TERRANCE TUNSTALL	*	**NO. 2000-CA-0823**
VERSUS	*	**COURT OF APPEAL**
ELVIN STIERWALD AND TRAVELERS INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-14286, DIVISION "B"
HONORABLE ROLAND L. BELSOME, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, Judge James F. McKay, III)

ROBERT G. HARVEY, SR.
MARK P. GLAGO
HARVEY JACOBSON, APLC
New Orleans, Louisiana
Attorneys for Plaintiff/Appellee

JAMES J. MORSE
New Orleans, Louisiana
Attorney for Defendants/Appellants

AFFIRMED

In this personal injury action, the defendants, Phoenix Insurance Company and Travelers Insurance Company, appeal the trial court's casting them in judgment for $1,006,674.00. We affirm.

FACTS AND PROCEDURAL HISTORY

On February 11, 1996, the plaintiff, Terrance Tunstall, was driving a taxi cab on Toulouse Street at its intersection with North Rampart Street when his vehicle was struck by a Chevrolet Suburban driven by defendant, Elvin Stierwald. Both Mr. Tunstall and Mr. Stierwald were proceeding toward the French Quarter on Toulouse Street. Mr. Tunstall was in the right lane while Mr. Stierwald was in the left lane; at its intersection with North Rampart, traffic in the left lane of Toulouse must turn left while traffic in the right lane has the option of going straight or turning left. Although Mr. Stierwald was in the left lane, he attempted to go straight and his vehicle collided with Mr. Tunstall's taxi. As a result of the impact, Mr. Tunstall was jerked out of his seatbelt and thrown about his vehicle.

On February 27, 1996, Mr. Tunstall saw Dr. Stewart Altman for

severe lower back pain and radiating pain to his right thigh and right leg. An MRI revealed disc herniations at L4-L5 and L5-S1. Over time, the back and leg pain worsened, causing Mr. Tunstall to experience some numbness, which would cause his right leg to "give out." Mr. Tunstall was referred to Dr. Toussaint LeClercq for neurosurgical treatment. In June of 1997, Dr. LeClercq recommended surgery. However, the surgery was canceled due to lack of funding.

Two months later, Mr. Tunstall stepped into a gravel indentation in a parking lot and his leg gave out, causing him to fall. Mr. Tunstall returned to Dr. Altman for treatment. Mr. Tunstall also consulted orthopedic surgeons Dr. Charles Billings and Dr. Richard Meyer regarding alternatives to surgery. They, however, both recommended that he undergo a fusion. Mr. Tunstall then saw Dr. Kenneth Vogel, a neurosurgeon, who also determined that he required surgery.

On March 24, 1999, Dr. Vogel performed a posterior lumbar interbody cage fusion at L4-L5, a posterior lumbar interbody cage fusion at L5-S1, a microsurgical discectomy at L4-L5, a microsurgical discectomy at L5-S1, and a medial branch neurotomy at L3-L4 and L4-S1 bilaterally on

Mr. Tunstall. Dr. Vogel's prognosis following the surgery was that Mr. Tunstall should reach maximum medical improvement by March 24, 2001 but would have a 15 to 20% permanent medical impairment of the body as a whole. These restrictions mean that Mr. Tunstall will have to avoid activities requiring him to lift, push or pull greater than 35 pounds or bend repeatedly on a permanent basis.

On August 29, 1996, Mr. Tunstall filed suit against Elvin Stierwald and Travelers Insurance Company. Later, Angelo's Bakery, its owner Lena Stierwald, and their commercial insurance carrier, Bituminous Fire and Marine Insurance Company were added as additional defendants. The case was tried before the Honorable Judge Louis DiRosa on August 19, 1999 and September 20, 1999. The trial court found defendants fully liable and, after post-trial briefing, entered judgment in favor of the plaintiff and against Elvin Stierwald and "Phoenix/Travelers" on November 5, 1999, in the amount of $1,006,674. The damage award was apportioned as follows: $575,000 for past, present, and future pain and suffering; $300,360 for loss of future wages and loss of earning capacity; $37,800 for loss of wages up to trial; $68,514 for past medical expenses; and $25,000 for future medical

expenses. Thereupon, the defendants filed a motion for a new trial. After a hearing on said motion, the Honorable Judge Roland Belsome amended the insurance company name to "Phoenix and Traveler's Insurance Companies." Travelers and Phoenix now appeal the trial court's judgment.

DISCUSSION

There are three principal issues before this Court. They are 1) whether an improper party was cast in judgment (the defendants/appellants contend that Mr. Stierwald's insurance coverage was from only Phoenix and not Travelers); 2) whether the defendant insurance companies were cast in judgment for an amount that was in excess of their policy limits; and 3) whether the quantum awarded was excessive.

As stated above, the trial court cast both Travelers and Phoenix in judgment. This is because the trial court found ambiguities in the policies, policy limits, and terms regarding pre-judgment interest. Absent a prejudicial error of law, an appellate court is not required to review the appellate record de novo. Brumfield v. Guilmino, 93-0806 (La. App. 1 Cir. 3/11/94) 633 So.2d 903, 911, writ denied, 94-0806 (La. 5/6/94) 637 So.2d 1056. An appellate court "can only reverse a lower court's factual findings

when (1) the record reflects that a reasonable factual basis does not exist for the finding of the trial court and (2) the record establishes that the finding is clearly wrong." Russell v. Noullet, 98-0816 (La. 12/1/98) 721 So.2d 868; Baumeister v. Plunkett, 95-2270 (La. 5/21/96) 673 So.2d 994. When reviewing the factual findings of the trial court, the Court of Appeal may not disturb the findings if there is any reasonable evidence contained within the record which supports the trial court's decision. Peterson v. State Farm Auto Ins. Co., 543 So.2d 109 (La App. 3 Cir. 1989); Kelley v. Great Atlantic and Pacific Tea Company, Inc., 545 So.2d 1099 (La. App. 5 Cir. 1989), writ denied, 550 So.2d 629 (La. 1989).

Initially, Mr. Tunstall filed suit against Travelers because he was informed that Travelers had issued Mr. Stierwald's automobile insurance policy. However, when the defendants filed an answer to Mr. Tunstall's suit on behalf of Phoenix, they asserted that Travelers had been erroneously named as a defendant. In Spite of this, in a letter dated December 13, 1996, defense counsel refers to the policy at issue as having been "issued by the Travelers to Elvin Stierwald." At trial, the defendants introduced a copy of the alleged policy; this document was labeled as "An Automobile Policy

Booklet from the Travelers" and was printed on Travelers stationary. The defendants also introduced a declarations page which had a note naming Phoenix Insurance Company as Mr. Stierwald's insurer and providing a policy limit of $50,000.00; there is, however, no policy from Phoenix in the record which pertains to this declarations page. Because of the confusion as to who actually insured Mr. Stierwald, the trial court cast both Phoenix and Travelers in judgment.

It is well established that the burden is on the plaintiff to establish every fact that is essential and also to establish that his claim is within the policy coverage. Mercadel v. Tran, 92-0798 (La. App. 4 Cir. 3/29/94) 635 So.2d 438; C.L. Morris, Inc. v. Southern American Ins. Co., 550 So.2d 828, 830 (La. App. 2 Cir. 1989); Collins v. New Orleans Public Service, Inc., 234 So.2d 270 (La. App. 4 Cir. 1970). There are cases, however, which hold that the insurer bears the burden of showing policy limits or exclusions. Massachusetts Protective Ass'n. v. Ferguson, 168 La. 271, 121 So. 863 (1929); B.T.U. Insulators, Inc. v. Maryland Casualty Co., *supra*; Paz v. Implement Dealers Mutual Insurance Company, 89 So.2d 514 (La. App. 1956). Furthermore, terms and provisions of insurance contracts are to be

construed in their general and popular meaning, and any ambiguity in an insurance contract will be construed against the insurer and in favor of the insured. Spillers v. ABH Trucking Co., Inc., 30,332 (La. App. 2 Cir. $/13/98) 713 So.2d 505. In the instant case, considerable confusion existed concerning the connection between the policy booklet issued by Travelers and the declarations pages which make reference to Phoenix as the insurer. This meets the standard of any reasonable evidence contained in the record which supports the trial court's decision. Peterson *supra*. Accordingly, we find no error in the trial court's holding both Travelers and Phoenix liable and not limiting their liability to $50,000.00. Likewise, the issue of whether the defendants pay interest covering pre-judgment and post-judgment periods on the whole judgment is governed by the language of the policy issued by the insurer. Because the defendants failed to produce the alleged Phoenix policy they were properly held liable for pre-judgment and post-judgment interest.

As stated above, the trial court awarded Mr. Tunstall: $575,000.00 for past, present, and future pain and suffering; $68,514.00 for past medical expenses; $25,000.00 for future medical specials; $37,800.00 for loss of

wages to trial; and $300,360.00 for loss of future wages and loss of earning capacity for a total of $1,006,674.00 with legal interest from the date of judicial demand until paid plus costs. The defendants contend that these awards were too high.

Terrance Tunstall underwent a two-level lumbar fusion, as well as multiple level neurotomies and a micro-surgical discectomy at two levels. The interbody caged fusion involved the placement of two titanium cages within the disc space and then the packing of bone around them. Mr. Tunstall has a 15 to 20 % permanent medical impairment of the body as a whole and is restricted from activities which require him to lift, push or pull greater than 35 pounds or bend repeatedly on a permanent basis. Furthermore, at maximum medical improvement, Mr. Tunstall should only have 80 % of his pain resolved; this means that Mr. Tunstall will continue to experience pain for the rest of his life.

The standard of review for damage awards requires a showing that the trier of fact abused the great discretion accorded in awarding damages. In effect, the award must be so high or so low in proportion to the injury that it "shocks the conscience." Moore v. Healthcare Elmwood, Inc., 582 So.2d

871 (La. App. 5 Cir. 1991). The appellate court's role is not to decide what it considers to be an "appropriate" award, but to review the exercise of discretion by the district court. Reck v. Stevens, 373 So.2d 498 (La. 1979). Because each case is different, the appellate court must first find a manifest abuse of discretion before comparing the award to other reported cases with "generically similar medical injuries." Youn v. Maritime Overseas Corp., 623 So.2d 1257 (La. 1993). Considering the particular injuries to Mr. Tunstall in the instant case, we find no abuse of discretion in the trial court's award of general damages.

In making its awards for lost wages and loss of earning capacity, the trial court relied on the testimony of the plaintiff as well as on the testimony of Dr. Melvin Wolfson, a forensic economist. Under Louisiana jurisprudential law, wage losses may be established by any proof which reasonably establishes the claim, including plaintiff's own reasonable testimony. Chapman v. Regional Transit Authority, 95-2620 (La. App. 4 Cir. 10/2/96) 681 So.2d 1301, 1307. Furthermore, there is little room for adjustment at the appellate level of a trial court's award for loss of earning capacity. Killough v. Bituminous Cas. Corp., 28329 (La. App. 2 Cir. 5/8/96)

674 So.2d 1091, 1101. Accordingly, we find no abuse of discretion in the trial court's awards of past lost wages or loss of earning capacity.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED