Reversed and Remanded and Opinion filed April 1, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00489-CV

WESTERNGECO RESOURCES INC., Appellant

V.

DAROLD BURCH, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2006-74396

O P I N I O N

In this personal injury suit, WesternGeco Resources Inc. appeals a judgment in favor of Darold Burch on numerous grounds. Finding harmful charge error, we reverse and remand.

Background

Darold Burch worked as a handling specialist who deployed and retrieved seismic air guns on the M/V Western Pride, a vessel owned and operated by appellant WesternGeco Resources, Inc.

Burch was working in the vessel's slipway on December 26, 2003, when he stood up from a squatting position and hit his head on an I-beam. Burch finished his shift and then visited the vessel's medic complaining of neck pain. The medic prescribed rest and pain killers. The medic also noted that Burch had a history of migraine headaches and had prescription medication from his doctor. Burch returned to work the next day.

On January 2, 2004, the medic prescribed 24 hours of complete rest because Burch complained of blurred vision and migraine headaches. On January 3, 2004, the medic prescribed 72 hours of rest; the medic recommended on January 7, 2004, that Burch be sent ashore for further medical evaluation. Burch was transported to New Orleans by helicopter on January 11, 2004, to see a doctor.

On January 15, 2004, Burch was flown to Houston to see Dr. Thomas Mims, a neurologist. Burch told Dr. Mims that, although he had a history of migraine headaches, he had been suffering from a different type of severe headache after hitting his head. Dr. Mims noted that Burch's "main problem was this right-sided headache, and then he had some discomfort, a little numbness and tingling that would travel from his neck or over on the right side over into his right shoulder and down the right arm somewhat. But his main problem was this fairly disabling headache that was quite uncomfortable." Dr. Mims concluded Burch was not severely injured or in significant distress; he diagnosed a cervical strain and released Burch to return home to North Dakota.

On January 16, 2004, Burch visited Dr. Paul Knudsen, who practices with Burch's family doctor, Dr. John Erickstad. Burch told Dr. Knudsen that he had "a little pain in the back of the neck going down the spine occasionally, but it is minimal." Dr. Knudsen concluded that Burch had suffered a minor head injury and ordered a MRI. On January 26, 2004, Burch visited his family doctor "for a follow-up and a review of the industrial injury" he sustained when he hit his head on the beam. At that time, Dr. Erickstad read the result of the MRI Dr. Knudsen had ordered. Dr. Erickstad diagnosed a "[h]ead/neck injury, industrial injury, occurrence 12/26/03, some associated right arm radiculopathy

sequelae." On February 9, 2004, Burch visited Dr. Erickstad again for a follow-up. At that time, Burch told his doctor that "he had been doing okay until this weekend when he helped a buddy put up an overhead door." Burch complained of pain in his shoulder and his doctor examined the shoulder.

Based on the complaint of shoulder pain, Dr. Erickstad referred Burch to neurologist Dr. James Ragland on February 12, 2004. Burch complained of neck and back pain and told Dr. Ragland that he hit his head on a beam. Dr. Ragland noted that Burch "currently . . . has a different issue. He was helping his friend and was screwing a heavy metal door . . . and he felt a real sharp pain in the right shoulder region radiating into the arm as well as the interscapular area. Since then he has been having a lot of pain." Burch returned to Dr. Erickstad on February 18, 2004; Dr. Erickstad's notes indicate that Burch felt better with regard to the head injury, although he "is still having some head and neck" problems. Dr. Erickstad's notes also indicate that Burch had been suffering from pain in his right shoulder since "he was working on a heavy metal overhead door with his arms in the air."

On March 8, 2004, Burch told Dr. Erickstad that, although he still had some upper thoracic pain, "he is better." In his notes, Dr. Erickstad indicated: "[F]rom a functional point of view[,] the patient indicates that he did some maneuvering of furniture weighing approximately 100 to 150 pounds without any major problem over the weekend." Dr. Erickstad's notes also indicate that he was preparing Burch "to return to duty with [the] understanding that [the] patient will be seen by an industrial physician working for his company in Texas within the next day or two."

Burch visited Dr. Erickstad on May 4, 2004 "for an industrial follow-up" and requested a new work release. Dr. Erickstad's notes reflect that Burch "indicates that his head, neck and back injury is good, resolved. He feels that he will be able to work on the boat in the ocean . . . . He denies any shoulder problem at this time." Dr. Erickstad concluded that Burch reached maximum medical improvement. Dr. Erickstad stated in

his notes as follows: "[H]ead and neck injury, industrial injury occurrence 12-26-03 follow-up, resolved and released to duty. Right shoulder and rotator cuff tear, significantly improved and released to duty."

In May 2006, Burch traveled to Houston to consult with Dr. Mims because he continued to suffer from neck pain and headaches, but the headaches were different from "classical migraine headaches." Burch told Dr. Mims that he had not returned to work "and that he was still having not only the headaches, but neck pain, pain radiating over into the right shoulder." A myelogram confirmed that Burch had pinched nerves in his neck. Dr. Mims concluded that at least part of Burch's "problem was related to nerve aggravation from some longstanding pressure aggravated by the traumatic injury" when Burch hit his head on the beam. Upon Dr. Mims's recommendation, Burch underwent neck surgery in September 2006 to relieve the pressure on his nerves. Dr. Mims noted that the surgery was successful because Burch felt better and "the bad headache he was getting before the operation from the pressure on the nerves is no longer a problem to him. His neck pain is — is less now."

Burch filed suit on November 23, 2006 against WesternGeco for Jones Act negligence,[1] unseaworthiness under general maritime law, and vessel negligence under the Longshore and Harbor Workers' Compensation Act[2] in connection with the December 26, 2003 incident on the M/V Western Pride. A jury found WesternGeco negligent, and found Burch comparatively negligent in the amount of 30 percent. After reducing the damages in accordance with Burch's comparative negligence, and after applying an offset for medical expenses WesternGeco previously paid, the trial court rendered judgment against WesternGeco for $1,497,542.40 on January 18, 2008. WesternGeco now appeals.

[1] *See* 46 U.S.C.A. § 30104 (West 2007).

[2] *See* 33 U.S.C.A. §§ 901-50 (West 2001).

Analysis

A. Overview

WesternGeco raises nine issues on appeal.

WesternGeco argues that (1) the jury's findings of seaworthiness and negligence "based on a single factual allegation related to a non-transient condition on the vessel" are inconsistent; (2) the jury's award for past and future medical care is not supported by sufficient evidence; (3) Burch failed to present sufficient evidence "to support the jury's excessive award of $350,000.00 in damages for past and future mental anguish and physical pain;" (4) the trial court erred by refusing to submit WesternGeco's proposed jury question number five, which separated damages relating to Burch's neck problem from damages relating to his shoulder problem; (5) there is no evidence to support the jury's award for future impairment and insufficient evidence to support the jury's award for past impairment; (6) the trial court erred by refusing to allow WesternGeco to present evidence of medical expenses it paid Burch prior to trial; (7) the trial court erred by allowing Burch's "expert to testify and forcing" WesternGeco "to make multiple objections to clearly improper questions, thereby creating the misimpression before the jury that it has something to hide;" (8) the jury's "flagrantly excessive" damages award was controlled by passion and prejudice; and (9) this court should order a remittitur as an alternative to a new trial because the jury's damages award was "flagrantly excessive" and "unsupported by the evidence."

We begin our analysis with WesternGeco's fourth issue because it is dispositive.

B. Charge Error Based on Complaint that Broad-Form Submission is not Feasible

WesternGeco argues that the trial court erred by refusing to submit its proposed jury question number five, which included separate answer blanks for damages relating to Burch's neck and his shoulder. Jury question number five as submitted by the trial court

contained a single answer blank for each element of damages, including damages for future medical care:

> What sum of money, if paid now in cash, would fairly and reasonably compensate Darold Burch for his injuries, if any, that resulted from the occurrence in question?
>
> * * *
>
> Do not include interest on any amount of damages you may find. Do not include any amount for any condition not resulting from the occurrence in question. Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such condition was aggravated by any injuries that resulted from the occurrence in question.
>
> * * *
>
> j. Medical care that, in reasonable probability, Darold Burch will sustain in the future.
>
> Answer: $215,000.00

WesternGeco complains that the trial court's "instruction and the jury's answer to the damage questions do not provide any insight into whether the jury believed Burch's shoulder condition resulted from the occurrence in question" or "if the jury awarded all of its damages for the neck injury [or] . . . if they awarded any amount of damages for the shoulder injury." WesternGeco contends the combined submission of neck and shoulder damages in a single answer blank is erroneous and harmful because Burch proffered no evidence (1) establishing that his shoulder problem was related to the December 26, 2003 occurrence aboard the M/V Western Pride; or (2) "to support an award for future medical care related to Burch's shoulder condition."

1. Preservation

We first address Burch's contention that WesternGeco waived the claimed charge error by failing to (1) tender a written charge request to the trial court; and (2) "include such a request in the appellate record." Burch contends that "[a]bsent a written charge

submission that was refused by the trial court, it is mere speculation for this court to assume what WesternGeco sought to accomplish."

The record establishes that WesternGeco asked the trial court to submit separate damages questions relating to the neck and shoulder. WesternGeco argued that it would be unable to challenge any damage award relating to Burch's shoulder problem on appeal unless the trial court submitted a question with separate answers for damages relating to his neck and shoulder. The trial court discussed the holding of *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); stated that there is evidence in this case from which a jury could conclude that Burch "absolutely did injure his neck in this accident and absolutely did not injure his shoulder;" and initially suggested that the parties submit separate questions. Burch opposed submitting separate questions to the jury.

The following exchange occurred thereafter between the trial court and WesternGeco's counsel:

> THE COURT: . . . [W]e solve it all by saying do not award any damages for anything that didn't, that wasn't . . . [proximately] caused by the incident in question.
>
> WESTERNGECO'S COUNSEL: That takes away our ability to challenge [on] appeal on causation of the shoulder. You can ask was it caused — that way we can get an answer to that, caused by this accident.
>
> THE COURT: Okay. And the same purpose is served by telling the jury, [d]on't award any damages for anything that you find didn't result from the incident in question or occurrence in question or the accident in question or whatever.
>
> WESTERNGECO'S COUNSEL: It still hampers.
>
> THE COURT: No, it doesn't hamper anything because the jury doesn't award damages for anything that they don't find happened in the accident. You specifically instruct them, don't give me any money for anything you find wasn't caused by whatever negligence you found, and, therefore, if they find neck and not shoulder, if they follow that instruction they're going to give damages for neck and not shoulder.

> WESTERNGECO'S COUNSEL: Admittedly, but up on appeal —
>
> THE COURT: Okay. And we can talk about this all day long . . . but that simple instruction, one line instruction solves the whole problem.
>
> WESTERNGECO'S COUNSEL: We'll submit something and deal with it on appeals [sic] if we have to. So we're clear on the charge.
>
> THE COURT: What I'd like for y'all to do . . . is get together on this and come up with something that — and I know you're going to want to submit this, and I will reject it and all that, but come up with something that we have — off the record.

At the formal charge conference, WesternGeco objected to question number five of the jury charge and tendered its proposed version of the question to the trial court:

> WESTERNGECO'S COUNSEL: We object to Question No. 5, the money damage question. We would request that the injuries related to the neck be separated from the injuries related to the shoulder. I have a proposed charge I would tender to the Court. We would file that with the Court, if the Court overrules our objection.
>
> THE COURT: . . . I'll sign it and date it for inclusion in the Court's file.

The record contains WesternGeco's tendered question number five, which contains separate answer blanks for damages relating to Burch's neck and shoulder. The tendered question is dated, marked "rejected," and signed by the trial court.

WesternGeco's timely objection alone would have sufficed to preserve charge error. *See Harris County*, 96 S.W.3d 231-334; *see also Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 228-29 (Tex. 2005). WesternGeco also submitted a proposed question, and the trial court rejected the question. Accordingly, we reject Burch's contention that WesternGeco failed to preserve this charge error complaint for appellate review.

2. Submission of Multiple Damage Elements with a Single Answer Blank

We next turn to WesternGeco's complaint that the trial court erred by submitting question five with a single answer blank for future medical care encompassing both Burch's neck problem and his shoulder problem.

WesternGeco contends there is no evidence to support findings that (1) there is a causal link between the December 26, 2003 occurrence —when Burch hit his head on the I-beam— and his shoulder problem; and (2) Burch will, in reasonable probability, require future medical care for his shoulder problem.

The Texas Supreme Court recognized the limits of broad-form submission in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 387-90 (Tex. 2000). Relying on the language of Texas Rule of Civil Procedure 277,[3] the court emphasized that jury questions should be submitted in broad-form only when doing so is "feasible," and explained that granulated submission should be used when a liability theory is uncertain. *Id*. at 390. The court refused to apply a harmless error analysis when a single answer blank allowed a single "yes" answer encompassing valid and invalid theories of liability. *Id*. at 388-89.

Casteel reaffirmed the reasoning of *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015 (1923), in which the court recognized the inherent harm to administration of justice caused by mixing invalid and valid liability theories in a single liability question. *Casteel*, 22 S.W.3d at 389. The Texas Supreme Court held in *Casteel* that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, one or more of which are invalid, the error is harmful; a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. *Id*. at 388. Therefore, there is no presumption that the jury based its verdict on the valid theory. *See id*.

[3] Texas Rule of Civil Procedure 277 provides: "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

Casteel involved a single answer blank that encompassed both valid and invalid theories of recovery. *Id*. at 387-90. Two years later, the Texas Supreme Court applied *Casteel*'s analysis to a complaint that a broad-form damage question erroneously used a single answer blank encompassing multiple damage elements, some of which were unsupported by legally sufficient evidence. *Harris County*, 96 S.W.3d at 234-36. The court held that such an error is harmful when the appellate court cannot determine whether the jury based its verdict on the unsupported damage elements. *Id*.

The court cited with approval and discussed *Eastern Texas Electric Co. v. Baker*, 254 S.W. 933, 934-35 (Tex. 1923), in which the court held that it was error to instruct the jury to consider past and future physical pain when there was no evidence of future physical pain; such error was harmful because "it was 'not possible for an appellate court to say the jury did not consider this erroneous charge in arriving at the amount of damage.'" *Harris County*, 96 S.W.3d at 234 (quoting *E. Tex. Elec. Co.*, 254 S.W. at 935.).

The reasoning of *Harris County* and *Eastern Texas Electric Co.* applies with equal force here. *See id*. In considering whether the trial court committed reversible error when it submitted question five, we first must determine whether there is any evidence in the record to support a jury finding that Burch's shoulder problem was caused by the December 26, 2003 occurrence, and that Burch will require future medical care for his shoulder. *See id*. If the record does not reveal any evidence establishing a causal link or the reasonable probability of future medical care, then the trial court erred by refusing to submit separate damage questions relating to Burch's neck problem and his shoulder problem under *Harris County*. Any such error would be harmful because this court cannot determine on appeal which portion of damages awarded in a single answer blank was attributed by the jury to Burch's neck problem and which portion was attributed to Burch's shoulder problem. *See id.*

a. Causal Link

We begin by determining whether there is any evidence to support a finding that Burch's shoulder problem was caused by the December 26, 2003 occurrence, considering the standards applicable in a Jones Act negligence claim.

The Jones Act provides a cause of action for maritime workers injured by an employer's negligence. *Mar. Overseas Corp. v. Ellis*, 971 S.W.2d 402, 405 (Tex. 1998). Federal law provides that a party asserting an admiralty action may bring the action in state court. *Id*. at 405-06; *see* 28 U.S.C. § 1333(1). When a state court hears an admiralty case, that court occupies essentially the same position occupied by a federal court sitting in diversity; the state court must apply substantive federal maritime law but follow state procedure. *Ellis*, 971 S.W.2d at 406.

The Jones Act expressly incorporates the Federal Employers' Liability Act (FELA) and case law applying that statute. *Id*.; *see* 45 U.S.C.A. 51 *et seq*. (West 2007). Accordingly, the Jones Act expressly incorporates FELA's "featherweight" causation burden. *Ellis*, 971 S.W.2d at 406. The causation burden is not tied to the common law proximate cause standard. *Id*. "Rather, the causation burden is 'whether the proof justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury for which the claimant seeks damages.'" *Ellis*, 971 S.W.2d at 406 (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506-07 (1957)). A seaman is entitled to recovery under the Jones Act if his employer's negligence is the cause, in whole or in part, of his injury. *Gautreaux v. Scurlock Mar., Inc.*, 107 F.3d 331, 335 (5th Cir. 1997).

Texas courts recognize that the standard of appellate review in a Jones Act case also is less stringent because FELA's standard of appellate review applies. *Ellis*, 971 S.W.2d at 406. The Jones Act standard vests the jury with complete discretion on factual issues about liability; once the appellate court determines that some evidence about which reasonable minds could differ supports the verdict, the appellate court's review is

complete. *Id.*; *Davis v. Odeco Inc.*, 18 F.3d 1237, 1242-43 (5th Cir. 1994) (maritime worker is entitled to recovery under the Jones Act if he adduced evidence that employer's negligence played "any part—however small—in the development of his condition;" he "proffered *some* evidence of . . . [causal] nexus, and that is all that is required to survive appellate review of a favorable verdict on a Jones Act negligence claim"); *see also Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983)(per curiam). The standard "is highly favorable to the plaintiff and requires that we validate the jury verdict if at all possible." *Hughes v. Int'l Diving & Consulting Servs., Inc.*, 68 F.3d 90, 93 (5th Cir. 1995). The evidence is sufficient and the jury's verdict must stand unless there is a complete absence of probative facts to support it. *Guevara v. Mar. Overseas Corp.*, 34 F.3d 1279, 1281 (5th Cir. 1994).

The submitted jury charge contains the following instruction regarding the applicable causation standard in a Jones Act case:

> Under the Jones Act, if the employer's negligent act caused the plaintiff's injury, in whole or in part, then you must find that the employer is liable under the Jones Act.
>
> * * *
>
> The accident must be the cause of the injury. In determining causation, a different rule applies to the Jones Act claim and to the unseaworthiness claim. Under the Jones Act, for both the employer's negligence and the plaintiff's contributory negligence[,] an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part.

WesternGeco points to Dr. Mims's and Dr. Brown's testimony to support its contention that there is no evidence of a causal link between the December 26, 2003 occurrence and Burch's shoulder problem. Burch's neck surgeon Dr. Mims testified as follows:

> BURCH'S COUNSEL: Was this surgery from your standpoint a success?
>
> DR. MIMS: Yes, sir.

BURCH'S COUNSEL: How so?

DR. MIMS: Well, Darold is better. . . . One of his problems that he's having now is probably the shoulder, and I'm not sure if it comes from some nerve irritation still from his neck or is it a local shoulder problem. And we're going to have one of the orthopedic doctors up in probably North Dakota see him to see if he has a shoulder problem, because he still has a little difficulty with his shoulder.

* * *

BURCH'S COUNSEL: Since the surgery, has Darold taken steps on your recommendation therapy-wise to try to continue to get better?

DR. MIMS: Correct, yes.

BURCH'S COUNSEL: What has he done?

DR. MIMS: Well, we've worked through quite a few months of regular physical therapy . . . . So, he's been able and has been willing to do all of that, every step of the way. As a matter of fact, right now, we're trying to get permission for some additional work conditioning exercises to try to get him able even a little bit more to be able to lift and everything, but his main limiting problem right now is his shoulder. So that's why I want to get a shoulder evaluation before going any further.

* * *

DR. MIMS: . . . . And again, whether or not he's got a shoulder problem or not is — is — that's still to be decided.

On cross-examination, Dr. Mims further testified:

WESTERNGECO'S COUNSEL: Could stress related to putting in an overhead door cause problems with the nerve impingement?

DR. MIMS: Well, when you look up putting in an overhead door, you are going to pinch your nerves more, yes. When you have pinched nerves, that is — looking up like that is a — is a — it's a position that brings out more nerve compression and irritation, yes.

WESTERNGECO'S COUNSEL: I want to show you a copy of some records of Mid Dakota Clinic again, February 9th, 2004. And about in the middle of the page, Dr. Er[i]ckstad writes: "Patient indicates he has been doing okay

> until this weekend when he helped a buddy put in an overhead door. Detailed questioning at this time indicates that on his job in the Gulf of Mexico, he is not doing any overhead work with his arms, but he is doing a lot of pulling and heavy duty work." Now, I'm not sure but is it — Darold didn't tell you about helping a buddy put in any overhead doors, whether this is the same overhead door as the previous one I gave you or not, but he didn't share any type of activity like that with you, did he?
>
> DR. MIMS: No.
>
> WESTERNGECO'S COUNSEL: Then the doctor continues on talking about, again, the heavy metal overhead door with his arms in the air, and since then he's had right shoulder pain. Is that fairly unusual or typical for somebody with Darold's condition to have that type of pain?
>
> DR. MIMS: No. You get — you get pain when you've got pinched nerves, and if they're intermittently symptomatic or whatever, you get pain over into your shoulders sometimes. And, of course, in this case, you know, we're still kind of — not necessarily debating, but we're trying to figure out how much of a shoulder problem he has. And, if he does, in fact, have a symptomatic rotator cuff injury, then that's a separate shoulder problem. But with looking up overhead, you know, doing heavy physical work with your head looking up at the ceiling putting in an overhead door, that can certainly irritate a nerve and give you shoulder pain.

WesternGeco particularly focuses on Dr. Brown's testimony. Dr. Brown is a board certified orthopedic surgeon who conducted an independent medical examination of Burch. On cross-examination, Dr. Brown testified as follows:

> BURCH'S COUNSEL: Do you have an opinion as to whether Mr. Burch's shoulder condition, his current shoulder condition, is related to the December 20 — or December 2003 accident?
>
> DR. BROWN: Do I have an opinion? Yes.
>
> BURCH'S COUNSEL: What's your opinion?
>
> DR. BROWN: My opinion is that it is not, for a variety of reasons.
>
> BURCH'S COUNSEL: And what are those reasons?

> DR. BROWN: Well, first is the mechanism of injury. We did discuss what happened on that ship and he described it to me in detail, in good detail, more detail than saw in the medical records, actually. He described that he was on the ship, in a crouched position, it was wavy, stormy, . . . and he rose up and struck his head and had a headache. There was no mention of a fall or anything such as that. The medical records also demonstrate the same mechanism of injury, rising up and striking the head on a beam. Rising up and striking a head on a beam, in all my experience with biomechanics and so forth, will not cause an injury to the shoulder.
>
> BURCH'S COUNSEL: Anything else, any other reason why you don't believe it's related — the shoulder injury is not related to the December incident?
>
> DR. BROWN: Yes. First, obviously the mechanism of injury is not going to injure the shoulder in my opinion, rising up and striking your head on the beam. Secondly, there is no mention of shoulder problems for at least six weeks following the injury in any of the visits to Dr. Mims or to Dr. Erickstad at least in the records I have. Third, the first mention in the records I reviewed of the shoulder problem is from Dr. Erickstad in February 2004, and Dr. Erickstad states that after detailed questioning about this issue, he feels it is related to working on an overhead door, and it is also described by Dr. Erickstad and also by the neurologist, I forget the name, Dr. Ragland, I think, that it is a new issue. So based on all three of those reasons, I feel that the shoulder issues the patient is currently having is unrelated to the ship accident.

Based on a complete review of the record, the following excerpts from Dr. Mims's and Dr. Erickstad's testimony contain the best evidence of a causal link between the December 26, 2003 occurrence and Burch's shoulder problem. Dr. Mims testified as follows:

> DR. MIMS: [When Burch first saw Dr. Mims about two weeks after the December 26, 2003 incident, Dr. Mims thought Burch's] main problem was this right-sided headache, and then he had some discomfort, a little numbness and tingling that would travel from his neck or over on the right side over into his right shoulder and down the right arm somewhat. But his main problem was this fairly disabling headache that was quite uncomfortable.
>
> * * *

> In 2006, . . . [h]e talked about the fact he was not yet back at work and that he was still having not only the headaches, but neck pain, pain radiating over into the right shoulder.
>
> * * *
>
> BURCH'S COUNSEL: The symptoms from these conditions that you showed us, the migraines, the neck pain, the shoulder pain, the symptoms, what were those symptoms caused by?
>
> DR. MIMS: Nerve irritation.
>
> BURCH'S COUNSEL: Were those symptoms, nerve irritation, a result in your opinion of what happened to Mr. Burch on board the WESTERN PRIDE?
>
> DR. MIMS: Yes, sir. He had compression of the nerves before the accident, but the nerves were not at that time irritated until he had the injury.
>
> BURCH'S COUNSEL: How sure are you of that?
>
> DR. MIMS: . . . The causation and the relationship between the injury and the irritation of the nerves to me is something that seemed to be very logical and understandable. And, you know, I'm very sure that — in my own mind, anyway, that at least a lot of his pain has been related to the irritation of the nerves which was caused from the accident.

Further, Burch's family doctor Dr. Erickstad testified as follows:

> BURCH'S COUNSEL: One of the things that Dr. Ragland told us — and it's similar to what Dr. Mims told us — there are likely two different things going on in Darold's shoulder, fair enough?
>
> DR. ERICKSTAD: Makes sense.
>
> BURCH'S COUNSEL: One — one of the things causing problems in Darold's shoulder, from your review of records, from your review of records and from your reliance and trust in Dr. Ragland, one of the things that was observed is a small tear in the rotator cuff?
>
> DR. ERICKSTAD: Correct.

> BURCH'S COUNSEL: The other thing that each of these doctors have noted is that shoulder and arm complaints are also consistent with spinal problems in the cervical area?
>
> DR. ERICKSTAD: Correct.
>
> BURCH'S COUNSEL: Is your impression of what's going on with Darold's shoulder similar to that of Dr. Ragland, similar to that of Dr. Mims, that there are likely two overlaying causes and problems in the shoulder?
>
> DR. ERICKSTAD: Based on what I've seen in the office, and the specialty of opinions, I would agree with that.

Considering that the causation burden of proof is featherweight and that our appellate review is less stringent, we cannot say there is a complete absence of probative facts to support a finding that the December 26, 2003 occurrence is related to Burch's shoulder problem. *See Guevara*, 34 F.3d at 1281; *Ellis*, 971 S.W.2d at 406. Accordingly, we conclude that the record before us contains some evidence of a causal nexus between the December occurrence and Burch's shoulder problem. *See Davis*, 18 F.3d at 1242-43 (maritime worker "proffered *some* evidence of . . . [causal] nexus, and that is all that is required to survive appellate review of a favorable verdict on a Jones Act negligence claim"). Therefore, WesternGeco's *Harris County* objection to a single answer blank encompassing damages for Burch's neck and shoulder cannot be predicated on a lack of evidence that Burch's shoulder problem is related to the December 26, 2003 occurrence.

b. Reasonable Probability of Future Medical Care

We consider next whether there is any evidence in the record to support a damage award for future medical care relating to Burch's shoulder problem. The jury was asked to award damages for "Medical care that, in reasonable probability, Darold Burch will sustain in the future." We examine the sufficiency of the evidence using the same standard we applied to the causation issue above. *See Curry v. Ensco Offshore Co.*, 54 F. App'x 407, 2002 WL 31689049, at *7 (5th Cir. 2002). The evidence is sufficient unless

there is a complete absence of probative facts to support a jury's finding. *Guevara*, 34 F.3d at 1281.

In a Jones Act case, a plaintiff ordinarily may recover reasonable past and future medical expenses incurred as a result of a demonstrated injury. *See Hagerty v. L&L Marine Servs., Inc.*, 788 F.2d 315, 319 (5th Cir. 1986); *Curry*, 54 F. App'x 407, 2002 WL 31689049, at *7. To sustain an award of future medical expenses under Texas law, a plaintiff must present evidence to establish that future medical care will be required in all reasonable probability, and the reasonable cost of that care. *Curry*, 54 F. App'x 407, 2002 WL 31689049, at *7 (citing *Whatley v. Armstrong World Indus., Inc.*, 861 F.2d 837, 843 (5th Cir. 1988), and *Pan Am. Ins. Co. v. Hi-Plains Haulers, Inc.*, 350 S.W.2d 644, 646 (Tex. 1961)); *Wal-Mart Stores Tex., LP v. Crosby*, 295 S.W.3d 346, 354 (Tex. App.—Dallas 2009, pet. denied); *Doctor v. Pardue*, 186 S.W.3d 4, 20 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see also Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1050 (5th Cir. 1990) (plaintiff did not prove future medical expenses because he "failed to prove that he needed further medical care"); *Davis v. Mobil Oil Exploration & Producing S.E., Inc.*, 864 F.2d 1171, 1176 (5th Cir. 1989) (reversing future medical expenses award because of plaintiff's failure "to produce any specific evidence at trial to support [award] other than the possibility that he might require some type of medical care in the future"). No damage award can be made based on speculation. *Curry*, 54 F. App'x 407, 2002 WL 31689049, at *7 (citing *Keeler v. Richards Mfg. Co.*, 817 F.2d 1197, 1202 (5th Cir. 1987)); *Whole Foods Mkt. Sw., L.P. v. Tijerina*, 979 S.W.2d 768, 782 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Burch contends that the following statement by Dr. Mims establishes that future treatment for Burch's shoulder will be required: "One of his problems that he's having now is probably the shoulder, and I'm not sure if it comes from some nerve irritation still from his neck or is it a local shoulder problem." Burch also contends that the following

testimony of Dr. Brown establishes that medical care for Burch's shoulder problem will be required in the future:

> WESTERNGECO'S COUNSEL: When evaluating Mr. Burch, you saw him the day after he saw an orthopedic specialist near his home?
>
> DR. BROWN: Yes.
>
> WESTERNGECO'S COUNSEL: Saw indications of treatment to his shoulder?
>
> DR. BROWN: Yes.
>
> WESTERNGECO: Right shoulder?
>
> DR. BROWN: Correct.
>
> WESTERNGECO'S COUNSE: Did Mr. Burch's shoulder in September 2007, in your opinion, require medical treatment of some kind?
>
> DR. BROWN: Mr. Burch showed evidence of [a] condition called impingement syndrome or mild tendonitis of the shoulder tendons. That can be a painful condition which does require treatment. Initial forms of treatment are oftentimes a steroid shot in what is called the subacromial space, which is what he received the day before. So, yes, he did require treatment.
>
> WESTERNGECO'S COUNSEL: Did you find the initial treatment, the injections with steroids for this shoulder condition, in your opinion, reasonable, consistent with good medical care?
>
> DR. BROWN: Yes.
>
> * * *
>
> WESTERNGECO'S COUNSEL: Mr. Burch, in your opinion, requires further medical care of some kind for his right shoulder?
>
> DR. BROWN: He at least requires a follow-up. Whether any further care is necessary after a follow-up is not unknown [sic].
>
> WESTERNGECO'S COUNSEL: You're not able to offer that opinion?

> DR. BROWN: The shot may fully relieve his symptoms indefinitely in which case he would not need any further care. It may not.
>
> WESTERNGECO'S COUNSEL: What I said is accurate, you, as a physician, cannot fairly at this point tell us whether or not further care for his shoulder condition is warranted or not?
>
> DR. BROWN: Exactly. What I did state is that it is — I do believe at least one more visit to his surgeon, to his orthopedic surgeon, Dr. Pierce, is warranted. And then if he continues to have problems, then further care would be warranted.
>
> WESTERNGECO'S COUNSEL: Such as?
>
> DR. BROWN: Further injections, physical therapy, and so forth.
>
> WESTERNGECO'S COUNSEL: What else?
>
> DR. BROWN: Possible surgery.

Lastly, Burch contends the following testimony from his physical therapist Steve Churchill establishes that "[i]n addition to surgery, additional rehabilitation work would be required, post-surgery:"

> WESTERNGECO'S COUNSEL: Okay. And if he gets the shoulder fixed, if that's what it needs to be, that should be rehabbed and then he should be even better than he is today?
>
> CHURCHILL: Well, I still think that there is — there is going to be some limited capacity as relates to his outstretched positioning and overhead activity, regardless of a shoulder consultation, regardless of possible surgery, because of the [neck surgery].

This testimony does not establish that Burch in all reasonable probability will require future medical care for his shoulder problem. Dr. Mims, Dr. Brown, and Churchill did not testify that future medical care is warranted. In fact, Dr. Mims and Churchill did not opine regarding any future medical care. Dr. Brown opined that, if Burch continues to have problems, then future care could encompass "further injections, physical therapy" and "possible surgery." Dr. Brown stated that the necessity for future

medical care is unknown. Burch's evidence regarding future medical care for his shoulder is speculative at best, and mere speculation regarding the need for future medical care cannot support an award for future medical expenses. *See Curry*, 54 F. App'x 407, 2002 WL 31689049, at *7; *Wal-Mart Stores Tex., LP*, 295 S.W.3d at 354; *Doctor*, 186 S.W.3d at 20; *Whole Foods Mkt. Sw., L.P.*, 979 S.W.2d at 782; *see also Davis*, 864 F.2d at 1176.

A review of the entire record further shows that there is no evidence Burch will in reasonable probability require future medical care for his shoulder problem, and no evidence as to the estimated cost of such medical care. Thus, there is no evidence in this case to support a damage award for future medical expenses relating to Burch's shoulder problem. Accordingly, the trial court erred under *Harris County* by refusing to submit separate damage questions relating to Burch's neck problem and his shoulder problem. *See Harris County*, 96 S.W.3d at 234-36. This error is reversible because this court cannot determine on appeal which portion of the single award for future medical care is attributable to Burch's neck problem and which portion is attributable to Burch's shoulder problem. *See id*. We therefore sustain WesternGeco's fourth issue.[4]

Conclusion

Because the trial court reversibly erred by refusing to submit separate damage questions relating to Burch's neck problem and his shoulder problem, the case must be remanded with regard to all damages. *See Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 155 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Further, Texas Rule of Appellate Procedure 44.1(b) provides that "[t]he court may not order a separate trial solely on unliquidated damages if liability is contested." Tex. R. App. P. 44.2(b). If a party files a general denial in the trial court, that pleading puts a

[4] The trial court believed it solved the *Harris County* problem by instructing the jury, "Do not include any amount for any condition not resulting from the occurrence in question." The trial court's instruction, however, does not address the damage question in the absence of evidence that Burch in reasonable probability will require future medical care for his shoulder.

plaintiff to his or her proof on all issues, including liability; its effect extends to contesting liability in the event of remand on appeal. *Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001)(per curiam). "A party's failure to present on appeal an additional discrete challenge to liability when that party challenges damages does not defeat the plain language of rule 44.1(b) proscribing a separate trial on unliquidated damages when liability is contested." *Id.* WesternGeco contested liability in this case by filing a general denial and alleging in its first amended answer that Burch's injuries and damages were caused by his own negligence. Because Rule 44.1(b) prohibits a separate trial solely on unliquidated damages when liability is contested, we must remand this entire case for a new trial.

Accordingly, the trial court's judgment is reversed, and this case is remanded for a new trial on liability and damages.

/s/ William J. Boyce
Justice

Panel consists of Justices Anderson, Frost, and Boyce.