

**MICHAEL K. BLAND** \* **NO. 2019-C-0550**  
**VERSUS** \* **COURT OF APPEAL**  
**KENNETH GREEN, ET AL.** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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APPLICATION FOR WRITS DIRECTED TO  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2012-04603, DIVISION "B-1"  
Honorable Rachael Johnson,

\* \* \* \* \*

**JUDGE SANDRA CABRINA JENKINS**

\* \* \* \* \*

(Court composed of Judge Roland L. Belsome,  
Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

***BELSOME, J., CONCURS IN THE RESULT***  
***LEDET, J., CONCURS IN THE RESULT***

Joseph E. "Jed" Cain  
Charles M. King  
HERMAN HERMAN & KATZ, LLC  
820 O'Keefe Avenue  
New Orleans, LA, 70113

Paul L. Billingsley  
LAW OFFICES OF PAUL L. BILLINGSLEY, LTD  
506 West Morris Avenue  
Hammond, LA 70403

COUNSEL FOR PLAINTIFF/APPLICANT

Richard B. Eason II  
Kyle Potts  
ADAMS & REESE LLP  
701 Poydras Street, Suite 4500  
New Orleans, LA 70139

COUNSEL FOR DEFENDANTS/RESPONDENTS

**WRIT GRANTED; REVERSED AND REMANDED**

**JUNE 27, 2019**

In this personal injury action, applicant Michael K. Bland seeks review of the trial court's May 31, 2019 order granting a motion *in limine* to exclude Mr. Bland's expert, Dr. Randolph Rice, from testifying about Mr. Bland's lost earning capacity damages because Dr. Rice did not expressly incorporate Mr. Bland's pre-injury earnings as a foundation for a determination of his post-injury lost earning capacity. Because lost earning capacity damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury, we find the trial court manifestly erred in granting the motion in *limine*. Accordingly, we grant Mr. Bland's writ application, reverse the trial court's judgment, and remand for further proceedings.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, Mr. Bland worked seasonally as a carpenter at the New Orleans Convention Center, assembling showroom and convention spaces. On March 27, 2012, Mr. Bland was setting up a display exhibit at the Convention Center when respondent, Kenneth Green, a forklift operator for respondent, Freeman Decorating

Services, Inc. (“Freeman”), knocked over several standing modular panels with his forklift that fell over and struck Mr. Bland’s right leg with tremendous force. The weight of the stack of panels essentially “de-gloved” Mr. Bland’s right leg from the knee down, causing catastrophic blood loss, a ruptured Achilles tendon, and compound leg fractures. On May 14, 2019, Mr. Bland filed a Petition for Damages against Mr. Green and Freeman (collectively, “Respondents”).

### **Expert Carla Seyler**

Mr. Bland retained expert Carla Seyler to determine his lost earning capacity from the injury. Ms. Seyler is an experienced vocational rehabilitation expert who has testified in court hundreds of times and has never been excluded from testifying. To determine Mr. Bland’s lost earning capacity, Ms. Seyler relied on his medical records, a Functional Capacity Evaluation (“FCE”), other vocational reports, and documents reflecting the wages of journeyman carpenters and trade show specialists. Ms. Seyler also examined Mr. Bland’s work history, noting that before his injury he worked as a rigger or lead carpenter at the Convention Center.

An important part of Ms. Seyler’s methodology to determine lost earning capacity was to consider an injured person’s pre-injury tax returns. In this case, Ms. Seyler was provided and examined Mr. Bland’s pre-injury tax returns that reflected his pre-injury income as part of her methodology to determine his lost earning capacity.

Ms. Seyler considered Mr. Bland's pre-injury income and work history, and understood that he typically earned less than a full-time carpenter in the area, with equivalent qualifications, would earn. She recognized this, and in her expert capacity, determined that his reported earnings underestimated his total earning capacity, or what he was actually capable of earning if he chose. Ms. Seyler also examined Mr. Bland's medical condition and the results of his FCE, noting that Mr. Bland had limited range of motion in his spine, he could only lift about 25-35 pounds occasionally, depending on his position, and that he could only stand between 1 to 2.5 hours in an 8-hour work day. Because of his limitations, Ms. Seyler concluded that Mr. Bland had lost access to many jobs requiring light exertion and likely all jobs requiring medium and heavy physical exertion. Essentially, Mr. Bland's career as a carpenter was over.

Ms. Seyler then compared the wages of jobs at which Mr. Bland could work with the wages earned by experienced carpenters in south Louisiana to determine Mr. Bland's lost earning capacity. She stated that the job that he could work after his injury (such as unarmed security guard or sewing machine operator) all paid significantly less (by 60-70%) than a journeyman carpenter. Ms. Seyler concluded that after the injury Mr. Bland was capable of earning about \$18,000 per year working full-time at a job he was capable of performing. She stated that without the injury, Mr. Bland would have been capable of earning about \$41,000 annually as a carpenter.

Ms. Seyler ultimately opined that Mr. Bland's lost earning capacity, after considering his medical condition and his pre-injury work history and income, to be about \$23,000 per year for the rest of his working life.

### **Expert Dr. Randolph Rice**

Dr. Randolph Rice is an economist who specializes in damage calculations in personal injury cases. He performs hundreds of these calculations a year and, like Ms. Seyler, has never been denied qualification as an expert in calculating damages in a personal injury case. The "vast majority" of Dr. Rice's calculations are related to loss of earning capacity. Based on Ms. Seyler's determination of Mr. Bland's annual lost earning capacity, Dr. Rice's task was to determine the lump-sum value that would equal Mr. Bland's total lost earning capacity for the rest of his working life.

Dr. Rice relied on Ms. Seyler's figures that were the result of her consideration of Mr. Bland's seasonal work history and prior earnings. In essence, Dr. Rice adopted Ms. Seyler's work product. He also was provided Mr. Bland's pre-injury tax returns. After having considered the past tax return earning history of Mr. Bland, and adopting the lost earning capacity determination of Ms. Seyler, which also included her own consideration and estimation of Mr. Bland's work and earning history, Dr. Rice gave a range of values based upon the potential length of Mr. Bland's working life and the annual lost earning capacity figures provided by Ms. Seyler. Dr. Rice calculated that Mr. Bland's losses ranged from \$483,021 to \$595,863, depending on how much longer he expected to work. In sum, Dr. Rice

provided a lump-sum value equal to the total of Mr. Bland's lost earning capacity through his remaining life based upon the annual earning capacity figures determined by Ms. Seyler.

### **Respondents' Motion in *Limine***

At issue is Respondents' motion in *limine* to exclude Dr. Rice's opinion of Mr. Bland's lost earning capacity. Respondents argue that Dr. Rice's methodology was unreliable because he relied on Ms. Seyler's determination of Mr. Bland's earning capacity, and because Ms. Seyler did not consider Mr. Bland's past work history and consistency. Respondents argued that these were mandatory factors to be considered in reliably calculating lost earning capacity.

Mr. Bland opposed the motion, arguing that lost earning capacity means exactly that – a person's lost capacity to earn money. Mr. Bland asserted that because he had been capable of earning what a full-time carpenter earned before the injury, and he was not capable of earning that after the injury, he was entitled to recover, as compensation for his accident, the difference between what had been capable of earning and what he now was capable of earning. In addition, Mr. Bland argued that Dr. Rice had based his work on Ms. Seyler's work, and that Ms. Seyler had expressly stated that she had considered his pre-injury income and determined that it underestimated his earning capacity. Mr. Bland also contended that his lost earning capacity was not necessarily related to what he was earning at the time of the injury, and his reduced income from seasonal work was not a

requisite component of the calculation, citing the jurisprudence from Louisiana Supreme Court and this Court.

On May 31, 2019, the trial court granted Respondents' motion to exclude Dr. Rice's testimony, finding that his methodology was flawed and inadmissible. Mr. Bland filed this application for supervisory writs.

### **DISCUSSION**

Mr. Bland lists two assignments of error: (1) the trial court erred in finding that Dr. Rice's methodology was flawed in determining the lump sum value of Mr. Bland's lost earning capacity claim because Dr. Rice relied upon the opinions of Ms. Seyler; and (2) the trial court erred as a matter of law by requiring Mr. Bland's lost earning capacity value to be based upon his pre-injury earnings.

#### **Standard of Review**

A trial court's decision to admit or exclude expert testimony is "subject to reversal only for abuse of discretion or manifest error." *Ballam v. Seibels Bruce Ins., Co.*, 97-1444, p. 4 (La. App. 4 Cir. 4/1/98), 712 So.2d 543, 546.

#### **Assignment of Error No. 1**

Mr. Bland first contends that Dr. Rice's methodology reliably estimated Mr. Bland's lost earning capacity. According to Mr. Bland, after his injury, he was incapable of working full time – or any time – as a carpenter. The jobs that Mr. Bland is eligible to obtain now, based on the analysis of Ms. Seyler, pay significantly less than a job as a carpenter. Mr. Bland asserts that his earning

capacity has thus been reduced, regardless of what he was earning before his injury.

Respondents challenge Dr. Rice's methodology regarding the lump sum amount only because it allegedly does not consider Mr. Bland's past work history and work consistency, as required by *Carter v. Baham*, 95-2126, p. 14 (La. App. 4 Cir. 10/9/96), 683 So.2d 299, 307; and *Scarberry v. Entergy Corp.*, 13-0214, p. 36 (La. App. 4 Cir. 2/19/14), 136 So.3d 194, 217.

Although Dr. Rice did not directly consider these two factors, Ms. Seyler examined Mr. Bland's work history, and Dr. Rice relied on and adopted Ms. Seyler's calculations that considered Mr. Bland's work history, concluding that Mr. Bland's past earnings "underestimated" what his actual earning capacity was. This comports with Louisiana law. In Louisiana, earnings are not earning capacity, and lost future income is not lost future earning capacity:

Loss of earning capacity is not the same as lost wages. Rather, earning capacity refers to a person's potential. Earning capacity is not necessarily determined by actual loss. While the plaintiff's earnings at the time of the accident *may* be relevant, such figures are not necessarily indicative of his past or future lost earning capacity. The plaintiff need not be working or even in a certain profession to recover this type of award.

*Finnie v. Vallee*, 620 So.2d 897, 900 (La. App. 4th Cir. 1993) (emphasis added); *see also Carter*, 683 So.2d at 309 ("Damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury.").

We agree with Mr. Bland that Ms. Seyler considered Mr. Bland's pre-injury earnings, but she was under no obligation to give it any particular weight in her



determination of what his lost earning capacity was. Dr. Rice took Ms. Seyler's numbers to come up with a lump sum value of Mr. Bland's total loss of earning capacity by adopting her work product "by inference." All Dr. Rice did was take Ms. Seyler's results and convert the annual amounts into a lump sum value of total lost earning capacity. This assignment of error lacks merit.<sup>1</sup>

### **Assignment of Error No. 2**

Mr. Bland also contends that the trial court erred in finding that his pre-injury income needed to be "plugged into a formula" for the lost earning capacity calculation in order for it to have been "considered." We agree with Mr. Bland that there is no "formula" to determine lost earning capacity into which one can "plug" a person's prior earnings. "The very nature of lost earning capacity makes it impossible to measure the loss with any kind of mathematical certainty." *Finnie*, 620 So.2d at 901; *Carter*, 683 So.2d at 307 ("Awards for loss of future income or future earning capacity are inherently speculative and unsusceptible of calculation with mathematical certainty."). Dr. Rice calculated a lump sum estimate based on calculations of Ms. Seyler using standard accounting procedures that have not been challenged by Respondents.

We also agree with Mr. Bland that the trial court erred as a matter of law in finding that Dr. Rice's calculation could only be reliable if it was directly tied to

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<sup>1</sup> Respondents assert that Ms. Seyler is not qualified to testify regarding Mr. Bland's claim because "Louisiana law requires a forensic economist to testify as an expert regarding a lost earning capacity claim," citing *Scarberry*, *supra*. Respondents misstate the language in *Scarberry*, which says "[a] forensic economist is **generally** necessary to make those calculations necessary to establish a loss of earning capacity claim." *Scarberry*, 13-0214, p. 36, 136 So.3d at 217 (emphasis added).

Mr. Bland's pre-injury earnings. This directly contradicts the law. As the Louisiana Supreme Court has said, "Damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury." *Folse v. Fakouri*, 371 So.2d 1120, 1123 (La. 1979); *see also Carter*, 683 So.2d at 307 (What a plaintiff earned before and after the injury does not constitute the measure of loss of . . . future earning capacity.').

We thus conclude that the trial court was manifestly erroneous in finding that the calculation of Mr. Bland's lost earning capacity was required to be based upon his pre-injury earnings. *See Hobgood v. Aucoin*, 574 So.2d 344, 346 (La. 1990) ("[D]amages for decreased earning capacity . . . [are] determined by deducting plaintiff's earning **ability** after the injury from his earning **ability** immediately prior to the injury **rather than by deducting his income after the injury from his income prior to the injury.**") (Emphasis added.) This assignment of error is without merit.

### CONCLUSION

For the foregoing reasons, we grant Mr. Bland's application for supervisory writs, reverse the trial court's May 31, 2019 judgment, and remand for further proceedings.

**WRIT GRANTED; REVERSED AND REMANDED**