

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

FILED
CLAIMS COMMISSION
CLERK'S OFFICE

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ELVIRA LEYVA,)
) Claim No. T20120823
 Claimant.)
v.)
)
STATE OF TENNESSEE)
) Regular Docket
 Defendant;)

JUDGMENT FOR CLAIMANT

This matter came on for trial before Robert N. Hibbett, Commissioner and judge of the facts and the law, at Legislative Plaza in Nashville, Tennessee. The Claimant, Elvira Leyva, seeks damages arising from a vehicular accident in which the company truck she was driving was struck by a state owned truck driven by Carl Munsil, an employee of the Tennessee Department of Transportation (TDOT), as both vehicles traveled on Highway 12 in Cheatham County, Tennessee. Assistant Attorneys General Dawn Jordan and Jason B. Miller represented the State of Tennessee. Henry S. Queener III, Esq. and Al Stoltz, Esq. represented the Claimant. The claim was tried on October 22, 2013. The trial transcript and evidence was forwarded to the Clerk of the Claims Commission on December 10, 2013. Because the transcript was not bound

properly into multiple volumes, the Clerk returned it to the court reporter to be corrected.¹ The trial transcript was returned to the Clerk on December 12, 2013 for filing. After reading the trial transcript on December 16, 2013, the Tribunal found that testimony was missing from the transcript. The Tribunal notified the parties of the missing testimony. Rather than recalling witnesses for examination, the attorneys for the parties filed stipulations on February 21, 2014 as to the cross-examination of the Claimant and the direct and cross-examinations of Misty Caudle. The Tribunal commends the parties on their work to provide stipulations that supplement the trial transcript.

The Claims Commission has jurisdiction of this matter under Tenn. Code Ann. § 9-8-307(a)(1)(A), relative to negligent operation of a motor vehicle. Pursuant to Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. The Accident

Carl Munsil was driving a six-ton dump truck owned by the Tennessee Department of Transportation (TDOT) on December 17, 2010, the day of the accident. He and another TDOT employee were riding down the state highway

¹ The Tribunal takes note that the court reporter was dilatory in the filing of the transcript from the date of the one-day trial. In addition, the transcript is captioned incorrectly.

picking debris off the road. The Claimant had been following the TDOT truck for five miles in her work truck. Mr. Munsil and his colleague passed a piece of rubber off a truck tire and decided to go back and remove it. Mr. Muncil then started backing the truck down the wrong way on the highway. He did this without having his fellow employee get out of the truck and ground guide the backing truck. The evidence is clear that the TDOT truck was negligently backing in the right lane of the state highway and struck the Claimant's vehicle. The State has admitted at least fifty-one percent liability in this accident.

However, the State used the Verizon Wireless telephone records for the Claimant on the day of the accident to prove that she was constantly using her cellular telephone near to the time of the accident and to attempt to prove that she was a distracted driver. The ostensible evidence shows the Claimant was seen and heard talking on her telephone within seconds after the accident when the driver of the State's truck walked back to Claimant's vehicle to survey the situation. Mr. Munsil overheard her saying, "I've got to get off here. This state man just backed over top of me." (Trial transcript page 34) Although Ms. Leyva testified that she was not on her cell phone at the time of the accident, the preponderance of the evidence shows otherwise.

II. Ms. Leyva's Injuries

At trial, Ms. Leyva testified that following the accident she became nauseated and dizzy. She was taken to the emergency room of a hospital by ambulance where she was evaluated and released. Ms. Leyva testified about the multiple vehicle accidents that she had been involved in and the injuries she had sustained from each accident. After the accident in controversy, she suffered soreness and discomfort in both her neck and lower back that was worse than ever before. She continued to receive medical attention from Dr. Robert E. Clendenin, M.D. through workers' compensation. She testified that because of all the prior accidents and the one in controversy she has discomfort from sitting or standing for a long period of time and walking. She also cannot run, lift heavy objects or do anything to jolt her back. She suffers pain in her neck, shoulder, lower back, buttock and groin. The pain in the neck comes and goes but she indicated that the pain in the lower back was constant. She has pain lifting a gallon of milk, which did not occur before the accident with the State's truck. However, she continues to be able to go to bars, fish, attend concerts, play and throw Frisbee with her dog and walk on the beach.

Testimony of Dr. West D.O.

The deposition of Dr. David Adam West, D.O. was taken and submitted as evidence in this matter. Dr. West is a board certified orthopedic surgeon and is currently in private practice. Dr. West conducted an independent medical evaluation of the Claimant and her medical records.

The Tribunal finds that Dr. West is a creditable and helpful witness. However, his opinions in this matter are based on the October 2010 and the December 2010 accidents and not on injuries sustained previously.

Q. Other than the October 2010 accident, did Ms. Leyva report to you any other car accidents that she had been in prior to your evaluation?

A. No, sir.

Q. Other than the treatment for the October 2010 accident, did Ms. Leyva report to you any other back or neck treatment she had before the December 2010 accident?

A. No, sir.

West deposition transcript page 37.

Dr. West submitted that all the medical services and treatment she had received since the accident in controversy were medically necessary and reasonable services caused by the accident, including the rhizotomy injections she received from St. Thomas Surgicare. Dr. West further opined that the \$24,614.00 in medical expenses was reasonable. At the time of her examination,

Dr. West noted that the only subjective issue the Claimant had was some discomfort through her lower back region from L-2 through L-5 and into the right side SI joint. His assessment was that she suffered chronic low back pain with mild right-sided joint dysfunction. Furthermore, she suffers a two percent impairment to the whole person. The Tribunal accredits the testimony of Dr. West on the issues of injury and medical expenses (except to their apportionment) and finds his testimony helpful to the Tribunal in applying the evidence to the law.

Testimony of Dr. McNamara M.D.

The deposition of Dr. Michael James McNamara M.D. was taken and submitted as evidence in this matter. Dr. McNamara is a board certified orthopaedic surgeon and associate professor with the Vanderbilt Bone and Joint Clinic. Dr. McNamara conducted an independent evaluation of the Claimant and her medical records. It is important to note, at this point, that the Claimant had been involved in numerous automobile accidents in her life and Dr. McNamara was asked about each accident and the cumulative effects on the Claimant's physical condition. He noted that he did not believe that any acute

change to the Claimant's condition occurred because of the impact with the State

TDOT truck:

Acute change first of all would be fracture, dislocation, it would be uptake on the MRI. The MRI has changes. I would not interpret the MRI, which was done after the accident, as normal. The MRI demonstrates, as we will probably discuss at some point, it demonstrates facet arthropathy and it demonstrates two degenerative disc at the lower two disc levels. So I would not interpret that as normal. But that is not an acute change. That is not a change that has occurred over a month or two, that is a change that has occurred over six months, a year, two years or three years, some cumulative, long time. Undefined it would be, but not an acute change such as – an acute change would be bone marrow [sic] edema or bleeding in the bone or some type of bruise you can see on the MRI, none of that was present.

McNamara deposition transcript page 24.

Dr. McNamara opined that her injuries are cumulative from the multiple motor vehicle accidents in which she had been involved. She does have a series of lumbar strains and damage to her cervical spine that occurred over the years.

As to the apportionment of those injuries to the accident in the instant matter, he stated thus:

I don't think her current condition is caused entirely by the December accident, in fact it is almost impossible to give any type of apportionment of that accident. I think the symptoms are very similar to what we have seen all along, so I guess that answers your question. With respect to the physicians that have seen her, Dr. Clendenin, Dr. West and myself, we all have diagnosed her as

having lumbar strain, so none of us have apportioned any of this to anything else.

McNamara deposition transcript page 34.

In conclusion, Dr. McNamara could not apportion her injuries to each accident, including the one in controversy. The Tribunal accredits the testimony of Dr. McNamara on the issues of injury and apportionment and finds his testimony helpful to the Tribunal in applying the evidence to the law.

CONCLUSIONS OF LAW

I. Liability and Comparative Fault

The Claims Commission's jurisdiction over this action is set forth in Tenn. Code Ann. § 9-8-307(a)(1)(C), which states:

The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

* * *

(A) The negligent operation or maintenance of any motor vehicle or any other land, air, or sea conveyance....

Tenn. Code Ann. § 9-8-307(c) provides that the State's liability "shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care." Under these concepts, a plaintiff in a negligence

action must prove (1) a duty owed to the plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) injury or loss; (4) cause in fact; and (5) proximate cause. *Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn.1993); *Lewis v. State*, 73 S.W.3d 88, 92 (Tenn.Ct.App.2001).

Because the State has stipulated to at least fifty-one percent fault in this matter, the Tribunal shall only discuss the Claimant's comparative fault in the accident. After reading the telephone records and considering the testimony, the Tribunal finds the Claimant was a distracted driver. There was a chance that she may have avoided the accident if she had been fully alert, however taking into consideration the truck driver's extreme negligence, the Tribunal finds the Claimant to be ten percent at fault for the accident. Therefore, the State is ninety percent at fault and is the proximate and legal cause of the accident.

II. Damages

Testimony of Linda Jones, MRC, MBA, MPA, CRC **Vocational Economic Analyst**

Linda Jones was retained by the Claimant to provide a vocational economic assessment for proving her loss of future earning capacity. The Tribunal notes that Ms. Jones does vocational expert work for the Social Security Administration as an independent expert.

She opined that the Claimant meets the definition of occupational disability because of the restrictions that were set forth by Dr. Clendenin in that she should not lift over thirty pounds occasionally and should not lift over fifteen pounds frequently. Therefore, she is limited to sedentary and light work, primarily.

In calculating loss of future earning capacity, Ms. Jones calculated her earning capacity from 2006 through 2009 by using her average earnings for those years and then restating the figure in 2013 dollars. She calculated that her average earnings per year was \$25,161.00. Because statistics show that a female high school graduate earns 5.7 percent less than her non-disabled counterparts, then her future estimated earnings would range from \$23,022 to \$23,727 per year. She also estimated her future workplace life to be 22.2 to 23.6 years. Taking all of this into consideration, she estimated her lifetime loss of earning capacity to be \$164,563 to \$262, 594.

In making the determination on this issue, the Tribunal follows the opinion in *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694 (Tenn. Ct. App. 1999) that discusses loss or impairment of future earning capacity at length.

Earning capacity refers not to actual earnings, but rather to the earnings that a person is capable of making. See *Southern Coach Lines*

v. Wilson, 31 Tenn.App. 240, 243, 214 S.W.2d 55, 56 (1948) (earning capacity refers to the loss of the power to earn); *see also Anderson v. Litzenberg*, 115 Md.App. 549, 694 A.2d 150, 161 (1997); Restatement (Second) of Torts § 924(b) (1979).

The extent of an injured person's loss of earning capacity is generally arrived at by comparing what the person would have been capable of earning but for the injury with what the person is capable of earning after the injury. *See Hunter v. Hardnett*, 199 Ga.App. 443, 405 S.E.2d 286, 288 (1991); *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 235 Ill.Dec. 886, 706 N.E.2d 441, 455 (1998); *Bergquist v. Mackay Engines, Inc.*, 538 N.W.2d 655, 659 (Iowa Ct.App.1995); *Wal-Mart Stores v. Cordova*, 856 S.W.2d 768, 770 (Tex.App.1993); *Klink v. Cappelli*, 179 Wis.2d 624, 508 N.W.2d 435, 437 (App.1993); Restatement (Second) of Torts § 924 cmt. d (1979). If the injury is permanent,¹ this amount should be multiplied by the injured person's work life expectancy, and the result should be discounted to its present value. *See Conte v. Flota Mercante Del Estado*, 277 F.2d 664, 669 (2d Cir.1960); *Athridge v. Iglesias*, 950 F.Supp. 1187, 1193 (D.D.C.1996); *Yosuf v. United States*, 642 F.Supp. 432, 440 (M.D.Pa.1986); *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1164–65 (Ind.Ct.App.1990); *Anderson v. Litzenberg*, 694 A.2d at 162.

The injured party has the burden of proving his or her impairment of earning capacity damages. *See Sutton v. Overcash*, 251 Ill.App.3d 737, 191 Ill.Dec. 230, 623 N.E.2d 820, 838 (1993); *Southwestern Bell Tel. Co. v. Sims*, 615 S.W.2d 858, 864 (Tex.App.1981). In order to recover these damages, the injured person must first prove with reasonable certainty that the injury has or will impair his or her earning capacity. *See Moattar v. Foxhall Surgical Assocs.*, 694 A.2d 435, 439–40 (D.C.1997); *Barnes v. Cornett*, 134 Ga.App. 120, 213 S.E.2d 703, 705 (1975); *Wahwasuck v. Kansas Power & Light Co.*, 250 Kan. 606, 828 P.2d 923, 931 (1992); *Young v. Stewart*, 101 N.C.App. 312, 399 S.E.2d 344, 346–47 (1991). Then, the injured party must introduce evidence concerning the extent of the impairment of his or her earning capacity.

The proof concerning impairment of earning capacity is, to some extent, speculative and imprecise. *See Marress v. Carolina Direct*

Furniture, Inc., 785 S.W.2d 121, 123 (Tenn.Ct.App.1989); *see also* *Altman v. Alpha Obstetrics & Gynecology, P.C.*, 255 A.D.2d 276, 679 N.Y.S.2d 642, 643–44 (1998); *Shivers v. Riney*, 72 Or.App. 281, 695 P.2d 951, 955 (1985); *Border Apparel–East, Inc. v. Guadian*, 868 S.W.2d 894, 897 (Tex.App.1993); 4 Harper, § 25.8, at 553; 2 Stuart M. Speiser, et al., *The American Law of Torts* § 8:27, at 625 (1985) (“Speiser”). However, this imprecision is not grounds for excluding the evidence. *See Turrietta v. Wyche*, 54 N.M. 5, 212 P.2d 1041, 1047–48 (1949); *Kaczkowski v. Bolubasz*, 491 Pa. 561, 421 A.2d 1027, 1037 (1980). The courts have found competent and admissible any evidence which tends to prove the injured person's present earning capacity and the probability of its increase or decrease in the future. *See Martinez v. Jordan*, 27 Ariz.App. 254, 553 P.2d 1239, 1240 (1976); *Anderson v. Litzenberg*, 694 A.2d at 162; *Turrietta v. Wyche*, 212 P.2d at 1047; *Wilson v. B.F. Goodrich Co.*, 52 Or.App. 139, 627 P.2d 1280, 1282 (1981). Thus, the courts have routinely admitted evidence concerning numerous factors, including the injured person's age, health, intelligence, capacity and ability to work, experience, training, record of employment, and future avenues of employment. *See Marress v. Carolina Direct Furniture, Inc.*, 785 S.W.2d at 123–24; *Clinchfield R.R. v. Forbes*, 57 Tenn.App. 174, 184–85, 417 S.W.2d 210, 215 (1966); *see also Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn.Ct.App.1987); *Allers v. Willis*, 197 Mont. 499, 643 P.2d 592, 595 (1982); *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821, 824 (1984); 4 Harper, § 25.8, at 550; 2 Speiser, § 8:27, at 631–32.

Impairment of earning capacity is not necessarily measured by an injured person's employment or salary at the time of the injury. *See Schaefer v. McCreary*, 345 N.W.2d at 824. It is not uncommon for an injured person to assert that an injury has caused him or her to abandon plans to change employment, to obtain additional education or training, or to otherwise advance a career. In the face of such an assertion, the trier of fact must distinguish between persons with only vague hopes of entering a new profession and those with the demonstrated ability and intent to do so. *See* Jacob A. Stein, 2 *Personal Injury Damages* § 6:15, at 6–55 (Gerald W. Boston, ed., 3d ed. 1997). Often, making this distinction depends on the steps the

person has actually taken to accomplish his or her educational or career goals.

Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 703-05 (Tenn. Ct. App. 1999)

Based on this opinion, the Tribunal finds that Ms. Jones' testimony is probative and has aided the Tribunal to apply the facts to the law. The Tribunal must recognize that the Claimant's previous work history was filled with gaps and must be considered uneven. Her last employment was with Cato's Exterminating Company. She was relieved from that company because she could not pass the exterminator's certification exam and not because of her injuries. The testimony of Misty Caudle, office manager of Cato's, showed that the Claimant's job visits actually increased from 132 job visits to 143 job visits per month after the accident. (Stipulations page four) For these reasons, the Tribunal shall use the conservative estimate of \$164,563.00 as her loss of lifetime earning capacity.

Furthermore, the Tribunal must recognize that the Claimant has voluntarily not worked since leaving Cato's in early 2011. Because of her reticence to work, even though she obviously is able to work with restrictions, the Tribunal shall reduce her loss of lifetime earning capacity to \$150,000.00.

The Tribunal must address whether her injuries should be apportioned between the one at issue and the injuries stemming from her prior accidents. The Tribunal looks again to our appellate courts for guidance on this issue.

Where the tortfeasor's negligence has rendered it impossible to apportion the amount of disability caused by the pre-existing condition and that caused by the subsequent injury, it is generally held that the defendant is liable for the total damages for the injuries whether the injuries were for new ones or aggravation of a pre-existing condition. *Matsumoto v. Kaku*, 484 P.2d 147 (Hawaii 1971); *Newbury v. Vogel*, 151 Colo. 520, 379 P.2d 811 (1963). But the jury must, if possible, apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. *Stephens v. Koch*, 561 P.2d 333 (Colo.1977). *Haws v. Bullock*, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979)

Although the medical professionals have not apportioned her injuries among the several serious accidents in which she was involved, the Tribunal will do so in accordance with the case law and the Tennessee Pattern Civil Jury Instructions as the Trier of Fact.

A person who has a condition or disability at the time of an injury is entitled to recover damages only for any aggravation of the pre-existing condition. Recovery is allowed even if the pre-existing condition made plaintiff more likely to be injured and even if a normal, healthy person would not have suffered substantial injury. A plaintiff with a pre-existing condition may recover damages only for any additional injury or harm resulting from the fault you may have found in this case. If you find that defendant's fault aggravated plaintiff's pre-existing condition you must apportion the amount of disability and pain

between that caused by the pre-existing condition and that caused by the incident. If, however, you find that defendant's fault aggravated plaintiff's pre-existing condition and you find that plaintiff's pre-existing condition had caused plaintiff no harm, pain or suffering before this incident, [or if you find that the defendant's fault makes it impossible to apportion the amount of disability or pain that pre-existed the incident], then defendant is responsible for all harm caused by the incident even though it is greater because of the pre-existing condition than it might otherwise have been.
T.P.I. – CIVIL 14.14 Aggravation of Pre-Existing Condition, 8 Tenn. Prac. Pattern Jury Instr. (2013 ed.)

The testimony of Dr. McNamara is especially helpful on this issue. He opined that the Claimant had not suffered an acute change as shown by the MRI because of the accident in question. He opined that the abnormalities that he observed would have occurred from six months to three years before the MRI.

Based on Dr. McNamara's testimony, the Tribunal finds, conservatively, at least seventy-five percent of the Claimant's condition pre-existed to the accident in question and will adopt that figure for the purpose of apportioning damages. This reduces the State's liability for loss of lifetime earning capacity to \$37,500.00.

The Tribunal further awards the Claimant \$24,614.00 for reasonable and necessary medical expenses incurred because of the accident. Finally, the Tribunal awards the Claimant \$5,000.00 for pain and suffering based on her testimony of discomfort and aggravation of prior injuries because of the accident.

Her damages total \$67,114.00. Based on the finding that the Claimant was ten percent at fault for the accident her total judgment is reduced to \$60,402.60.

IT IS, THEREFORE, ORDERED, DECREED AND ADJUDGED:

1. That the Claimant is awarded \$60,402.60 in damages incurred from the collision with the TDOT truck.
2. That the costs, if any, of this cause are taxed to the State of Tennessee.
3. This is a final judgment.

ENTERED this 6 day of March, 2014.



ROBERT N. HIBBETT
Claims Commissioner
Sitting as Trial Judge of Record

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 10th of March, 2014.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission