

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30192
Summary Calendar

OLIVER EUGENE,

Plaintiff-Appellant,
Cross-Appellee,

versus

MORMAC MARINE TRANSPORT, INC.,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA-91-453-L/E)

(February 7, 1995)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:*

In this Jones Act case, a jury found defendant Mormac Marine Transport, Inc. ("Mormac") negligent and plaintiff Oliver Eugene contributorily negligent for an accident which occurred as Eugene boarded a vessel. Eugene appeals. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

Eugene was employed by Mormac as a general steward utility aboard the S.S. Mormacsky when the accident giving rise to Eugene's claim occurred. On April 23, 1990 the vessel was anchored near the Panama Canal and Eugene caught an evening launch ashore. Eugene returned to the ship by launch at approximately 3:45 a.m. The pilot's ladder, a type of rope ladder used to board the ship, was partially pulled up from its "ready" position by a tag line. The launch sounded its horn several times to summon a crewman from the vessel to lower the ladder, but no one appeared to assist the passengers of the launch in boarding the ship. Eugene then climbed on top of the launch's wheelhouse and attempted to pull down the ladder. When Eugene put his weight on the ladder, the tag line holding the ladder came loose. Eugene fell to the deck of the launch, injuring his back and neck.

Eugene filed suit against Mormac under the Jones Act, 46 U.S.C. §688. A jury found Mormac 25% responsible for the accident and Eugene 75% contributorily negligent. The jury awarded total damages of \$45,000, and judgment was entered on behalf of Eugene in the amount of \$11,250.

DISCUSSION

After judgment was rendered in this case, Eugene made a motion for judgment as a matter of law and for a new trial on the issue of quantum. In addition to arguing that he was entitled to judgment as a matter of law on the issue of liability, Eugene argued evidentiary and jury charge errors relating to both liability and

damages, and he complained that the verdict as to both liability and damages was against the great weight of the evidence. The district court denied Eugene's motion. We affirm, concluding that Eugene was not entitled to judgment as a matter of law or to a new trial on liability or damages.

A. *Liability*

The evidence in support of the jury's conclusion that Mormac was 25% responsible for Eugene's injuries and that Eugene was 75% responsible is not so lacking as to require judgment as a matter of law or a new trial. Eugene presented evidence which tended to show that a safer ladder than the rope pilot's ladder should have been set out by the ship's master. Some evidence also showed that crew members of the ship should have been keeping watch near the area of the pilot's ladder to assist returning crew members in boarding the vessel. However, the evidence at trial also showed that the ladder was in its normal unready position, and that Eugene should have known that it was not safe to climb. Mormac also presented evidence tending to show that Eugene tried the ladder which he knew was unsafe, because he had been drinking alcohol.

The evidence on liability was such that "reasonable and fair-minded men . . . might reach different conclusions." Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). The district court therefore did not err in denying Eugene's motion for judgment as a matter of law. Nor was the jury's verdict on liability against the great weight of the evidence. A new trial is not required on that basis. Narcisse v. Illinois Cent. Gulf R.R., 620

F.2d 544, 546-47 (5th Cir. 1980).

Nor did any errors occur at trial which were sufficient to justify the grant of a new trial on liability. The district court did not abuse its discretion in admitting evidence that Eugene had been drinking alcohol on the night of the accident. See Hardy v. Chemetron Corp., 870 F.2d 1007, 1009 (5th Cir. 1989). Such evidence was certainly relevant to the issue of whether Eugene climbed the pilot's ladder when he should not have done so and was thus partially responsible for his injury. At trial, Eugene presented several witnesses who testified that Eugene was not stumbling or slurring his words. This testimony was properly used to rebut Mormac's claim that alcohol had affected Eugene's judgment and ability, but it did not serve to make the evidence of drinking inadmissible. Mormac was not required to prove that Eugene was fully inebriated to achieve admission of the evidence of Eugene's drinking. The jury could decide, based on the evidence, whether Eugene was affected by his drinking to a degree which caused him to negligently contribute to his own injury.

Nor did the district court abuse its discretion in allowing evidence of Eugene's guilty plea to charges of possession of cocaine as impeachment evidence. Fed. R. Evid. 609(a)(1); see Hardy, 870 F.2d at 1009. The resolution of this case depended largely on Eugene's credibility. The impeachment value of the relatively recent cocaine conviction was significant. The court did not err in concluding that the probative value of the conviction was not sufficiently outweighed by the potential for

prejudice to justify exclusion. See Fed. R. Evid. 609, 403.

The district court did not abuse its broad discretion in charging the jury on the liability issues. See Concise Oil & Gas Partnership v. Louisiana Intrastate Gas Corp., 986 F.2d 1463, 1474 (5th Cir. 1993). Eugene claims that the court should not have instructed the jury on contributory negligence, because the evidence did not support such a charge. As we have recounted above, the evidence clearly supported a contributory negligence instruction.

Eugene also argues that it was error to refuse to give Eugene's proposed instruction on the predisposition of sailors ashore to drink. Eugene cites no caselaw which requires that such an instruction be given. The foreseeability of a seaman returning drunk from shore leave might be brought out at trial, as it was in this case, so that the jury might weigh that factor in determining whether the seaman's employer was negligent. But the predisposition of a sailor to drink is not a principle of law which requires an instruction to the jury.

B. Damages

A major portion of Eugene's request for damages included past and future lost wages. His theory was that, although Eugene had achieved significant physical recovery, he could not work after the accident. His union had determined that he could no longer work as a seaman because of his injury, and he was unable to find other employment because of his education and past experience. Eugene claims that this legitimate theory was almost entirely undermined

by error at trial. We conclude that the district court did not abuse its discretion in refusing to grant Eugene a new trial on damages. See International City Bank and Trust Co. v. Morgan Walton Properties, Inc., 675 F.2d 666, 669 (5th Cir.), cert. denied, 103 S.Ct. 379 (1982).

Eugene argues that the attorney for Mormac made comments in closing argument which were so improper and prejudicial as to require a new trial. Mormac's attorney argued that the denial of permission to return to work by the union was possibly a result of Eugene's felony cocaine conviction rather than a result of the injury from the fall. Eugene did not timely object to the comments made by Mormac's attorney, and we find no plain error. See Daniel v. Ergon, Inc., 892 F.2d 403, 411 (5th Cir. 1990).

The evidence of Eugene's cocaine conviction was admitted for the limited purpose of impeaching his credibility. Mormac's attorney was not entitled to argue that conviction as substantive evidence of inability to obtain employment. The record contained no evidence that the conviction did affect his return to work. The testimony regarding the refusal of the union to grant permission to work was that the union "believed that it would be medical malpractice" to return Eugene to work as a seaman. That proof was that Eugene was not allowed to return to work because of injury problems rather than because of drug or criminal problems.

Nevertheless, the one-sentence speculation by Mormac's attorney about the reason for the union's decision did not affect the overall fairness or integrity of the proceedings in this case.

See United States v. Olano, 113 S.Ct. 1770, 1776 (1993) (citations omitted). The circumstances of this case are not sufficiently exceptional to require invocation of the plain error rule. See id. at 1778-79.

Eugene also complains that the trial court erred in excluding the expert testimony of Dr. Gorman, a vocational rehabilitation expert offered by Eugene. Dr. Gorman concluded that the limitations on Eugene's movement resulting from the accident combined with Eugene's age and minimal academic preparation completely removed Eugene from the workforce. Mormac argued against Eugene's past and future earnings damages claim, contending that Eugene had been physically able to return to work for some time. Eugene proffered the report prepared by Dr. Gorman.

A trial court has broad discretion to admit or exclude expert testimony, and the district court did not commit manifest error in excluding the testimony of Dr. Gorman represented by the proffer. See Edmonds v. Illinois Cent. Gulf R.R., 910 F.2d 1284, 1287 (5th Cir. 1990). Much of the report prepared by Dr. Gorman consisted of medical information which was cumulative of information provided by other experts. The report also made the vocational conclusion that, "[t]he likelihood of competitive full time re-employment [for Eugene] is very poor." Dr. Gorman did not support that conclusion with specific findings about the relevant job market and the unavailability of identifiable jobs which could be performed by a person with Eugene's skills, education and residual physical capabilities after the accident. Dr. Gorman's report would not

have provided significant additional information beyond Eugene's testimony that he had unsuccessfully sought employment, together with the jury's common sense knowledge about the employability of a person with Eugene's limitations.

Eugene argues that the district court erred in denying his request to charge the jury on the rule of law that the defendant takes a plaintiff as he finds him. At trial, the district court admitted evidence of prior injuries suffered by Eugene and of the existence of a degenerative condition in his spine before the accident. Much of Eugene's pain and disability after the accident resulted from a ruptured disk. The testimony at trial indicated that a disk rupture can occur more easily in a person with degenerated disks but often occurs as the result of an injury which impacts degenerated disks. Eugene argues that, without proper instruction, the jury may not have properly evaluated this evidence. He argues that the jury may have concluded that Eugene suffered serious disability and pain after the accident only because he already had a degenerative disk problem. He claims that the jury could not have understood that Mormac would be responsible for any aggravation of Eugene's pre-existing degenerative condition which it caused.

A new trial is not required, because we find that the charge "as a whole" does not leave us "with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 167-68 (5th Cir. 1990) (citation omitted). The court

charged the jury that, in assessing damages, it should "attempt to restore the plaintiff, that is, to make him whole or as he was immediately prior to his injury." Record at V-180. This instruction made it clear that, if aggravation of a previous injury occurred after and as a result of the accident, damages for that aggravation were required to make Eugene as he was before the accident.

Eugene finally argues that the damages award was against the great weight of the evidence. However, there was significant evidence against Eugene on the damages issue, and "a jury has great discretion in determining and awarding damages in an action for personal injuries." Book v. Nordrill, Inc., 826 F.2d 1457, 1462 (5th Cir. 1987). The district court did not abuse its discretion in refusing Eugene's request to grant a new trial on damages based on the inadequacy of the award. See id.

The jury awarded \$5,000 for past lost wages. Eugene supplied testimony by an economic expert that his loss of income from the date of the accident until the date of trial, a period of approximately 45 months, was \$65,428.00. However, the jury was not required to adopt this figure as its damages figure for past wages. The calculations of an economic expert "are only a suggested guideline for a jury." Haas v. Atlantic Richfield, 799 F.2d 1011, 1017 (5th Cir. 1986). Nor was the jury bound by medical expert testimony indicating that Eugene had been disabled for a period of 29 months. The jury could have found from the evidence that the period of incapacitation resulting from the accident was much

shorter than either 45 or 29 months. The jury was not required, as Eugene urges, to accept as damages at least a pro rata share of the economist's calculations reflecting a 29-month period of disability. The evidence showed that as early as November, 1990, approximately six months after the accident, Eugene felt that he could return to work. The jury could have found, in the exercise of its discretion, that damages for past wages were appropriate for only that six-month period or even a shorter period.

Given the evidence that Eugene had recovered at the time of trial, had the physical ability to return to work, and had only a 10% remaining permanent disability of the cervical spine and minimal or non-existent overall disability, the award of \$10,000 for pain and suffering was not grossly inadequate. See id. The \$10,000 award for future loss of wages and the \$20,000 award for future medical expenses were similarly supported in the evidence.

AFFIRMED.