COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2007

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP298 **Cir. Ct. No. 2005CV5773**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STEVEN MARTINKA,

PLAINTIFF-APPELLANT,

BARBARA MARTINKA,

PLAINTIFF,

MERIDIAN RESOURCE CORPORATION AND MICHAEL LEAVITT, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

SUBROGATED-PLAINTIFFS,

V.

MID-CENTURY INSURANCE COMPANY AND BRANDON A. BISCOBING,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded with directions*.

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 WEDEMEYER, J. Steven Martinka appeals from a final order whereby the trial court, in motions after verdict, eliminated the jury's award for both past and future loss of earning capacity. Martinka claims the trial court erred in such a reduction because there is credible evidence to support the loss of both past and future earning capacity. Because the evidence supporting the loss of past and future earning capacity was not patently incredible, we reverse the orders of the trial court and direct that the verdicts related to the same be reinstated.[1]

BACKGROUND

¶2 Martinka was injured in a motor vehicle accident on June 23, 2003, when a vehicle he was driving collided with a vehicle driven by Brandon Biscobing, Mid-Century Insurance Company's insured. The incident resulted in a jury trial in which both liability and damages were contested. The jury found that Biscobing was 100% causally negligent as to liability. It awarded Martinka $20,000 for past pain, suffering and disability, and $80,000 for future pain, suffering and disability. The trial court, by stipulation, set the past medical expenses at $14,554.41. None of these determinations are the subject of this appeal.

[1] The order for dismissal dated January 8, 2007 must also be reversed so that costs related to the reinstated verdict can be calculated.

¶3 In addition, the jury awarded $45,000 for past loss of earning capacity and $80,000 for future loss of earning capacity. In motions after verdict, Mid-Century moved to reduce the amounts for both past and future loss of earning capacity to "zero." The motion was granted. Martinka now appeals from that order.

ANALYSIS

Standard of Review and Applicable Law

¶4 In reviewing a challenge to an award for lost earning capacity as excessive and unsupported by the evidence, we must adhere to the following standard of review:

> If there is any credible evidence which under any reasonable view fairly admits of inferences which support the jury's verdict, the verdict must be sustained, and neither the trial court nor this court may tamper with it …. The evidence must be considered in the light most favorable to the jury verdict …. Furthermore, the trial judge and this court are only to consider the evidence which supports the jury's verdict …. The evidence supporting the verdict must be accepted by the court unless it appears that the evidence is patently incredible.

Balz v. Heritage Mut. Ins. Co., 2006 WI App 131, ¶22, 294 Wis. 2d 700, 720 N.W.2d 704. If there is credible evidence to support the jury verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict of the jury must stand. The credibility of the witnesses and the weight of the evidence are for the jury." ***Lutzenberger v. Milwaukee Elec. Ry. & Light Co.***, 224 Wis. 44, 47-48, 271 N.W. 409 (1937).

¶5 "[T]he quantum of proof required to sustain a finding of loss of future earning capacity is not as great as that required in other damage issues."

Krause v. Milwaukee Mut. Ins. Co., 44 Wis. 2d 590, 616, 172 N.W.2d 181 (1969). "[E]vidence of a permanent injury was usually sufficient to infer a loss of earning capacity. This is true in cases where the nature of the injury by common knowledge disables the plaintiff from performing the only type of work he is fitted to do." ***Wells v. National Indem. Co.***, 41 Wis. 2d 1, 11, 162 N.W.2d 562 (1968).

Application

¶6 Martinka contends that the combination of the testimony of his orthopedic spine specialist, Dr. James Cain, and his own testimony provides the additional evidence necessary to support the jury's awards for loss of earning capacity, and thus, there was credible evidence to support the jury's verdict. Mid-Century, in response and in support of the trial court's order, contends there is insufficient credible evidence to sustain the jury awards for loss of earning capacity. It sets forth five reasons to support its contention.

¶7 First, Dr. Cain never testified that he told Martinka that he could not work. Second, Martinka never discussed any back problems he was having at work with Dr. Cain which caused him to be unable to work. Third, he did not call upon an expert witness to testify he was unable to work. Fourth, he in fact went to work at General Capital immediately after the accident and maintained the same work and schedule until June 2004. Fifth, after he left General Capital, he still thought he could work because he was employed for a short time at Legacy Supper Club as a chef. In addition, Martinka submitted numerous other job applications albeit unsuccessfully because of what he believed to be his age.

¶8 Our review of the record reveals the following. Martinka was seventy-seven years of age on the date of the accident. The habit of working was very much a part of his life style. While young, at various times he was a steam

engineer, plant electrician and performed maintenance work in connection with plumbing, heating, electrical and steam fitting. For twenty-six years he was a chef at many of Milwaukee's better known restaurants and country clubs. Most of his adult life, he has worked two jobs. In 1999, Martinka began working for General Capital, a company that owned and managed shopping malls throughout Wisconsin. His responsibilities consisted of general maintenance. On given days, after work, he would experience back discomfort, but after a hot shower he experienced relief and was ready for the next day's work. He never had to miss work. He normally put in forty to fifty hours each week.

¶9 The evening after his accident, Martinka experienced pain in his back. On the following day, he was examined by his family doctor. When none of the prescribed treatments were of any benefit, he was referred to an orthopedic spine specialist, Dr. Cain. He first saw Dr. Cain on September 29, 2003. Dr. Cain ordered an MRI, which revealed a ruptured disc at the L3-4 level, which bulged into his spinal cord, creating a condition called stenosis. Dr. Cain concluded the condition was severe. Over a period of two years, neither the prescribed epidural steroid injections, the wearing of a back corset, a regimen of exercises nor facet joint injections produced any satisfactory relief.

¶10 Dr. Cain agreed that if Martinka was working full-time before the accident, doing maintenance work, which involved lifting and bending and he was able to perform those functions without any difficulty, it would indicate that his back was not bothering him. Dr. Cain further testified to a medical degree of certainty that the accident probably caused his herniated disc condition, which in turn led to his severe condition of stenosis. This condition explains the symptoms of pain that he was having if he had to be on his feet for a long period of time, either walking or standing, and was consistent with the objective findings

observed on the MRI and other diagnostic tests. Because these symptoms have persisted for over two years, it was unlikely that they would get better and, in his opinion, are permanent. Dr. Cain opined that Martinka "seemed to be honest and everything that he told me added up to what I was seeing on the scan and what was present on his examination."

¶11 Martinka continued working at General Capital for ten additional months after the accident. In June 2004, due to continuous back pain, he become increasingly crabby and short-tempered, which precipitated an argument between him and his supervisor. Whether he was fired or quit is uncertain, but he parted ways with General Capital. During his tenure from 2001-2004, he averaged about $21,000 per year in salary or wages, earning $11,369 in the last five months of his employment. Martinka testified that he continued working for General Capital after the accident in spite of his back problems, because he was a recipient of social security and needed the money.

¶12 After leaving General Capital, he attempted to return to his old profession as a Chef for the Legacy Supper Club for Friday night fish fries, but due to pain arising from standing for long periods, he was never able to complete an eight-hour shift. He lasted for only two months. Since then he has tried to find employment at other places, but to no avail.

¶13 From the time that Martinka was first referred to Dr. Cain on September 29, 2003 to his final visit in September 2006, despite the various forms of treatments given, although his basic diagnosis remained the same, its adverse effects intensified. The condition of his back had not improved. He was able to perform his duties at General Capital because it was light maintenance work. As evidenced by his giving up his job at the Legacy Supper Club, his ability to stand

for lengthy periods of time was greatly diminished. In the last several months before the trial, he took a pain pill every four to five hours to withstand the pain. As for walking, sometimes he did a lot; other times he could only walk ten or fifteen steps and had to sit down. He had trouble sleeping. He went to bed early at 6:00 p.m. and was up at 11:00 p.m. because of the pain. He can no longer work in his garden, do general yard work, or do housework. Finally, Martinka testified he would not be able to do a job where he had to bend or lift or be on his feet for some long period of time. If not for the condition of his back, he would still be working.

¶14 In resolving the opposing views of the evidence, we note the following. Earning capacity is directly related to the capacity to do work in the fields of employment where one is capable. Human experience and common sense tells us that the loss of earning capacity is not necessarily a static phenomenon. Such an occurrence may manifest itself all at once or over a period of time, depending upon the nature of a permanent injury. In this appeal, we are concerned about a time period from the date of the accident, June 23, 2003 to the date of trial in October 2006. As it relates to this appeal, the testimony deals primarily with the nature and consequences of Martinka's spinal injury and the circumstances of his working life and its termination.

¶15 Contrary to the trial court's determination, in its post-verdict decision, the record amply supports that Martinka sustained a permanent condition of severe stenosis. The question that remains open is whether the nature of Martinka's permanent injury is sufficient to infer a loss of earning capacity. If not, was there additional evidence sufficient to support a finding of loss of earning capacity, taking into account reasonable probabilities that can arise from the nature of Martinka's injury and its sequential effects.

¶16 In ***Neider v. Spoehr***, 39 Wis. 2d 552, 556-57, 159 N.W.2d 587 (1968), our supreme court declared:

> Many elements that go to a determination of impairment capacity cannot be proven with certainty. Proof of these elements must be permitted by facts or inferences that lead to reasonable probabilities. Some (but not all) of the elements which cannot always be shown with certainty are the length of time a disability will exist, the degree of improvement or additional disability that will ensue, the aptitude and ability of a disabled person to engage in other types of work, and the compensation he will be able to obtain. As to these and other uncertain elements the trier of fact must be allowed to consider the reasonably apparent probabilities as they appear from the evidence, together with such known facts as his age, his education and training, the type of work he was doing before the injury, and the compensation he was receiving.

¶17 In addition, the supreme court clarified the rule that where the evidence establishes that the plaintiff has suffered a "permanent injury," this is usually sufficient to allow the jury to infer there has been a compensable impairment of earning capacity. Writing for the court, Justice Beilfuss explained:

> However, where there is affirmative evidence that there has been no impairment of earning capacity, without any evidence to the contrary, *medical or otherwise*, the jury should not return an award for this item. There are cases where the injury and disability so obviously impair the earning capacity of the individual that no medical evidence is needed to support an award.

Id. (emphasis added). Thus we know of no standard, once permanency has been established, requiring the necessity of an expert testifying as to the loss of any earning capacity. When considering the evidence as a whole, the jury heard about an individual who sustained a severe spinal injury at the age of seventy-seven. There is no doubt he had a strong work ethic as evidenced by his return to work right after the accident. The jury heard that he sought medical care first from his family doctor and when that provided him with little or no relief he was referred to

a spinal specialist. Over a period of two years he was given a variety of treatments, none of which improved his overall spinal condition. He was seen by his specialist as least six times; the last of which occurred on September 6, 2006, for a final pre-trial evaluation.

¶18 During this period of time, initially he first was able to continue his maintenance job at General Capital despite the pain because he was not doing anything that involved heavy lifting; rather he picked up litter and did things of that nature. Because of the pain he was experiencing, he had to get up each morning very early to arrive at work on time at 7:00 a.m. His disposition changed. He became grumpy and irritable, a condition consistent with his injury. In June 2004, after an argument with his supervisor, he had a parting of the ways from General Capital. Up to that time, he had put in a normal forty-to-fifty hour work week. In keeping with his work ethic, he tried to return to his old profession, that of chef at the Legacy Supper Club preparing Friday night fish fries. The job required an eight hour shift, much of it standing. Physically, he was unable to meet the requirement. After two months he had to leave that job. Again consistent with his work ethic, he attempted to find other employment but was unsuccessful. Prior to the October 2006 trial, he was reevaluated by Dr. Cain. At the time of trial, Martinka was eighty years old. He had not held a job since leaving the Legacy Supper Club. He testified that his back is very bad. He has to take a pain pill every four or five hours or else he "can't hold up." His ability to walk varies; sometimes he can walk a lot and other times he has to sit down after ten to fifteen steps. He has trouble sleeping lengthy periods of time because of the pain. He can no longer tend to his garden, perform yard work or housework.

¶19 Doubtless, Mid-Century and the trial court, when viewing the evidence, are entitled to draw whatever inferences they deemed appropriate to

support their conclusory views. The fact, however, that they could reasonably arrive at contrary or even stronger inferences is not the state of the law when reviewing a jury verdict. *See* ***Balz***, 294 Wis. 2d 700, ¶22, ***Lutzenberger***, 224 Wis. at 47-48.

¶20 From the evidence submitted to the jury, Mid-Century may claim that evidence exists demonstrating the lack of impairment of Martinka's earning capacity because there was no interruption in his work at General Capital immediately after the accident and he maintained a forty-to-fifty hour work week. There is, however, other evidence contained in the combined testimony of Dr. Cain and Martinka that provides ample support for the jury's verdict awarding damages for loss of his earning capacity.

¶21 After the accident Martinka had to return to his family doctor and specialist on numerous occasions for additional procedures to alleviate his pain. At first, by sheer willpower, though in pain, he was able to perform his normal job functions given a lighter work load. Eventually his condition affected his disposition culminating in an oral altercation with his supervisor resulting in a "parting of the ways" with his employer, General Capital. Undaunted, he sought to return to his old food service profession, but because of the worsening effects of stenosis, he could no longer stand for an eight-hour shift. It is uncontroverted from the record that walking, standing for extended periods of time, bending and lifting were sources of increased pain. He was unable to keep his position as chef at Legacy Supper Club. Dr. Cain opined that the inability to stand for lengthy periods of time and a weakening of the legs are consistent symptoms of stenosis. At the time of his final evaluation prior to trial, he had to take a pain pill every four to five hours to manage the pain. He had trouble sleeping at night. He had to give up his hobbies of gardening, performing yard work and housework.

¶22 The trial court's analysis and Mid-Century's interpretation of the evidence notwithstanding, none of the evidence supporting the loss of earning claim was patently incredible. The jury could quite reasonably infer the probability that the consequences of the stenosis' progression curtailed his ability to pursue the type of employment for which he was qualified, resulting in a loss of past and future earning capacity.

¶23 Because we conclude that the evidence presented, in the testimony of Dr. Cain and Martinka himself is not patently incredible, and because this evidence, under the circumstances, is sufficient to prove the loss of past and future earning capacity, we reverse the post-verdict order on this issue and remand with instructions to reinstate the awards for both past and future loss of earning capacity.

¶24 In our judgment it was not unreasonable for the jury to infer that because of the stenosis, Martinka was unable to pursue the type of employment for which he was qualified, and thus he suffered a loss of past and future earning capacity.

By the Court.—Orders reversed and cause remanded with directions.

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