

**COURT OF APPEALS
DECISION
DATED AND FILED**

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1336

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WENDELL DULL,

PLAINTIFF-RESPONDENT,

v.

**CONTINENTAL WESTERN INSURANCE COMPANY,
DOTSETH TRUCK LINE, INC. AND DONNA TETZLAFF,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Continental Western Insurance Company and its insureds appeal a judgment awarding Wendell Dull \$642,000 for injuries Dull suffered in a work-related accident. Continental argues that the trial court improperly exercised its discretion when it denied a motion in limine requesting

exclusion of Dull's worker's compensation disability ratings and that the verdict was excessive. We reject these arguments and affirm the judgment.

Dull was injured in a 1991 work-related accident and was assessed a three-percent permanent partial disability (PPD) for worker's compensation purposes. After Dull was injured in a subsequent accident with Continental Western's insured, his PPD rating was increased to twenty-five percent. In this third-party action filed pursuant to § 102.29, STATS., Continental Western moved in limine to preclude Dull from utilizing the PPD ratings at trial. It argued that the PPD ratings were inadmissible under § 904.03, STATS., because the purpose of worker's compensation law and its reliance on a worker's "earning capacity" rather than "functional disability" render the PPD ratings irrelevant. Continental Western further contends that introduction of the PPD ratings was prejudicial due to the prospect of confusing the jury.

The trial court properly allowed limited use of the PPD ratings at trial. The admissibility of evidence is a matter for trial court discretion, and this court will not interfere with its ruling unless it represents a prejudicial misuse of discretion. *Nowatske v. Osterloh*, 201 Wis.2d 497, 503, 549 N.W.2d 256, 258 (Ct. App. 1994). The PPD ratings were relevant to the issue of whether Dull's injuries were aggravated by the second accident or whether his symptoms were the result of a natural progression of the injuries suffered in the first accident. The PPD ratings are one indication that Dull's condition was made worse by the second accident. The trial court addressed Continental Western's concerns that the PPD ratings would be converted into dollars by limiting the use of this evidence to the issue of aggravation of the injury. Because the PPD ratings provided some relevant information and the danger of unfair prejudice was

substantially reduced by the trial court's limitations on the use of that evidence, the court properly exercised its discretion when it denied the motion in limine.¹

Continental Western requests a new trial in the interest of justice, alleging that the verdict was excessive and the result of perversity and prejudice. Aspects of this issue were also waived by Continental Western's specific withdrawal of its allegation of perversity at the hearing on the postverdict motion. Nonetheless, we will review the sufficiency of the evidence to support the jury's assessment of damages.

The record supports the \$642,000 verdict. We must view the evidence in a light most favorable to the verdict. *See Nowatske v. Osterloh*, 201 Wis.2d 497, 509, 549 N.W.2d 256, 260 (Ct. App. 1996). Dull presented evidence of damage in every category equal to or greater than the amount found by the jury. The jury awarded \$30,000 for past medical expenses despite evidence that past medical expenses exceeded \$39,000. The jury awarded \$230,000 for future

¹ Continental Western argues that Dr. Donald Bodeau improperly used the PPD ratings during his testimony and confused the jury by improperly referring to the PPD rating as a disability "of the whole person within the Wisconsin Worker's Compensation guidelines." This issue is not properly preserved because it was not addressed in a postverdict motion. *See Roach v. Keane*, 73 Wis.2d 524, 535-36, 243 N.W.2d 508, 515 (1976). The failure to raise this issue in a postverdict motion waives Continental Western's right to present the issue on appeal. We may, in our discretion, review an issue that is waived. Because the motion in limine raised aspects of this issue and a postverdict motion would only have repeated arguments already made, we review the ruling on the motion in limine. We will not review whether the parties or the witnesses strayed from the restrictions imposed by the trial court because that question was never presented to the trial court. Therefore, we restrict our review to the order in limine based on the information the trial court had at that time.

Nonetheless, our review of the record discloses no evidence that the jury was confused. Dull's vocational examiner and his medical doctors provided substantial evidence that his condition worsened as a result of the second accident without relating it to the PPD ratings. In the context of the entire record, the testimony regarding the PPD ratings played a small role and the great weight of the evidence supports the jury's damage award without reliance on the PPD ratings.

medical expenses despite testimony that future medical expenses would total \$396,000. The \$42,000 award for past wage loss represents the exact amount suggested by Dr. Karl Egge. The \$200,000 award for future loss of earning capacity represents only half of the amount suggested by Dull's expert witnesses. The \$30,000 award for past pain, suffering and disability is not excessive for injuries that required four or five emergency room visits and 158 appointments with health care providers, the implanting of electrodes in the spinal column to diminish pain, the need to wear a back brace, and the need to take prescription medicines four or five times per day. The \$110,000 award for future pain, suffering and disability is not excessive based on testimony that Dull may be required to use the neurostimulator for the rest of his life, along with narcotic painkillers, that he is unemployable, has difficulty walking and climbing stairs and thinking clearly. Hall was forty-two years old at the time of trial. The record, construed most favorably to the verdict, shows that the jury reasonably compensated Dull for the injuries he suffered in the second accident after discounting the injuries caused by the first accident.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

