NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2659

GLAISE JOHN BABIN

VERSUS

ROUSTABOUTS, INC.

Judgment Rendered: NOV 1 5 2006

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne,
State of Louisiana
Docket Number 142,278

Honorable Timothy C. Ellender, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

McDonald, J. concurs in part and dissents in part with reasons.

WHIPPLE, J.

This matter is before us on appeal by defendant, Roustabouts, Inc., from a judgment of the trial court awarding damages to plaintiff, Glaise John Babin, for injuries sustained during his employment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 20, 2003, plaintiff was employed by Roustabouts, Inc. as a "roustabout" performing oil field construction work in White Lake, Louisiana. At some time between 7:00 and 8:00 a.m., Peter Dubois, the job foreman, and crew members, Tommy LaPointe and plaintiff, began working on a barge, pulling up old pipelines from the bottom of the lake, cutting them into sections and stacking them on the barge for disposal.[1] The barge measured 120 feet by 30 feet and the pipes were two to four inches in diameter.

To accomplish their assigned tasks, the crew would attach a cable from an air tugger, which was welded down to the end of the barge, to the pipe. The pipe was pulled up from the lake bed, and placed over the front of the barge, where a chain was thrown across it to stop the pipe from "popping up." The pipe was then cut halfway through to determine which way the pipe was going to "tear." After cutting the pipe halfway through, the crew member cutting the pipe would determine which way the pipe would fall, then would move to the opposite side to avoid being hit by the pipe. The piece of cut pipe was then stacked on the barge.

At approximately 2:30 p.m., Dubois was operating the air tugger and plaintiff was cutting the pipe with a "victor torch" when suddenly, while plaintiff was in the process of cutting a pipe measuring approximately two and

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[1]Aaron Watson, another crew member, was also on the job site that day, but was operating the jet pump on a nearby barge.

a half inches in diameter, the pipe snapped and broke, striking plaintiff in his left leg below the knee. The blow from the pipe threw plaintiff into a three-foot stack of pipes piled on the deck of the barge, causing the stacked pipes to dislodge and also hit plaintiff in the knee.

Following the accident, plaintiff was immediately transported to a hospital in Abbeville, Louisiana. The following day, plaintiff was transported to his home town of Houma, Louisiana, for further treatment. There, plaintiff was treated by Dr. Michael LaSalle, an orthopedic surgeon. Dr. LaSalle determined that as a result of the accident, plaintiff sustained a tibia plateau fracture of his left knee, and recommended that plaintiff undergo an open reduction internal fixation of the knee. The surgery, which entailed opening the knee joint from the front with a straight incision to access the top of the tibia, then putting the bones in place and setting them with screws, was performed on August 25, 2003. Following the surgery, plaintiff continued to experience pain and difficulty with his left knee, despite the use of pain medication and continued prescribed physical therapy. A subsequent MRI revealed plaintiff had also sustained a posterior horn medial meniscal tear on plaintiff's left knee. In order to repair the tear, a second surgery was performed by Dr. LaSalle on February 18, 2004.

Dr. LaSalle concluded that as a result of plaintiff's knee injuries, plaintiff would eventually need a total knee replacement and would be restricted to light to medium duty work that required no stooping, bending, or excessive walking in the future. Dr. LaSalle determined that because of the post-traumatic changes in plaintiff's left knee, he would no longer be able to withstand or perform the type of heavy labor work plaintiff had performed in the past.

On June 15, 2004, plaintiff filed a petition styled, "Seaman's Suit for Damages," asserting claims of Jones Act negligence and of unseaworthiness, and seeking damages for his injuries. The matter was heard before the trial court on July 20, 2005.[2] At the conclusion of a bench trial, the trial court rendered judgment in favor of plaintiff, awarding him: $150,000.00 for past pain and suffering; $50,000.00 for future pain and suffering; $22,400.00 for past lost wages; $120,000.00 for future lost wages; and $5,000.00 for future medical expenses. A judgment was signed on July 28, 2005.

The defendant appeals, assigning the following as error:

1. The finding of unseaworthiness of the barge was made upon insufficient evidence to prove that there was an unseaworthy condition which caused plaintiff's injury.

2. The finding of negligence on the part of defendant was made upon an insufficiency of evidence to prove that the injury resulted from breach of a duty of care toward this plaintiff.

3. The award of $200,000.00 in general damages was excessive.

Plaintiff filed an answer to appeal, contending that he was aggrieved by the amount of damages awarded by the trial court for his past and future wage losses. Specifically, plaintiff requested that the judgment of the trial court be modified: to increase the amount of past wage loss from $22,400.00 to $49,989.00; to increase the amount of future wage loss from $120,000.00 to $381,408.00; to affirm the judgment in all other respects; and to assess to defendant all costs of the proceedings before the trial court and on appeal.

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[2]The parties stipulated at trial that plaintiff was a Jones Act seaman.

DISCUSSION

Jones Act Negligence and Seaworthiness (Assignment of Error Numbers One and Two)

Plaintiff has asserted two theories for his recovery, namely negligence and unseaworthiness. The appropriate standard of review employed by Louisiana appellate courts in general maritime and Jones Act cases is the manifest error-clearly wrong standard of review. Foster v. Destin Trading Corporation, 96-0803 (La. 5/30/97), 700 So. 2d 199, 202. Under this standard, in order to reverse a factual finding, an appellate court must find (1) a reasonable factual basis does not exist in the record for the finding of the trial court, and (2) the record further establishes that the finding is clearly wrong or manifestly erroneous. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993).

Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, inferences of fact should not be disturbed upon review where conflict exists in the testimony. Stobart, 617 So. 2d at 882. Where two permissible views of the evidence exist, the fact finder's choice between them cannot be clearly wrong. Stobart, 617 So. 2d at 883. Moreover, if the findings of the trial court are reasonable in light of the record reviewed in its entirety, they cannot be said to be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

The Jones Act, 46 U.S.C.A. § 688, provides a cause of action against a maritime employer based on negligence when a seaman is injured in the course and scope of his employment. The Jones Act contains a liberal causation requirement. Thus, a seaman is entitled to recover if negligence chargeable to the employer played any part, even the slightest, in producing

the injury. Jenkins v. Sonat Offshore U.S.A., Inc., 96-2504 (La. App. 1st Cir. 12/29/97), 705 So. 2d 1184, 1187. An employer's negligence may arise from a dangerous condition on or about the vessel, failure to use reasonable care to provide a seaman with a safe place to work, failure to inspect the vessel for hazards, and any other breach of the employer's duty of care. Foster, 700 So. 2d at 204-205. Under the Jones Act, both the employer and the seaman are obligated to act with ordinary prudence under the circumstances. Jenkins, 705 So. 2d at 1187.

In contrast, liability under the doctrine of unseaworthiness does not rest upon fault or negligence. The owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty under the Jones Act to exercise reasonable care. Terrebonne v. B & J Martin Inc., 2003-2658 (La. App. 1st Cir. 10/29/04), 906 So. 2d 431, 435-436. To be seaworthy, a vessel and its appurtenances must be reasonably suited for the use for which they were intended. A more stringent standard of causation is required to prevail on an unseaworthiness claim than on a Jones Act claim. Specifically, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about the injury and that the injury was either the direct result or a reasonably probable consequence of the unseaworthiness. Jenkins, 705 So. 2d at 1187.

Although negligence and unseaworthiness are totally separate concepts, the same factual basis has been used to assert both theories of recovery. Cabahug v. Text Shipping Company, Ltd., 98-0786 (La. App. 1st Cir. 5/12/00), 760 So. 2d 1243, 1251, writ denied, 2000-2366 (La. 11/03/00), 773 So. 2d 145. Herein, plaintiff contends there was Jones Act negligence and/or unseaworthiness based upon: (1) the defendant's breach of its legally imposed duty of care owed to plaintiff; (2) the defendant's

failure to provide plaintiff with a reasonably safe place to work; and (3) the defendant's failure to maintain a reasonably safe vessel by, including but not limited to, failing to provide a safe method by which to secure the pipe properly while cutting it.

At trial, plaintiff, Dubois, and Watson each explained the method utilized to pull the "flow line" (or pipe) out of the lake and to cut the pipe. When questioned regarding the work being performed and the surrounding circumstances of the accident, Dubois testified as follows:

Q. As I understand the method that was used is, when you would cut it, you would cut the pipe halfway through?

A. Yes, sir.

Q. And then you would try and determine which way it was going to go after you cut it?

A. Yes, sir.

Q. So, you would cut it halfway through; okay. And try to determine which side it would go to?

A. Yes, sir.

Q. And you would get on the opposite side?

A. Yes, sir.

* * *

A. The pipe was cut halfway on the barge –

Q. All right, and then it broke?

A. Then it broke.

Q. And then it hit Babin?

A. Right.

Q. All right, and so at that point, Babin had to guess what side to get on?

A. Right.

Q. So, if he got on the wrong side, he would get hurt?

A. Yes, sir.

At trial, Watson also explained the procedure that was used to cut the pipe, as follows:

Q. Now, my understanding is that when you cut this pipe, you cut it part of the way to determine which way it's going to break?

A. That's correct.

Q. Okay, so you cut part of the way, and then you watch it?

A. Yes, sir.

Q. And then you try to decide which way it's going to go?

A. It's going to let you know which way it's going.

Q. It's going to let you know?

A. Yes.

Q. And then you try to stay out of the way?

A. Yes, sir.

As shown by the testimony at trial, the procedure employed by defendant was inherently dangerous and unsafe. Moreover, unlike the particular procedure utilized by the crew on the day of plaintiff's accident, various alternative methods were readily available and had been utilized in the past to safely complete this task wherein the pipe was secured prior to being cut. In response to questions by the court regarding the appropriate method to use to safety accomplish the work, plaintiff, who had performed construction work in the oilfield, testified as follows:

BY THE COURT:

Did y'all have any anchors and winches on the boat?

A. No, sir.

Q. Now, you have done this kind of work before, because you have worked in construction work a lot; haven't you?

A. Yes, sir.

Q. Have you ever heard of using a V-door in the front of the barge to pull a pipe through?

A. Yes, Sir.

Q. What does the V-door do?

A. Well, it holds the pipe that's coming out of the water stationary and keeps it from moving laterally, and vertically to a certain extent.

Q. And there was no V-door on this job?

A. No – no V-door.

Q. Is there a lot of tension in the pipe that you pull up on that barge?

A. Well, that particular time, there was quite a bit of tension. The pipe was being bent pretty extreme.

Q. Okay, -- now you had done this kind of work before this job?

A. Yes, sir.

Q. Years before?

A. Yes, sir.

Q. Did you ever have a method – when you cut the pipe, did you ever have a method of fastening both ends of the pipe so it wouldn't flip or move?

A. Yes, sir.

Q. And how would you do that?

A. Bind it to some pad-eyes on the barge.

Q. So, you would weld pad-eyes on the barge?

A. Well, it would stay there?

Q. It would stay there?

A. Weld them there, and you rig up for a job, you would set it up; and when you would finish, you would cut them off, if they was in your way.

Q. Right, but by putting the pad-eyes in chain, you could hold both ends of the pipe that you were going to cut; is that right?

A. Until you finished cutting it.

Q. Right – So, when you had chains around it with binders, and you cut it – then the pipe wouldn't swing?

A. No.

Q. Now, had you asked your foreman to do that on this job?

A. I had spoke to him about it.

Q. And what did they do?

A. The first day he took over the torch.

Q. So, they didn't do what they asked you to do?

A. No.

The testimony of Elton LeCompte, a superintendent with Roustabouts, Inc. at the time of plaintiff's accident, with roughly forty-three years of experience in oilfield construction work, also demonstrates the dangerous nature of the procedure being used and that safer methods were available. On the day of plaintiff's accident, LeCompte was working nearby on another barge, and was pulling pilings. After he was notified of the accident, LeCompte transported plaintiff from the barge by boat and then drove him to the hospital in Abbeville. LeCompte testified that instead of employing the procedure used by the crew when plaintiff was injured, a hydraulic clamp mechanism that clamped directly on the pipe after it came up from the water

would also have worked to secure the pipe before it was cut, considering that the weight of such equipment did not overload the barge.

In its oral reasons for judgment, the trial court stated:

> The Court determines that this is an absolute no-brainer. This was a terribly dangerous procedure that could have been very cheaply and readily taken care of, but a jack-leg operation – negligence from not having a device to secure the pipe properly; unsafe place to work; unseaworthiness – the barge, itself, was not furnished with the proper equipment. It was inadequate protection for the seamen. The Court finds unseaworthiness also.

Defendant argues that the accident herein was not a result of the procedure employed by plaintiff at the time of the accident and that the action of the pipe breaking and hitting plaintiff "was clearly an anomaly, the physical cause of which looms unexplained in the trial court record." We disagree. The testimony of the plaintiff, the foreman, and a third crew member, clearly demonstrates the procedure being used, i.e., the pipe was pulled from the lake over the barge while under tension; then, while unsecured, the pipe was cut halfway through; next, the person cutting the pipe was required to then "guess" which way the pipe would break, and then to move to the opposite side to avoid being hit by the pipe. As the trial court correctly concluded, this method was clearly unsafe and dangerous for all crew members involved. The record also shows defendant could have properly equipped the barge for safely securing and cutting the pipe by, at the very least, welding pad-eyes to the deck and then securing the ends of the pipe with chains prior to cutting.

Because a vessel and its appurtenances must be reasonably suited for the use for which they were intended, we agree with the trial court's conclusion that the barge plaintiff was on at the time of his accident was not seaworthy. Moreover, plaintiff has shown that the barge's unseaworthy condition played a substantial part in bringing about his injury and that his

injury was either the direct result or a reasonably probable consequence of the unseaworthiness. See Jenkins, 705 So. 2d at 1187. Defendant's negligence arose from this dangerous condition on or about the barge and defendant's failure to use reasonable care to provide plaintiff with a safe place to work. See Foster, 700 So. 2d at 204-205.

As outlined above, plaintiff's burden of proof in establishing negligence under the Jones Act was to show whether the negligence of defendant played even the slightest part in causing his accident. The more stringent causation requirement for plaintiff's claim of unseaworthiness required him to show that the unseaworthy condition of the barge played a substantial part in bringing about or actually causing the injury. Following our thorough review of the record, we find the evidence presented by plaintiff clearly satisfied both of these burdens. Thus, we find no error in the trial court's conclusion that defendant was negligent and breached the duty owed plaintiff as a Jones Act seaman nor in the court's conclusion that defendant breached its duty to provide plaintiff with a seaworthy vessel. Accordingly, we affirm the trial court's finding on liability.

These assignments of error lack merit.

Damages
(Assignment of Error Number Three)

Defendant next argues that the trial court abused its discretion in awarding excessive general damages to plaintiff for the injuries sustained by plaintiff as a result of the accident. We disagree and conclude the trial court did not abuse its discretion in awarding $150,000.00 for plaintiff's past pain and suffering, and $50,000.00 for plaintiff's future pain and suffering.

The trier of fact is given much discretion in the assessment of damages. LSA-C.C. art. 2324.1. On appellate review, damage awards will

be disturbed only when there has been a clear abuse of that discretion. Theriot v. Allstate Insurance Company, 625 So. 2d 1337, 1340 (La. 1993). The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon the particular injured person is a clear abuse of the trier of fact's much discretion. Scarbrough v. O.K. Guard Dogs, 2003-1243, 2003-1244 (La. App. 1st Cir. 5/14/04), 879 So. 2d 239, 246-247, writ denied, 2004-1440 (La. 9/24/04), 882 So. 2d 1127; Reck v. Stevens, 373 So. 2d 498, 501 (La. 1979).

In Youn v. Maritime Overseas Corporation, 623 So. 2d 1257, 1260 (La. 1993), cert. denied, 510 U.S. 1114, 114 S. Ct. 1059, 127 L.Ed.2d 379 (1994) (citing Coco v. Winston Industries, Inc., 341 So. 2d 332 (La. 1976)), the Louisiana Supreme Court instructed that, "Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion."

Plaintiff testified that after the accident, he was in "severe pain." As a result of the accident, plaintiff endured two knee surgeries. Plaintiff testified that he still experiences pain on a daily basis. Dr. LaSalle testified that the fracture sustained by plaintiff was very painful and that the fixation of the fracture was very painful. Dr. LaSalle further testified that plaintiff would probably need a left knee replacement in approximately ten years.[3]

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[3]Specifically, in discussing plaintiff's complaints of anterior and lateral pain in the knee and **when** (as opposed to **whether**) plaintiff would need a future knee replacement surgery, Dr. LaSalle testified, as follows:

Q. [The complaints] will be a chronic problem with chronic posttraumatic arthritis in his left knee, which may result in a total left knee arthroplasty.
A. Correct.
Q. Can you give us some insight as to what you were thinking about?
A. Well, arthritic changes in the knee tend to progress to being arthritic, and he does have a high chance of this progressing to be degenerative severe arthritis,

Although plaintiff had reached maximum medical improvement from this injury, he remained on light to medium work restrictions without excessive bending, squatting, or stooping. Considering the record herein, and the particular injuries suffered by the plaintiff, we cannot conclude that the trial court abused its vast discretion in making its awards.[4] Accordingly, we need not look to prior awards as suggested by defendant. See Youn, 623 So. 2d at 1260.

This assignment of error likewise is without merit.

ANSWER TO APPEAL

Past and Future Wage Loss

In his answer to appeal, the plaintiff contends that he is aggrieved by the amount of damages awarded for past and future wage loss. A plaintiff is required to prove special damages by a preponderance of the evidence, and the findings of the trier of fact are subject to the manifest error standard of review. Fleniken v. Energy Corporation, 2000-1824, 2000-1825 (La. App. 1st Cir. 2/16/01), 780 So. 2d 1175, 1195, writs denied, 2001-1268, 2001-1305, 2001-1317 (La. 6/15/01), 793 So.2d 1250, 1253, and 1254.

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which one day in the future, I don't think anytime soon, but he may need to have a knee arthroplasty, more likely due to this injury than natural causes.
Q. When you first saw him on 08/21/03, he was 47 years old?
A. Yes.
Q. Assuming that he restricts his work activities, can you give a guesstimation as to when he might need a knee replacement, 10 years?
A. Ten years or maybe more. That's a guesstimation.

Thus, the doctor's "guesstimation" referred to **when** plaintiff would need a knee replacement, as opposed to **whether** he would require the replacement.

Moreover, in explaining his future plans for surgery, when asked whether Dr. LaSalle ever talked to him about a knee replacement, plaintiff testified: "He did. He told me to keep this knee as long as I could, that he felt I was too young to have a total knee replacement but eventually I would."

[4]See and compare Badeaux v. State, Department of Transportation and Development, 96-853 (La. App. 5th Cir. 2/25/97), 690 So. 2d 203, writ denied, 97-0779 (La. 5/01/97), 693 So. 2d 733 and Bridgett v. Odeco, Inc., 93-1536, 94-0112 (La. App. 4th Cir. 12/15/94) 646 So. 2d 1249, writs denied, 95-0381, 95-0398 (La. 3/30/95), 651 So. 2d 840.

Contending that the trial court erred, plaintiff seeks an increase in the award for past lost wages from $22,400.00 to $49,989.00. A plaintiff seeking damages for past lost wages bears the burden of proving lost earnings, as well as the duration of time missed from work due to the accident. Boyette v. United Services Automobile Association, 2000-1918 (La. 4/03/01), 783 So. 2d 1276, 1279. A trial court has broad discretion in assessing awards for past lost wages, but there must be a factual basis in the record for the award. Burrell v. Williams, 2005-1625 (La. App. 1st Cir. 6/09/06), ___ So. 2d ___, ___.

The trial court calculated plaintiff's award for wages lost from August 20, 2003, the date of the accident, through May 24, 2004, the date plaintiff was released by Dr. LaSalle to return to work, by averaging the annual wages plaintiff received over a ten-year period from 1994 through 2003.[5] Plaintiff argues, however, that his wages were inconsistent from 1999 through 2002 because he was unable to work during this time.[6] Thus, he claims that the wages earned for those years do not reflect his usual earnings and should not be averaged with the wages earned in years that he worked full time.

In rendering its award for past lost wages, the trial court considered plaintiff's testimony and the argument of counsel concerning plaintiff's inconsistent work history, as well as the expert economists' reports prepared by Dr. G. Randolph Rice and Dr. Kenneth J. Boudreaux. Apparently rejecting plaintiff's explanation and arguments regarding the basis for his inconsistent earnings, the trial court averaged his earnings over a ten-year

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[5]As plaintiff was injured in August of 2003, the annual wages used for 2003 were prorated based upon the wages plaintiff earned from January to August 20, 2003.

[6]Plaintiff explained that during this time, he was caring for his elderly parents and was also going through a divorce.

period. On review, we find no error and note that the award rendered by the trial court was consistent with that recommended by Dr. Boudreaux in his report. After a thorough review of the record and evidence herein, we find a reasonable factual basis exists for the award rendered by the trial court. See Burrell, ___ So. 2d at ___. Accordingly, given the trial court's broad discretion, we find no error in the trial court's award of $22,400.00 for past lost wages and decline to disturb it.

Plaintiff also seeks an increase in the award for future lost wages from $120,000.00 to $381,408.00. Awards for loss of future income are intrinsically insusceptible of mathematical exactitude. Oliver v. Cal Dive International, Inc., 2002-1122 (La. App. 1st Cir. 4/02/03), 844 So. 2d 942, 946, writs denied, 2003-1230, 2003-1796 (La. 9/19/03), 853 So. 2d 638, 853 So. 2d 648. Although courts are not expected to calculate such awards with mathematical certainty, they cannot be based purely on speculation, conjecture, and probabilities. Levy v. Bayou Maintenance Industrial Services, Inc., 2003-0037 (La. App. 1st Cir. 9/26/03), 855 So. 2d 968, 973, writs denied, 2003-3161, 2003-3200 (La. 2/06/04), 865 So. 2d 724, 727. As such, the judiciary must exhibit sound discretion in rendering awards that are consistent with the record. Oliver, 844 So. 2d at 946. An award of loss of future income is not based solely upon the difference between the plaintiff's earnings before and after a disabling injury. Rather, the award is predicated upon the difference between a plaintiff's earning capacity before and after a disabling injury. Lasyone v. Kansas City Southern Railroad, 1999-0735 (La. App. 1st Cir. 9/28/01), 809 So. 2d 344, 351, writ denied, 2002-0093 (La. 3/15/02), 811 So. 2d 891.

With regards to plaintiff's future lost wages, at the time of the accident, plaintiff was capable of earning $43,285.00 per year. After the

accident, plaintiff was restricted to light to medium work duty with no stooping, bending, or squatting. Dr. LaSalle opined that plaintiff would no longer be able to work performing heavy labor in the oil field construction field as he had done his entire adult life. Kathleen Falgoust, a vocational consultant, testified as to her evaluation of plaintiff and future job opportunities that may be available to plaintiff. Given the physical restrictions placed on plaintiff by Dr. LaSalle and considering plaintiff's educational background, Ms. Falgoust was able to locate and recommend several available job positions for which plaintiff was a qualified applicant. These included the positions of cashier I, cashier II, cashier III, and bridge tender, all of which ranged in salary from $5.50 to $6.00 per hour. Given Ms. Falgoust's recommendations, both Drs. Rice and Boudreaux agreed in their reports, that since the accident, plaintiff is capable of earning $12,480.00 annually (at $6.00 per hour/40 hours per week) to $15,223.52 annually (at $5.63 per hour/48 hours per week (40 regular/8 overtime)).

The trial court awarded plaintiff $120,000.00 in future lost wages. In awarding this amount, the trial court apparently relied on the future wage loss projections set forth in Dr. Boudreaux's report. While this award is slightly higher than the future wage loss amount projected by Dr. Boudreaux, we note that it falls within the range of figures calculated by Drs. Rice and Boudreaux.[7]

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[7]In reviewing the expert economists' reports, we note that although both experts claimed to have calculated plaintiff's work-life expectancy using the U.S. Department of Labor, Bureau of Labor's Statistics from 1986, plaintiff's economic expert, Dr. Rice, incorrectly listed plaintiff's date of birth as May 15, 1966, while defendant's economic expert, Dr. Boudreaux, listed plaintiff's date of birth as May 15, 1956, which is plaintiff's actual date of birth. This discrepancy may be the reason that Dr. Rice valued plaintiff's work-life expectancy at 18.76 years, thereby yielding higher future wage losses than Dr. Boudreaux, who valued plaintiff's work-life expectancy at 11.71 years.

While this court may have awarded a different amount, the trial court, as the trier of fact, is free to accept or reject in whole or in part the opinion expressed by an expert. Moreover, the effect and weight to be given expert testimony is within the broad discretion of the trial judge. Rao v. Rao, 2005-0059 (La. App. 1st Cir. 11/04/05), 927 So. 2d 356, 365, writ denied, 2005-2453 (La. 3/24/06), 925 So. 2d 1232. Because the award for future lost wages is reasonably supported by Dr. Boudreaux's report and the record as a whole, we find the trial court did not abuse its broad discretion.

Finding no error in the awards for past and future lost wages as awarded by the trial court, the relief sought in the answer to appeal is also denied.

CONCLUSION

For the above and foregoing reasons, the July 28, 2005 judgment of the trial court is affirmed. The relief requested in plaintiff's answer to appeal is denied. Costs of this appeal are assessed against the defendant/appellant, Roustabouts, Inc.

AFFIRMED; ANSWER TO APPEAL DENIED.

GLAISE JOHN BABIN

VERSUS

ROUSTABOUTS, INC.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2659

McDONALD, J., Concurs in part and dissents in part:

While I concur with the majority in most of this opinion, I must respectfully dissent in regard to the amount of general damages. The majority concludes that "Dr. LaSalle further testified that plaintiff would probably need a left knee replacement in approximately ten years." I find no support in the record for this conclusion. In fact, I find just the opposite. The majority correctly notes Dr. LaSalle's opinion that if the plaintiff were to need knee replacement surgery, the cause would be his injury and not a gradual degenerative decline in his knee. However, the doctor could only speculate as to whether the plaintiff would actually need knee replacement surgery. His May 24, 2004 note states that he thought this would be a chronic problem with post-accident arthritis which **may** result in a total knee arthroplasty. He suggested that Babin would probably need the knee replacement surgery "in 10 years or maybe more. That's a guesstimation."

The majority interprets this statement as referring to when the plaintiff would need knee replacement surgery, as opposed to whether he would require it. While this is a fair interpretation of this particular statement, the majority ignores the fact that Dr. LaSalle never stated with any legal certainty that Babin would require the surgery. His note of May 24, 2004 uses the term "may". In his deposition he also states "...but he may need to have a knee arthroplasty, more likely due to this injury than to natural causes." Rather than a "when" as opposed to "whether" as suggested by the

majority, Dr. LaSalle's opinion is related to causation **if** Babin were to ever need the surgery.

In fact, Dr. LaSalle was never even asked if it were more probable than not that Babin would need knee replacement surgery. Future medical expenses should only be awarded if there is some reasonable probability that they will be needed. In this case, the court only awarded $5,000 in future medical expenses and this amount was not appealed by the defendants. Dr. LaSalle's testimony does not support the probability that knee replacement surgery will be necessary and thus, any general damage award that includes pain and suffering for such surgery is not supported by the record.

For these reasons I respectfully dissent as to the general damage award and concur in all other respects.