UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7696

LUKE MUCKLEROY,

Plaintiff-Appellee,

versus

OPI INTERNATIONAL, INC. and
OFFSHORE PIPELINES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Texas
(CA-G-92-540)

(December 2, 1994)

Before POLITZ, Chief Judge, WISDOM and SMITH, Circuit Judges.

POLITZ, Chief Judge:[*]

OPI International, Inc. and Offshore Pipelines, Inc. appeal the damages award to Luke Muckleroy following a bench trial of his Jones Act and general maritime law claim. For the reasons assigned we affirm in part and vacate and remand in part.

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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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

In April 1992, while working as a rigger on the derrick barge OCEAN BUILDER, Muckleroy sustained injuries to his back, neck, and head causing pain and numbness in the injured areas and in his legs. Ultimately he was subjected to surgery at the C5-6 level. The pain and difficulty persisted; the instant suit followed.

The district judge found OPI and Offshore liable and, after discounting the damages to reflect current cash value,[1] awarded Muckleroy $508,451 for future net economic loss, $40,801 for past economic loss, $17,500 for future cervical surgery, $250,000 for pain and suffering, and prejudgment interest of $8082.80, for a total of $824,834.80, plus post-judgment interest. Defendant timely appealed.

Analysis

OPI and Offshore (hereinafter collectively "OPI") claim that the award of damages was excessive and clearly erroneous. Specifically, OPI contends that the district court used an improper discount rate, used the wrong work-life expectancy, and allowed double recovery of future medical expenses. OPI also disputes the awards for pain and suffering, a future cervical operation, and for the loss of the ability to do his household services and employer-provided meals. We review these assignments of error mindful that generally a "district court's determination on the

[1] **Culver v. Slater Boat Co.**, 722 F.2d 114 (5th Cir. 1983) (*en banc*), cert. denied, 467 U.S. 1252 (1984).

amount of damages may not be overturned unless clearly erroneous."[2]

OPI initially challenges the future economic loss award, claiming that the court erred in its selection of the discount rate range. We have held that a district court may use a pre-tax discount rate ranging between 1% and 3%, and may even go to a negative discount if supported by appropriate expert testimony.[3] From our reading of the record we are not able to determine with the certitude required the discount rate accepted by the court. Further, it would appear that the discount may have been based on a post-tax calculation. On remand the district court should specify the discount rate used and assign reasons for selecting that rate. Additionally, in the calculation of the annual loss figure which is to be projected and discounted, the court should make clear whether it is accepting as an appropriate base a pre-tax or post-tax annual figure. In doing this, the court may, of course, rely on expert testimony it finds credible and helpful in this difficult area.

OPI next maintains that the trial judge erred in accepting the prediction of plaintiff's expert that Muckleroy had a work-life expectancy of 65 years rather than the 62-year level reflected in the Department of Labor tables used by defendants' expert. While cognizant that a trial judge's decision to credit the testimony of

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[2]**Brunet v. United Gas Pipeline Co.**, 15 F.3d 500, 505 (5th Cir. 1994).

[3]**Culver**.

one expert over another is reviewable only for manifest error,[4] we have held that in the absence of "evidence that a particular person, by virtue of his health or occupation or other factors, is likely to live and work a longer, or shorter, period than the average,"[5] a determination of work-life expectancy "should be based upon the statistical average."[6] As Muckleroy's expert failed to identify any special evidence supporting his work-life expectancy projection beyond the statistical average, the district court clearly erred in accepting this particular testimony. The court should have used the DOL table reflecting a work-life expectancy figure of 20 years from the date of Muckleroy's accident.

OPI also correctly contends, and Muckleroy candidly concedes, that the award for future economic losses mistakenly allowed Muckleroy double recovery on future medical expenses. In its discounted award for future economic losses the court relied upon the calculations of Muckleroy's expert. Those calculations included the non-discounted sum of $1500 for medical expenses each year, until Muckleroy reached the age of 65. The court also instructed Muckleroy's expert to separately compute the same $1500 in annual medical expenses to the end of Muckleroy's natural life-expectancy of 75.4 years. Based on this calculation, after properly discounting the sum, the court awarded it in addition to

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[4] **Gulf Consolidated Services v. Corinth Pipeworks, S.A.**, 898 F.2d 1071 (5th Cir.), cert. denied, 498 U.S. 900 (1990).

[5] **Madore v. Ingram Tank Ships, Inc.**, 732 F.2d 475, 478 (5th Cir. 1984) (emphasis in original).

[6] **Id.**

the future economic award that included a $1500 annual medical expense until the age of 65.[7] As a result, the damages computation included the $1500 annual medical projection twice each year until Muckleroy reaches age 65. Therefore, in light of the use of age 65 instead of age 62 for work-life expectancy, and the double computation on future medical expenses, we must vacate that portion of the damages award and remand for recomputation of Muckleroy's future economic loss.

OPI also challenges other elements of the damages award, claiming first that the district court's award for Muckleroy's loss of household services was clearly erroneous because of a lack of evidence that Muckleroy previously performed household services.

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[7]The factors that went into the economist's future economic loss calculation were as follows:

$27,249 (base pay)
1,680 (fringe benefits)
3,102 (household services)
1,460 (employer-provided meals)
1,500 (future medical expenses)
$34,991 (unadjusted total past losses)

$29,960 (total past losses adjusted for taxes and fees)

This figure was projected out to age 65 using discount rates of 1% and .5%, resulting in a range of $671,052 to $801,252. The economist then estimated Muckleroy's future earnings in his present condition to be $12,000 annually, resulting in, after discounting at rates of 1% and .5%, a total future income projection to age 65 ranging from $256,851 to $309,014. After deducting the projected future income from the projected future economic loss, the expert arrived at a range of $414,201 to $492,238 for economic losses to age 65. Muckleroy's future medical expenses to age 75.4 were then calculated separately to arrive at, after discounting at either 1% or .5%, a figure of $48,144 to $62,319, respectively.

The district court adopted these calculations and added future net economic losses and future net medical losses to arrive at a range of loss between $462,345 and $554,557. The court selected the midpoint, $508,451, as Muckleroy's future net economic loss.

While a district court "is not at liberty to grant damages for lost household services in the absence of any evidence that [a plaintiff] performed household services in the past,"[8] the record contains adequate evidence to support this award.

Plaintiff's expert testified that the nature and performance of the lost services discussed in his calculation were developed in discussions with Muckleroy which revealed that he formerly performed household chores such as auto repair, grocery shopping, and lawnmowing. Further, Muckleroy testified at trial that he could no longer do work around the farm and had to live with his sister and brother-in-law, relying upon them to perform all household chores for him. Albeit scant, the record contains sufficient evidence that Muckleroy had lost his ability to perform household services that he had actually performed before the injury, to support the district court's factual finding and decision to award damages for this loss.

The record also supports the court's finding that Muckleroy would need another cervical surgery at a probable cost of $17,500.[9]

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[8]**Hernandez v. M/V RAJAAN**, 841 F.2d 582, 589 (5th Cir.), cert. denied, 488 U.S. 981 (1988) (emphasis in original); see also, **De Centeno v. Gulf Fleet Crews, Inc.**, 798 F.2d 138 (5th Cir. 1986).

[9]OPI has moved to strike references and attachments in Muckleroy's brief relating to his being scheduled for back surgery. As these references and attachments are outside the record on appeal, we cannot consider them and the motion to strike these portions of Muckleroy's brief is granted. **In re GHR Energy Corp.**, 791 F.2d 1200 (5th Cir. 1986). See also, **Diversified Numismatics v. City of Orlando, FL**, 949 F.2d 382 (11th Cir. 1991). Although Muckleroy has belatedly moved to supplement the record under Fed.R.App.P. 10(e), this motion is denied, as "[a] court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court." **Kemlon Products &**

Despite a disagreement with the prognosis of the treating neurosurgeon, Muckleroy's treating neurologist testified that plaintiff's continued post-operative complaints of pain in the neck area would probably require more surgery to correct, at a cost between $15,000 and $20,000. Based on this expert medical testimony the district court found that another surgery was necessary and awarded $17,500. This finding is not clearly erroneous.

OPI's next contention is that the district court erred in awarding damages to Muckleroy for his loss of employer-provided meals. Muckleroy's job at OPI was eliminated shortly after his accident because of OPI's reduction in its workforce. He contended, however, that if he were still capable of work he would be able to receive these customary meals from another employer in the industry. Plaintiff's economist assigned a value of $1460 per work-year to this loss. The only relevant defense testimony offered was elicited from a former OPI employee who noted that he, along with many OPI employees, had been discharged and replaced by cheaper Mexican labor. This testimony was the sole basis for OPI's argument that Muckleroy could not count on another meal-providing job in an industry that now employed primarily cheaper foreign labor. Given the absence of meaningful evidence or expert testimony of a trend in the oil industry that would have prevented Muckleroy from obtaining future employment, we perceive no clear

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Development Co. v. United States, 646 F.2d 223, 224 (5th Cir.), cert. denied, 454 U.S. 863 (1981).

error in the district court crediting Muckleroy's expert and awarding damages for the loss of this employment-related perk.

Finally, OPI argues, albeit unpersuasively, that the $250,000 award for past and future pain and suffering was excessive, and invites our attention to other decisions in which lesser sums were awarded for similar injuries. The record amply supports this award, reflecting that Muckleroy received painful injuries to his head, neck, back, and hip, and has since suffered from chronic and severe discomfort and pain, with numbness in his extremities. He underwent cervical surgery that was painful and debilitating, and faces the likelihood of another such surgery. He cannot do any heavy lifting or exercise and cannot participate in most of his former recreational activities, such as cow-roping or skiing. Muckleroy's inability to exercise vigorously has had the unfortunate side-effect of contributing to a pronounced weight gain adversely affecting his social life. Further, the injuries have exacerbated a preexisting degeneration of the spinal discs which has occasioned increasing discomfort and pain. The district court's award of $125,000 for past pain and suffering and $125,000 for future pain and suffering is not clearly erroneous and does not breach this circuit's maximum recovery standard.[10]

In summation, the judgment awarding Muckleroy $508,451 for future net economic loss is VACATED and this matter is REMANDED to the district court for a recalculation of this segment of the

[10]See **Seidman v. American Airlines, Inc.**, 923 F.2d 1134 (5th Cir. 1991); **Williams v. Chevron U.S.A., Inc.**, 875 F.2d 501 (5th Cir. 1989).

damage award consistent herewith. The court may, should it deem such appropriate, conduct an evidentiary hearing in the event that additional evidence is required to reach a just result in this "complex and time-consuming"[11] calculation. The remainder of the judgment of the district court is AFFIRMED.

[11]**Culver**, 722 F.2d at 119.