IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

HERMAN INDALECIO,
Plaintiff-Appellee,

v.

MOBIL OIL MARIANAS, INC.,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0035-CIV

ORDER DENYING PETITION FOR REHEARING

Cite as: 2020 MP 3

Decided April 3, 2020

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Civil Action No. 14-0065
Presiding Judge Roberto C. Naraja, Presiding

CASTRO, C.J.:

¶ 1 Defendant-Appellant Mobil Oil Mariana Islands, Inc. ("Mobil Oil") petitions for rehearing. It asserts we (1) incorrectly found harmless error in the improper admission of an expert's testimony and (2) misapprehended its arguments as to future medical expenses. The arguments fail to meet the petition for rehearing standard, but we write to clarify that flaws in the expert's methodology go to the weight of the testimony and not its admissibility. We therefore DENY Mobil Oil's petition.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2013, Herman Indalecio ("Indalecio") sued to recover damages for injuries suffered while working at Mobil Oil's bulk plant facility. At trial, Indalecio sought to introduce expert testimony from two witnesses: Bruce M. MacMillan ("MacMillan"), who evaluated Indalecio's lost future earning capacity; and Doris J. Shriver ("Shriver") who testified as to the course of care for Indalecio's injuries. Mobil Oil submitted multiple motions to exclude the experts' testimony on the ground that neither witness's methodology met the requisite *Daubert* standard for reliability. The trial court denied the various motions, permitting the experts to testify. The jury subsequently awarded Indalecio a total of $981,000 in damages.

¶ 3 On appeal, Mobil Oil took issue with MacMillan's admission as an expert because "MacMillan failed to account for actual historical hours and earnings in 2014 and 2015 following the injury, and MacMillan assumed Indalecio would never work again." *Indalecio*, 2020 MP 1 ¶ 22. We found the court's inadequate reasoning in admitting MacMillan as an expert was an abuse of discretion. However, we determined this was harmless error because the error did not materially affect the verdict and "[j]ust as we found with any deficiencies in MacMillan's testimony, . . . that such deficiencies in the *Daubert* determinations were cured through cross-examination." *Id.* ¶ 31. We determined "any deficiencies in MacMillan's methodology ultimately go to the weight and not admissibility of his testimony, as they were curable by cross examination." *Id.* ¶ 29.

¶ 4 In a footnote, we addressed the arguments concerning the time element for the medical treatments. We stated: "since Dr. Walker's testimony suggested Indalecio might need surgery immediately, a reasonable jury could have concluded costs might be incurred immediately and would not need to be reduced to present value." *Id.* ¶ 21 n.5. This was part of a larger discussion on expert testimony and reducing a plaintiff's damages to present value. In that discussion, we held that "the defendant has the burden to provide expert testimony to reduce future damages to present cash value—not the plaintiff[]." *Id.* ¶ 21.

¶ 5 Mobil Oil now petitions for rehearing.

II. STANDARD OF REVIEW

¶ 6 The petition raises two issues: (1) whether we incorrectly found harmless error in the admission of an expert's testimony; and (2) whether we

misapprehended its arguments as to future medical expenses. A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the Court has overlooked or misapprehended and must argue in support of the petition." NMI SUP. CT. R. 40(a)(2). Raising the same issues and arguments, or raising new issues not asserted in the original appeal is not permissible unless extraordinary circumstances exist. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 30 ¶ 2. "If a petition for rehearing is granted, the Court may . . . [m]ake a final decision of the case without re-argument; [r]estore the case to the calendar for re-argument or resubmission; or [i]ssue any other appropriate order." NMI SUP. CT. R. 40(a)(4)(A)-(C).

III. DISCUSSION

A. Expert Testimony

¶ 7 Mobil Oil argues we erroneously held that deficiencies in the reliability of an expert's methodology may be cured through cross-examination. In so holding, a party is put "in the horrible quandary of trying to determine whether to cross examine the expert or waive entirely its right to cross examine the expert to preserve the objection to the expert testifying at all." Pet. Reh'g 3. Mobil Oil concludes that cross-examination is not enough to surpass any *Daubert* reliability determination.

¶ 8 Mobil Oil misapprehends our holding. We did not hold that a party waives its objection to a *Daubert* reliability determination by cross-examination. Rather, issues going to the *weight* of an expert's testimony are curable through cross-examination. Issues going to the reliability of an expert's methodology are not curable through cross-examination. Nevertheless, in an effort to provide clarity, we will elaborate whether MacMillan's expert testimony goes to its weight or its admissibility. To do so, we look to caselaw that discusses the difference between lost earning capacity and lost wages and expert testimony on lost earning capacity.

¶ 9 The Sixth Circuit's decision in *Andler v. Clear Channel Broad., Inc*. is instructive on loss of earning capacity and expert testimony thereto. 670 F.3d 717 (6th Cir. 2012). In *Andler*, the injured plaintiff fell in a grass-covered hole, sustaining extensive injuries to her feet. These injuries "forced her to switch jobs and, in the years following, she [] worked full-time," earning at one point $15,000 more than she did pre-injuries. *Id.* at 721. The trial court excluded the plaintiff's proffered expert testimony on lost earning capacity as unduly speculative. The Sixth Circuit issued a comprehensive decision on the parameters of lost earning capacity and what it means for an expert's testimony to be "unduly speculative."

¶ 10 On loss of earning capacity, the *Andler* court described these damages as "the difference between the amount which the plaintiff was capable of earning before his injury and that which he is capable of earning thereafter." *Id*. at 726 (internal citation omitted). Like other courts, *Andler* noted that "damages are awarded for loss of earning *power*, not simply loss of earnings." *Id*.; *see Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910, 946 (S.D. Iowa 2007) ("Damages for future lost earnings . . . is based on capacity to earn, not on earnings alone."

(internal citation and quotation marks omitted)). That is to say, lost earning capacity and lost wages are not the same thing. *See Williams v. Pharmacia, Inc.*, 956 F. Supp. 1457, 1465 (N.D. Ind. 1996) (acknowledging that courts use the terms future wages and lost earning capacity interchangeably but "us[ing] the terms interchangeably does not show that they are the same."); *Finnie v. Vallee*, 620 So. 2d 897, 900 (La. Ct. App. 1993) ("Earning capacity is not necessarily determined by actual loss."). The Sixth Circuit opined: "[t]he proper focus is [] what the injured plaintiff could have earned over the course of her working life without the injury versus what she will now earn, not what she earned or will earn in any given year." *Andler*, 670 F.3d at 726. Thus, an injured plaintiff who earns more post-injury "does not bar her from recovering for loss of earning capacity." *Id*; *see Lublin v. Am. Fin. Group, Inc.*, 960 F. Supp. 2d 534, 541 (E.D. Pa. 2013) ("[A]n injured plaintiff may recover for loss of future earning capacity even if he does not suffer reduced earnings immediately after the injury."). Thus, a court may evaluate actual pre-injury earnings in its award for lost earning capacity, but they are not dispositive.

¶ 11 Despite the difference between capacity and actual earnings, an expert presenting testimony on lost future earning capacity is still subject to a *Daubert* evaluation: "[d]epartures from actual pre-injury earnings must be justified and cannot be unduly speculative." *Andler*, 670 F.3d at 727. The *Andler* court therefore examined whether the expert's testimony was based on "unrealistic assumptions regarding the plaintiff's future employment prospects." *Id*. (quoting *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996)). In the facts of *Andler*, the court ultimately concluded that the expert's testimony was not unduly speculative: "[the expert's] testimony that [the plaintiff] would have earned more over the course of her working life than the earning capacity suggested by her salary in the two years prior to her injury is not unreasonable as a matter of law." *Id*. at 729. It distinguished *Boucher*, stating: "the shift from part-time to full-time . . . is not as speculative as the shift from seasonal employment to a regular 40-hour workweek with full benefits." *Id*. Rather, an expert's testimony "involves a degree of speculation, as does all analysis of future damages." *Id*. However, the court carefully noted that a degree of speculation does not mean "unrealistic speculation." *Id*. "The factual basis" for the *Andler* expert's calculation of "pre-injury earning capacity . . . may not be particularly strong, but 'it is not proper for the Court to exclude expert testimony merely because the factual bases for an expert's opinion are weak.'" *Id*. (quoting *Boyar v. Korean Air Lines Co.*, 954 F. Supp. 4, 7 (D.D.C. 1996)). It concluded that "the jury could have *weighed [the expert's] opinion, informed by [the defendant's] vigorous cross examination*." *Id*. (emphasis added); *see also Polaino v. Bayer Corp.*, 122 F. Supp. 2d 63, 66-67 (D. Mass. 2000) ("[I]t is *not the expert's methodology that might be suspect, but the reasonableness of the assumptions that she has factored into her actuarial model*. Doubts about the validity of her ultimate conclusions will almost always be resolved by a fact finder exposed to vigorous cross-examination . . . ." (internal citation and quotation marks omitted) (emphasis added)). *Andler* therefore found the

exclusion of the plaintiff's expert to be an abuse of discretion because the expert's testimony was not unduly speculative, and deficiencies went to the weight of the testimony and were curable through cross-examination.

¶ 12 We find MacMillan's testimony was based on assumptions that are not "unduly speculative" and that go to the weight of his testimony, challengeable through vigorous cross-examination. MacMillan calculated Indalecio's earning capacity by using minimum wage, which Mobil Oil does not contest. He further evaluated Indalecio's earning capacity based on a normal 40-hour work week, which when compared to work history does not seem implausible. And finally, MacMillan based Indalecio's work-life expectancy on data that is not generally in dispute. With respect to the assumption that Indalecio would be 100 percent disabled, MacMillan emphasized throughout the trial that he calculated future earnings capacity and that any earned income after the injury could and should be subtracted from the future earnings capacity figure. *See* Tr. 1033.[1] The jury did not lack sufficient evidence from which to make a reasonable calculation and it was not an abuse of discretion to admit MacMillan's testimony under the circumstances. As in *Andler*, these assumptions may be properly addressed through cross-examining the weight of MacMillan's testimony.

¶ 13 It is worth reiterating the sentiments expressed in *Commonwealth v. Taitano*: "we interpret *Daubert* as a liberal standard and 'rejection of expert testimony is the exception rather than the rule.'" 2018 MP 12 ¶ 22 (quoting FED. R. EVID. 702 advisory committee note to 2000 amendment). Undoubtedly, *Daubert* and its progeny sought to allow vigorous cross-examination when parties challenge the weight of an expert's testimony. This is one of those cases. Particularly in a locale where expert testimony is limited, *Daubert*'s liberal threshold must be echoed. Mobil Oil has failed to meet its burden in demonstrating how we have "overlooked or misapprehended" a point of law or fact. *See* NMI SUP. CT. R. 40(a)(2). While Mobil Oil may disagree with our

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[1] Mobil Oil originally compared MacMillan's testimony to the expert's testimony in *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d. Cir. 2000). There, the expert assumed the injured plaintiff to be 100 percent disabled in calculating the plaintiff's lost earning capacity. The Third Circuit found this unsupported by the record and an abuse of discretion. However, *Elcock* noted: "Although [the expert] suggested to the jury that it might discount the 100 percent disability figure . . . this suggestion is not sufficient to change the result. In the absence of clearer instructions or emphasis by the witness or the court, a jury is likely to adopt the gross figure advanced by a witness who has been presented as an expert." *Id*. at 756. In contrast, here, MacMillan stated throughout the trial that the jury should deduct actual earnings. *Elcock* is further distinguishable because there the expert made a number of unrealistic assumptions. First, the majority of MacMillan's testimony is not unduly speculative. Second, MacMillan did in fact point out throughout the trial that any actual earnings can and should be deducted. And third, we find these issues go to the weight of MacMillan's testimony, not to its admissibility.

findings, that is not the same as overlooking or misapprehending law. We therefore deny Mobil Oil's petition for rehearing as to this issue.

B. Future Medical Expenses

¶ 14 Mobil Oil disputes our discussion of the time element of Indalecio's medical treatments. Specifically, Mobil Oil points out that we did not address its arguments as to reduction to present value for all future medical needs and instead restricted our discussion to the surgery. Thus, Mobil Oil argues, the jury awarded damages for future medical services in which "these services would indisputably not be required immediately and no testimony was provided as to the time when any of these damages would be incurred." Pet. Reh'g 4. Mobil Oil concludes that we did not address the "time element necessary to do a calculation to present value." *Id*.

¶ 15 Mobil Oil poses a valid argument that various procedures in the life plan, unlike the surgery, could not be required immediately. However, a reasonable jury could still have concluded that the discount rate would be cancelled out by the rate of increase in medical costs, as testified to by Shriver. *See* Tr. 880. The jury could reasonably have made the reduction to present value calculation accordingly. While the assumption that the rate of increase in costs would precisely cancel out the discount rate may seem implausible, it is not unreasonable as an approximation and does not result in excessive damages. *See Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 62–64 (1993) (trial court's calculation of damages using contested inflation rate did not rise to the level of an abuse of discretion); *see also Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986) ("The choice of a discount rate, used to adjust to present value an award . . . should be reviewed for an abuse of discretion."); *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1180 (11th Cir. 2002) ("There . . . was no error resulting from the fact that the jury arrived at a damages value equal to the amount of future damages that [the plaintiff's] expert calculated would be lost."); *Waxman v. Truman*, 792 So. 2d 657, 659 (Fla. Dist. Ct. App. 2001) ("[T]he fact that a present value award for future economic damages is the same as the future value sum does not mean that the jury failed to follow the instructions to reduce the future sum award to present value."). Thus, we cannot hold that Mobil Oil has met its burden to justify rehearing on this issue.

IV. CONCLUSION

¶ 16 For the foregoing reasons, we DENY Mobil Oil's petition.

SO ORDERED this 3rd day of April, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

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