

From The Bench

legal news of interest

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Recent Case on Lost Earnings Capacity Claims Revisits Standards of Recovery

by Gary J. Delahoussaye

Q. Is an employee who has been retained by his employer and earning more than he did prior to an injury entitled to damages for loss of earning capacity?

a. Yes, if the court determines that he is employed only through the “grace” of a benevolent employer and is at the “mercy” of his employer and a volatile oilfield industry.

In *Fruge v. Hebert Oilfield Construction, Inc.*,¹ the Third Circuit Court of Appeal considered a fairly straightforward case involving an automobile accident, personal injuries to a twenty-one (21) year old machinist and claims for loss of earning capacity. The significance of the court’s ruling is found in the fresh and new language used by the court to explain the standards of proof and items of recovery available on a claim for loss of earning capacity. While the broad rules of law are unchanged by the court’s opinion, some narrow distinctions and implications were made by the court.

On August 27, 1999, Klint Fruge, then twenty-one (21) years old, was involved in an intersectional accident. He was hit by a vehicle driven by Raul Chavez who failed to stop at a flashing red light while working for Hebert Oilfield Construction, Inc. AXA Global Risk U.S. Insurance Company was Hebert Oilfield’s insurer.

Subsequent to the accident, Fruge went to a local emergency room complaining of low back pain radiating into both legs. He was treated, released and referred to an orthopedic surgeon. Fruge was treated conservatively through September of 2002. During this time, Fruge continued to complain of stiffness and pain in his low back, numbness and pain in his right leg, particularly after sitting too long, and slight weakness in his right foot. An MRI revealed degenerative disc disease and a small herniation at L5-S1. Fruge was assigned a ten percent (10%) anatomical impairment of his whole body.

Because no neurological deficit was diagnosed, the surgeon did not recommend surgery. However, the surgeon did caution that a traumatic disc injury begins an arthritic process whereby the disc degenerates earlier and more severely than it would under normal circumstances. Accordingly, Fruge was more likely to need surgery in the future and was advised to avoid performing heavy work.

At the time of the accident, Fruge was employed as a machinist by Stabil Drill Specialities, Inc. His position involved repetitive standing, frequent stooping, bending and occasional lifting of up to forty (40) to fifty (50) pounds. Restrictions on his activities outlined by his orthopedic surgeon prevented Fruge from performing the physical demands of his prior job.

Since he could no longer perform the physical aspects of his job, his employer “made up” a job for Fruge as a night supervisor in which he handled most of the paperwork from the day and night shifts. After working for one (1) year at this position, Fruge was retrained by his employer as a computer numerical control (CNC) operator, a job described by Fruge as “more of a mental position than manual position” which did not require stooping or bending. Even the new position required accommodations for Fruge which were not available for other CNC



operators. Because of these accommodations, Fruge’s supervisor testified he would be the “first to go” should the oilfield experience a decline during its many “ups and downs.”

As a machinist, Fruge earned \$28,614.00 in 1999, the year of the accident. In 2000, as a night supervisor, he earned \$51,013.00. In 2001, as a CNC operator, Fruge earned \$59,081.00.

At trial, Fruge was awarded \$90,000.00 for loss of earning capacity. The trial court explained that Fruge “has an uncontroverted herniated lumbar disc, with a ten (10) percent impairment, with the restriction of performing only medium work, and with only a high school education.” However, “by the grace of Stabil Drilling Company, it (loss of earning capacity) has not yet manifested itself, yet plaintiff would be relegated to seeking employment with a high school education and a bad back...” The trial court also stated Fruge was now “stymied and at the mercy of Stabil Drilling and the oilfield...but for his good fortune with Stabil, plaintiff, after this accident, would have been in a bind.”

The Third Circuit recognized a plaintiff’s burden of proof to recover damages for lost earning capacity requires medical evidence indicating with reasonable certainty that he has a residual disability causally related to the accident which affects his future ability to earn wages.² The court also stated lost earning capacity is not necessarily determined by the actual wages lost, but, instead, whether and how much his condition disadvantages him in the work force.³

Based on these standards, the court found Fruge’s injury placed him at a great disadvantage in the labor market, because he could no longer perform the work for which he was originally trained and was only able to continue working with accommodations. Finally, the court stated the evidence showed Fruge would have “great difficulty in competing for jobs” and should his “precarious position” be altered, he would have a substantially lower earning capacity in the future.

¹ 2003-349 (La. 10/1/2003); 2003 WL 2224909.

² *Kennedy v. Columbus America Properties, L.L.C.*, 99-940 (La. App. 4 Cir. 1/12/00), 751 So.2d 369.

³ *Batiste v. New Hampshire Insurance Company*, 94-1467 (La. App. 3 Cir. 5/3/95), 657 So.2d 168, 170 writ denied, 95-1413 (La. 9/22/95), 660 So.2d 472.



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