that the Incident Investigation Report was not prepared at the direction of counsel. Furthermore, after review, Diamond's Incident Investigation Report does not discuss possible legal exposure and instead merely states what happened, why it happened, and measures that could be taken to prevent a similar incident.

After an *in camera* review of the Incident Investigation Report, the Court finds that it is not covered by the work product doctrine. First, Diamond has not adequately established that the

document was prepared in anticipation of litigation. The accident in this case occurred on December 6, 2008, and Lindsay did not file his Complaint until September 21, 2009. The Incident Investigation Report is not dated and contains no references to the litigation and does not mention the potential for litigation at any point.

Furthermore, there is no evidence that the report contains the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party as required for protection under the work product doctrine. After review, the Court finds that the report is primarily a summary of the facts that led up to the incident and does not contain Diamond's theory of the case or litigation strategy. *See, e.g., Asset Funding Group, LLC v. Adams & Reese, LLP*, No. 07-2965, 2008 WL 4948835, at *5 (E.D. La. Nov. 17, 2008) (Lemelle, J.) (holding that work product doctrine did not apply to documents when party claiming the protection did not show that the documents were prepared in anticipation of litigation or reflected its theory of the case or litigation strategy). Accordingly, Lindsay's motion to compel is granted as to the production of the Incident Investigation Report.

2. Video Surveillance

As to Request for Production 7, Lindsay claims that Diamond obtained videotaped surveillance of Lindsay prior to the suit being filed. (R. Doc. 18-1, p. 2.) Although Lindsay requested the entire surveillance file, Lindsay claims that Diamond refuses to produce a complete copy of the materials. (R. Doc. 18-1, p. 2.)

In response, Diamond argues that although it objects to the production of the surveillance film, it offered to make the film available to Lindsay's counsel for viewing. (R. Doc. 20, pp. 4-5.) Therefore, Diamond argues that Lindsay's contention that it has not produced the film is without merit. (R. Doc. 20, p. 5.) Diamond claims that it has repeatedly offered to make the surveillance video available for viewing, but that Lindsay has ignored those offers. (R. Doc. 20, p. 5.)

At the hearing, counsel for Diamond stated that it had sent counsel for Lindsay full copies of the tapes along with Diamond's supplemental responses after Lindsay filed the instant motion to compel. Counsel for Lindsay stated that if Diamond has, in fact, sent the tapes, then there is no issue as to Request for Production 7 and that the motion to compel is satisfied as to this request. Accordingly, the Court held that the motion to compel is denied as moot insofar as Diamond has already supplied the video surveillance tapes to Lindsay.

B. Lindsay's Second Set of Requests for Production

1. Jay St. John's Job Description

Lindsay further claims that Diamond has not produced all relevant documents responsive to his second set of Requests for Production, specifically Requests for Production 1, 3, and 4. (R. Doc. 18-1, pp. 2-3.) As to Request for Production 1,[3] Lindsay contends that Diamond has refused to produce a written job description for the Diamond employee in charge of safety aboard the rig where Lindsay was injured, Jay St. John. (R. Doc. 18-1, p. 2.) Lindsay claims that St. John's job duties are discoverable. (R. Doc. 18-1, p. 2.) In response, Diamond argues that Lindsay was not a safety representative at the time of the accident or at any point that he was employed by Diamond. (R. Doc. 20, p. 5.) Diamond argues that the request is not relevant to the incident that is the basis of the litigation and that it therefore should not be required to produce the document. (R. Doc. 20, p. 5.)

At the hearing, counsel for Lindsay stated that St. John was the safety representative on board the vessel on which Lindsay was injured and that he filled out numerous reports regarding the accident. Counsel for Lindsay therefore argued that St. John's job description is relevant and discoverable in this

[3]Request for Production 1 in Lindsay's second set of discovery requests seeks a complete current job description or description in effect in December of 2008 for the position held by Jay St. John. (R. Doc. 18-3, Exh. B, p. 1.) Diamond objected to the production of the requested information as not relevant or likely to lead to discoverable information and claimed that because Lindsay was not employed as a Safety Representative, the information was irrelevant. (R. Doc. 20-1, Exh. B, p. 7.)

matter. Counsel for Diamond argued that Lindsay is trying to discover Diamond's proprietary information and argued that St. John has already testified about his job duties in his deposition. Counsel for Diamond therefore argued that the job description was not relevant and was cumulative of St. John's testimony.

The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result. *United States v. Proctor & Gamble* Co., 356 U.S. 677, 682 (1958). Discovery is intended to operate with minimal judicial supervision unless a dispute arises and one of the parties files a motion involving judicial intervention. "The rules require that discovery be accomplished voluntarily; that is, the parties should affirmatively disclose relevant information without the necessity of court orders compelling disclosure." *Bush Ranch v. E.I. DuPont Nemours and Co.*, 918 F.Supp. 1524, 1542 (M.D. Ga. 1995), *rev'd on other grounds*, 99 F.3d 363 (11th Cir. 1996); *Cruz v. United States*, No. 3:09-cv-155-J-25TEM, 2010 WL 2612509 (M.D. Fla., June 25, 2010).

"Rule 26 embraces all 'relevant information' a concept which is defined in the following terms: 'Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'" *Victor v. Lawler*, No. 3:08-CV-01374, 2010 WL 2595945, at *2 (M.D. Pa. June 24, 2010); *see also United States v. Shaw*, No. 04-2503 RDR, 2005 WL 3418497, at *1 (D. Kan. 2005) (stating that relevancy is broadly construed so "as a general proposition, a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party") (quoting *Sheldon v. Vermonty*, 203 F.R.D. 679, 689-90 (D. Kan. 2001))).

Diamond's relevancy objection is overruled and Diamond is ordered to produce any written

job description for its safety representative, Jay St. John. As the Court noted at the hearing, Lindsay is entitled to compare St. John's written job description to the duties stated in St. John's testimony to ensure that he complied with the requirements of a safety representative. Therefore, the Court finds that the request appears to be reasonably calculated to lead to discoverable evidence. Lindsay's motion to compel is granted as to his request for St. John's job description.

2. Blank Incident Investigation Form

As to Request for Production 3,[4] Lindsay claims that a blank incident investigation form is relevant and important to the matter if Diamond claims that the actual Incident Investigation Report from Lindsay's accident is no longer available. (R. Doc. 18-1, p. 3.) Lindsay argues that if the actual report for the incident cannot be located, the jury should be able to see a blank form, so that they can see what information the report would have contained and draw their own conclusions as to why the report might be missing. (R. Doc. 18-1, p. 3.)

Diamond claims that the information sought in Request for Production 3 seeks to invade the mental impressions of Diamond and is therefore harassing. (R. Doc. 20, p. 6.) Diamond further argues that the request is not reasonably calculated to lead to discoverable evidence and that the blank form might cause confusion in the mind of the jury, cause undue prejudice to Diamond, and waste the Court's time. (R. Doc. 20, p. 6.)

As the Court granted Lindsay's request to produce the Incident Investigation Report for Lindsay's accident (*see supra* Part III.A.1), the Court finds that Request for Production 3 is moot because Lindsay now has a fully completed copy of the Incident Investigation Report. Therefore,

[4]Request for Production 3 in Lindsay's second set of discovery requests seeks a blank for of the Incident Investigation Report sought in Request for Production 2 of Lindsay's second set of discovery requests. (R. Doc. 18-3, Exh. B, p. 2.) Diamond objected to the request, claiming that the request seeks information prepared in anticipation of litigation and containing the mental impressions of Diamond and its representatives. (R. Doc. 20-1, Exh. B, p. 8.)

Lindsay's motion to compel is denied as moot as to Request for Production 3 from Lindsay's Second Set of Requests for Production.

3. Emails

As to Request for Production 4,[5] which seeks all emails related to Lindsay's injury, Lindsay claims that Diamond asserted a blanket objection even though many of these records would have been kept as normal business records. (R. Doc. 18-1, p. 3.) Lindsay argues that to the extent Diamond claims that any of the documents are privileged, it must produce a privilege log so that its objections can be addressed. (R. Doc. 18-1, p. 3.)

In response, Diamond contends that the request is overly broad, that the information sought was created in anticipation of litigation, and that the communications contain the mental impressions and evaluations of Diamond and its representatives. (R. Doc. 20, p. 6.) Diamond argues that Lindsay has not shown a substantial need for the emails or that the information contained in the emails could not be discovered from other sources. (R. Doc. 20, p. 6.)

The Court sustains Diamond's overbreadth objection as to Request for Production 4. Upon review of the request, which seeks all emails to and from Diamond's claims department regarding Lindsay's injury, the Court finds that it could cover communications from Diamond to its counsel regarding Lindsay's injury or between Diamond and its experts. The Court therefore finds that in its current format, the request is overly broad and seeks privileged communications. Therefore, Lindsay's motion to compel is denied as to Request for Production 4 from Lindsay's Second Set of discovery.

[5]Request for Production 4 in Lindsay's second set of discovery requests seeks all emails to and from Diamond's claims department that relate to Lindsay's injury, specifically any emails from or to St. John referencing Lindsay's injury. (R. Doc. 18-3, Exh. B, p. 2.) Diamond objected to the request as overly broad, vague, harassing, and calling for documents prepared in anticipation of litigation; and Diamond further claimed that the request might include internal reporting by claims represenative and counsel for Diamond that was protected by work product and attorney-client privilege. (R. Doc. 20-1, Exh. B, p. 2.)

IV. Conclusion

Accordingly,

IT IS ORDERED that Lindsay's **Motion to Compel Defendant's Responses to Plaintiff's Interrogatories and Request for Production of Documents (R. Doc. 18)** is hereby **GRANTED IN PART** and **DENIED IN PART.**

- **IT IS GRANTED** insofar as Diamond is ordered to supplement its responses, as stated in this order, to Request for Production 1 from his First Set of discovery requests and Request for Production 1 from his Second Set of discovery requests.

- **IT IS DENIED** in all other respects, as stated in this Order.

IT IS FURTHER ORDERED that Diamond shall produce documents responsive to the requests no later than **eleven (11) days** from the signing of this Order.

IT IS FURTHER ORDERED that Diamond retrieve the Incident Investigation Report, provided for *in camera* review no later than **seven (7) days** from the signing of this Order, or the document will be destroyed.

New Orleans, Louisiana, this 17th day of August 2010

KAREN WELLS ROBY
UNITED STATES MAGISTRATE JUDGE

MINUTE ENTRY
DUVAL, J.
January 20, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH THAMES	**CIVIL ACTION**
VERSUS	**NO. 03-2257**
PRIDE OFFSHORE INC.	**SECTION: K**

JURY TRIAL

COURTROOM DEPUTY: SHEENA DEMAS
COURT RECORDER: CYNTHIA CRAWFORD

APPEARANCES: Timothy Young, Nolte DeRussy, James Daigle & Kent Ryan

Court begins at 8:45a.m. Jury trial continued from Thursday, January 20, 2006. All present and ready. Closing argument by parties. Jury Charged and Instructed by the Court. Jury begin their deliberations at 10:20 a.m. Jury recesses for lunch at 12:10 p.m. Jury resumes its' deliberations at 12:40 p.m. Jury return from its' deliberations at 1:10 p.m. VERDICT, see the attached form. Deft's oral mtn to poll the Jury and all answered affirmative. Jury instructed and thanked by the Court. Court to prepare and enter a judgment. Court adjourns at 1:20 p.m. PARTIES GIVEN NOTICE FOR REMOVAL OF EXHIBITS.

JS-10: (1:45)

CA 03-2257 K Joseph Thames V. Pride Offshore Inc.

Joint Exhibits admitted 1/18/06

Table of Contents

Over

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH THAMES	**CIVIL ACTION**
VERSUS	**03-2257**
PRIDE OFFSHORE, INC.	**SECTION "K"(5)**

JURY INTERROGATORIES

YOUR VOTE MUST BE UNANIMOUS IN ANSWER TO EACH QUESTION:

1. Do you find by a preponderance of the evidence that plaintiff was injured aboard the PRIDE ALABAMA on or about February 22, 2003.

Yes: ✓ **No:**_____

Note: If you have answered Question Number 1 "Yes", go to Question Number 2.

If you have answered Question Number 1 "No," please go directly to Question Number 8 and skip Question Nos. 2 through 7. DO NOT ANSWER QUESTIONS NOS. 2 THROUGH 7.

JONES ACT

2. Do you find, by a preponderance of the evidence, that Pride Offshore, Inc. was negligent with reference to the accident involving the plaintiff which occurred on or about February 22, 2003?

Yes: ✓ **No:**_____

Note: If you have answered Question Number 2 "No," please skip to Question Number 4. DO NOT ANSWER QUESTION 3.

3. Did negligence by Pride Offshore, Inc. on or about February 22, 2003 cause the Plaintiff's injuries in whole or in part?

Yes: ✓ **No:**_____

Proceed to Question 4.

UNSEAWORTHINESS

4. Do you find by a preponderance of the evidence that the vessel, PRIDE ALABAMA, was unseaworthy and that this unseaworthiness was the legal cause of the plaintiff's injuries on or about February 22, 2003?

Yes: ✓ **No:**_____

Note: If you answered "No" to Question 2 and/or 3, AND "No" to Question 4, stop and proceed to Question 8.

If you answered "Yes" to Question 2 and 3 AND/ OR "Yes" to Question 4, proceed to Question 5.

CONTRIBUTORY NEGLIGENCE

5. Do you find by a preponderance of the evidence that Joseph Thames contributed, through his own negligence, to the injuries?

Yes: ✓ **No:** _____

If you answered "No" to Question 5, proceed to Question 7. DO NOT ANSWER QUESTION 6. If you answered "Yes" to Question 5, proceed to Question 6.

6. With respect to Joseph Thames's claims against Pride Offshore, Inc., what is the degree of fault, if any, expressed in a percentage?

Pride Offshore, Inc.	51 %
Joseph Thames	49 %
*** TOTAL PERCENTAGE OF FAULT**	100 %

*** Note: The total percentage of fault should equal 100%**

Proceed to Question 7.

7. What sum of money do you find to be the total amount of plaintiff Joseph Thames's damages on or about February 22, 2003?

Note: Do not reduce any amount because of any finding of fault on the part of Joseph Thames.

a.	Past and future physical pain, suffering, disability, disfigurement	$100,000
b.	Past and future mental anguish and suffering	$70,000
c.	Past loss of income	$80,000
d.	Impairment of earning capacity or ability in the future	$100,000
e.	Past medical expenses	$32,000

Proceed to Question 8.

MAINTENANCE AND CURE

8. Was Plaintiff injured while in the service of the PRIDE ALABAMA?

Yes: ✓ **No:**_____

Note: If you answered "No" to Question 8, please skip the remainder of the questions, sign the form and advise the Court that you have reached a verdict.

If you answered Question 8 "Yes ," proceed to Question 9.

9. Do you find by a preponderance of the evidence that Plaintiff made a "material misrepresentation" in his application form with Pride Offshore?

Yes:_____ **No:** X

Note: If you answered "Yes" to Question 9, please skip the remainder of the questions, sign the form and advise the Court that you have reached a verdict.

If you answered "No" to Question " 9," proceed to Question 10.

You are not required to calculate the amount of maintenance and cure as the parties have made a stipulation which will allow the Court to make this calculation should you so find.

10. Do you find, by a preponderance of the evidence, that Plaintiff incurred compensatory damages as a result of the Pride Offshore, Inc.'s failure to pay "maintenance and cure?"

Yes: ✓ **No:**_____

Note: If you have answered "No" to Question 10, please skip Question 11, and proceed to Question 12.

If you have answered "Yes" to Question , proceed to Question 11.

11. What is the amount of compensatory damages owed to the plaintiff for the failure to pay "maintenance and cure"?

$ $ 11,000

Proceed to Question 12.

12. Do you find, by a preponderance of the evidence, that the Pride Offshore, Inc. acted willfully, arbitrarily, or with callous disregard in failing to pay maintenance and cure to Plaintiff?

Yes: X **No:**_____

Note: If you have answered Question 12"No", please skip Question 13, sign the form, and advise the Court that you have reached a verdict. If you have answered "Yes," proceed to Question 13.

13. Is plaintiff entitled to attorney's fees for the prosecution of his claims for cure?

Yes: X **No:**_____

SO SAY WE ALL!

New Orleans, Louisiana

Date: 01/20/06

Dolph Curtis
Foreperson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LARRY NAQUIN, SR.	CIVIL ACTION
VERSUS	NO: 10-4320
ELEVATING BOATS, LLC AND TECHCRANE INTERNATIONAL, LLC	SECTION: J(4)

ORDER AND REASONS

This matter is before the Court on a series of post-trial motions filed by Defendant Elevating Boats, L.L.C. ("EBI") following an adverse jury verdict at trial. In particular, EBI moves for judgment as a matter of law, or alternatively, for a new trial on the issues of seaman status (**Rec. Doc. 126**) and future lost wages **(Rec. Doc. 133)**. EBI also moves for a new trial, or alternatively, for remittitur on the issues of general damages **(Rec. Doc. 134)** and past lost wages **(Rec. Doc. 135)**.

PROCEDURAL HISTORY AND BACKGROUND FACTS

Defendant EBI is a company whose principal business operations involve the design and manufacture of lift boats and marine

pedestal cranes for sale and use in maritime commerce.[1] EBI also operates a fleet of lift boats for charter for offshore work in the Gulf of Mexico. In support of these operations, EBI maintains a lift boat and pedestal crane inspection and repair facility in Houma, Louisiana, where Plaintiff Larry Naquin, Sr. ("Plaintiff") has worked in various capacities since January 10, 1997. At the time he was originally hired, Plaintiff worked as a fitter/welder, performing precision cutting in the vessel fabrication building at EBI's Houma facility. He held this position for approximately two years, at which time he was promoted to the role of construction foreman. As a construction foreman, he oversaw the construction of lift boat hulls and managed a small team of repair technicians, including welders, painters, electricians, and carpenters. Shortly after Hurricane Katrina, Plaintiff assumed the position of repair supervisor, which he held until the events giving rise to the instant lawsuit. In his capacity as a repair supervisor, Plaintiff oversaw the inspection, repair, and servicing of EBI's fleet of lift boats and cranes, as well as those that were owned by other companies who contracted with EBI for such services.

On November 17, 2009, Plaintiff was operating one of EBI's land-based cranes in order to move a thirty-ton test block from a trailer to its normal storage location. Before he was able to complete the move, however, the crane's pedestal snapped and

[1] The facts of this case are more fully presented in the Court's January 3, 2012 Order and Reasons denying EBI's Motion for Summary Judgment **(Rec. Doc. 51)**.

separated, sending the crane's boom toppling into an adjacent building and killing another EBI employee, who was Plaintiff's cousin's husband. Plaintiff suffered injuries to both his left ankle and right heel as a result of the accident and required surgery.

Plaintiff filed suit against EBI on November 15, 2010, asserting claims under the Jones Act, and in the alternative, reserving his claims and benefits under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq. Plaintiff also sued Techcrane, International, L.L.C. ("Techcrane"), a company believed by Plaintiff to work with EBI to supply, design, and/or construct EBI cranes. On September 13, 2011, Techcrane filed a motion for summary judgment, arguing that there was no evidence that it had designed, manufactured, or in any way assumed responsibility for the crane at issue in this case.[2] The Court agreed and granted the motion on the same day.[3] Subsequently, on October 24, 2011, EBI moved for summary judgment, arguing that the undisputed evidence demonstrated that Plaintiff was not a Jones Act seaman as a matter of law.[4] The Court issued written Order and

---

[2] Rec. Doc. 33. Techrane also concurrently moved for sanctions, which the Court denied. Rec. Docs. 32, 34.

[3] Rec. Doc. 34.

[4] Rec. Doc. 40.

Reasons denying the motion on January 3, 2012.[5] The case came on for trial before a jury on May 14, 2012.[6] After a three-day trial, the jury returned its verdict, finding that Plaintiff was a seaman, that EBI had been negligent, and that its negligence was the cause of Plaintiff's injuries.[7]

The jury awarded Plaintiff a total of $2,560,000.00 in damages, in the following specific categories: $160,000.00 in past lost wages; $400,000.00 in future lost wages; $600,000.00 in past mental and emotional suffering; $400,000.00 in future mental and emotional suffering; $300,000.00 in past physical pain and suffering; and $700,000.00 in future physical pain and suffering.[8] The Court entered judgment in accordance with the jury's verdict on May 18, 2012.[9] The parties then jointly moved to amend the judgment with respect to the award for past lost wages to reflect a credit to EBI in the amount of $89,600.00 for payments made to Plaintiff pursuant to the LHWCA. The Court granted the motion and

---

[5] Rec. Doc. 51. The Court found that Plaintiff had introduced evidence sufficient to create a genuine issue of material fact as to whether he satisfied the two-prong test for seaman status articulated by the United States Supreme Court in Chandris v. Latsis, 515 U.S. 347 (1995), thereby precluding summary judgment. Id. at pp. 10-21.

[6] At the close of Plaintiff's evidence, EBI orally moved for judgment as a matter of law on the issues of seaman status, liability, future lost wages, and future medical expenses. Rec. Doc. 114. The Court denied the motion for judgment as a matter of law on the issue of liability, granted the motion for judgment for judgment as a matter of law on the issue of Plaintiff's future medical expenses, and deferred ruling on the remaining motions. Rec. Docs. 114, 116.

[7] Rec. Doc. 116-4.

[8] Rec. Doc. 116-4.

[9] Rec. Doc. 118.

concurrently entered an amended judgment reducing the total past lost wages award to $70,400.00 and discharging any lien EBI may be entitled to assert based on previously paid LHWCA benefits.[10] The instant motions followed soon thereafter.

LEGAL STANDARD

A. Motion for Judgment as a Matter of Law

"A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997). Under the standards established by Rule 50 of the Federal Rules of Civil Procedure, a court may grant judgment as a matter of law where "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a). In general, a legally sufficient evidentiary basis does not exist where "the facts and inferences point so strongly and overwhelmingly in favor of one party that . . . reasonable men could not arrive at a contrary verdict." Brown v. Bryan Cnty., 219 F.3d 450, 456 (5th Cir. 2000) (quoting Boeing v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), overruled on other grounds, Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc)). In deciding a motion for judgment as a matter of law, a district court must

[10] Rec. Docs. 120, 121.

consider the evidence in the light most favorable to the party opposing the motion. Brown, 219 F.3d at 456 (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir.1996)). Because credibility determinations, weighing evidence, and drawing reasonable inferences in light of common experience are functions best left to the jury, courts should generally be "especially deferential" to a jury's findings. DP Solutions, Inc. v. Rollins, Inc., 353 F.3d 421, 427 (5th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)); Brown, 219 F.3d at 456.

Additionally, in Jones Act cases, a more stringent standard must be satisfied before a court will disturb a jury's findings based on a challenge to the sufficiency of the evidence. See Hughes v. Int'l Diving & Consulting Servs., Inc., 68 F.3d 90, 93 (5th Cir. 1995) (per curiam). Under this standard, "judgment as a matter of law on a Jones Act count is appropriate only when there is a complete absence of probative facts supporting the nonmovant's position." Id. (citing Lavender v. Kurn, 327 U.S. 645, 653 (1946)). "This standard is highly favorable to the plaintiff," requiring courts "to validate the jury verdict if at all possible." Id.

B. Motion for New Trial

Rule 59 of the Federal Rules of Civil Procedure provides the standard governing motions for a new trial. The rule does not specify the precise grounds that are necessary to grant a new

trial, but merely states that "[a] new trial may be granted for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59(a). A new trial may be granted "if the district court finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." Smith v. Transworld Drilling Co., 773 F.2d 610, 612 (5th Cir. 1985) (citations omitted). In considering a Rule 59(a) motion based on evidentiary grounds, a court may weigh all the evidence in the record and need not view it in the light most favorable to the non-movant. Id. at 613. While a court should "respect the jury's collective wisdom and must not simply substitute its opinion for the jury's," if a district judge is dissatisfied with the jury's verdict, he has both the right and also the duty to set aside the verdict and order a new trial. Id.

C. Remittitur

Depending on the circumstances of the case, a district court has the option of either granting a new trial or a remittitur on the issue of damages. See Brunnemann v. Terra Int'l, Inc., 975 F.2d 175, 178 (5th Cir. 1992). "[W]hen a jury verdict results from passion or prejudice, a new trial, not remittitur is the proper remedy." Id. However, a damage award that exceeds the "bounds of any reasonable recovery" is properly corrected through remittitur, rather than a new trial. Id. A court should not disturb a jury's

damages award unless it is "entirely disproportionate to the injury sustained." Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988) (quoting Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983)). If the jury's award is unacceptably disproportionate, either the district or appellate court should reduce the award to "the maximum amount the jury could properly have awarded." Brunnemann, 975 F.2d at 178; Simeon, 852 F.2d at 1426 (quoting Caldarera, 705 F.2d at 784). The Fifth Circuit has long recognized that because pain and suffering are largely insusceptible to monetary quantification, the jury necessarily enjoys especially broad leeway in making general damage awards. Simeon, 852 F.2d at 1427.

DISCUSSION

A. EBI's Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial on the Issue of Seaman Status

In support of its first motion, EBI argues that the record contains no sufficient evidentiary basis from which the jury could permissibly find Plaintiff to be a Jones Act seaman. According to EBI, the totality of the evidence concerning the nature of Plaintiff's employment shows that he was a land-based repairman who cannot be a seaman as a matter of law. In response, Plaintiff contends that the record in this case contains sufficient evidence to support the jury's determination that Plaintiff was a seaman.

On balance, the Court finds that Plaintiff has the better argument. The Court has previously considered and rejected the majority of the arguments presented in the instant motion when it denied EBI's motion for summary judgment on the issue of seaman status.[11] EBI does not contend that the evidence presented at trial with regards to the nature of Plaintiff's employment differs in any significant respect from that which was presented at the summary judgment stage, and in fact, appears to acknowledge that its motion relies largely on the same evidence the Court previously considered in denying the aforementioned summary judgment motion. See Memorandum in Support, Rec. Doc. 126-1, p. 11 ("Therefore, the following argument relies heavily on the evidence already in the record prior to trial, all of which was covered during the direct and cross examination of the witnesses . . ."") (emphasis in original). In its Order and Reasons dated January 3, 2012,[12] the Court found this same evidence sufficient to create a jury question with regards to the issue of Plaintiff's status, and the Court finds no compelling reason to depart from this conclusion at the present time. See Green v. Adm'rs of Tulane Educ. Fund, No. 97-1869, 2000 WL 341027, at *3 (E.D. La. Mar. 30, 2000) (denying Rule 50 motion that primarily reiterated the same arguments raised in prior motion for summary judgment), aff'd, 284 F.3d 642 (5th Cir.

---

[11] Rec. Doc. 51.

[12] Rec. Doc. 51.

2002).[13] Accordingly, EBI's motion for judgment as a matter of law, or alternatively, for a new trial on the issue of seaman status will be denied.

B. EBI's Motion for Judgment as a Matter of Law, or Alternatively, for a New Trial on the Issue of Future Lost Wages

In its second motion, EBI moves for judgment as a matter of law, or alternatively, for a new trial on the issue of Plaintiff's future lost wages. As previously noted, the jury returned a verdict awarding Plaintiff $400,000 in future lost wages. EBI asserted as an affirmative defense that Plaintiff failed to mitigate his damages and is thereby precluded from recovering *any* future lost wage award whatsoever.[14]

In particular, EBI argues that the evidence in this case overwhelmingly shows that: (1) Plaintiff was capable of performing sedentary work; (2) EBI offered Plaintiff a sedentary position at EBI with the same hours and at the same salary as his pre-injury position approximately six months before this litigation was instituted; and (3) Plaintiff failed to accept EBI's offer. Based on the foregoing, EBI requests that the Court vacate the jury's

---

[13] As the Court previously explained in its Order and Reasons denying EBI's motion for summary judgment, the evidentiary showing necessary to create a jury question on the issue of seaman status is very low. See Bernard v. Binnings Constr. Co., Inc., 741 F.2d 824, 827 (5th Cir. 1984) (citing Leonard v. Exxon Corp., 581 F.2d 522 (5th Cir. 1978)) ("[S]ubmission of Jones act claims to a jury requires a very low evidentiary threshold; even marginal claims are properly left for jury determination.").

[14] Answer, Rec. Doc. 4, p. 2.

verdict with respect to the future lost wages and enter judgment as a matter of law in its favor. In response, Plaintiff contends that the jury was well within its discretion to reject EBI's affirmative defense and impose a future lost wages award based on the evidence in the record, most notably the testimony of Plaintiff's vocational expert regarding his future employability, as well as Plaintiff's own testimony regarding his injuries and emotional difficulties suffered as a result of the accident.

A Jones Act seaman, like other tort victims, has a duty to mitigate his damages, and his recovery will be reduced to the extent that his losses are enhanced by unreasonable conduct. See Williams v. Reading & Bates Drilling Co., 750 F.2d 487, 490 (5th Cir. 1985). The duty to mitigate damages encompasses an obligation to exercise reasonable diligence to seek alternative employment. See Earl v. Bouchard Transp. Co., Inc., 735 F. Supp. 1167, 1173 (E.D.N.Y. 1990); Burden v. Evansville Materials, Inc., 636 F. Supp. 1022 (W.D. Ky. 1986), aff'd, 840 F.2d 343 (6th Cir. 1988). Whether an injured party has discharged this duty "requires a factual assessment of the reasonableness of his conduct," which is a determination generally best left to the jury. Hill v. City of Pontotoc, Miss., 993 F.2d 422, 427 (5th Cir. 1993) (citing Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1476 (5th Cir. 1991)); Sellers v. Delgado College, 902 F.2d 1189 (5th Cir. 1990). Because failure to mitigate damages is an affirmative defense, EBI bears the burden of proof and must have established

(1) that Plaintiff's conduct after the accident was unreasonable and (2) that his unreasonable conduct had the consequence of aggravating the harm. Marathon Pipe Line Co. v. M/V Sea Level II, 806 F.2d 585, 592 (5th Cir. 1986) (citing Tenn. Valley Sand & Gravel Co. v. M/V DELTA, 598 F.2d 930, 933 (5th Cir. 1979)).

Motions for judgment as a matter of law are rarely granted in favor of the party bearing the burden of proof on an issue. See Jefferson Amusement Co. v. Lincoln Nat'l Life Ins. Co., 409 F.2d 644, 651 (5th Cir. 1969); see also 9B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2535, at 526-527 (3d ed. 2008) ("[C]ourts often caution that granting a judgment as a matter of law for the party bearing the burden of proof is reserved for extreme cases."). In such cases, a court should only grant judgment as a matter of law where, "on the entire record construed in the light most favorable to the nonmoving party," the evidence is "so overwhelmingly in favor of the moving party that no reasonable jury could have arrived at the disputed verdict." Long v. Shultz Cattle Co., 881 F.2d 129, 132 (5th Cir. 1989); see also 9B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2535, supra, at 527 (explaining that the party with the burden of proof must have "established the elements of its case by testimony that the jury is not at liberty to disbelieve" before judgment as a matter of law may be granted in its favor).

Applying the foregoing standard to the facts of this case, the Court is not persuaded that the evidence, when viewed in the light

most favorable to Plaintiff, weighs so overwhelmingly in EBI's favor that the jury could not have reasonably rejected its affirmative defense and awarded Plaintiff future lost wages. Even accepting that EBI offered Plaintiff the opportunity to return to work in a sedentary "data input" position, there is evidence in the record from which the jury could reasonably conclude that Plaintiff was neither physically nor emotionally capable of performing this job or any other job as a result of the accident. Plaintiff's vocational expert, Dr. Cornelius "Neal" Gorman, opined at trial that Plaintiff would likely be unable to ever gain meaningful employment in any type of position in the future as a result of his accident.[15] On cross-examination, EBI's counsel also asked Dr. Gorman whether he knew EBI had offered to re-employ Plaintiff in a desk job involving primarily sedentary duties. In response to these questions, Dr. Gorman reasserted his belief that Plaintiff was "not competitively employable in any capacity" based on his physical limitations, his "significant" emotional upset, advanced age, and level of education.[16] In addition, the Plaintiff testified that the chronic physical pain and considerable emotional difficulties he experienced as a result of his injuries and the

---

[15] See Rec. Doc. 141-1, p. 4:

> Q: Your opinion is that in all likelihood . . . there are no future jobs available for this man; is that correct?
>
> A: Unfortunately that is true.

[16] Rec. Doc. 141-1, p. 5.

accident hampered his ability to perform even sedentary work. Specifically, Plaintiff testified that he continues to experience chronic pain in both feet, his back, and his knee as a result of the accident, and that the pain in his feet persists regardless of whether or not he is sitting. Plaintiff also described to the jury the considerable emotional difficulties he experienced as a result of the accident, including depression, guilt, feelings of alienation, and thoughts of suicide, all of which prompted him to seek treatment from a licensed social worker.[17] Plaintiff testified that these emotional problems, coupled with his physical pain, hampered his ability to perform even sedentary work.

In considering whether a party is entitled to an award of damages based on future loss of earnings, a jury may consider his ability to mitigate his damages, as well as other factors that may prevent him from obtaining work in the future. See Bartholomew v. CNG Producing Co., 832 F.2d 326, 331 (5th Cir. 1987). In making this assessment, a jury may consider the party's physical and emotional condition in light of the accident on which the suit is based. See O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1197 (7th Cir. 1982) (noting that, with respect to a future lost wages award, the question is whether the plaintiff could "find gainful employment, *given the physical condition in which the accident left her*"); Baker v. Baltimore & Ohio R.R. Co., 502 F.2d 638, 644 (6th

[17] Rec. Doc. 140-1, pp. 12-13.

Cir. 1974) (in considering issues of mitigation of damages and loss of future earnings, a jury may consider "the extent of Plaintiff's injuries, his education, station in life, and character") (emphasis added). If there is sufficient evidence showing that the party was unable to reasonably mitigate his damages through alternative employment because of his injuries, then the jury's verdict should not be disturbed. See, e.g., DeBiasio v. Ill. Cent. R.R., 52 F.3d 678, 688 (7th Cir. 1995) (affirming district court's denial of defendant's motions for judgment as a matter of law, for new trial, or for remittitur on future lost wages award and explaining that although plaintiff had a duty to mitigate his damages, the evidence showed that the only jobs available to him were jobs "which he would have been emotionally unable to handle"); England v. Mack Trucks, Inc., No. 07-5169, 2008 WL 168689, at *3-*4 (W.D. Wash. Jan. 16, 2008) (plaintiff's testimony that he was unable to accept a job his doctor had medically authorized him to accept because it would require a long commute that would be painful on his injured knee was sufficient to create a jury question with regards to mitigation of damages); see also Williams, 750 F.2d at 490 (affirming district court's refusal to require injured seaman to attempt to return to his former employment in an effort to mitigate damages where seaman was likely to suffer adverse health effects if he resumed his previous position).

Here, based on the evidence described above, the Court finds that the jury could have reasonably concluded that Plaintiff's

physical condition and emotional difficulties rendered him unable to perform even sedentary work, thereby limiting his ability to mitigate his damages.[18] As EBI observes, there is testimony in the record that contradicts the above-described testimony of Plaintiff and Dr. Gorman.[19] However, the Court is not convinced that the evidence, when viewed in its entirety, "weighs so heavily" in EBI's favor that the jury had no reasonable option but to find that EBI satisfied its burden of proof on its affirmative defense. Accordingly, EBI's motion for judgment as a matter of law, or alternatively, for a new trial on the issue of Plaintiff's future lost wages will be denied.

C. EBI's Motion for a New Trial, or Alternatively, for Remittitur on Issue of General Damages

---

[18] It is also perhaps not insignificant that accepting the desk job EBI had reportedly offered would require Plaintiff to return to work for the same company at the same general facility where the accident occurred with the same coworkers. In light of Plaintiff's testimony regarding his difficulty coping with the emotional stress caused by the accident and his feelings of alienation from his coworkers, the jury could have drawn a reasonable inference that Plaintiff was simply emotionally unable to accept any further employment with the company, even if such were made available to him, or alternatively, that his choice to decline the offer of reemployment was a reasonable one. A jury is permitted to draw such inferences from the evidence introduced at trial. See Smith v. A.C. & S., Inc., 843 F.2d 854, 859 (5th Cir. 1988).

[19] For instance, EBI attempts to minimize the significance of Dr. Gorman's testimony by pointing out that he had never reviewed Plaintiff's complete medical records or the results of his subsequent functional capacity evaluation before formulating his opinion. It also points out that several physicians had. However, EBI's counsel elicited this information during the course of the trial, and the jury undoubtedly considered it in determining the proper weight to be assigned to Dr. Gorman's testimony. See Whitehead v. Food Max of Miss., Inc., 163 F.3d 265, 273 (5th Cir. 1998) ("It is within the province of the jury to decide how much weight to give this expert testimony.") (citing Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1069 (5th Cir. 1993)).

In its third motion, EBI moves for a new trial, or alternatively, for remittitur on the issue of general damages. On May 18, 2012, this Court entered judgment consistent with the jury's verdict awarding Plaintiff a total of $2,000,000 in general damages, consisting of $1,000,000 for past and future physical pain and suffering and $1,000,000 for past and future mental and emotional suffering.[20] Specifically, the jury allocated the awards as follows: $300,000 for past physical pain and suffering; $700,000 for future physical pain and suffering; $600,000 for past mental and emotional suffering; and $400,000 for future mental and emotional suffering.[21] On May 30, 2012, this Court entered an amended judgment which reduced Plaintiff's past lost wages award but left the jury's general damages award undisturbed.[22]

EBI asserts that it is entitled to a new trial on the issue of general damages or, alternatively, to a denial of a new trial conditioned on a remittitur, because the jury awarded excessive general damages. EBI does not expressly urge this Court to apply either the maximum recovery rule or the clearly excessive rule, instead arguing that regardless of which approach the Court uses, it is entitled to a new trial or, alternatively, a denial of a new trial conditioned on Plaintiff accepting a reduced general damage award of either $1,191,084 or $450,000. With respect to the jury's

[20] Rec. Doc. 116-4.

[21] Rec. Doc. 116-4.

[22] Rec. Doc. 120, 121.

award for past and future physical pain and suffering, EBI argues that the award is clearly excessive, because Louisiana state and federal cases indicate that past and future physical pain and suffering awards for what are, according to EBI, comparable physical injuries range between $194,000 and $444,000. With respect to the jury's award for past and future mental and emotional pain and suffering, EBI argues that the award is clearly excessive, because in several Louisiana state and federal cases, courts awarded approximately $350,000 for what are, according to EBI, comparable mental and emotional damages. According to EBI, the disparities between the awards in those cases and the jury's awards in this case demonstrate that the $1,000,000 award for past and future physical pain and suffering and the $1,000,000 award for past and future mental and emotional suffering are clearly excessive.

EBI arrives at its proposed $1,191,084 total general damages figure by separately re-calculating proposed "maximum" awards for physical pain and suffering and emotional pain and suffering on an injury-by-injury basis.[23] EBI directs the Court's attention to

[23] Although the jury heard evidence to the effect that the Plaintiff never suffered from back pain before the accident, but has suffered from back pain since, EBI dismisses this evidence noting that there is no objective evidence that the Plaintiff suffered any back injury in the accident. Consequently, none of the cases that EBI cites as "points of reference" for the Court include plaintiffs who suffered back pain. However, the plaintiff's complaints of back-pain after the accident, even if related to the disc-removal surgery many years before, are sufficient to entitle the jury to award damages for that pain, because "'when a defendant's [negligence] aggravates or accelerates a plaintiff's pre-existing condition and disables a plaintiff, thus rendering him unable to continue his work, or said aggravation awakens a dormant condition that causes a plaintiff to experience pain although he suffered no pain from the condition prior to the aggravation, such defendant is liable in full for the disability

various cases, many of which are unreported or more than ten years old, where Louisiana state and federal courts awarded plaintiffs general damages ranging between $194,000 and $444,000 for what are, according to EBI, comparable physical injuries, and damages of $350,000 for what are, according to EBI, comparable mental and emotional injuries. *E.g.*, Vinet v. Estate of Calix, et al., 860 So. 2d 160 (La. App. 5 Cir. 2003); Lejeune v. Transocean Offshore Deepwater Drilling Inc., 247 Fed. Appx. 572 (5th Cir. 2007); Thompson v. Amerada Hess Corp., 1998 U.S. Dist. LEXIS 7891 (E.D. La. 1998); Domjan v. Divcon, LLC, et al. 10-3398 (E.D. La. 2012); Nielsen v. Northbank Towing, Inc., et al., 768 So. 2d 145 (La. App. 1 Cir. 2000); Duncan, et al. v. Kansas City Southern Railway Co., et al., 773 So. 2d 670 (La. 2000). EBI then applies a 50% multiplier to the highest itemized per-injury awards in the cited cases to arrive at what EBI perceives to be the maximum the jury could have awarded in this case for each of Plaintiff's individual injuries. EBI then proposes a total general damages award that is the sum of its proposed maximum awards for Plaintiff's individual injuries.[24]

For instance, with respect to the award for past and future physical pain and suffering, EBI argues that the maximum that the

---

and/or pain caused." Todd v. Delta Queen Steamboat Co., 2007-1518 (La. App. 4 Cir. 8/6/08); 15 So. 3d 107, 115-16 (quoting Lopinto v. Crescent Marine Towing, Land Serv. Inc., 02-2983, 02-3364, 03-0235, 2004 WL 1737901, at *5 (E.D. La. 2004)).

[24] Specifically, EBI asks for a new trial on general damages or a denial of its new trial motion conditioned on the plaintiff's acceptance of an approximately $800,000 reduction of the general damages award from $2,000,000 to $1,191,084. Rec. Doc. 134-1.

jury could have awarded is $666,084. EBI reaches this figure by adding up what it perceives to be the maximum the jury could have awarded for the Plaintiff's hernia and injuries to the Plaintiff's lower extremities collectively. EBI concludes that the maximum that the jury could have awarded for Plaintiff's hernia injury is $66,084 by applying a 50% multiplier to the $44,056 award in Vinet v. Estate of Calix, et al., 860 So. 2d 160 (La. App. 5 Cir. 2003), a case in which the plaintiff suffered a ventral hernia that required surgery, in addition to unspecified neck and back injuries. EBI then concludes that the maximum that the jury could have awarded for the "injuries to the Plaintiff's lower extremities" is $600,000 by applying a 50% multipier to the $400,000 award in Lejeune v. Transocean Offshore Deepwater Drilling Inc., 247 Fed. Appx. 572 (5th Cir. 2007), an unreported Fifth Circuit decision in which the Plaintiff sustained a crushed first metatarsal bone and was later diagnosed with Complex Regional pain syndrome. EBI adds these two adjusted figures together for a proposed maximum award of $666,084 for past and future physical pain and suffering.

With respect to the award for past and future mental and emotional suffering, EBI follows a similar pattern to arrive at a proposed maximum award of $525,000. EBI points to two cases, Nielsen v. Northbank Towing, Inc., et al., 768 So. 2d 145 (La. App. 1 Cir. 2000) and Duncan, et al. v. Kansas City Southern Railway Co., et al., 773 So. 2d 670 (La. 2000), in which courts awarded

plaintiffs who suffered what constitute, according to EBI, comparable mental and emotional injuries only $350,000. Applying a 50% multiplier to that figure, EBI concludes that the maximum that the jury could have awarded in this case is $525,000. EBI then adds its proposed maximum award for emotional pain and suffering ($525,000) to its proposed maximum award for physical pain and suffering ($664,084) to reach a proposed total general damages award of $1,191,084.

Alternatively, EBI argues that the total general damage award should be remitted to $450,000. Considering the Plaintiff's physical and emotional injuries in the aggregate, EBI asserts that they are "very factually similar" to those that the plaintiff suffered in LaBleu v. Dynamic Industrial Constructors, et al., 526 So. 2d 1184 (La. App. 3 Cir. 1988). Since the award in LaBleu was $300,000, EBI applies a 50% multiplier to get its proposed alternative general damages award of $450,000.

The plaintiff argues that the maximum recovery rule is inapplicable in this case, because the defendant has submitted no factually comparable cases in terms of the plaintiff's injuries and the pain and suffering the plaintiff endured following his accident. Specifically, the plaintiff urges the Court to apply the reasoning followed in two recent maritime cases, Raynes v. McMoran Exploration Co., 10-1730, 2012 WL 1032902 (E.D. La. Mar. 27, 2012) (J. AFRICK) and Thornton v. Diamond Offshore Drilling, Inc., 07-1839, 2008 WL 2622998 (E.D. La. June 30, 2008) (J. VANCE), in which

other sections of the Court declined to apply the maximum recovery rule to remit significant damage awards on the grounds that the facts of the case were simply not comparable to the facts in any other cases within the relevant jurisdiction. The plaintiff argues that all of the cases cited by the Defendants are distinguishable from the instant case. Alternatively, the plaintiff argues that if the maximum recovery rule applies, the jury's award is well within the limits. In support of this argument, the plaintiff asserts that Simeon T. Smith and Son, Inc., 82 F.2d 1241 (5th Cir. 1988) and Gough v. Natural Gas Pipeline Company, 996 F.2d 763 (5th Cir. 1993) more accurately reflect the type of injuries and suffering the plaintiff in this case endured. The plaintiff asserts that when the awards in Simeon and Gough are adjusted to account for inflation, they demonstrate that the plaintiff's general damage awards do not exceed 150% of the general damage awards in those allegedly factually analogous cases.

Finally, the plaintiff argues that the two million general damage award in this case is not "clearly excessive" in light of the evidence of the physical and emotional pain and suffering that the plaintiff presented at trial. The plaintiff asserts that the jury's award was consistent with the evidence and that the breakdown of the damages[25] demonstrates that the jury logically and

[25] The breakdown of the general damages award was as follows:
$600,000 for past mental and emotional suffering
$400,000 for future mental and emotional suffering
$300,000 for past physical pain and suffering
$700,000 for future physical pain and suffering

reasonably considered the evidence of the physical and emotional suffering the plaintiff experienced in the past and would experience in the future and awarded damages accordingly. Specifically, plaintiff asserts that the breakdown of the general damages award demonstrates the jury's reasonable conclusions that the plaintiff: (1) is likely to suffer several more years of significant chronic pain in the future, and (2) has likely already experienced the worst of his mental and emotional suffering.

In its reply, EBI argues that plaintiff's pain and suffering was exaggerated at trial. Specifically, EBI asserts that plaintiff did not spend multiple days in the hospital following the surgery on his heel as he claimed. EBI also argues that the testimony of Dr. Lawrence Haydel and Chadd Duncan, the plaintiff's orthopedist and physical therapist, showed that plaintiff spent a few months, not a year in a wheelchair. EBI also argues that there was no evidence that plaintiff had developed post-traumatic arthritis in his right heel at the time of trial, and that plaintiff is not crippled in both feet, because the fracture to his left ankle is not as severe as the fracture to his right heel. EBI also asserts that it is inconsistent for plaintiff to claim that he feels a sense of guilt or responsibility for his cousin's husband's death when he sought a judgment as a matter of law on contributory negligence. Finally, EBI asserts that plaintiff engages in speculative math by failing to provide any basis at all for his conversion of the awards in the cases he cites into "today's

dollars."

With respect to EBI's arguments related to the embellishments at trial, the Court notes that the jury heard all of the contradictory evidence about the length of time that the plaintiff spent in the hospital following his surgery and the length of time he spent in a wheelchair in rendering its general damages award. As far as EBI's argument that Dr. Lawrence Haydel's testimony established that plaintiff was not currently suffering from post-traumatic arthritis at the time of trial (Trial Tr. Day 1, 276), Dr. Lawrence Haydel also testified that "whenever you have a fractured calcaneus of this severity, you're going to develop some posttraumatic arthritis." (Trial Tr. Day 1, 280) He further stated that if the plaintiff developed traumatic arthritis in his joint, it would worsen over time. (Trial Tr. Day 1, 259, 263) The jury was entitled to award the plaintiff damages for future pain and suffering on that basis of that testimony even though plaintiff was not presently suffering from any post-traumatic arthritis at the time of trial. Hagerty v. L&L Marine Servs., Inc., 788 F.2d 315, 317, 319 (5th Cir. 1986) (noting in a Jones Act case that "plaintiff is entitled to recover damages for all of his past, present, and *probable* future harm attributable to the defendant's tortious conduct," and that the plaintiff could recover where he could show that the defendants' tortious conduct more probably than not would lead to future condition). In addition, because human emotion is the antithesis of rational, the Court finds that

plaintiff's freedom from *legal fault* for the accident does not preclude him from suffering from feelings of guilt and responsibility in light of his role in operating the crane prior to the accident. People who are legally responsible don't necessarily feel guilt and people who feel guilt are not necessarily legally responsible. Thus, the Court rejects EBI's contentions on those points.

1. The "Maximum Recovery Rule" and "Clearly Excessive Rule"

The Fifth Circuit has endorsed two competing methods for evaluating the propriety of a jury award, the "maximum recovery rule," and what may be termed the "clearly excessive rule." Under the "maximum recovery rule," a court reviewing a jury verdict should remit damage awards that are found to be excessive to the maximum amount the jury could have awarded. Salinas v. O'Neill, 286 F.3d 827, 830 (5th Cir. 2002). The maximum amount is determined by comparing the award under scrutiny to awards in other similar cases. Id. A multiplier of 150% is then applied to arrive at the maximum recovery amount, and the jury award is remitted to that amount if necessary. Id.; see also Thomas v. Texas Dep't of Crim. Justice, 297 F.3d 361, 369 n. 8 (5th Cir. 2002). "'Because the facts of each case are different, prior damages awards are not always controlling; a departure from prior awards is merited 'if

unique facts are present that are not reflected within the controlling caselaw.'" Learmonth v. Sears Roebuck and Co., 631 F.3d 724, 739 (5th Cir. 2011) (citing LeBron v. United States, 279 F.3d 321, 326 (5th Cir. 2002)). Under the "clearly excessive" rule, a "damage award may be overturned only upon a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice. Eiland v. Westinghouse Elec. Corp., 58 F.3d 176, 183 (5th Cir. 1995). Applying this rule, courts have traditionally frowned upon comparing an award to awards in factually similar cases as a method for determining if an award is excessive. Johnson v. Off-shore Express, Inc., 845 F.2d 1347, 1356 (5th Cir. 1988) ("we do not determine excessiveness of damage awards by comparing verdicts in similar cases, but rather we review each case on its own facts."); see also, Thomas, 297 F.3d at 374 n. 5 (Dennis, J., concurring) (citing Fifth Circuit cases for this proposition). Rather, this inquiry emphasizes the uniqueness of each case, which must be determined upon its own facts, while recognizing that comparisons may serve as a point of reference. Id. at 374. A court's "reassessment of damages cannot be supported entirely by rational analysis, but involves an inherently subjective component." Eiland, 58 F.3d at 183.

2. The Evidence Supporting the Jury's Awards for Past and Future Physical Pain and Suffering

The jury awarded the plaintiff one million dollars for his past and future physical pain and suffering. Under the Jones Act, a plaintiff may recover all of his pecuniary losses, including pain and suffering. Cruz v. Hendy Int'l Co., 638 F.2d 719, 723 (5th Cir. 1981). The jury is only permitted to award the plaintiff damages for pain and suffering attributable to an injury caused by the Defendant's negligence. Owens v. Abdon Callais Offshore, LLC, No. 10-3296, 2011 WL 3654239, at *11 (E.D. La. Aug. 19, 2011) (citing Daigle v. L&L Marine Transp. Co., 322 F. Supp. 2d 717, 730 (E.D. La. 2004) (citing Thomas J. Schoenbaum, Admiralty and Maritime Law § 5-15, at 234)). "The standard of causation in Jones Act cases is not demanding." Johnson v. Cenac Towing, Inc., 544 F.3d 296, 302 (5th Cir. 2008). Under the Jones Act, a seaman is entitled to recover damages for injuries that were caused, in whole or in part, by his employer's negligence. Id. (citations omitted); Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957) (applying the same standard of causation used in FELA § 51 cases in a Jones Act case and explaining that "'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'") (quoting Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957)). The plaintiff must prove his damages by a

preponderance of the evidence. Clements v. Chotin Trans. Inc., 496 F. Supp. 163, 168 (M.D. La. 1980).

On the date of the accident, November 17, 2009, Plaintiff was thrown from a collapsing crane before impacting the ground. (Trial Tr. Day 1, 106) Plaintiff testified that immediately after the accident, he had a painful, bleeding cut on his head, experienced numbness and pain in both feet, and burning pain in his right lower abdomen. (Trial Tr. Day 1, 106, 109) Immediately after the accident, Plaintiff was admitted to the emergency room at Terrebone General Medical Center ("TGMC") by Dr. Cenac and discharged three days later on November 20, 2009. (Trial Tr. Day 1, 112, 240) As a result of the crane accident, plaintiff sustained a comminuted fracture of his right calcaneus (heel) and a fracture of his left talus (ankle). (Trial Tr. Day 1, 241, 265) CT scans and x-rays taken by Dr. Lawrence Haydel on November 24, 2009, seven days after the accident, showed that plaintiff suffered from a severe fracture of his right heel in which the calcaneus bone was in multiple pieces and depressed (Trial Tr. Day 1, 242, 245-46) Dr. Lawrence Haydel explained to the jury that plaintiff's "entire heel is crushed, is flattened out and kind of kicked over and pushed out of place." (Trial Tr. Day 1, 245) Plaintiff's calcaneus fracture in his right extremity was more severe than the avulsion or "chipping" fractures on his left side around his ankle. (Rec. Doc. 142-3, p. 32) Upon discharge, plaintiff was sent home in a wheelchair for about a week to wait for the swelling in his feet to subside so

that surgery on his right heel could be performed. (Trial Tr. Day 1, 112, 240-42) During that week, Plaintiff testified that he was sedated on oxycodone, sleeping in a hospital bed with his feet elevated in large boots, forced to use a bed pan and a urinal to use the restroom, and dependent on his wife's assistance. (Trial Tr. Day 1, 112-13)

On November 25, 2009, eight days after Plaintiff's accident, Dr. Lawrence Haydel performed surgery on Plaintiff's right calcaneus, which involved the placement of a metal plate and screws to realign the joint surface, decrease the risk of posttraumatic arthritis, and improve plaintiff's joint motion. (Trial Tr. Day 1, 245-46) Plaintiff testified that he was hospitalized for approximately five or six days with both of his feet in hard casts and received pain medications through an IV. (Trial Tr. Day1, 114) Plaintiff recounted that he experienced significant pain on the second and third day after his surgery, because the IV with his pain medication had gone through the vein in his arm creating a six inch bulge filled with fluid and medication in his elbow. (Trial Tr. Day 1, 114) However, Dr. Lawrence Haydel testified that he performed the surgery on Plaintiff's right heel on November 25, 2009 and discharged Plaintiff the next day in a splint, rather than a cast, because of the swelling from the surgery. (Trial Tr. Day 1, 247) Moreover, the TGMC records that were admitted into evidence show that plaintiff was admitted to TGMC on November 25, 2009, and discharged at 9:45 a.m. on November 26, 2012, the day

after Dr. Lawrence Haydel performed the surgery on his right heel. (Trial Exhibit 14, Bates numbers Naquin 001428 - Naquin 001432) Plaintiff testified that immediately after his surgery, he was unable to walk, and slept in a hospital bed in the den of his house while his wife slept in their regular bedroom. (Trial Tr. Day 1, 115-16) He further testified that while he was initially taking oxycodone to manage his pain, he stopped taking oxycodone after his wife expressed concern that he might develop an addiction to the painkiller. (Trial Tr. Day 1, 117-18)

Following his surgery, plaintiff attended nine post-surgery follow-up visits with his orthopedist, Dr. Lawrence Haydel, between December 1, 2009 and April 3, 2012. (Trial Tr. Day 1, 248-58) Plaintiff also attended three post-surgery visits with Dr. Sweeny, the defense medical expert, between April 20, 2010 and August 10, 2010. (Rec. doc. 142-3, p. 38) During his first post-surgery follow-up visit with Dr. Lawrence Haydel on December 1, 2009, Plaintiff's legs were placed in short-leg fiberglass casts. (Trial Tr. Day 1, 248) During his second post-surgery follow-up visit, approximately one-month after his surgery, Dr. Lawrence Haydel placed Plaintiff in bilateral, removable walking boots, so that Plaintiff could begin physical therapy, provided Plaintiff with a prescription for a walker with wheels, and permitted Plaintiff to begin weight bearing on his left but not his right foot. (Trial Tr. Day 1, 248-49) Plaintiff underwent over seventy painful physical therapy sessions with Chadd Duncan, a licensed physical

therapist, between December 22, 2009 and August 19, 2010. (Trial Tr. Day 1, 118, 284) During his third post-surgery follow-up visit with Dr. Lawrence Haydel, approximately three months after his surgery, his orthopedist permitted plaintiff to increase his weight bearing on the right heel and testified that Plaintiff was improving with physical therapy. (Trial Tr. Day 1, 253-54) Plaintiff testified that he spent close to a year in a wheelchair after his surgery. (Trial Tr. Day 1, 117) Dr. Lawrence Haydel, plaintiff's orthopedist, testified that Plaintiff would have needed a wheelchair for "a three-months duration at least," and that while Plaintiff would be able to walk after three months, he would probably require a wheelchair to do shopping or other activities that required him to walk long distances. (Trial Tr. Day 1, 267, 269) Dr. Lawrence Haydel also stated that it would be up to Plaintiff whether he used a wheelchair at home regardless of his progress at physical therapy. (Trial Tr. Day 1, 268)

Throughout all of his visits to both Dr. Sweeney and Dr. Lawrence Haydel over the course of approximately two and a half years after his surgery, plaintiff reported pain in both lower extremities. Dr. Lawrence Haydel testified at trial and Dr. Sweeny's trial deposition was read to the jury. Both doctors observed that following the surgery, Plaintiff's fractures were healing well,[26] but that Plaintiff continued to report that he

[26] By January 18, 2010, approximately two months after the plaintiff's accident and right heel surgery, Dr. Lawrence testified that x-rays showed that all of the plaintiff's fractures were healing well. (Trial Tr. Day 1, 253-54) Similarly,

experienced significant pain. Dr. Lawrence Haydel testified that Plaintiff's fractures were healing well by April of 2010. (Trial Tr. Day 1, 248, 254) However, Plaintiff reported pain over his left ankle in the region of his talus fracture and continued to suffer from recurrent swelling in both feet, for which Dr. Haydel prescribed Plaintiff Celebrex, a prescription anti-inflammatory and pain medication. (Trial Tr. Day 1, 254, 270) Similarly, Dr. Sweeney testified that in April of 2010, Plaintiff walked with a painful limp, had swelling and tenderness his left and right feet, with greater swelling as well as discoloration in his right foot. (Rec. Doc. 142-3, p. 17, 22, 24) By June of 2010, seven months after his heel surgery, Plaintiff continued to suffer from pain in both heels and ankles and developed plantar fasciitis, an inflammatory condition in the sole of the foot. (Trial Tr. Day 1, 255) Dr. Haydel administered an injection to the plantar fascia and prescribed Plaintiff Celebrex, a prescription anti-inflammatory and pain medication (Trial Tr. Day 1, 255-56, 270) On June 8, 2010, during his visit with Dr. Sweeney, Plaintiff reported moderate to severe pain most of the time as well as pain in his shoulders from using forearm crutches. (Rec. Doc. 142-3, p. 39) Dr. Sweeney also observed that at this point, and in spite of his physical therapy, Plaintiff had limited ability to walk or stand. (Rec. Doc. 142-3, p. 43) During his August 2010 visit with Dr.

---

on June 7, 2010, six months after the plaintiff's surgery, Dr. Lawrence Haydel testified that x-rays indicated that plaintiff's fractures were healing well. (Trial Tr. Day 1, 255)

Lawrence Haydel, Plaintiff also reported pain in the lateral aspect of his left foot where he sustained the talus fracture, pain in the plantar aspect of his right heel, and only temporary relief from the steroid injection administered during his previous visit with Dr. Lawrence Haydel in June of 2010. (Trial Tr. Day 1, 256, 246)

By October of 2010, approximately eleven months after Plaintiff's accident and right heel surgery, Plaintiff's right talus fracture had completely healed, and Dr. Lawrence Haydel diagnosed him with tendonitis developing over the site of the left talus fracture and injected the area with steroids to manage the pain. (Trial Tr. Day 1, 257) Plaintiff also continued to report plaintiff continued to report pain in his right joint region and heel. (Trial Tr. Day 1, 257) In addition, Dr. Lawrence Haydel noted that on that date, the left talus fracture was fully healed, but that he diagnosed plaintiff with tendonitis developing over the site of the left talus fracture and injected that area with steroids. (Trial Tr. Day 1, 257) On April 3, 2012, approximately two years and a half years after his surgery, plaintiff returned to Dr. Lawrence Haydel (Trial Tr. Day 1, 258) Plaintiff's fractures were fully healed and had good position of the joint. (Trial Tr. Day 1, 258) Nevertheless, plaintiff reported recurrent discomfort in his left foot and in the heel of his right foot, and Dr. Lawrence Haydel noted tenderness on his right heel and left ankle. (Trial Tr. Day 1, 258) Dr. Lawrence Haydel opined that Plaintiff was suffering from chronic pain as a result of the trauma to his

calcaneus, chronic pain in his left foot in the area of his talus fracture due to tendonitis, and plantar fasciitis.[27] (Trial Tr. Day 1, 258-59, 263). Although Dr. Lawrence Haydel testified that on April 3, 2012, Plaintiff had not yet developed any post-traumatic arthritis, he also testified that Plaintiff had a "high risk" of developing post-traumatic arthritis due to the severity of his calcaneus fracture and that "whenever you have a fractured calcaneus of this severity, you're going to develop some posttraumatic arthritis." (Trial Tr. Day 1, 280) He further stated that if Plaintiff developed traumatic arthritis in his joint, which was a "high risk," it would worsen over time, and in that event, a fusion of the joint would be a treatment option. (Trial Tr. Day 1, 259, 263) Dr. Lawrence Haydel testified that the only treatment that could be provided to manage Plaintiff's pain as of the time of trial was anti-inflammatories, heat, and stretching exercises. (Trial Tr. Day 1, 263) On cross-examination, Dr. Lawrence Haydel testified that although there was no evidence of post-traumatic arthritis and that he had not diagnosed Plaintiff with post-traumatic arthritis, "[Plaintiff] probably has some arthritic changes there because the joint was involved. It has to come to a certain degree before it starts showing up on x-ray." (Trial Tr. Day 1, 276) Plaintiff testified that he continued to

[27] Dr. Lawrence Haydel explained that plantar fasciitis is a condition in which the fascial layer on the sole of the foot becomes inflamed and causes pain.

experience pain in his feet at the time of trial. (Trial Tr. Day 1, 119)

Dr. Sweeney testified that the fact that both of Plaintiff's lower extremities had sustained fractures made Plaintiff's recovery more difficult. (Rec. Doc. 142-3, p. 32) Dr. Sweeney also rendered his opinion that Plaintiff "would, in all likelihood, not recover completely and he would be left with a whole person impairment . . ." (Rec. Doc. 142-3, p. 33)

Plaintiff testified that following the accident, he experienced back and knee pain that he had not experienced prior to his accident. (Trial Tr. Day 1, 215, 229) Although Plaintiff underwent surgery to have a disc removed in 1975, he testified that he had not experienced any back pain during the ten years preceding the accident and began to experience back pain after the accident for which he occasionally took Aleve. (Trial Tr. Day 1, 119, 120) None of Plaintiff's doctors treated him for a back injury following the accident despite his complaints of pain.[28] (Trial Tr. Day 1, 215-16) Plaintiff further testified that he had cartilage removed from his knee in the mid-1980s and that changes in his walking gait as a result of his foot injuries caused him to have problems with

[28] Dr. Lawrence Haydel testified that plaintiff never complained of back pain and that he never treated plaintiff for back pain. (Trial Tr. Day 1, 278) The plaintiff reported back pain to his family practitioner, Dr. Guidry, on August 12, 2010. (Trial Tr. Day 2, 453; Tr. Ex. 16, p. 9) The plaintiff reported lower back pain to Trevor Bardarson during his functional capacity evaluation on September 22, 2010, approximately ten months after his accident. (Trial Tr. Day 2, 422, 431) The plaintiff also reported back pain to his vocational rehabilitation specialist, Dr. Cornelius Gorman, when he met with him on June 6, 2011. (Trial Tr. Day 1, 318)

his knees. (Trial Tr. Day 1, 120) Plaintiff reported knee pain during his evaluation with Dr. Gorman on June 6, 2011. (Trial Tr. Day 2, 336)

On February 25, 2010, approximately three months after the crane accident, plaintiff sought treatment from Dr. Gerald Haydel who diagnosed him with a large right inguinal hernia.[29] (Trial Tr. Day 1, 234-35) On March 4, 2012, Dr. Haydel performed a hernioplasty on Plaintiff under general anesthesia. (Trial Tr. Day 1, 234-35) During the course of the surgery, Dr. Gerald Haydel discovered that plaintiff actually suffered from a double hernia, including a large direct hernia as well as an indirect hernia, and inserted mesh into Plaintiff's groin area. (Trial Tr. Day 1 234-35) Dr. Gerald Haydel's record's reflect that he saw Plaintiff three times after performing the hernioplasty, and that by April, 20, 2012, approximately two months after the surgery, Plaintiff's hernia repair was completely healed and asymptomatic with no tenderness and no pain. (Trial Tr. Day 1, 236, 238)[30]

[29] Dr. Gerald Haydel characterized the injury as a "weakness in the groin area around the fascia." (Trial Tr. Day 1, 234-35)

[30] Although Dr. Gerald Haydel's testimony regarding whether or not the crane accident caused the plaintiff's hernia injury was ambivalent, a reasonable jury could have concluded that the plaintiff's hernia injury was more probably than not caused by the crane accident. Dr. Gerald Haydel acknowledged that the injury was consistent with the type of trauma the plaintiff reported. (Trial Tr. Day 1, 237) He further opined that the plaintiff would have experienced significant pain picking up or moving things if he had the hernia prior to the accident. (Trial Tr. Day 1, 237) The jury heard evidence that the plaintiff's day to day work while employed at EBI involved cleaning, painting, and chipping boats, changing boards on the decks of boats, fixing broken glass on windshields, and changing floors. (Trial Tr. Day 1, 141) The plaintiff also recounted that "sometimes I had to pull the exhaust pipes off, maybe replace and engine. Get on the crane and - on the boat and pull that engine out and put another one in." (Trial Tr. Day 1, 141) The jury did not hear any evidence that plaintiff had complained of pain in the course of performing such manual labor and lifting

Plaintiff testified that as of the time of trial, he was taking two Lyrica twice a day, Lexapro for depression, and Aleve for his back pain occasionally. (Trial Tr. Day 1, 120-21) Plaintiff testified that he always uses a cane to walk. (Trial Tr. Day 1, 129) Plaintiff testified that he continues to experience pain in his right foot that gets worse in the evening, rating 8 on a scale of 1-10. (Trial Tr. Day 1, 131) On cross-examination, Plaintiff concedes that he regularly suffers from pain that rates as a 6 on the scale from 1-10. (Trial Tr. Day 1, 217) He also testified that he suffers from shaking, stiffness, and inability to control the toes on his right foot. (Trial Tr. Day 1, 131) He testified that he experiences somewhat less pain in his left foot, somewhere around 5-6 on a scale of 1-10. (Trial Tr. Day 1, 131) He further testified that he took Lyrica for his pain as prescribed by his family doctor and only took narcotic pain medication for a brief period immediately after the accident, because his wife was concerned about him developing an addition. (Trial Tr. Day 1, 131) Plaintiff testified that the Lyrica "does real well to help me out." (Trial Tr. Day 1, 213) Dr. Larry Haydel testified that

---

activities prior to his accident. The jury did not hear any testimony about any other event that could have caused the plaintiff hernia injury. Under the circumstances, a reasonable jury could have concluded that the crane accident played a part in producing the hernia injury and awarded the plaintiff damages for physical pain and suffering associated with the hernia injury and the surgery the plaintiff underwent to repair it. See Owens v. Abdon Callais Offshore, LLC, 10-3296, 2011 WL 3654239, at *7 (E.D. La. Aug. 19, 2011) (finding sufficient evidence that accident had caused back injury where physician testified that the plaintiff's back injury was likely caused by a traumatic event, and plaintiff had worked for two years before his accident as an unlicensed engineer without any difficulty). In addition, in its opposition, EBI apparently concedes that the plaintiff's hernia was caused by the accident.

Lyrica probably will not help with pain unless it is neurogenic in nature. (Trial Tr. Day 1, 276) Dr. Lawrence Haydel also testified that he never received complaints of pain that were 8 or 6 on a scale out of 10, but he also testified that he never quantified Plaintiff's pain on a scale of 1-10. (Trial Tr. Day 1, 275-76, 278-79) Dr. Lawrence Haydel also testified that he would not prescribe narcotic-type pain medication for chronic pain, because "it kind of created another problem for the patient to become addicted to, and then over time they build a tolerance to it." (Trial Tr. Day 1, 280) Plaintiff complained of having "a lot of pain in my feet and my back and my knee." (Trial Tr. Day 1, 214) Plaintiff also testified that he periodically takes Celebrex for swelling. (Trial Tr. Day 1, 215) Although, plaintiff did not seek pain treatment very frequently in 2011, he testified that Dr. Sweeney told him in 2012 that there was nothing more that they could offer him to get better. (Trial Tr. Day 1, 228) Plaintiff testified that he always uses a cane, and that his goal is to be able to get around without relying so much on the cane. (Trial Tr. Day 1, 129)

3. The Evidence Supporting the Jury's Awards for Past and Future Mental and Emotional Pain and Suffering

The jury awarded Plaintiff one million dollars for his past and future mental and emotional pain and suffering. Although Plaintiff was unaware of the condition of his co-worker and family members while in the emergency room immediately following his

accident, he worried about his family, friends, and co-workers who were working in the building where the crane collapsed. (Trial Tr. Day 1, 110) The day after the accident, Plaintiff learned that his cousin's husband had been killed when the crane fell through the roof of the building. (Trial Tr. Day 1, 111) Plaintiff and his wife testified that he was devastated by the news of his cousin's husband's death. (Trial Tr. Day 1, 111; Trial Tr. Day 2, 397) In the weeks following the accident, Plaintiff experienced nightmares about the accident that interfered with his sleep. (Trial Tr. Day 1, 114; Trial Tr. Day 2, 398) and at the time of trial, he continued to have nightmares about the accident two to four times per week, in which he would wake up in the middle of the night screaming. (Trial Tr. Day 1, 114; Trial Tr. Day 2, 398)

Plaintiff testified that he sought treatment for depression from Dana Davis, a licensed social worker. (Trial Tr. Day 2, 343) once per week immediately following the accident, and that at the time of trial, he attended counseling once per month. (Trial Tr. Day 1, 172) Dr. Gorman, plaintiff's vocational rehabilitation specialist, testified that Plaintiff had attended counseling sessions with Dana Davis at least twenty-nine times since his accident. (Trial Tr. Day 2, 343) Dr. Sweeney testified that on August 10, 2012, approximately seven months after his accident, Plaintiff reported to him that he was suffering from depression and that his wife had removed all the guns to which Plaintiff had access. (Rec. Doc. 142-3, p. 34, 37-39) About nine months after

the accident, Plaintiff sought treatment at the Family Doctor Clinic and reported that he was suffering from depression, bad dreams, and suicidal thoughts. (Trial Tr. Day 1, 125) Plaintiff reported that his wife would periodically find him crying in their yard and Plaintiff's wife recounted an episode in which she found her husband sitting on the bench by his brother's grave crying. (Trial Tr. Day 1, 125; Trial Tr. Day 2, 402) Plaintiff reported that his wife was so worried that he might attempt to kill himself that she called his son over and took all of his guns, and Plaintiff's wife confirmed that she was worried about her husband harming himself. (Trial Tr. Day 1, 125; Trial Tr. Day 2, 402) Plaintiff testified that he turned suicidal, because he felt guilty about the death of his co-worker and the impact on his co-worker's family, and perceived that his family was avoiding him even though there was nothing he could have done. (Trial Tr. Day 1, 126) Plaintiff's wife testified that her husband felt guilty that he lived and his cousin's husband died. (Trial Tr. Day 2, 403) Plaintiff testified that at the time of trial, he was taking Lexapro prescribed by his family doctor, Dr. Guidry, once a day for his depression and that the medication causes his to gain weight, gives him headaches, and affects his memory, making it difficult for him to remember names. (Trial Tr. Day 1, 122, 214)

Plaintiff testified that his family relationships and social life changed following the accident. (Trial Tr. Day 1, 126) While in a wheelchair after his surgery, Plaintiff struggled with not

being able to participate in family activities like the other members of his family and with feeling like a burden on his family members.[31] (Trial Tr. Day 1, 117) Plaintiff testified that as a result of the accident, he is unable to attend many social functions with his family and friends, because of his lack of mobility, or because there is no room for his wheelchair, or because it is too dangerous for him to attend. (Trial Tr. Day 1, 136) Plaintiff testified that the accident adversely affected his relationship with his wife, and his wife testified that the accident affected their intimacy. (Trial Tr. Day 1, 135; Trial Tr. Day 2, 204) As a result of his accident, Plaintiff was forced to sell many personal effects that he was no longer able to use and enjoy as a result of his injuries, including his truck and motorcycle. Prior to his accident, plaintiff and his family enjoyed riding motorcycles and attending car shows, but as a result of his accident, plaintiff testified that he is unable to ride motorcycles or attend car shows. (Trial Tr. Day 1, 132-34; Trial Tr. Day 2, 403) He gave his truck to his daughter, because he was unable to get into it. (Trial Tr. Day. 1, 134) Plaintiff was also forced to sell the property where he was born and raised, which was formerly owned by his father, because he was unable to maintain the property as he had done before his accident and did not want to

[31] The plaintiff, a man who had formerly been active in riding motorcycles and loved working, specifically testified that he struggled with "not being able to go around with my family and do things with my family like everybody else. Lagging behind and bothering people to do this for me and push me there. (Trial Tr. Day 1, 117)

burden his busy children with maintaining the property. (Trial Tr. Day 1, 134-135) Plaintiff's wife testified that his father's property meant more to Plaintiff than his own property. (Trial Tr. Day 2, 401)

Plaintiff testified that he missed working and used to love being with his friends at his job. (Trial Tr. Day 1, 127) He also testified that he had intended to work until he was seventy years old and that his father worked until he died at the age of 67. (Trial Tr. Day 1, 131) Although Plaintiff stated that he may be able to perform some type of sedentary work in the future provided his depression improves, (Trial Tr. Day 1, 214) this is likely an overly optimistic assessment. Dr. Gordon, the vocational rehabilitation specialist who evaluated Plaintiff approximately a year and a half after the accident, (Trial Tr. Day 2, 236) stated in his report that Plaintiff was totally and permanently disabled and that there were no future jobs available for Plaintiff. (Trial Tr. Day 2, 320, 324)

Numerous witnesses, even adverse witnesses, bolstered Plaintiff's account of his mental and emotional suffering. Dr. Gordon, plaintiff's vocational rehabilitation specialist, testified that during their meeting, over a year and a half after the accident, plaintiff had "a lot of emotional reaction talking with me and describing some things." (Trial Tr. Day 2, 332) Trevor Bardarson, a defense witness who preformed a functional capacity evaluation ten months after plaintiff's accident and whose

testimony was offered by the defense to suggest that Plaintiff was exaggerating his physical symptoms, (Trial Tr. Day 2, 445) corroborated Plaintiff's account of his emotional suffering. For instance, Mr. Bardarson testified on direct examination that "[Plaintiff] was very high on issues that related to depression and psychological distress," that "[Plaintiff] was having a lot of difficulty, psychologically, I think, with the injury and dealing with everything that happened," and that there is "a very strong psychological issue going on here that's impacted [Plaintiff] from a physical standpoint." (Trial Tr. Day 2, 439) On cross-examination, Mr. Bardarson stated that he did not doubt the validity or truthfulness of Plaintiff's complaints of depression, bad dreams, and suicidal thoughts, and recollected from his interaction with Plaintiff that he was "very distraught." (Trial Tr. Day 2, 456)

To summarize, following the accident, Plaintiff sustained cuts to his head, a hernia that required surgery, a fracture to his left talus and other avulsion or "chipping" fractures in his left foot, a very severe fracture to his right calcaneus (heel) that required surgery and the insertion of a plate and pins, back pain and knee pain as a result of changes in his walking stride, tendonitis over the site of the fracture in his left foot, and plantar fasciitis. Immediately following the accident, Plaintiff's lower extremities were so swollen that he spent a week at home on narcotic strength pain medications waiting for the swelling to diminish so that his

surgery could be performed on his right heel without complications. As a result of the accident, plaintiff underwent two surgeries. The surgery on his right heel, performed approximately one week after the accident, involved the insertion of a plate and multiple screws into Plaintiff's right heel. The surgery on Plaintiff's double hernia involved the insertion of mesh into to Plaintiffs groin area. Following his surgeries, Plaintiff underwent over seventy painful physical therapy sessions over the course of approximately eight months to try to improve his ability to walk while his feet were swollen and in pain. Although the fractures in Plaintiff's left and right extremities are healed, Dr. Haydel opined that Plaintiff will continue to experience chronic pain in his left and right feet, and that there is a very high risk that Plaintiff will develop post-traumatic arthritis in the joint where his calcaneus surgery was performed which will worsen with time. Plaintiff, a man who loved to work, is permanently disabled and unemployed according to the medical and vocational rehabilitation experts, despite his cautious optimism that he may be able to perform some type of sedentary work in the future. Plaintiff is currently dependent upon a cane.

Moreover, by all accounts, Plaintiff experiences severe mental and emotional pain and suffering as a result of his accident. He endured the death of his cousin's husband in the crane accident, several months of physical therapy in which he achieved only minimal improvement and had to come to terms with that fact that

his injuries were likely permanent, his inability to engage in social and family activities he enjoyed prior to the accident, his inability to return to work at a job that he loved, his feeling of being a burden on his family, and adverse changes in his relationship with his wife. Following the accident, Plaintiff was depressed and suicidal at times. At the time of trial, Plaintiff continued to suffer from depression for which he takes Lexapro, a medication that gives him various negative side effects, and seeks counseling from a social worker approximately once per month. Plaintiff also continues to suffer from recurrent nightmares about the accident that are so vivid he wakes up screaming.

4. Application of the Maximum Recovery Rule and Clearly Excessive Rule to the Evidence

As discussed above, application of the maximum recovery rule presupposes the existence of a case that is factually analogous in terms of the nature, intensity, and duration of Plaintiff's aggregate injuries, as well as the categories of damages awarded. The Court can find no precedent for EBI's proposed piecemeal method for determining the maximum that the jury could have awarded in this case for Plaintiff's physical and emotional pain and suffering. Moreover, EBI relied on several unreported awards in reaching its proposed piecemeal figure, and the Court will not consider unreported awards for quantum purposes, as they generally lack precedential value. LeBron v. United States, 279 F.3d 321, 326

(5th Cir. 2002). Moreover, EBI has offered no comparable factual analog to the instant case in terms of the aggregate injuries that Plaintiff suffered. The fact that EBI re-calculated the "maximum" award the jury could have awarded based on the evidence by looking at Plaintiff's injuries in a piecemeal fashion and applying a 50% multiplier to the itemized awards in several cases where plaintiffs suffered some, but far from all, of the physical or emotional injuries that Plaintiff suffered in this case suggests that EBI was unable to locate a case that is truly factually analogous to the case at hand in terms of the nature, duration, and intensity of Plaintiff's injuries. Thus, the Court rejects the methodology by which EBI drew from various cases where plaintiff's suffered only one or a few, but not all, of the injuries that Plaintiff in this case suffered in the aggregate to reach its proposed award of $1,191,084. The only reported case that EBI argues is factually analogous when Plaintiff's physical and emotional pain and suffering are viewed in the aggregate, LaBleu, is not factually analogous in terms of the nature and extent of Plaintiffs physical and emotional injuries.

Moreover, the Court is reluctant to rely on LaBleu for quantum purposes, because it was decided in 1988. Although the award in LaBleu is over twenty-years old, EBI asserts that LaBleu remains relevant and on-point, because the Fifth Circuit relied heavily on the case in Lejeune v. Transocean Offshore Deepwater Drilling, Inc., 247 Fed. Appx. 572 (5th Cir. 2007).

Although EBI is correct that the Fifth Circuit relied heavily on LaBleu in LeJeune, Lejeune is an unpublished opinion issued after January 1, 1996 that consequently lacks precedential value.[32] Thus, this Court is not necessarily bound to follow the Fifth Circuit's unusual approach in that unreported decision and examine a damage award that is over twenty years old. In reported Fifth Circuit precedent, the Fifth Circuit has routinely considered only reported[33] awards from the relevant jurisdiction within the last ten years for quantum purposes. See e.g., Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1427 n. 7 (5th Cir. 1988) (sampling reported general damage awards in cases involving somewhat comparable injuries within the prior *ten* years in a Jones Act case); Lebron v. United States, 279 F.3d 321, 328 (5th Cir. 2002) (sampling two reported awards in cases involving roughly comparable injuries within the prior *ten* years); Douglass v. Delta Air Lines, Inc.,

[32] Unpublished opinions issued on or after January 1, 1996 are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). Fed. R. App. P. 47.5.4.

[33] In Foradori v. Harris, 523 F.3d 477 (5th Cir. 2008), the Fifth Circuit declined to apply the maximum recovery rule where there were "'no reported cases from [the relevant jurisdiction] addressing the recovery for pain and suffering for injuries like those sustained by the plaintiff,'" and the defendants' attorney offered a selective sampling of only two cases from outside of the relevant jurisdiction, one of which was an award from 1984. Id. at 505-06. The Court declined to rely on the 1984 decision and declined to find the plaintiff's award excessive. Id. at 505. In a footnote, the court criticized the defendant's narrow sampling of reported decisions from foreign jurisdictions, and observed that the defendant gave no reason for omitting many other foreign cases involving somewhat similar injuries, including one unreported 2006 decision from Connecticut. Id. at 505 n. 22. Thus, the footnote in Foradori suggests that when there are no recent reported cases from the relevant jurisdiction, unreported awards from outside of the relevant jurisdiction might have some persuasive value, provided they are *recent*. The unreported award to which the Fifth Circuit referred was only two years old when Foradori was decided.

897 F.2d 1336, 1344-45 (5th Cir. 1990) (sampling reported awards in cases involving roughly comparable injuries within the prior *four* years); Wheat v. United States, 860 F.2d 1256, 1260-63 (5th Cir. 1988) (sampling reported general damage awards in cases involving roughly comparable injuries within the prior *seven* years); In re Air Crash Disaster, 767 F.2d 1151, 1156-57 (5th Cir. 1985) (sampling reported general damage awards for loss of love and affection of a spouse and loss of love and affection of a child within the prior *five* years); Wakefield v. United States, 765 F.2d 55, 60-61 (5th Cir. 1985) (sampling reported general damage awards in cases involving roughly comparable injuries within the prior *nine* years); Gutierrez v. Exxon Corp., 764 F.2d 399, 403 (5th Cir. 1985) (comparing general damage award to award for similar injuries in a case that was only two years old). The Court was able to locate one recent exception to this general practice of sampling only recent awards, Learmonth v. Sears, Roebuck and Co., 631 F.3d 724 (5th Cir. 2011), in which the Fifth Circuit considered two recent unreported decisions and one reported decision that was over twenty years old, Wells Fargo Armored Service Corp. v. Turner, 543 So. 2d 154 (Miss. 1989), for purposes of quantum comparison. Id. at 738. However, this case is clearly an exception to the well-established general practice of looking only at recent awards for purposes of quantum comparison, and the Fifth Circuit ultimately distinguished Learmonth from Turner, instead of using it to remit the plaintiff's award. In this case, like in Learmonth, neither

Lejeune nor LaBleu are factually analogous in terms of the nature, severity, and duration of the respective plaintiffs' injuries.

After examining the cases cited by the parties and researching the issue independently, the Court finds that the maximum recovery rule is not implicated, because "this case presents unique facts for which there are no controlling cases in the relevant jurisdiction." Learmonth, 631 F.3d at 739 (citing Vogler v. Blackmore, 352 F.3d 150, 158 (5th Cir. 2003)). In addition, the Court finds that the general damage award is not clearly excessive. District courts may only overturn damage awards upon "a clear showing of excessiveness or upon a showing that the jury was influenced by passion or prejudice." Eiland, 59 F.3d at 183. An "excessive" award is one that is "so large as to shock the judicial conscience," or "so gross or inordinately large as to be contrary to right reason," or clearly in excess of "that amount that any reasonable man could feel the claimant is entitled to." Foradori, 523 F.3d at 504 (internal quotation marks and citations omitted). The Court observed all of the witnesses at trial and has exhaustively reviewed the evidence supporting the general damage award in this case, as well as the evidence supporting the general damage awards in the cited cases. Although the general damages award in this case is certainly generous, it does not shock this Court's judicial conscience or exceed that amount that *any* reasonable man could feel Plaintiff is entitled to in light of his aggregate physical and emotional injuries. Thus, the Court

declines to substitute its judgment for that of the jury by ordering a new trial or remittitur of Plaintiff's general damages award.

D. EBI's Motion for a New Trial, or Alternatively, for Remittitur on Issue of Past Lost Wages

In its fourth motion, EBI moves for a new trial, or alternatively, for remittitur of the jury's award for past lost wages.[34] The jury awarded Plaintiff $160,000 for past lost wages even though Dr. Rice, Plaintiff's expert economist, calculated Plaintiff's past wage loss to be $153,442, and John Theriot, EBI's expert economist, calculated Plaintiff's past wage loss to be $125,429.[35] EBI argues that the award is excessive to the extent that it exceeds the highest figure offered by either party's expert. Relying on the Fifth Circuit's decision in Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 168-69 (5th Cir. 1990), EBI argues that the court should order a new trial on past lost wages or condition the denial of a new trial on Plaintiff's acceptance of a remittitur in the amount of $6,558, the amount by which the award exceeded the highest figure offered by either expert.

In Treadaway, the Fifth Circuit, applying the maximum recovery rule, reduced a past lost wages award in excess of the

[34] Rec. Doc. 135.

[35] Trial Transcript, p. 346; Trial Exhibit 24a; Trial Transcript, p. 520; Trial Exhibit 26.

highest figure offered by either party's expert to the higher figure supplied by the plaintiff's economist. Id. at 169-70. The Court reasoned that the jury exceeded the maximum it could have awarded based on the evidence, since there was no evidentiary support in the record for an amount in excess of the figure supplied by the plaintiff's own expert economist. Id. at 169. Similarly, in the instant case, there is no evidentiary support in the record for an award in excess of the figure offered by Dr. Rice.

Plaintiff's counsel has apprised the Court that he does not oppose the remittitur of the award for past lost wages. (Rec. Doc. 159) Because the motion is well-founded and unopposed, the Court finds that EBI's motion for a new trial on the issue of past lost wages should be denied conditioned on Plaintiff's acceptance of a remitted past lost wages award of $153,442.00.

Accordingly, for the reasons expressed above, **IT IS HEREBY ORDERED** that EBI's motions for judgment as a matter of law, or alternatively, for a new trial on the issues of seaman status **(Rec. Doc. 126)** and future lost wages **(Rec. Doc. 133)** are **DENIED. IT IS FURTHER ORDERED** that EBI's motion for a new trial, or alternatively, remittitur of the general damages award **(Rec. Doc. 134)** is hereby **DENIED**, and EBI's motion for a new trial on past lost wages **(Rec. Doc. 135)** is **DENIED**, conditioned on Plaintiff's

acceptance of a remitted past lost wages award in the amount of $153,442.00.

New Orleans, Louisiana this 15th day of November, 2012.

CARL J. BARBIER
UNITED STATES DISTRICT COURT