NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2004 CA 2290

CYNTHIA H. PALMER

VERSUS

PROGRESSIVE SECURITY INSURANCE COMPANY, DEDRIC (OR CEDRIC) WILLIAMS, AND ALLSTATE INSURANCE COMPANY

Judgment Rendered: SEP 2 0 2006

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Case No. 479,304

The Honorable Janice Clark, Judge Presiding

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Walter Landry Smith **Baton Rouge, Louisiana** **And** **J. Craig LeJeune** **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellant (2nd)** **Counsel for Plaintiff/Appellee** **Cynthia H. Palmer**
Christopher E. Lawler **Christopher P. Lawler** **Metairie, Louisiana** **And** **Robert J. Burns** **Baton Rouge, Louisiana**	**Counsel for Defendant/Appellant (1st)** **Counsel for Defendant/Appellee** **Allstate Insurance Company**

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BEFORE: CARTER, DOWNING, AND GAIDRY, JJ.

GAIDRY, J.

In this suit arising out of an automobile accident, both the plaintiff and the defendant insurer appeal the trial court judgment. We amend in part and affirm as amended.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Cynthia Palmer, was involved in an automobile accident on December 21, 1999. The accident occurred when defendant, Dedric[1] Williams, attempted to change lanes and struck Ms. Palmer's vehicle. Williams was uninsured at the time of the accident. Ms. Palmer was covered by an uninsured motorist ("UM") policy with her liability insurer, Progressive Security Insurance Company ("Progressive"), as well as a million-dollar umbrella policy with Allstate Insurance Company ("Allstate").

Following the accident, Ms. Palmer filed suit against Williams and against Progressive seeking UM benefits. Ms. Palmer later amended her suit to seek compensation under the UM portion of Allstate's policy. Ms. Palmer settled with Progressive for the $100,000.00[2] UM policy limit and later dismissed Mr. Williams, who had never filed an answer. The matter proceeded to trial against Allstate. In addition to damages, Ms. Palmer sought penalties and attorney fees for Allstate's arbitrary and capricious denial of her claim.

A jury trial was held September 16-19, 2003, after which the jury rendered a verdict in favor of Ms. Palmer and against Allstate, awarding compensation for her injuries as follows:

A. Pain and Suffering---------- $25,000.00
B. Mental Anguish and Stress---------- $20,000.00
C. Disability---------- $50,000.00

[1] Mr. Williams has also been referred to in the record as "Dedrick" and "Cedric."
[2] Progressive initially tendered $30,000.00 under the UM coverage and paid another $2,000.00 in medicals. On November 12, 2002, Ms. Palmer accepted Progressive's settlement offer for the remaining $70,000.00 in UM coverage.

D. Loss of Enjoyment of Life---------- $10,000.00
E. Lost Earning Capacity----------$100,000.00
F. Past Medical Expenses---------- $27,132.17
G. Future Medical Expenses---------- $75,000.00

A separate bench trial was held on the issue of penalties and attorney fees on November 18-19, 2003. The trial court found that Allstate was arbitrary and capricious in denying Ms. Palmer's claim and assessed a $20,713.21 penalty against Allstate and ordered Allstate to pay $91,138.15 in attorney fees, plus legal interest on both sums from December 20, 2000, the date of judicial demand.

Allstate appealed, arguing that the trial court's finding that Allstate was arbitrary and capricious in its denial of Ms. Palmer's claim was manifestly erroneous. Ms. Palmer appealed the judgment as well, asserting that the jury awards for lost earning capacity and general damages were abusively low.

DISCUSSION

Motion to Supplement the Appellate Record

After this appeal was lodged, Allstate filed a motion to have the record on appeal supplemented with certain exhibits, namely Allstate Exhibits 20-24, which were purportedly admitted into evidence during the penalties and attorney fees portion of the trial, and were missing from the record on appeal. Judge Janice Clark signed an order on November 30, 2004, directing that the record on appeal be supplemented with Allstate Exhibits 20-24. On September 29, 2005, this court received an "Objection By Plaintiff To Supplementation Of Record On Appeal With Large Box Of Hodgepodge Of Documents Delivered By Allstate Insurance Company To Trial Court For The First Time A Year After The Judgment In The Trial Court." Allstate filed an opposition to Ms. Palmer's objection, and an order was then issued by this court instructing Judge Clark to hold a hearing in

regards to the proposed supplementation to determine whether the exhibits were admitted into evidence at trial, whether they should have been part of the appellate record, whether the district court can find the actual exhibits admitted into evidence, and if not, whether the proposed supplement contains duplicate copies of the exhibits actually filed into evidence. Judge Clark responded that Allstate had been allowed, at the November 18-19, 2003 trial on penalties and attorney fees, to admit Exhibits 20-24 without actually producing them during the hearing, implicitly conditioned on Allstate producing the exhibits to the court and plaintiff's counsel promptly, so that plaintiff could have the opportunity to respond to the exhibits and the court could consider the exhibits in its ruling. The exhibits were not physically offered or filed into evidence. When the court issued reasons for judgment on the penalties and attorney fees issue on February 4, 2004, three and a half months after the hearing, Allstate had still not produced the exhibits. They were also not produced prior to the signing of the final judgment on March 12, 2004. Allstate finally produced the exhibits in August 2005, well over a year after the final judgment was signed by the trial court and after the lodging of this appeal. Louisiana Code of Civil Procedure art. 2132 provides that an appellate record "which omits a material part of the trial record" may be corrected even after the record is transmitted to the appellate court. Since these exhibits were never actually filed into evidence at the trial court, and were not considered by the trial court in its ruling, Allstate's motion to supplement the record is denied.

Damages

Ms. Palmer was injured in two accidents prior to the December 1999 accident: one in December 1993, and another in December 1995. After the 1993 accident, she had neck pain, paresthesia in her right arm, low back pain, and paresthesia in her right leg, but these symptoms subsided after a

period of time. After the 1995 accident, she had recurrent neck pain and low back pain which subsided with treatment. Ms. Palmer reported that after the December 1999 accident, her neck pain and low back pain returned, and she also experienced pain in her mid-back for the first time. Ms. Palmer also reported a number of other symptoms after the 1999 accident, including numbness and tingling in her legs and hands, shoulder pain, hip pain, and bowel and bladder control problems.

Dr. Charles Eberly, Ms. Palmer's neurologist, testified at his August 14, 2003 deposition that he believed that the December 1999 accident worsened Ms. Palmer's C5, C6 disc bulge and caused her herniated disc with pressure on the spine at T7, T8 and the symptoms associated therewith, including the paresthesia in her legs and the bladder and bowel control problems. Dr. Eberly believed that Ms. Palmer should undergo surgery on her thoracic spine. He also believed her to be a candidate for cervical surgery in the future, but felt that the most pressing issue would be to fix the thoracic spine.

Dr. John R. Clifford, a neurosurgeon, saw Ms. Palmer in his clinic both before and after the December 1999 accident. Dr. Clifford testified that Ms. Palmer had two problems with her thoracic spine: a T6, T7 disc touching the cord with a bony ridge, and a protrusion at T7, T8 which is touching and deforming the spinal cord. Of these, the T7, T8 protrusion is the major problem. Dr. Clifford opined that the T6, T7 problem predated the December 1999 accident, but the T7, T8 problem was probably caused by the December 1999 accident. It was Dr. Clifford's opinion that Ms. Palmer would need surgery for her thoracic spine, which he characterized as a "very big operation," and that there would be permanent impairments even with surgery.

Dr. David K. Corbin, Ms. Palmer's chiropractor both before and after the 1999 accident, believed that all of Ms. Palmer's thoracic symptoms were caused by the December 1999 accident.

Dr. Anthony S. Ioppolo, a neurosurgeon, performed an independent medical exam ("IME") at Allstate's request on July 2, 2003. In addition to examining and taking a history from Ms. Palmer, he reviewed all of her medical records, as well as films of her cervical, lumbar, and thoracic spine. Dr. Ioppolo was of the opinion that the December 1999 accident aggravated previously-existing cervical and lumbar injuries. As for whether the thoracic symptoms were caused by the December 1999 accident, Dr. Ioppolo was unsure, but stated that "certainly the onset of her symptoms seem to occur subsequent to that 1999 accident." While Ms. Palmer's thoracic MRI showed significant cord deformity, Dr. Ioppolo stated that his ability to give an opinion as to causation was hampered by the fact that there was no MRI of the thoracic spine from before the accident to compare with the one taken afterwards. Although he believed that some of the symptoms she reported before December 1999 could have been suggestive of a ruptured thoracic disc, he saw no evidence in the medical records that Ms. Palmer had ever made any complaints of thoracic pain before December 1999. Furthermore, he observed that a month after the 1999 accident, Ms. Palmer showed early signs of a thoracic nerve injury. Dr. Ioppolo felt that the need to perform surgery on Ms. Palmer's thoracic spine would depend upon the progression of her symptoms; while he would recommend conservative treatment, he did not disagree with Dr. Clifford's recommendation to do the surgery.

Quantum

The jury awarded Ms. Palmer $100,000.00 for her lost earning capacity. Ms. Palmer argues on appeal that this amount is abusively low.

Ms. Palmer worked as a registered nurse for eighteen years; however, she has not worked in any capacity since her December 1993 accident. She testified that initially after the 1993 accident she did not return to work because of her injuries, and then once she had recovered, she elected to stay home with her children until they began school. Ms. Palmer testified that her youngest son started kindergarten in the fall of 1999, but she did not return to work at that time because her husband had just died and she did not feel that the timing was right. Her plan was to return to work in the spring of 2000, but that plan failed as well due to the December 1999 accident and her resulting injuries.

A plaintiff need not be working in order to recover damages for loss of earning capacity. What is being compensated is her lost ability to earn such an amount, and she may recover such damages even though she may never have taken advantage of that capacity. *Matos v. Clarendon Nat. Ins. Co.*, 2000-2814, pp. 14-15 (La.App. 1 Cir. 2/15/02), 808 So.2d 841, 850.

In determining whether a personal injury plaintiff is entitled to recover for the loss of earning capacity, the trial court should consider whether and how much plaintiff's current condition disadvantages her in the work force. The trial court should thus ask itself what plaintiff might have been able to earn but for her injuries and what she may now earn given her resulting condition. *Lawson v. Mitsubishi Motor Sales of America, Inc.*, 2004-839, p. 20 (La.App. 3 Cir. 12/29/04), 896 So.2d 149, 162, *Reversed on other grounds*, 05-0257, ___ So.2d ___ (La. 9/6/06).

Bobby Roberts performed a vocational rehabilitation evaluation on Ms. Palmer on August 5, 2003, and testified that she had "limited endurance in sustaining activity" and that she did not demonstrate the sustained capability necessary for even sedentary work. Mr. Roberts agreed with the recommendation of Dr. Scott Nyboer, Ms. Palmer's rehabilitation doctor,

that Ms. Palmer should not have any direct patient contact and should not lift anything heavier than ten pounds. However, Mr. Roberts went on to say that the ten pound restriction does not mean that Ms. Palmer was capable of even sedentary work, because "[e]ven though her restriction would say sedentary, ten pounds, she is not meeting the other criteria for work, that is, the sustainability necessary to do work." Regarding what Ms. Palmer could have earned but for her injuries, Mr. Roberts testified that the nationwide median annual earnings for registered nurses in 2000 was $44,840.00.

An award for lost earning capacity is an item of special damages which is "inherently speculative" and "intrinsically incapable of being calculated with mathematical certainty." *Williams v. State Through Dept. of Wildlife and Fisheries*, 95 2456, p. 7 (La.App. 1 Cir. 11/20/96), 684 So.2d 1018, 1023-24, *writ denied*, 96-3069 (La. 3/7/97), 689 So.2d 1372. As such, an appellate court should not set aside such an award absent an abuse of discretion in setting the award. *Id.*

While the jury's award of $100,000.00 for Ms. Palmer's lost earning capacity may be lower than we would have awarded had we been sitting as trier of fact, we do not believe that the jury abused its discretion in making the award.

Ms. Palmer also alleges on appeal that the jury's general damages award was so low as to constitute an abuse of discretion. The jury awarded Ms. Palmer a total of $105,000.00 in general damages: $25,000.00 for pain and suffering; $20,000.00 for mental anguish and stress; $50,000.00 for disability; and $10,000.00 for loss of enjoyment of life.

Much discretion is left to the judge or jury in the assessment of general damages. La. C.C. art. 2324.1. In reviewing an award of general damages, the court of appeal must determine whether the trier of fact has abused its much discretion in making the award. *Youn v. Maritime Overseas*

Corp., 623 So.2d 1257, 1260 (La.1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. *Youn*, 623 So.2d at 1261.

Given the fact that the jury awarded Ms. Palmer $75,000.00 for her future medical expenses, it is clear that they attributed her herniated thoracic disc, for which a major surgery was recommended, to the 1999 accident. Under these circumstances, we agree with Ms. Palmer that the jury's award of $25,000.00 for pain and suffering was so low as to constitute an abuse of the jury's vast discretion, and we must increase the award to the lowest point within that discretion. *Reck v. Stevens*, 373 So.2d 498, 501 (La. 1979). Thus, the judgment is amended to increase the award for Ms. Palmer's pain and suffering to $120,000.00.

Penalties and Attorney Fees

Louisiana Revised Statutes 22:658(A)(1) provides that insurers shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss. Failure to make such payment within thirty days of receipt of such satisfactory written proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to penalties and attorney fees. La. R.S. 22:658(B)(1).

Louisiana Revised Statutes 22:658 is a penal statute, and as such it must be strictly construed. It subjects an insurer who is arbitrary and capricious in failing to unconditionally tender the undisputed amount within thirty days of satisfactory proof of loss, to the mandatory imposition of penalties and attorney fees for the collection of such loss. *DeSoto v.*

Balbeisi, 2002-0169, p. 4 (La.App. 1 Cir. 12/20/02) 837 So.2d 48, 51, *writ denied*, 03-0672 (La. 5/9/03), 843 So.2d 399.

It is well established that the trial court's conclusion with respect to the assessment of penalties and attorney fees under La. R.S. 22:658 is, in part, a factual determination and should not be disturbed in the absence of a finding that it was manifestly erroneous. *DeSoto*, 2002-0169, p. 5, 837 So.2d at 51.

A claimant must demonstrate, as a prerequisite to showing that the insurer was arbitrary and capricious in denying benefits, that a satisfactory proof of loss was made. "Satisfactory proof of loss" is proof which is sufficient to fully apprise the insurer of the insured's claim. *DeSoto*, 2002-0169, pp. 4-5, 837 So.2d at 51. Dr. Clifford, Ms. Palmer's treating neurosurgeon, testified at his deposition taken on October 9, 2002, that Ms. Palmer's T7-T8 disc herniation was caused by the 1999 accident; that "a very big operation" was recommended which should not be undertaken lightly; and that there may be permanent impairments, despite the surgery. On November 21, 2002, Ms. Palmer's attorney sent a settlement letter to Allstate, referencing Dr. Clifford's deposition and attaching supporting documentation, offering to settle and, alternatively, demanding that Allstate make an unconditional tender within sixty days of Dr. Clifford's deposition. Notes from Allstate's adjuster's loss report diary on December 9, 2002 state that Allstate's attorney advised that Allstate should make a tender at that time, but that Allstate did not believe that was necessary. Allstate's attorney then responded to the settlement offer, declining to make a tender of any sort, stating that "your client's claim appears to have been fully satisfied within the amount of the underlying policy." Allstate's attorney additionally noted that an IME would be sought. Allstate did not set a date for the IME until June of 2003, and the IME was not conducted until July 2, 2003, eight

months after Allstate refused to make an unconditional tender. On October 31, 2003, after the jury portion of the trial was complete, but before the trial on the penalties and attorney fees, the Allstate adjuster's loss report diary states that Allstate's counsel has again recommended that they "resolve this claim as he feels we can be exposed to penalties and attys fees since the jury award was so high." Allstate again declined to make a settlement offer.

Statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense. Especially when there is a reasonable and legitimate question as to the extent and causation of a claim, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. *Reed v. State Farm Mut. Auto. Ins. Co.*, 2003-0107, p. 13 (La. 10/21/03), 857 So.2d 1012, 1021. Allstate alleges that there were serious issues regarding Ms. Palmer's right to recovery, such that Allstate had a reasonable basis to defend the claim. Specifically, Allstate alleges that Ms. Palmer's two prior accidents wherein she sustained similar injuries and exhibited similar complaints to those she presented with following the December 21, 1999 accident, as well as the conflict between the testimony of Dr. Clifford and Dr. Ioppolo as to whether Ms. Palmer was a surgical candidate, and the fact that evidence raised doubts as to the legitimacy of Ms. Palmer's lost earning capacity claim, raised serious issues as to her right to recovery.

The trial court found that "relatively early on in the litigation, it should have been clear, based upon the treating physicians [sic] medical diagnoses and treatment, that this was a substantial injury. A tender should have been made." We find no manifest error in this finding by the trial court. This assignment of error is without merit.

CONCLUSION

The judgment appealed from is amended to increase the award for pain and suffering to $120,000.00. As amended, the judgment is affirmed. Costs of this appeal are to be borne by Allstate.

MOTION TO SUPPLEMENT DENIED, JUDGMENT AMENDED, AND AFFIRMED AS AMENDED.