Not Reported in F.Supp.2d, 2003 WL 25676101 (E.D.Mich.)
(Cite as: 2003 WL 25676101 (E.D.Mich.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Larry CERVO, Plaintiff,
v.
AMERICAN STEAMSHIP COMPANY, Defendant.

No. 02–70864.
July 1, 2003.

Named Expert: Dr. James Agre
Kirk E. Karamanian, Dennis M. O'Bryan, O'Bryan, Baun, Birmingham, MI, for Plaintiff.

Thomas W. Emery, Garan Lucow, Detroit, MI, for Defendant.

ORDER

LAWRENCE P. ZATKOFF, Chief Judge.

***1** This matter is before the Court on the following motions in limine:

(1) Plaintiff's Motion in Limine to Preclude Testimony or Argument Comparing Plaintiff's Injury to Different Medical Conditions of Others;

(2) Plaintiff's Motion in Limine to Bar Evidence of Gratuitous Payments;

(3) Defendant, American Steamship Company's Motion in Limine to Preclude Certain Testimony of Plaintiff [sic] Expert Physician.

All motions have been briefed. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of the instant motions. *See* E.D. MICH. LR 7.1(e)(2); *see also* *Nelson v. Tenn. Gas Pipeline*, 243 F.3d 244, 248–49 (6th Cir.2001) ("[T]he Supreme Court's Decision in *Kuhmo [Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)] makes clear that whether to hold a hearing is a question that falls within the district court's discretion."). Accordingly, the Court ORDERS that the motions be decided on the briefs submitted. The Court shall address each motion in order.

1. Background

Plaintiff worked as a 1st assistant engineer aboard Defendant's vessel, the M/V AMERICAN MARINER. On April 28, 2000, the vessel ran into a lighthouse. In the confusion that ensued after the collision, Plaintiff slipped on a floormat that was placed outside the engine room door, and injured his knee. After his injury, Plaintiff underwent an arthroscopy on his knee, and received physical therapy, steroid injections, and Hyalgan injections. Plaintiff also alleges that his doctor issued him a handicap parking sticker, put restrictions on his ability to perform work, and predicts that he may need to have future knee operations, including a possible knee replacement.

The parties bring these present motions in limine.

2. Analysis

A. Comparing Injuries

Sometime after his injury, Plaintiff started treating with Dr. James Agre. During discovery, Dr. Agre's *De Bene Esse* deposition was taken. As will be discussed in more detail, Dr. Agre testified during his deposition that he believes that Plaintiff will likely need to undergo further surgery at some point in the future. Dr. Agre was also asked questions about his own medical history, specifically, his hip replacement

surgery, and how he was able to recover from his surgery to resume an active lifestyle. In addition, a deposition was taken of one of Plaintiff's co-workers, Mr. Charles Campbell, who also worked on Defendant's vessel as an engineer. Mr. Campbell underwent a knee fusion surgery. Mr. Campbell was asked question during his deposition about how he was able to recover from his surgery, and how he was able to resume his job on the vessel.

Plaintiff seeks to exclude from evidence any questions and answers regarding Dr. Agre's hip replacement surgery, and Mr. Campbell's knee fusion surgery. Plaintiff argues that these questions are not relevant because these surgeries were different than Plaintiff's potential future surgery. Alternatively, Plaintiff argues that even if this evidence is relevant, it should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice. Defendant responds by arguing that this evidence is relevant in order to demonstrate that through sufficient motivation and hard work that people can overcome major injuries and surgery, and resume active lifestyles.

***2** As for Dr. Agre, the Court finds this line of questioning to be proper and relevant. It is proper to ask a doctor about the role of motivation, hard work, and fidelity to a post-surgery rehabilitation program, such as physical therapy, in recovering from an injury. As for Mr. Campbell, however, the Court agrees with Plaintiff, and shall exclude any questions regarding his knee fusion surgery, or how he has recovered from it. There is no reason to believe that Mr. Campbell's surgery was at all similar to any potential surgery that Plaintiff might undergo, and there is no reason to believe that the events that necessitated Mr. Campbell's surgery were at all similar to the events at issue. Thus, there can be no meaningful comparison made between the surgical procedure that Mr. Campbell underwent, and Plaintiff may need to undergo. Therefore, Plaintiff's Motion in Limine to Preclude Testimony or Argument Comparing Plaintiff's Injury to Different Medical Conditions of Others is GRANTED IN PART and DENIED IN PART. The Court HEREBY ORDERS that there shall be no reference made at trial to the dissimilar injuries of Mr. Campbell; Defendant, however, may be allowed to ask Dr. Agre questions regarding his own leg surgery, as well as questions about how he has recovered from such an injury.

B. "Gratuitous" Payments

After Plaintiff was injured, there is no dispute that Defendant paid Plaintiff maintenance and cure, as Defendant was obliged to. *See Blarney v. Am. S.S. Co.*, 990 F.2d 885, 887 (6th Cir.1993) (*citing Al– Zawkari v. Am. S.S. Co.*, 871 F.2d 585, 586 n. 1 (6th Cir.1989)) (stating that maintenance refers to a shipowner's obligation to provide food and lodging to a seaman who becomes injured or falls ill while in service of the ship, whereas cure refers to the shipowner's duty to provide necessary medical care and attention). Plaintiff and Defendant also agree that after he was injured, but before this action was commenced, that Defendant paid Plaintiff some significant sum of money that exceeded what Defendant was required to pay in maintenance and cure.

Plaintiff characterizes this excess amount of money that he received as voluntary, gratuitous payments above and beyond that which common law required the shipowner pay and therefore requests that this Court exclude any evidence of such payments in its assessment of damages. Defendant argues, however, that this excess amount of money represents Plaintiff's lost wages, and is in effect an advance of Plaintiff's damages; consequently, the jury should be informed as to the amount that Plaintiff has already been compensated.

The Court finds that Plaintiff's motion should be denied. The Court notes that it has not been presented with any evidence, such as an affidavit or deposition testimony, that would either indicate that said excess payments were in fact made by Defendant to com-

pensate Plaintiff for his lost wages, or that said excess payments were gratuitous; therefore the Court lacks sufficient evidence to rule on this motion presently. Courts have held that if there is evidence that demonstrates that the parties understood the excess payments to constitute lost wages, then the defendant should be allowed to offset set that amount against a potential award of damages. *See* *Cunningham v. Noble Drilling, Corp.*, 2002 WL 31528444 (E.D.La.2002) (holding that the damage award should be reduced by $9,120.32, the amount of money already paid in advances/supplemental wages, in excess of what was paid in maintenance and cure in part because the parties understood that the excess payments constituted compensation for lost wages); *see also* *Clifford v. Mt. Vernon Barge Serv., Inc.*, 127 F.Supp.2d 1055 (S.D.Ind.1999) (holding that although the payments made above and beyond maintenance and cure would not be taken into account when calculating amount of maintenance and cure that has already been paid, said payments would be offset with respect to any other damages that the plaintiff is entitled to recover under the Jones Act).

***3** The Court agrees with the rationale that supports such a holding. First, it was reasonable for Defendant to begin making such payments. In the present action, Plaintiff was injured when Defendant's vessel hit a lighthouse on April 28, 2000; thus, Defendant could have reasonably anticipated litigation, and could have reasonably anticipated being found liable. Thus, it would be reasonable for Defendant to begin making payments to its employee in order to compensate him for his lost wages while he was not working. And second, if Plaintiff has already been compensated for his lost wages, and if the Court were to grant Plaintiff's motion in limine, then Plaintiff would be afforded double recovery-Plaintiff would have already been compensated for his lost wages due to the excess payment, and then Plaintiff would be made whole again by the judgment.

The case Plaintiff relies most heavily upon, *Durgin v. Crescent Towing & Salvage, Inc.*, 2002 WL 31365365 (E.D.La.2002), is distinguishable. *Durgin* was an indemnity action by the owner of the vessel that employed a seaman who became injured, against the insurance company of the vessel that caused the injury. *See id.* at *1. The seaman was injured when defective mooring from the insured's vessel broke loose and struck the seaman. *See id.* After the seaman sustained his injury, but before he filed an action against his employer, as well as the vessel that caused the injury, his employer paid his lost wages, in addition to paying him maintenance and cure. *See id.* The court held that the injured seaman's employer could not recover in the indemnity action for the payments that exceeded maintenance and cure that it made the injured seamen. *See id.* at *1. The court reasoned that indemnity was not proper because indemnity is generally only permissible after a party was found to be at fault, which, due to the fact that the injured seamen settled his action against all parties, no one was found at fault. *See id.* at *4. In addition, because *Durgin* was an indemnity action, the court did not have to be concerned with possible unjust double recovery by the injured seaman. Therefore, the Court finds that *Durgin* arose in a separate factual context.

Consequently, the Court finds that said excess payments should be considered by the jury when damages are assessed, along with evidence regard Defendant's intent in making such payments. Plaintiff's Motion in Limine to Bar Evidence of Gratuitous Payments is DENIED.[FN1]

FN1. It is noted that the parties do not agree as to the amount of money Defendant paid Plaintiff. Plaintiff claims to have received from Defendant and that which Defendant claims to have provided Plaintiff. In his motion in limine, Plaintiff alleges that Defendant provided Plaintiff with $25,150 in periodic amounts between February 2001 and February 10, 2002. Defendant responds by stating that it paid Plaintiff $21.50 a day in

> maintenance for 546 days—for a total of $11,739—and that it also paid Plaintiff $63,411 as wage replacement while Plaintiff was off work from February 26, 2001 through August 25, 2002. No documentation is provided from either party as to the amount of money provided to Plaintiff. Because there is a dispute as to the actual amount of money paid, that issue shall be left to the jury to decide.

C. Expert Physician

As discussed above, after his accident, Plaintiff treated with Dr. James Agre for his knee injury. During his deposition, Dr. Agre stated that he believed that at some point in the future that Plaintiff may require some type of knee surgery. During his deposition, Dr. Agre was asked what Plaintiff may expect in the future in terms of his knee, to which Dr. Agre replied:

> and as I recall he had reported for sure that he had seen another surgeon who was actually suggesting a couple of surgical procedures. I can't remember the details of that, but he will in almost all probability need to have some kind of procedure done on the knee.

***4** Dep. of Dr. Agre, 45–46. Plaintiff's attorney then asked Dr. Agre to describe some of these procedures.

> Q: What types of procedures are you referring to?
>
> A: Well, I'm not an Orthopedic Surgeon, but they do various procedures. Sometimes they can do an Osteotomy where they will actually saw off part of the bone to change the way it is shaped so that it can change some of the stress and strain on the joint to help the pain relieving function, and of course, ultimately he might require a total knee arthoplasty down the road, but I would hope that wouldn't be the case for quite some period of time as he is still a very young gentleman.
>
> Q: Doctor, does the total knee arthroplasty, do they have a finite life span?
>
> A: From my understanding they do. They are not as good as the hip replacements right now. My understanding it's maybe five, ten year, something like that, but I would certainly have to refer to the orthopedic surgeons on that. I don't follow that literature.

Dep. of Dr. Agre, 46. Finally, on cross-examination, Dr. Agre was asked:

> Q: Mr. Emery also asked you about your opinions previously given about the likelihood of him having to have a knee replacement and also the duration of the remainder of this work life. My understanding is, of course, Doctor that you don't have a crystal ball. Do you have an opinion as to whether or not its probable that he will require a knee replacement?
>
> A: I suspect that, yes, down the road should he live so long, you know, another ten years, 20 years—heavens, I hope 30 years that in all probability he—either he'll have to have some sort of surgical procedure which could possibly include knee replacement.
>
> Dep. of Dr. Agre, 69.

Defendant argues that although Dr. Agre is a certified physician, he is not a surgeon, and is therefore unqualified to testify as to what procedures that Plaintiff will need to undergo in the future. Defendant asserts that Plaintiff has not laid a sufficient foundation to qualify Dr. Agre as an expert in knee surgery, and thus, Dr. Agre's opinions are not admissible as expert testimony of FED.R.EVID. 702. Plaintiff responds that while Dr. Agre is not a surgeon, he is qualified to testify as to Plaintiff's future medical needs because Dr. Agre specializes in non-surgical

treatment for physical injuries, and has spent two years treating Plaintiff for his injury. Consequently, Plaintiff argues that Dr. Agre is in the best position to determine whether non-surgical treatment has been providing effective treatment, or whether surgery would be required.

Rule 702 provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: 1) the testimony is based upon sufficient facts or data, 2) the testimony is the product of reliable principles and methods, and 2) the witness has applied the principles and methods reliably to the facts of the case.

***5** Rule 702 was amended on December 1, 2000, to reflect the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). *See Nelson*, 243 F.3d at 250 n. 4. According to those Supreme Court decisions, the Court is to act as a gatekeeper and ensure that all expert testimony is not only relevant, but reliable. *See Nelson*, 243 R3d at 250 (quoting *Daubert*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); citing *Kumho*, 526 U.S. at 141)). Not only must such testimony be based on reliable principals and methods, but it must also assist the trier of fact. *See id.* So long as the expert's testimony has a reliable basis in the knowledge and experience of the discipline, an expert's testimony does not need to be based on firsthand knowledge. *See John v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir.2000). Thus, in short, expert testimony is admissible if: (1) it has a reliable basis on specialized knowledge, (2) and it assists the trier of fact in a case. *See Nelson*, 243 F.3d at 251. Finally, the Sixth Circuit has stated that Rule 702 should be interpreted broadly in determining whether the use of expert testimony will assist the trier of fact. *See Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 516 (6th Cir.1998).

Thus, in the present action, the Court must first test whether there is a reliable basis for Dr. Agre's statement about Plaintiff's prognosis, and then the Court must determine whether is assists the trier of fact. As for the first element of the test, the Court finds Plaintiff's argument to be persuasive, and that Dr. Agre has a reliable basis for giving his opinion as to Plaintiff's prognosis. Plaintiff points out that Dr. Agre specializes in non-surgical treatment of injuries, and can determine when non-surgical treatment no longer proves to be useful. In addition, Dr. Agre has spent two years treating Plaintiff after his injury, and is thus very familiar with the nature and extent of Plaintiff's injury. Thus, the Court finds that Dr. Agre is qualified to discuss whether Plaintiff will need surgery in the future. As for the second element of the test, the Court finds that Dr. Agre's testimony will assist the trier of fact on the issue of future damages. Consequently, Dr. Agre's testimony on this issue is admissible, and Defendant, American Steamship Company's Motion in Limine to Preculde Certain Testimony of Plaintiff Expert Physician is DENIED.

5. Conclusion

For the reasons set forth above,

(1) Plaintiff's Motion in Limine to Preclude Testimony or Argument Comparing Plaintiff's Injury to Different Medical Conditions of Others is GRANTED IN PART and DENIED IN PART;

(2) Plaintiff's Motion in Limine to Bar Evidence of Gratuitous Payments is DENIED;

(3) Defendant, American Steamship Company's Motion in Limine to Preclude Certain Testimony of

Plaintiff [sic] Expert Physician is DENIED.

IT IS SO ORDERED.

E.D.Mich.,2003.
Cervo v. American Steamship Co.
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