UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-9569
Summary Calendar

TROY L. McCULLOUGH,

Plaintiff-Appellee

VERSUS

ODECO, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
90 CV 3868 "N" (2)

(August 19, 1993)

Before REYNALDO G. GARZA, SMITH, and WIENER, Circuit Judges

PER CURIAM:[*]

The defendant, Odeco, Inc., appeals an adverse jury verdict that found Odeco negligent and awarded damages for pain and suffering and lost wages to the plaintiff, Troy L. McCullough. We find that the jury had sufficient evidence before it to conclude that Odeco negligently trained McCullough and that he was injured at least in part because he was not adequately trained.

FACTS

McCullough severely injured his left knee on September 9,

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

1990, when he lost control of a drill collar aboard the D/B OCEAN TITAN ("TITAN").[1] The TITAN is an offshore jackup drilling rig owned and operated by ODECO.

In 1981, when McCullough was employed by Penrod Drilling Corporation he sustained an injury to his left knee when he fell out of a deer stand while hunting. As a result of his injury McCullough underwent reconstructive surgery for his left knee. After a few months of recovery, McCullough returned to work at Penrod as a tool pusher.

McCullough remained at Penrod until September 1989 when he was demoted from tool pusher to driller. Soon thereafter the rig that McCullough had been working on was transferred overseas. Consequently, McCullough was required to undergo a physical examination. The examination revealed that McCullough had arthritis and loose bodies in his left knee. The examining physician, Dr. Webre, concluded that because of his left knee McCullough was not physically able to perform offshore work. On January 18, 1990, Penrod terminated McCullough because he failed the physical examination.

On February 12, 1990, McCullough applied to ODECO. In his employment application he stated that he had seventeen years of experience as a tool pusher, driller and roughneck. Further, in his employment application, McCullough misrepresented his physical health by neglecting to mention any prior problems with

[1] McCullough was a seaman for about twenty years prior to his accident aboard the TITAN. For the ten years prior to the accident, McCullough worked as a tool pusher.

his knee.

Although, McCullough did not tell ODECO or its examining physician about his knee he passed the pre-employment physical examination administered by Dr. Martz. McCullough was then hired by ODECO as a roustabout at a salary of $26,000 per year. McCullough then worked for seven months at ODECO without incident until the September 9th accident.

On September 9th, McCullough was working with drill collars when he lost control of one of them. The drill collar allegedly fell on his knee and he was thereby injured. Apparently, McCullough did not complain to his supervisor or co-workers about the injury.

Following the accident on September 26, 1990, McCullough obtained initial treatment for the injuries. On October 15, 1990, McCullough underwent surgery to remove loose bodies in his left knee. The surgery was performed by Dr. George Cary.

Three weeks after the October 15th surgery, McCullough filed a motion for summary judgment for maintenance and cure. Odeco opposed the motion on the ground that McCullough had misrepresented his physical condition and that the loose body removed in the October surgery preexisted McCullough's employment with ODECO. The district court granted ODECO's motion for summary judgment on the maintenance and cure because it found that McCullough's misrepresentation precluded recovery.

The case was tried before a jury and the jury returned a verdict for McCullough. In the answers to interrogatories the

jury found: (i) McCullough's left knee condition was worsened aboard the TITAN, Odeco's rig; (ii) McCullough's back was not injured aboard the TITAN;[2] (iii) the TITAN was seaworthy; and (iv) Odeco was negligent due to its failure to train McCullough. The jury found that McCullough sustained damages of $50,000 for pain and suffering and $200,000 for loss of past and future earning capacity. The total award was reduced proportionately because the jury found that McCullough was 40% contributorily negligent.[3]

DISCUSSION

Odeco argues that: (i) McCullough was physically unable to work offshore before Odeco hired him and, thus, he has no claim for loss of earnings; (ii) McCullough's intentional mis-representations are a bar to recovery; (iii) there was no evidence to support the jury's determination that Odeco was negligent; and McCullough counters that: (iv) there was no evidence that McCullough was contributorily negligent.

i. Loss of Earnings.

Odeco contends that all of the physicians who testified at trial concluded that McCullough was incapable of offshore work

[2] McCullough also sought damages for alleged injuries to his back; however, the jury determined that he could not recover for his alleged injuries. The issue is not before us on appeal and, thus, it is not mentioned further.

[3] The parties stipulated that McCullough had incurred $7,848.00 in medical expenses associated with his knee injury. The total damages were thus $257,848.00. The total amount of damages were reduced by McCullough's 40% contributory negligence and the total net judgment entered by the court was $154,708.00.

before he started to work for Odeco. Thus, they argue that the jury incorrectly assumed that at the time of his injury, McCullough would have been able to work for twenty-two more years offshore. Further, that Odeco was duped into hiring McCullough solely because of his misrepresentations. Consequently, they argue that the alleged injury did not cause any loss of future earnings because McCullough would not have been able to work in any case.

The jury heard testimony that suggested McCullough was able to work offshore before he commenced employment with Odeco. First, Dr. Martz, who performed the pre-employment physical testified that he examined McCullough, studied him, took x-rays, and certified that he was fit for offshore employment. Dr. Martz admitted that he examined the knee and it appeared objectively physically fit. Further, McCullough had worked offshore for Penrod for nine years after the 1981 accident and worked for six months with Odeco.

Odeco recognizes that there was some evidence before the jury that provided it with a basis to award future earnings. Odeco, however, argues that Parra v. Atchison, Topeka and Santa Fe Ry. Co., 787 F.2d 507 (10th Cir. 1986), bars McCullough's recovery for lost future earnings. Parra does not support Odeco's position. In Parra, the Tenth Circuit found that the plaintiff's expert testimony failed to establish that the plaintiff's injuries were caused by a non-obvious injury. Id. at 509. Further, in Parra the court found that the plaintiff's expert

testimony refuted the causal connection between the injury and the lost future earnings. Id.

However, in the present case there was testimony that there were "fresh tears" in the knee and, thus, it was within the jury's power to decide that they resulted from McCullough's mishap aboard the TITAN. Parra therefore, can be distinguished on the ground that there was no evidence of a causal connection, while in this case there is sufficient evidence to support the jury verdict.

Admittedly, the weight of the evidence appears to suggest that McCullough's injuries preceded his job with Odeco. However, we are reviewing a jury verdict. With regard to jury verdicts we have articulated:

> The standard for appellate review of a jury's verdict is exacting. The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded.

Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir. 1988) (*citing* Western Co. of N. Am. v. United States, 699 F.2d 264, 276 (5th Cir.), cert. denied, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983). The standard is referred to as the "sufficiency of the evidence" standard. Granberry, 866 F.2d at 113. We find that there was sufficient evidence in the record to support the jury award for lost future earnings.

ii. McCullough's Pre-Employment Misrepresentations.

Odeco points to the trial court's summary judgment in its

favor, which disposed of McCullough's maintenance and cure claims because of his misrepresentations. Odeco now contends that the summary judgment bars McCullough's tort recovery for medical expenses and lost wages.[4] Odeco offers no legal support for its argument. Although, Odeco's argument has appeal in equity the fact remains that the jury found Odeco negligent and that McCullough injured his knee as a result of that negligence. Further, Odeco's own physician certified that McCullough was fit for offshore employment. The jury verdict was supported by sufficient evidence, as a result it is unimpeachable.

iii. Evidence of Negligence.

Odeco contends that there was no evidence presented at trial from which the jury could have found it negligent for failing to train McCullough. McCullough contends that there was evidence that Odeco was negligent, but argues that there was no evidence that he was contributorily negligent.

Apparently, McCullough was not experienced with the type of air hoist that was used on the TITAN. Further, it is undisputed

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[4] There is extensive authority to support a bar to recovery of maintenance and cure as a result of misrepresentations on pre-employment physicals. Maintenance and cure is an action sounding in contract. However, in the tort arena the same logic does not apply. Perhaps that explains why there are no cases holding that a pre-employment misrepresentation bars recovery in a negligence action. Odeco recognizes that there is no authority, but asks us to create a new rule barring recovery in cases where there is a substantial, wilful misrepresentation made in a pre-employment physical questionnaire. On the facts of this case it is clear that Odeco's examining physician determined that McCullough was objectively fit for work. That undermines Odeco's position to such an extent that we need not consider creating a new rule on the facts of this case.

that McCullough received no training. Odeco merely contends that it should have been able to rely on McCullough's extensive experience. Gordon Powell, the Odeco driller, testified that he knew that McCullough had no experience in moving the drill collars on the Odeco rig. Further, he admitted that McCullough did not receive any training.

Mr. Robert an expert witness testified that Odeco's failure to train McCullough failed to meet generally accepted safety principles in the offshore oil industry. Surely, there is adequate evidence in the record for the jury to have concluded that Odeco was negligent.

McCullough admits in its brief that "there may be some evidence of slight negligence" on McCullough's part; however, he contends that the jury's conclusion that he was 40% contributorily negligent was not supported by the evidence. We are not in the business of reapportioning fault. The jury properly had evidence before it both of Odeco's negligence and McCullough's contributory negligence. We will not disturb their apportionment of the relative fault between the two parties.

CONCLUSION

The jury verdict on behalf of McCullough is unassailable. As an appellate court we review the jury determination based on the sufficiency of the evidence. After careful review of the record we find that the jury had sufficient evidence to arrive at the conclusions it did. Therefore, WE AFFIRM.