

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TWIN RIVERS TOWING COMPANY and )  
CONSOLIDATION COAL COMPANY, as owners or )  
owners pro hac vice of six coal barges, )

Plaintiffs, )

-VS- )

Civil Action No. 01-1752

CECELIA HUSARCHIK, RANDOLPH L. SMITLEY, )  
JAMIE A. THISTLEWAITE and TEDDY W. )  
TURNER, )

Defendants. )

AMBROSE, Chief District Judge.

**ORDER OF COURT**

AND NOW, this 4<sup>th</sup> day of August, 2004, it is ORDERED that an award is entered in favor of Ted Turner in the amount of \$29,426.32 for past medical expenses incurred, with prejudgment interest calculated according to the Conclusions of Law, the amount of \$2,800.00 for past wage loss, with prejudgment interest calculated according to the Conclusions of Law, the amount of \$150,000 for past pain and suffering, with prejudgment interest calculated according to the Conclusions of

Law, and the amount of \$50,000.00 for future pain and suffering, with no corresponding prejudgment interest award.

BY THE COURT:

*Donetta W. Ambrose*

Donetta W. Ambrose,  
Chief U. S. District Judge

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AMBROSE, Chief District Judge.

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

and

**ORDER OF COURT**

**INTRODUCTION**

After a non-jury trial on liability, this Court issued Findings of Fact and Conclusions of Law. (Docket No. 81). Therein, I found Twin Rivers Towing and Consolidation Coal (collectively referred to as "Twin Rivers") liable for 15% of damages and Jamie Thistlethwaite liable for 85% of damages sustained by the Claimants, Randolph Smitley ("Smitley"), Ted Turner, Cecelia Husarchik and Jamie Thistlethwaite. On June 10, 2004, I conducted a non-jury trial on damages regarding Smitley. The following individuals testified at the non-jury trial on damages: Smitley, Patricia Smitley (Smitley's mother), Dr. Kenneth Janson, Dr. Fred Edge, and Dr. Roger

Ferguson. Counsel for the parties filed Proposed Findings of Fact and Conclusions of Law regarding damages for Smitley. (Docket Nos. 89 and 91). Based on the evidence submitted at the non-jury trial on damages for Smitley, I make the following Findings of Fact and Conclusions of Law.

**Findings of Fact**

1. Smitley is thirty-six (36) years old and is married, but separated. He lives with his mother, Patricia Smitley. He has three children, an infant and two teenagers, all of whom live out-of-state.

2. Prior to the allision, Smitley had a sporadic history of employment at a roofing job and at a machine shop.

3. Smitley had no problems with his neck or back prior to the allision.

4. At the time of the allision, Smitley was unemployed due to the fact that his driver's license was suspended due to a DUI conviction and he had no means of transportation to work.

5. On May 24, 2000, Smitley was a passenger on a pleasure boat when the pleasure boat allided with a barge.

6. During the allision, Smitley was thrown from the rear seat forward out of the boat and lost consciousness for a brief time. However, he did help other passengers and went to the nearest house to summon emergency assistance.

7. As a result of the allision, Smitley suffered injuries and was transported from the scene of the accident to Mercy Hospital by STAT MedEvac.

8. Smitley does not remember much of his time at Mercy Hospital. At the

hospital, Smitley's admitting diagnosis was "forehead contusion[,], chest wall pain[,], and acute alcohol intoxication." Smitley Damages Ex. 1.

9. Smitley's CT scans and x-rays of his spine were normal. *Id.*

10. Smitley was discharged on May 25, 2000.

11. On May 28, 2000, Smitley went to Monongahela Valley Hospital, Inc. See, Smitley Damages Ex. 2.

12. Hospital records indicate that Smitley complained of back pain, right leg tingling, left fingers tingling, headaches. *Id.*

13. Smitley's x-rays of his cervical and lumbar spine were normal and he was diagnosed with "multiple contusions/cervical sprain." *Id.*

14. He was discharged from Monongahela Valley Hospital, Inc. on the same day.

15. On June 15, 2000, Smitley went to Greene County Hospital emergency room due to continued pain. See, Smitley Damages Ex. 3. There, Smitley was diagnosed with chronic post traumatic musculoskeletal back pain.

16. At the trial on damages, the parties stipulated to medical expenses incurred by Smitley as a result of the allision (incurred May 24, 25, 28 and June 15, 2000) totaling \$13,782.94. Accordingly, these expenses are not at issue. See, Stipulation of Parties, Joint Damages Ex. 1.

17. Smitley continued to have pain in his neck and back over the next few months but did not seek treatment due to his inability to pay.

18. Approximately four months after the accident, on September 25, 2000,

Smitley sought treatment from Dr. Kenneth Janson. Dr. Janson is not a medical doctor. He is a chiropractor. Dr. Janson has no undergraduate degree.

19. According to Dr. Janson, Smitley complained of constant nagging pain in his lower back, that his back pops, and that his legs go numb with activity.

20. Dr. Janson testified that although he had not attempted to get any of Smitley's prior medical records or results, he diagnosed Smitley with multiple subluxations of the spine, in other words, "one big sprain/strain," and recommended treatment.

21. Dr. Janson testified that soft tissue injuries, such as the injuries claimed by Smitley, usually resolve within twelve (12) weeks of the onset of the injury. Nevertheless, Dr. Janson testified that he treated Smitley over 18 times from September 25, 2000 (seventeen (17) weeks post injury) through December 1, 2000. Thus, I find Dr. Janson's testimony to be contradictory and not credible.

22. According to Smitley, he stopped treating with Dr. Janson because he was not improving.

23. Smitley's unpaid medical bill for treatment by Dr. Janson totals \$3,256.00.

24. On January 15, 2001 (nearly eight months post-accident), Smitley saw Dr. Fred Edge at Health First Medical Center located in Dunbar, Pennsylvania.

25. Dr. Edge is the owner and medical director of Health First Medical Center. He is licensed as a chiropractor and a physician. He graduated from Palmer College of Chiropractic in 1975 and obtained his medical degree from American University of the Caribbean in 1983. American University of the Caribbean is not an accredited

medical school. There is no board certification in "pain management" recognized by the American Medical Association.

26. In 1992, Dr. Edge pled guilty and was sentenced to five (5) months in federal prison and three (3) years supervised release, fined \$30,000.00 and a forfeiture of \$400,000.00 for using false social security numbers to conceal assets, filing false corporate income tax returns and filing false personal income tax returns. I find this evidence affects Dr. Edge's credibility.

27. Dr. Edge treated Smitley on a regular basis from January 2001 to August 2002, and thereafter every three (3) months or so, most recently as May 20, 2004. Consequently, Dr. Edge has treated Smitley for almost 3½ years and almost 4 years post accident.

28. Dr. Edge testified in another matter, however, that a soft tissue back injury "without disc involvement" should usually resolve within six (6) to twelve (12) months, but must be assessed on a case by case basis.

29. On June 14, 2002, Dr. Edge performed an MRI on Smitley's spine which indicated that Smitley's spine was not misaligned and showed no evidence of muscle or ligament tears.

30. Smitley testified that even after all of his treatment with Dr. Edge, he has improved very little, but continues to go to Dr. Edge to get pain medications.

31. Based on this evidence, I do not find Dr. Edge's testimony to be credible.

32. Smitley's unpaid medical bill for treatment by Dr. Edge totals \$45,563.00.

33. Roger J. Ferguson, M.D., Ph.D., performed an independent medical

examination on Smitley on September 18, 2002.

34. Dr. Ferguson was licensed as a doctor in 1972 and was board certified in orthopedic surgery in 1977. He retired from practice in December of 2003.

35. Dr. Ferguson testified that strains and sprains, like those in this case, usually resolve themselves in two (2) to three (3) months, even if untreated.

36. Dr. Ferguson further testified that there are no objective findings to corroborate Smitley's continued complaints of pain and that his strain could have been successfully treated in three (3) to four (4) visits for a total of \$500.00.

37. According to Dr. Ferguson, the examination results in Smitley's medical record were all normal.

38. Dr. Ferguson testified to a reasonable degree of medical certainty that Smitley's continued complaints are not related to the allision and that Smitley has recovered from any and all injuries related to the allision.

39. Consequently, Dr. Ferguson testified that the treatment Smitley received from Drs. Janson and Edge beginning four months post accident were not medically reasonable or necessary.

40. I accept the testimony of Dr. Ferguson as credible and, to the extent that it is inconsistent with the testimony of Drs. Edge and Janson, I reject their testimony.

41. After the allision, Smitley's driver's license was still suspended, but nevertheless, for approximately eight months (from October 2003 - May 1, 2004), Smitley was employed by Burns and Scalio as a roofer. Smitley quit this job in May



of 2004. He also had a job pulling weeds one day.

42. Smitley has not set forth a claim for lost wages or future income.

43. Smitley testified that he is still not pain free and still unable to do many physical activities.

44. Smitley's mother testified at trial that before the accident, Smitley was active and did work around the house, but after the accident she no longer asks him to help due to his complaints of pain. She also testified that Smitley is moody and does not sleep well.

### **CONCLUSIONS OF LAW**

1. A plaintiff in a general maritime negligence case may recover damages for lost earning capacity, medical and other expenses, and pain and suffering. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 4<sup>th</sup> Ed., §5-15 (West 2004).

2. Smitley did not set forth any claim for lost earning capacity, there was no evidence introduced at trial regarding the same, and Smitley did not submit any findings of fact or conclusions of law regarding the same.

3. Consequently, Smitley is not entitled to any damages for lost earning capacity.

4. To recover both past and future medical and other expenses, those expenses must be reasonably necessary. *Id.*

5. The parties stipulate that medical expenses in the amount of \$13,782.94 were incurred by Smitley in connection with injuries related to the allision.

6. Based on the finding of fact above, I find that Dr. Janson's unpaid medical

expenses were not reasonably necessary or related to the allision, and therefore, Smitley is not entitled to recover any amounts relative to said treatment.

7. Based on the finding of fact above, I find that Dr. Edge's unpaid medical expenses were not reasonably necessary or related to the allision, and therefore, Smitley is not entitled to recover any amounts relative to said treatment.

8. Smitley did not set forth any claim for damages for future medical and other expense, there was no evidence introduced at trial regarding the same, and Smitley did not submit any findings of fact or conclusions of law regarding the same.

9. Accordingly, Smitley is not entitled to any damages for future medical or other expenses.

10. Accordingly, Smitley is entitled to recover the sum of \$13,782.94 for past medical and other expenses incurred and \$0.00 for future medical and other expenses.

11. Past and future pain and suffering and loss of pleasures of life damages "are calculated on the basis of the facts of the particular case." *Id.*

12. Based on the findings of facts above, I find that Smitley is entitled to recover the sum of \$25,000.00 for past pain and suffering and loss of pleasures of life and \$0.00 for future pain and suffering and loss of pleasures of life.

13. Thus, Smitley is awarded total damages in the amount of \$38,782.94.

14. This Court is afforded discretion in the award and computing of prejudgment interest. I am guided by the rationale that an injured party should be

fully compensated for a loss from the time it accrues until the judgment is entered. Prejudgment interest cannot serve as a penalty to the Defendant. See City of Milwaukee v. National Gypsum Company, 515 U.S. 189, 195-96, 115 S.Ct. 2091 (1995).

15. Although prejudgment interest is generally awarded, not all types of damages are entitled to such an award. Damages which are awarded for future medical expenses, future pain and suffering, disability and disfigurement, and future loss of earning capacity are not entitled to prejudgment interest. See Couch v. Cro-Marine Transport, Inc., 44 F.3d 319 (5<sup>th</sup> Cir. 1995). Therefore, Smitley is only entitled to a prejudgment interest award on his past damages.

16. With regard to the rate of prejudgment interest, I elect to use the postjudgment interest rate set forth in 28 U.S.C. Section 1961. See Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986). The rate shall be compounded annually from the date of the allision (May 24, 2000), until the entry of judgment. See BP Exploration & Oil, Inc. v. Moran Mid-Atlantic Corporation, 147 F. Supp.2d 333 (D. N.J. 2001).

17. Smitley is entitled to prejudgment interest on past damages. Said interest is to run from May 24, 2000 until the present, and shall be at the rate of the weekly average 1 year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, and shall be compounded annually.

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DATE FILED: August 4, 2004

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TURNER, )


Claimants. )

AMBROSE, Chief District Judge.

**ORDER OF COURT**

**AND NOW**, this 4<sup>th</sup> day of August, 2004, it is ordered that an award is entered in favor of Randolph Smitley in the amount of \$13,782.94 for past medical expenses incurred, with prejudgment interest calculated according to the Conclusions of Law, and the amount of \$25,000.00 for past pain and suffering, with prejudgment interest calculated according to the Conclusions of Law.

BY THE COURT:

  
Donetta W. Ambrose

Donetta W. Ambrose,  
Chief U. S. District Judge

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AMBROSE, Chief District Judge.

**FINDINGS OF FACT**  
**CONCLUSIONS OF LAW**  
**and**  
**ORDER OF COURT**

This Court has already issued Findings of Fact and Conclusions of Law with respect to liability for the boating accident which occurred on May 24, 2000. See Docket No. 81. I will not repeat these Findings and Conclusions. Suffice it to say that I concluded that Twin Rivers Towing and Consolidation Coal (collectively referred to as "Twin Rivers") were liable for 15% of the damages incurred by the Claimants, and Jamie Thistlewait ("Thistlewait") was liable for the remaining 85% of the damages

incurred by the Claimants.<sup>1</sup>

On June 28, 2004, I conducted a non-jury trial on damages in connection with Ted Turner's ("Turner") claim. Counsel for the parties have filed Proposed Findings of Fact and Conclusions of Law (Docket Nos. 93 and 95). Based on the evidence submitted at trial, and on the parties's submissions, I make the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. Turner sustained an injury to his right arm as a result of a boating accident which occurred on May 24, 2000.

2. At the time of the accident, Turner was 35 years old. He is single, has no children, and has never been married.

3. Prior to the date of the accident, Turner had been in a generally good state of health, with the exception that he had a long standing diagnosis of Tourettes Syndrome. He has suffered from this condition in varying degrees since childhood.

4. He has been receiving Social Security disability payments on the basis of his Tourettes Syndrome from the Social Security Administration since 1996.

5. Prior to the date of the accident, Turner had completed high school and served four years on active duty as an enlisted member of the United States Navy. He received an honorable discharge in 1988.

6. Following his discharge from military service, Turner returned to his home in Fayette County, Pennsylvania. He pursued various forms of manual labor, and

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<sup>1</sup> The Claimants are Randolph Smitley, Ted Turner, Cecelia Husarchik and Thislewait himself.

held numerous minimum wage jobs.

7. Turner described these jobs as "dead end," and explained that employment typically lasted from a few days to a few months. The jobs routinely ended with Turner quitting, tired of being harassed by fellow employees because of his Tourettes Syndrome.

8. In 1998, Turner's total income was \$2,086.00. In 1999, Turner's total income was \$3,256.00.

9. Apparently frustrated by these jobs, Turner enrolled in the ICM School of Business and Medical Careers in Pittsburgh to pursue a degree in Criminal Justice, with the intent of becoming a security guard.

10. His education was interrupted when his counselors at the Bureau of Vocational Rehabilitation advised him against pursuing this degree because a security guard position would likely require that he carry a gun. Turner's Tourettes Syndrome is incompatible with carrying a gun.

11. While on leave from the ICM School of Business, and immediately prior to the accident, Turner was employed by Eastern Excavating. He cut grass and worked on digging in connection with septic systems at a rate of \$9.00 per hour.

12. Though Turner estimated that he worked 35-40 hours per week, with a monthly income of approximately \$1,312.50, I find such testimony not supported by the record, and thus not credible.

13. The documentary evidence of record indicates that Turner earned a total of \$1,441.00 during the 4 months immediately preceding the accident, for an



average of \$350.00 per month. At \$9.00 per hour, Turner thus worked approximately 53 hours per month.

14. Turner ceased work with Eastern Excavating as a result of the accident.

15. On the date of the accident, Turner suffered an intra-articular comminuted right distal humerus fracture extending into the elbow joint. Because it was an open fracture (a break in the skin overlying the fracture), the situation was emergent.

16. The following day, Dr. Jory Richman, head of Orthopaedics at Mercy Hospital, operated on Turner. He performed an osteotomy of the olecranon that involved using metal plates and screws in an effort to stabilize and realign the fracture. Dr. Richman elected not to perform an ulnar nerve transposition at that time.

17. Dr. Richman continued treating Turner following the surgery, first every two weeks, and then monthly.

18. Dr. Richman reported that Turner was not compliant with physical therapy. According to Richman, physical therapy is of critical importance in recovering from an ulnar nerve injury.

19. In October of 2000, Turner reported to Dr. Richman that swelling had improved and that he was doing "considerably better" in terms of pain. A neurological exam was normal.

20. At this point, Dr. Richman explained, Turner could have worked, for instance as a pizza delivery driver, so long as he avoided heavy lifting. Accordingly,

I find that Turner was unable to work as a result of this surgery for a period of five months (May of 2000 through October 2000).

21. Given Turner's subsequent complaints of increased stiffness in the elbow joint, Dr. Richman performed a second surgery on December 12, 2000. Dr. Richman removed the hardware that had been placed in Turner's elbow. Dr. Richman noted a pseudoarthrosis, or incomplete healing in the ulna such that the bone did not heal with a solid bone bridge, but with some fibrous scar tissue interposed between the bones.

22. Dr. Richman continued to follow Turner. In January of 2001, Turner reported doing "reasonably well."

23. According to Dr. Richman, Turner could have worked as a janitor at this time. Given Dr. Richman's uncontradicted testimony, I find that Turner was precluded from working for a period of two months (December of 2000 and January of 2001) while recuperating from this second surgery.

24. In April of 2001, Turner again presented to Dr. Richman. Turner stated that he was doing quite well and was satisfied with the result of his surgery. Dr. Richman instructed Turner that he did not require continued visits, and should return only as needed.

25. In September of 2001, Turner again visited Dr. Richman and reported that he was doing reasonably well and had only minimal pain. He did, however, complain of a tingling sensation in his right hand.

26. On October 30, 2001, Dr. Richman performed a third surgery. Dr. Richman

inspected the ulnar nerve because of Turner's continued complaints of irritation. The inspection revealed that a great deal of scarring had occurred around the nerve. Rather than move the nerve, Dr. Richman elected to decompress the nerve.

27. In November of 2001, Turner reported to Dr. Richman that he had experienced dramatic improvement. He stated that he could lift light dumbbells on a daily basis and could perform some manual labor. Dr. Richman noted that he was pleased with the result of surgery. Consequently, I find that Turner was precluded from work for a period of one month as a result of this surgery.

28. Around this same time, Turner obtained employment with Patton Building Services as a janitor. He quit shortly thereafter, discouraged by the long commute. At any rate, Turner's success in obtaining employment supports my conclusion that his surgeries did not result in an extended period of wage loss.

29. In March of 2002, Dr. Richman wrote to counsel for Turner, and recorded that he was quite satisfied with the surgical result.

30. In April of 2002, Turner presented to Dr. Richman for a scheduled follow-up visit. Dr. Richman observed no significant change to the functioning of the right hand and arm. He placed no formal restrictions on Turner and advised him to follow-up on an as needed basis.

31. In January of 2003, Turner visited Dr. Richman with complaints of constant pain. Dr. Richman observed that motor function was intact and that Turner displayed an excellent range of motion. He noted no atrophy. He denied Turner's request for oxycontin.

32. Dr. Richman last saw Turner on April 10, 2003. At that visit, Turner again complained of pain. Turner denied that he had re-injured the arm. Dr. Richman found that Turner had excellent strength in the arm and observed that no atrophy had occurred.

33. Dr. Richman confirmed that Turner's x-rays show a narrowing of the elbow joint, a loss of cartilage and post traumatic arthritis. He acknowledged that such results are normal following Turner's injury. He further reported that, although the injury will never improve, he was unable to determine whether it would worsen over time.

34. Dr. Richman acknowledged that Turner did have pain from his ulnar nerve but commented that the complaints of pain exceeded what he would have expected given Turner's injury.

35. Approximately one year after last seeing Dr. Richman, Turner presented to Dr. Robert Kaufmann. Dr. Kaufmann is also an orthopedic surgeon.

36. On his first visit, Turner gave his medical history to Dr. Kaufmann. Turner complained of elbow pain, numbness and tingling.

37. Upon examination, Dr. Kaufmann noted that Turner's range of motion in his shoulder was without significant limitation, that the range of motion in his right elbow was limited to a short arc, and that the range of motion in his right wrist was good. Dr. Kaufmann also found that while Turner had good strength in his right arm and hand, he had a decreased sensation in the ulnar nerve region.

38. In determining whether another surgery was necessary, Dr. Kaufmann

considered both nerve conduction velocity results and EMG results. With respect to the nerve conduction velocity, Turner's results were above the "cut-off line." Nevertheless, the results were less favorable than a test completed at an earlier time. Dr. Kaufmann interpreted the results as indicating that Turner's nerve was not staying the same, rather it was decreasing its velocity. The EMG test assesses whether a muscle is dying. In Turner's case, the results indicated that the muscle was dying.

39. The decrease in velocity coupled with evidence that the muscle was dying, convinced Dr. Kaufmann that surgery was appropriate. Dr. Kaufmann also stated that Turner's complaints of cramping and inside elbow pain supported his conclusion that Turner was a good surgical candidate.

40. Accordingly, on February 23, 2004, Dr. Kaufmann performed neurolysis and ulnar nerve transposition. That is, he located the ulnar nerve and transposed it, placing it in a biomechanically more favorable position.

41. A few short weeks after this operation, Turner reinjured his arm. He was throwing a ball with a nephew.

42. Dr. Kaufmann stated that Turner was initially very happy with the results of surgery. Turner reported that the pain and cramping resolved.

43. Dr. Kaufmann last saw Turner on June 9, 2004. Turner reported that his symptoms were much improved. Nevertheless, he did complain about pain at night and difficulty sleeping.

44. Dr. Kaufmann indicated that Turner does not have many options at this

point. The ulnar nerve cannot withstand many operations. Dr. Kaufmann did, however, state that it can take up to two years following surgery for the ulnar nerve to fully recover.

45. Turner consulted with Dr. Richard Kasdan on two occasions, for the purpose of Independent Medical Examinations. I do not find Dr. Kasdan's testimony to be helpful given that approximately 90% of his practice as a neurologist involves evaluating and treating patients for headache, back pain, and more serious diseases such as muscular dystrophy. Though Dr. Kasdan does occasionally treat patients who have nerve injuries in their extremities, he is not an orthopaedist, and Turner's lasting injury is orthopaedic in nature.

46. After each of the four surgeries, Turner was required to wear a host of different braces. He also had to undergo physical therapy, which was often painful.

47. As a result of the surgeries, Turner is permanently cosmetically disfigured - he will always bear the surgical scars on his right arm. Turner testified that people have called him "T Rex" based upon those scars.

48. Turner has testified that the injury to his elbow now precludes him from engaging in many activities which he previously enjoyed, such as, doing exercises, playing with his nephews, riding motorcycles and throwing balls. He also has difficulty in performing daily activities such as brushing his teeth, eating, folding laundry, and shaving. Finally, Turner testified that even now he experiences pain when trying to sleep.

49. In the midst of Turner's various surgeries, he renewed his interest in

attending the ICM School of Business. Beginning in July of 2002, Turner took classes to become a juvenile probation officer. He completed all classwork in October of 2003.

50. Turner has yet to complete an internship. He explained that he delayed applying for an internship because Dr. Kaufmann had told him that he would be undergoing surgery. I find this testimony to lack credibility, as his coursework was completed in October of 2003, and he did not consult with Dr. Kaufmann until January of 2004.

51. Despite his injuries, Turner is currently capable of performing the duties of a juvenile probation officer. Since the completion of his coursework, Turner has unsuccessfully sought employment in that field.

52. I reject any contention that Turner's start and thus completion of his coursework at ICM was occasioned by the accident. As stated above, Turner's enrollment was on hold because of issues related to his Tourettes Syndrome at the time of the accident. Further, while Turner's recuperation from the various surgeries may have temporarily prevented him from performing manual labor, the injuries would not have precluded him from attending classes, taping lectures and studying for tests. As such, I do not find persuasive Turner's argument that Twin Rivers should be responsible for paying Turner two years of wages as a criminal justice degree holder.

53. The total sum paid to Turner's medical care providers as a result of the accident is \$29,426.32.

54. Turner offered the United States Life Tables, indicating that Turner has a life expectancy of 39.1 more years.

### **CONCLUSIONS OF LAW**

1. Because this action arises from an allision which occurred on the navigable waters of the United States, the rights and liabilities of the parties must be determined by applicable federal statutes and/or general maritime law. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 455 (2001).

2. A plaintiff in a general maritime / admiralty negligence case may recover damages for lost earnings / earnings capacity, medical expenses and pain and suffering. See Thomas J. Schoenbaum, Admiralty and Maritime Law, 4<sup>th</sup> Ed., Section 5-15 (West 2004).

3. With regard to Turner's claim for past wage loss, I find credible Dr. Richman's testimony as to when Turner could have returned to employment following each surgery. Thus, I conclude that Turner's injuries and surgeries accounted for five months of wage loss following the first surgery, two months of wage loss following the second surgery and one month of wage loss following the third surgery. Turner did not offer any credible evidence regarding an inability to work following the fourth surgery. Further, given that he was playing ball with a nephew soon thereafter, I decline to award any damages for lost wages associated with this surgery.

4. Given Turner's sporadic work history, his minimal earnings, and his receipt of social security payments with respect to his Tourettes Syndrome, I find the



monthly rate of pay earned while at Eastern Excavating to be an appropriate measure for Turner's past wage loss. Accordingly, Turner is awarded 8 months of lost pay, at \$350.00 per month, for a total of \$2,800.00.

5. Turner has presented no evidence which would support any future lost wages as a result of his injuries. Further, Dr. Richman concluded that Turner exhibits an excellent range of motion, no atrophy and good strength. Dr. Kaufmann did not offer any testimony rebutting these conclusions. For this reason, and the reasons set forth in the preceding conclusions, Turner is awarded no damages for future wage loss damages.

6. Turner has proven that he suffered medical expense damages as a result of the allision in the amount of \$29,426.32. Accordingly, he is awarded the sum of \$29,426.32 for medical expenses.

7. Turner has presented no evidence of future medical treatment and future medical expenses. Accordingly, Turner is not entitled to any damages for future medical treatment and no damages for future medical expenses.

8. I find that Turner suffered a serious painful fracture to his right elbow requiring three surgeries by Dr. Richman and one surgery by Dr. Kaufmann. Those surgeries have left Turner with a permanent disfiguring scar. I further find that Turner suffered painful periods of rehabilitation following each surgery. I also find that Turner suffered in the past, and will likely suffer in the future, some degree of loss of motion in his right elbow, some degree of limitation in his daily activities of living, and some pain. For this past pain and suffering (including disfigurement), I

award Turner a sum in the amount of \$150,000. For future pain and suffering (including disfigurement), I award Turner a sum in the amount of \$50,000.

9. This Court is afforded discretion in the award and computing of prejudgment interest. I am guided by the rationale that an injured party should be fully compensated for a loss from the time it accrues until the judgment is entered. Prejudgment interest cannot serve as a penalty to the defendant. See City of Milwaukee v. National Gypsum Company, 515 U.S. 189, 195-96, 115 S. Ct. 2091 (1995).

10. Although prejudgment interest is generally awarded, not all types of damages are entitled to such an award. Damages which are awarded for future medical expenses, future pain and suffering, disability and disfigurement, and future loss of earning capacity are not entitled to prejudgment interest. See Couch v. Cro-Marine Transport, Inc., 44 F.3d 319 (5<sup>th</sup> Cir. 1995). Therefore, Turner is only entitled to a prejudgment interest award on his past damages.

11. With regard to the rate of prejudgment interest, I elect to use the postjudgment interest rate set forth in 28 U.S.C. Section 1961. See Sun Ship, Inc. v. Matson Navigation Co., 785 F.2d 59, 63 (3d Cir. 1986). The rate shall be compounded annually from the date of the allision (May 24, 2000), until the entry of judgment. See BP Exploration & Oil, Inc. v. Moran Mid-Atlantic Corporation, 147 F. Supp.2d 333 (D. N.J. 2001).

12. Turner is entitled to prejudgment interest on past damages. Said interest is to run from May 24, 2000 until the present, and shall be at the rate of the weekly average 1 year constant maturity treasury yield, as published by the Board of

Governors of the Federal Reserve System, and shall be compounded annually.

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