

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

06-958

EUGENE BELLARD

VERSUS

AMERICAN CENTRAL INS. CO., ET AL.

THIBODEAUX, Chief Judge, dissenting in part.

The trial court was manifestly erroneous in its assessment of causation and damages. The majority compounds that error.

Bellard suffered a cervical spine injury, resulting in three-level fusion; a lumbar spine injury, resulting in a one-level fusion; and bilateral carpal tunnel syndrome, resulting in bilateral carpal tunnel release surgeries. He also suffered emotional distress after the accident. The trial court awarded the plaintiff general damages totaling \$50,000.00 and a loss of future earning capacity award of \$29,822.00. In doing so, the trial court adopted the loss of earning capacity estimates provided by Trinity's expert economist, Dr. Womack. The loss of future earning capacity award assumes Bellard's ability to obtain a GED and receive successful retraining in a light-duty capacity job within twenty months of trial, as was proposed in the 2004 functional capacity evaluation report prepared by Dr. Grimes. Dr. Grimes' report was issued approximately two years *prior* to trial and *prior* to Bellard undergoing the bilateral carpal tunnel surgeries and cervical spine surgery. Also, Bellard's treating orthopedist and surgeon, Dr. Bernauer, unequivocally testified that

Bellard was functionally disabled due to his susceptibility to adjustment segment syndrome and recommended that Bellard not return to work.

It is clear that the trial court rejected, at least, Dr. Bernauer's testimony that Bellard was functionally disabled and unable to return to the workforce. Dr. Bernauer's opinions in this regard were *not* refuted by any evidence presented by Trinity. The trial court committed manifest error in failing to accept this testimony. I note that although the trial court's decision to accept or reject expert testimony is not to be disturbed absent manifest error, the appellate court is not required to affirm the rejection of "uncontradicted testimony or greatly preponderant objectively-corroborated testimony where the record indicates no sound reason for its rejection and where the factual finding itself has been reached by overlooking applicable legal principles." *Mart v. Hill*, 505 So.2d 1120 (La.1987).

The trial court was manifestly erroneous in seemingly placing more weight on Dr. Bernard's testimony.

Dr. Bernard examined Mr. Bellard on *one* occasion for the purpose of litigation. He stated that his opinion of Bellard suffering a residual 15% anatomical impairment rating of the spine as a result of the lumbar injury only, was not meant to be indicative of his level of functional impairment, distinguishing it from a *functional disability rating*. This anatomical spinal impairment rating did not take into consideration the existence of a cervical spine injury as well. Also, although Dr. Bernard stated initially that if Bellard had a successful lumbar discectomy and fusion, he would place *no* physical limitations on him, he also acknowledged the possibility of segment adjust syndrome occurring because of the increase in pressure on the discs above and below the fused area.

Regarding the existence of carpal tunnel syndrome, Dr. Bernard initially testified that Bellard did not suffer from the syndrome, but *recanted* that statement on cross-examination, testifying that he could not say that Bellard was *not* suffering from carpal tunnel. This is because it was shown that he did *not* perform *any* diagnostic tests during his examination of Bellard that would indicate the existence of the condition and that he did *not* review the EMG and nerve conduction studies that confirmed the existence of bilateral carpal tunnel syndrome.

When he recanted his prior claim, he then stated that his only opinion regarding carpal tunnel was that it could not have occurred as a result of the August accident, which he initially deemed to be minor. His later testimony revealed that he possessed no knowledge of the severity of the impact of the August 2002 crash (which he later acknowledged was *severe* based on the approximate rate of speed Gayle may have been traveling), no knowledge of the position of Bellard's arms or hands during the accident, nor any knowledge of any injuries possibly suffered by Bellard in the nature of internal bleeding, bruising or otherwise, which may have readily indicated injury to the relevant areas.

Regarding the cervical injuries, Dr. Bernard stated during direct examination that Bellard exhibited no objective findings of any nature during his pre-cervical surgery evaluation on September 30, 2004. However, on cross-examination Dr. Bernard testified that he did *not* review Bellard's CT scan and myelogram, which are the diagnostic tools used to more accurately identify or determine the extent of spinal injuries when a physical exam and/or MRI are not clear enough. In this case, Dr. Bernard admitted that his opinion of no objective findings of cervical spine injury of any nature did *not* include a review of the findings shown on the CT scan and myelogram.

Dr. Foret, the court-appointed IME physician, reviewed the MRIs, CT scan, and myelogram of the cervical spine, and performed a physical examination of Bellard on June 8, 2005, which revealed spasms in the neck area. He agreed with the radiologist's findings of disc bulging and osteophytic formation at the 3-4 through 5-6 levels and some central canal narrowing. He also agreed with Dr. Bernauer's decision to proceed with surgery. He acknowledged that Bellard may have had arthritic or degenerative changes in the cervical spine preceding the accident, but did not discount the accident as an aggravating factor in his chronic pain development and subsequent development of disc bulging.

Does any of this testimony represent that which may be reasonably viewed differently, such that the trial court cannot be held manifestly erroneous in its determinations based on such? I do not think so. It is apparent to me that there was not sufficient evidence presented by the defendant to successfully discount the three injuries attributed to the first accident, the necessity for the surgeries, nor the subsequent impairment established by the plaintiff.

Consequently, I would raise the loss of future earning capacity awards to \$547,994.00, representing the loss of future earning capacity determined by plaintiff's economist, Dr. Charles Bettinger, based upon Bellard's inability to return to the workforce. I would award general damages in the amount of \$250,000.00, the lowest amount which could reasonably be awarded.

For the foregoing reasons, I dissent in part.