COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2956 **Cir. Ct. No. 2003CV470**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ROSS A. ADAMS,

PLAINTIFF-RESPONDENT,

V.

NICK K. KADO AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Nick Kado and State Farm Mutual Insurance Company (collectively, Kado) appeal a judgment in favor of Ross Adams, who

sustained injuries in a vehicle collision with Kado. Kado argues the trial court erroneously (1) made a number of evidentiary rulings; (2) denied his motion for a directed verdict dismissing Adams' claim for lost future earning capacity; (3) instructed the jury; (4) allowed an excessive award for future medical and health care expenses to stand; and (5) permitted recovery for medical expenses not scheduled but nonetheless discharged in bankruptcy. We reject all of Kado's arguments but the last. We therefore affirm in part, reverse in part and remand with directions to the trial court to reduce the award for past medical expenses to reflect all Adams' pre-bankruptcy petition medical debts.

BACKGROUND

¶2 On November 1, 2000, a vehicle driven by Kado turned directly in front of Adams' pick-up truck, causing a collision that Adams' passenger characterized as "very severe."[1] Following the accident, Adams suffered pain between his shoulder blades.

¶3 Dr. Stephen Endres provided care and treatment for injuries Adams sustained in the accident.[2] Adams was referred to Endres because of low neck pain and high thoracic pain, described by Endres as pain in "the area between the shoulder blades." Endres stated that as the primary provider, he treated Adams for

[1] Kado's statement of facts is not completely consistent with the record. For example, in his statement of facts, Kado states: "Adams recalled he was still in the driver's seat with his hands on the steering wheel." Kado cites to R56:29-30, which is the transcript of Adams' trial testimony, in which Adams testified, "I don't recall, I guess[,]" when asked if he still had his hands on the steering wheel. Although Adams agreed he was still in the driver's seat, he also was asked, "You were in the normal position for a driver?" to which Adams replied, "I was still in the driver's area, yes."

[2] We derive Dr. Endres' testimony from the transcript of his videotaped deposition testimony that was admitted at trial. The parties do not indicate that any part of Endres' deposition was excluded.

severe disruption of the musculoskeletal and tissue part of both the lower neck and higher thoracic spine. Endres stated:

> And the injury from the amount of force that he sustained in the accident was a disruption of the ligaments and tendons, as well as the tissue that holds all of this stuff together, as well as probable injury to the disks, which are the spacers between the bones, and that combination has caused the unrelenting pain in this area.

¶4 Endres testified that Adams will continue to have pain for at least ten to fifteen years and the injured area will more than likely show advanced signs of degenerative processes, such as arthritis. Endres stated that Adams would need periodic physical therapy visits and periodic injections to settle down muscle spasms. He believed that Adams would benefit from a radio frequency procedure that would be administered about once a year. He estimated his fees for future procedures to be approximately $3,000 to $5,000 per year. He agreed that a restriction of twenty-five to thirty pounds for lifting was "very reasonable."

¶5 Endres also testified that ultimately, Adams' condition will never get better, only worse, and for him to survive, he will need to make adjustments in his work and activities. The injury will "resolve in terms of his adaptation to this injury that he has, which will never get better and only get worse."

¶6 In response to questions regarding the subjectivity of Adams' complaints, Endres testified that he

> was always impressed by [Adams'] tremendous work ethic, in terms of his business with lawn care and his snowplowing. … I always got a sense that his desperation wasn't so much because of the pain, it was because it affected … his ability to do the job that he needed to do and wanted to do to care for his family.

He also testified to the effect that small injuries, while significant, are not always visible on medical tests due to insensitivity of instruments.

¶7 Kado presented his medical expert, Dr. John Dowdle, who is an orthopedic surgeon specializing in spine work. Dowdle testified that Adams suffered mid-thoracic pain from muscle or ligament strain suffered in the accident. He believed the injury was not permanent. Because of Adams' subjective complaint of pain, Dowdle suggested a thirty-pound lifting restriction to manage his pain.

¶8 When asked if the complaint of pain would resolve over time, Dowdle stated, "Well, it's hard to say because I can't see a reason for his complaint of pain." Dowdle testified that Adams needs no additional medical care or treatment. While Dowdle stated that the restrictions were temporary, he also agreed on cross-examination that he could not guarantee that the pain would ever go away.

¶9 At the time of the 2004 trial, Adams was twenty-eight years old and a 1994 high school graduate. He obtained one and one-half years of training as a welder and, in 1998, started working at a welding business in Eau Claire. He worked the night shift, but lost his job due to tardiness. He received no complaints regarding his welding and testified, "they thought my welding was good." Adams then started his own welding business, building cattle chutes, bale forks, buckets for tractors and trailers; he also repaired farm equipment. Adams was frequently paid in cash and did not file income tax returns for 1999 or 2000.

¶10 Approximately five months after the accident, Adams discontinued welding due to his back pain. He began a lawn care/snow removal business in 2001 and began to earn more than before the accident. However, he continued to

have similar back pain. He testified he is not able to shovel snow and the lawn care "was probably stupid to do. … I thought … I could ride on a mower. … But … [y]ou're always bouncing up and down … so it was probably not the best choice to do that. But … where else to go."

¶11 Adams testified that he has done some "light duty" carpentry work. However, he stated his doctors have advised him,

> you shouldn't bend, you shouldn't lift, you shouldn't twist, that kind of thing, and that pretty much rules out anything I do. So their suggestion … was to have someone help with some of that stuff …. I do try to get someone to help as much as I can, but that's just not always possible either.

¶12 Jay Smith, Adams' vocational expert, testified that welders are categorized as requiring medium lifting, up to fifty pounds. Smith stated that with over four years of experience, Adams could expect to earn average wages and benefits equaling $22.54 per hour. Smith testified to the effect that medical restrictions of twenty-five to thirty pounds would prevent Adams from being a welder. Smith further testified that, given Adams' background as a tradesman, his physical restrictions limited him to jobs paying $9 to $10 per hour. With retirement at age sixty-seven, a $5 per hour wage differential would result in $200 per week or $10,000 per year, and after forty years, would total $400,000.

¶13 On cross-examination, Smith acknowledged that he was unfamiliar with what Adams earned before the accident and that Dowdle's report indicated that Adams' condition may eventually improve. He also testified that Adams' lawn/snow care business was typically categorized in the fifty-pound medium range of lifting requirements.

¶14 Kado presented a vocational expert, Thomas Herro, who testified that before the accident, no doctor had placed any physical limitations on Adams. He also opined that Adams suffered no loss of earning capacity as a result of the accident. On cross-examination, Adams challenged Herro's credentials as an expert. Herro agreed that he works more hours as a chaplain than as a vocational expert and generally testifies for the defense. Herro also admitted that he had no knowledge whether Adams' back condition had shown any improvement and that workers should find suitable employment within their restrictions. In addition, Herro agreed that the twenty-five to thirty-pound lifting restriction precluded welding and, for the most part, carpentry, although some carpentry may be possible. He also testified to the effect that retraining would take Adams out of the work force, during which time he would not be receiving any income. He acknowledged that Adams had children to support.[3]

¶15 The jury returned a verdict in Adams' favor and awarded damages of $687,401.06. In post-verdict motions, the court reduced the damages by $6,114.06 for certain medical expenses that had been listed and discharged in Adams' bankruptcy. The court entered judgment for $681,287.

1. Evidentiary rulings

¶16 Kado argues that the circuit court made a number of erroneous evidentiary rulings. Because the court correctly applied the law and the record reflects a proper exercise of discretion, we affirm the court's ruling. The admission of evidence is addressed to trial court discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We do not upset a circuit court's

[3] The record indicates that Adams has four sons.

evidentiary ruling if the decision has a reasonable basis and was made in accordance with the accepted legal standards and facts of record. ***Id.*** In the exercise of its discretion, the trial court must determine whether, under WIS. STAT. § 904.03,[4] relevant evidence must be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶17 Kado claims the court erred when it denied admission of a medical record written by one of Adams' physicians, Dr. Donald Bodeau. He argues that the trial court misapplied the case of ***Noland v. Mutual of Omaha Ins. Co.***, 57 Wis. 2d 633, 205 N.W.2d 388 (1973). We disagree.

¶18 Kado did not call Bodeau as a witness, but offered a medical record excerpt from 2001, in which Bodeau stated:

> Without specific diagnosis to explain his symptoms, his legal efforts will be difficult. On my examination, I do not see anything that makes me believe that he should hold back from any particular occupational activity, nor should he require any specific work restriction.[5]

¶19 The trial court ruled that the statement was incomplete and therefore would be confusing:

> The difficulty that I see with the opinion … is this: The doctor is saying … kind of, and it isn't clear without a

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[5] Kado ultimately agreed that the first sentence of the above excerpt could be deleted.

> specific diagnosis as to why that [pain is] happening and he [isn't] making … an opinion as to what's causing the pain … so you read the two together, this guy has got thoracic pain, I don't make any diagnosis, I don't make a specific diagnosis of why he's got pain, it's an incomplete opinion, one that would be confusing and one that needs testimony. The motion in limine is granted.

¶20 The record demonstrates the court properly exercised its discretion when it declined to admit the medical record excerpt. In ***Noland***, our supreme court held that medical records containing diagnostic statements and medical opinion may be admitted without requiring the physician to testify. ***Id.*** at 641-42. However, "[a]s is required in applying any rule that permits evidence to be admitted, the trial judge is to use sound judicial discretion in determining whether under the circumstances the particular record should be admitted." ***Id.*** at 641.

¶21 Our supreme court approved of the following guidelines:

> It would seem that the determination of whether an opinion or diagnosis should be admitted should depend upon the character of the entry. If it is a routine diagnosis, readily observable, and one which in the judgment of the trial court competent physicians would not differ, the time and inconvenience of requiring the author to testify outweighs the need for producing him. If the entry requires explanation and is a matter of discriminating judgment, then the author should be present for cross-examination.

Id. (citation omitted).

¶22 We applied this guideline in ***Pophal v. Siverhus***, 168 Wis. 2d 533, 547, 484 N.W.2d 555 (Ct. App. 1992), and sustained the trial court's decision to exclude a medical record in a case that involved disputed medical expert testimony, stating:

> The trial court understood that opinions or diagnoses in medical records are admissible under sec. 908.03(6), Stats. [1991-92]. The court nevertheless properly exercised its discretion to exclude the evidence, relying on ***Noland v.***

> ***Mutual of Omaha Ins. Co.***, 57 Wis. 2d 633, 205 N.W.2d 388 (1973). The ***Noland*** court held that sec. 908.03, Stats., does not necessarily require admission of a medical opinion or diagnosis in a record qualifying under that rule. ***Id.*** at 641-42, 205 N.W.2d at 393. "A medical record containing a diagnosis or opinion … may be excluded in the trial judge's discretion if the entry requires explanation or a detailed statement of the judgmental factors upon which the diagnosis or opinion is based." ***Id.*** The trial court said that the crux of the case was "what caused the damage to the child, and when was it caused," that varying medical opinions would be produced at the trial and that the case involved expert against expert.

¶23 We are satisfied that the record before us reflects the court's decision as an appropriate exercise of discretion. It is apparent that the trial court understood that a medical record may be admitted if it were a routine diagnosis, readily observable, or "one which in the judgment of the trial court competent physicians would not differ." ***Noland***, 57 Wis. 2d at 641. However, when expert testimony is disputed and the entry requires explanation, the author should be present for cross-examination. ***Id.***

¶24 Kado alternatively argues that the trial court also erred because it failed to admit the record under WIS. STAT. § 907.03[6] and as impeachment evidence. Again, we disagree. Although Kado offered alternative grounds for admission, it still falls within the trial court's discretion whether to admit it. "A circuit [court] administering [§ 907.03] must be given latitude to determine when

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[6] WISCONSIN STAT. § 907.03, entitled "**Bases of opinion testimony by experts**," provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

the underlying hearsay may be permitted to reach the trier of fact ...." ***State v. Watson***, 227 Wis. 2d 167, 200, 595 N.W.2d 403 (1999). Section 907.03 "does not give license to the proponent of an expert to use the expert solely as a conduit for the hearsay opinions of others." ***Walworth County v. Theresa B.***, 2003 WI App 223, ¶9, 267 Wis. 2d 310, 671 N.W.2d 377.

¶25 Regardless of whether Bodeau's opinion was offered directly as a medical record, for impeachment of witnesses other than Bodeau, or as a record reviewed by vocational experts, Kado sought to use it to prove the truth of the matter asserted—that Adams did not need any work restrictions. The trial court had previously ruled that Bodeau's opinion was incomplete and therefore confusing. Kado's attempt to offer the record through its vocational expert did not clarify the record. Therefore, the court was entitled to reject the record in the absence of Bodeau's testimony. The court properly applied the law and gave a rational basis for its decision. Also, because Kado knew before trial that the court would not admit the medical record without some testimony from Bodeau and the record indicates no attempt to call him as a witness, Kado fails to convince us that he was prejudiced by the court's ruling. *See* WIS. STAT. § 901.03(1).[7]

¶26 Next, Kado argues that the trial court erred when it ruled that a letter from the Pain Clinic to Adams' attorney was inadmissible. Kado argues that the letter was relevant because it impeached the testimony of Smith, Adams' vocational expert. He claims the letter showed that in rendering his opinion regarding lost earning capacity, Smith relied on "testimony concerning restrictions from a physician whose office considered its physicians unqualified to render

[7] Kado provides no explanation as to why he did not call Bodeau as a witness.

opinions on that subject." Kado further claims the letter impeached Endres' testimony regarding work restrictions.[8] We reject his contentions.

¶27 The letter, authored by Dr. Mark Schlimgen, stated that the Pain Clinic sees patients for outpatient procedures of the cervical, thoracic, and lumbar spine and "It is beyond *my* area of expertise to assess disability and functional limitations." (Emphasis added.) The letter said that the patient "needs to see their referring physician or a physician specializing in occupational medicine." Adams objected to the letter on the basis of hearsay. The court denied admission on the basis of hearsay and relevancy. The court stated that because the letter referred to "my," not "our," expertise, the letter only addressed Schlimgen's ability to make assessments, not Endres'.

¶28 The record establishes a reasonable basis for the court's decision. The letter itself limited its applicability to Schlimgen, not Endres. Schlimgen was not called to testify. Thus, the court acted within its discretion ruling that the Schlimgen letter lacked foundation and probative value.

¶29 Next, Kado argues the trial court erred when it excluded evidence of Adams' chiropractic records and pre-existing low back pain. Kado claims the evidence is relevant to Adams' claim for pain, suffering and disability, as well as lost earning capacity, because it shows that Adams had problems with his lower back before the accident, which affected his enjoyment of life and ability to perform his work. Also, Kado argues the records were relevant because experts relied on them.

[8] Endres testified only that a twenty-five to thirty-pound weight restriction "sounds very reasonable to me."

¶30 Before the accident, Adams made a total of six visits to chiropractors for treatment of low back pain in the two years before the accident.[9] However, the injury Adams suffered in this case was to his thoracic back; there was no injury sustained or claim related to his low back.[10]

¶31 In determining relevance of the evidence of Adams' previous low back pain, the trial court inquired, "[W]as a question posed to any of the experts, medical folks, that based upon this treatment record for his low back, if he would have continued as a welder, he would have had periodic low back problems?" When the answer was negative, the court stated, "I don't see that without a doctor's testimony of an opinion that based upon his condition of his back and his treatment record, it's my opinion as a chiropractor or as a doctor that he will need treatment as a welder … that it's relevant." Thus, the court considered whether the low back treatments might have had an impact on Adams' occupation as a welder. The court ruled that to admit the low back evidence, Kado would have to establish its relationship to the vocational aspect of the case. The court ruled that even if relevant, its prejudicial effect outweighed its probative value.

¶32 We are satisfied the record discloses a rational basis for the court's determination. Kado points to no evidence showing a low back problem continued after the dates of the treatments and there was no testimony suggesting that his low back pain would have interfered with Adams' work as a welder. The

[9] Both parties agree that the number of visits over two years was six.

[10] Endres stated that Adams never complained of a current low back problem to him.

court was entitled to conclude that reference to records concerning a low back condition would be misleading and confusing because Adams' claim was for thoracic injury. Further, according to Kado's vocational expert, because there was no evidence of any medically imposed restrictions prior to the accident, Adams was capable of work as a welder before the accident. The court reached a reasonable conclusion that the evidence of occasional low back pain would be unduly prejudicial in evaluating a claim involving thoracic back pain.

2. Directed verdict

¶33 Kado argues that the trial court erroneously denied him a directed verdict dismissing Adams' claim for loss of earning capacity. To establish a claim for reduced capacity to earn, the plaintiff must demonstrate with reasonable probability what would have happened economically if the injury had not occurred. ***Schulz v. St. Mary's Hosp.***, 81 Wis. 2d 638, 657, 260 N.W.2d 783 (1978). The person must demonstrate an impaired ability to get or hold a job. ***Id.*** The person must also show that the injuries in question are the cause of the diminished capacity to earn. ***Id.*** at 656-57. Considering all credible evidence and reasonable inferences in the light most favorable to the nonmoving party, if there is any credible evidence to sustain a claim, it must be submitted to a jury. ***Warren v. American Fam. Mut. Ins. Co.***, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984).

¶34 Additionally, Kado argues that the court should have granted his motion for judgment notwithstanding the verdict. A motion notwithstanding the verdict accepts the findings of the verdict as true, but contends that the moving party should have judgment for reasons evident in the record other than those

decided by the jury. *See* WIS. STAT. § 805.14(5)(b). We conclude that under either test, Kado's argument fails.

¶35 Adams testified that although he had training and experience as a welder, he could not continue to work in that occupation due to injuries sustained in the accident. Smith testified that the lifting restriction precluded Adams from working as a welder where he could reasonably earn $22.54 an hour and now would likely earn $9 to $10 per hour. Herro testified that the restriction precluded Adams from working both as a welder and many types of carpentry jobs. Based on Endres' testimony that Adams' condition could be expected to worsen, the jury could infer that his thoracic injury was permanent. Dowdle testified that Adams should not lift more than twenty-five to thirty pounds until the condition was resolved. Because Endres agreed with this recommendation and testified to the effect that the injury was permanent, the jury was entitled to infer the restriction would be ongoing. This testimony supports the court's determination to deny Kado's motions.

¶36 Next, Kado relies on ***Ianni v. Grain Dealers Mut. Ins. Co.***, 42 Wis. 2d 354, 365, 166 N.W.2d 148 (1969), which states that full information as to prior employment and prior actual earnings is "not only relevant but required to aid the jury in determining [a plaintiff's lost] earning capacity." ***Ianni*** involved the claim of a housewife with no established employment outside the home at the time of trial. ***Id.*** Although she had worked prior to her 1947 marriage as a sales clerk and in a factory, and worked on two occasions during the marriage, there was no testimony regarding how long she had worked at each job or what she had actually earned. ***Id.*** Based on ***Ianni***, Kado claims that the absence of income tax records and definitive evidence about Adams' past income precluded the jury's ability to base its award on anything but speculation.

¶37 We conclude that ***Ianni*** does not hold that income tax records and past income are the only methods of proving lost earning capacity. ***Ianni*** explains:

> There is no fixed rule for estimating the amount to be recovered for loss or diminution of future earning capacity….
>
> The process of ascertaining the amount of compensation to be awarded requires (1) the determination of the extent to which such capacity has been diminished, and (2) the fixing of the amount of money which will compensate for the determined extent of impairment.
>
> The extent of the diminution or impairment of earning capacity is generally to be arrived at by comparing what the injured party was capable of earning at or before the time of the injury with what he was capable of earning after it occurred.

Ianni, 42 Wis. 2d at 364 (citation omitted).

¶38 In contrast to ***Ianni***, here there was no factual vacuum. The record discloses Adams' training, experience and work history. Medical testimony, as well as the testimony of Smith and Herro, demonstrate Adams' diminution in earning capacity as a result of his injury. Smith was entitled to base his opinion on Adams' capabilities, rather than a projection of his earnings. Employment history and earnings are not dispositive. The court based its determination on expert testimony, as well as on Adams' training and experience. Whether Adams earned up to his capacity in the past is no basis for the court to disregard the expert's testimony.

¶39 Kado further claims that Dowdle testified that the twenty-five- to thirty-pound restriction was temporary and Endres never imposed any restrictions, although he stated that a twenty-five- to thirty-pound restriction sounded

reasonable. Kado argues: "Adams tried to meet his burden by showing that one doctor imposed temporary restrictions and another doctor said his injury was permanent," but "[t]his cobbling together of the testimony of two different doctors is insufficient to maintain the claim." We disagree.

¶40 The jury is free to piece together portions of the testimony it finds credible to construct a chronicle of the circumstances of the case. *See* ***State v. Sarabia*****,** 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). As this court has frequently stated, it is not our function to review questions as to weight of testimony and credibility of witnesses. These are matters to be determined by the trier of fact and their determination will not be disturbed where more than one reasonable inference can be drawn from credible evidence. ***Valiga v. National Food Co.***, 58 Wis. 2d 232, 244, 206 N.W.2d 377 (1973).

> To the contention that this gives to the jury a power to pick and choose between conflicting statements, the answer is that such authority is at least in the hands of those who have the opportunity to observe the witness, his demeanor, manner of testifying, hesitancies and similar nuances in speaking. An appellate court has only the cold, hard type of a printed record before it, and is in a poorer position to determine which statement has the ring of truth or whether all statements are to be considered counterfeit.

Ianni, 42 Wis. 2d at 361.

¶41 Kado also argues that because Adams violated the law by failing to file income tax returns, it is contrary to public policy to allow him to profit by his wrongdoing. We are unpersuaded that Adams' failure to file income tax returns bars him from recovery on public policy grounds. *See* ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 140-41, 403 N.W.2d 747 (1987). Because the record contains evidence from which the jury could reach its verdict in Adams' favor, the

trial court correctly denied Kado's motions for directed verdict and motion notwithstanding the verdict.

3. Jury instructions

¶42 Kado argues that the trial court erred when it modified the standard jury instruction for loss of future earning capacity, WIS JI—CIVIL 1762.[11] He argues that the instruction asks the jury to speculate in considering the loss of earning capacity as an employee of another and "it was error for the trial court to instruct the jury in a manner that suggested how it should determine the outcome."

[11] The standard jury instruction WIS JI—CIVIL 1762, provides:

> If you are satisfied that (plaintiff) has suffered a loss of future earning capacity as a result of the injuries sustained in the accident, your answer to this question will be the difference between what (plaintiff) will reasonably be able to earn in the future in view of the injuries sustained and what (he) (she) would have been able to earn had (he) (she) not been injured.
>
> [**Where appropriate add the following paragraph**: Because (plaintiff) was the owner and operator of a business at the time of the accident, you should, in determining (his) (her) loss of future earning capacity, consider the character and size of the business, the capital and labor employed in the business, (and) the extent and quality of (plaintiff)'s services to the business, (and the profits of the business).]
>
> While the plaintiff has the burden of establishing loss of future earning capacity, the evidence relating to this item need not be as exact or precise as evidence needed to support your findings as to other items of damage. The reason for this rule is that the concept of (loss of future earning capacity) requires that you consider factors which, by their very nature, do not admit of any precise or fixed rule. You, therefore, are not required in determining the loss of future earning capacity to base your answer on evidence which is exact or precise but rather upon evidence which, under all of the circumstances of the case, reasonably supports your determination of damages.

We conclude that the trial court did not misstate the law and the record supports the instruction.

¶43 Over Kado's objection, the trial court added the following language to the standard instruction:

> When considering the character and size of the business, you should consider the age of Ross Adams when the business was operational and the length of time the business was in existence at the time of the accident. A person who is the owner and operator of a business may or may not continue to be so self-employed regardless of the accident. You should also consider the earning capacity of Ross Adams as an employee of another in determining the loss of future earning capacity.

The court explained its reasoning for modifying the instruction:

> In this case you have someone that was a young man, that is, that they'd been … self-employed, had been employed by another, and what have you, that a jury can use and should use its common sense with regard to making estimations of future loss of earning capacity based upon both criteria in which they believe is the most appropriate for that particular person.

¶44 The trial court has wide discretion in choosing the language of jury instructions. ***State v. Herriges***, 155 Wis. 2d 297, 300, 455 N.W.2d 635 (Ct. App. 1990). "[I]f the instructions given adequately explain the law applicable to the facts, that is sufficient and there is no error in the trial court's refusal to use the specific language requested." ***Id.***

¶45 Our supreme court has stated that the determination of future earning capacity depends not on whether the injured person would have worked by choice, but on the injury's influence on the person's capacity to earn, whether the person would have chosen to exercise it or not. *See* ***Ballard v. Lumbermens Mut. Cas. Co.***, 33 Wis. 2d 601, 608, 148 N.W.2d 65 (1967) (A plaintiff is entitled to

"compensation for his lost *capacity* to earn, whether he would have chosen to exercise it or not."). Also, "there need be no proof of the availability of future employment if there is proof of a lessened capacity." ***Id.*** While facts regarding employment history are required, *see* ***Schulz***, 81 Wis. 2d at 657, there may be an award for lost earning capacity even when post-injury earnings reflect greater income than pre-injury earnings. *See* ***Sampson v. Laskin***, 66 Wis. 2d 318, 333-34, 224 N.W.2d 594 (1975). This is because the plaintiff may have had a greater earning potential than actually realized at the time of the accident. *See* ***Patterson v. Silverdale Resort, Inc.***, 8 Wis. 2d 572, 580, 99 N.W.2d 730 (1959).

¶46 Adams presented evidence to the effect that due to weight restrictions imposed as a result of injuries received in the accident, he was no longer qualified to engage in his previous efforts as a self-employed welder. His vocational expert, Smith, presented testimony regarding the average earnings Adams could have earned had he continued working as a welder employed by another. Therefore, Adams was entitled to a jury instruction that reflected his lost capacity to earn as a welder, whether he would have exercised it or not.

¶47 Kado cites ***Featherly v. Continental Ins. Co.***, 73 Wis. 2d 273, 243 N.W.2d 806 (1976), for the rule that for a self-employed plaintiff, proof of profits should not be shown until all the elements of the nature of the business are proven. Kado argues that because Adams' business before the accident "does not support the award," the court inaccurately stated the law. We disagree. The court's instruction that the jury could consider whether Adams could have worked as a self-employed welder or as an employee of a welding business is not an inaccurate statement of the law.

¶48 Kado argues however that the record failed to support the instruction because Adams offered no evidence as to what he actually earned prior to his injury and after his injury. Thus, he contends that like the unemployed housewife in ***Ianni***, Adams' failure to provide actual earning information precludes the instruction. We disagree.

> The defendant, of course, errs if it contends that damages for the inability to work are to be measured in terms of loss of earnings. The proper test is whether the plaintiff's *capacity* to earn has been impaired, although the comparison of the earnings after the accident as compared to the earnings before the accident is some evidence of earning capacity.

Ballard, 33 Wis. 2d at 608. Adams presented evidence as to his work history, training and experience, as well as expert vocational testimony regarding a welder's expected earning capacity. Thus, impairment of his capacity to earn was established by medical and vocational testimony. Where as here, there is competent evidence that the injury is permanent, a jury could properly draw the inference that there was a compensable impairment of earning capacity. *See* ***id.*** We conclude that the trial court's instruction was supported by the record.

4. Future medical and health care expenses

¶49 Kado challenges the award of future medical expenses as excessive. The jury awarded $60,000 for future medical expenses. Kado argues that the medical experts did not give any information for the need for medical procedures beyond the next three or four years. This is a matter to be determined by the jury as the trier of fact and its determination will not be disturbed where more than one reasonable inference can be drawn from credible evidence. *See* ***Valiga***, 58 Wis. 2d at 244.

¶50 Based on Endres' testimony, the jury could have found that Adams would incur medical expenses of $5,000 per year for ten to fifteen years. We reject Kado's suggestion to substitute his inference for that drawn by the jury.

5. Bankruptcy discharge

¶51 Finally, Kado argues that the court erroneously failed to reduce the award for past medical expenses in the sums reflecting all of Adams' pre-bankruptcy liability. He claims that because Adams declared bankruptcy, all his medical bills incurred before the bankruptcy filing were discharged.

¶52 In motions after verdict, the trial court reduced Adams' award for past medical expenses by amounts listed in Adams' bankruptcy schedules. Because neither Luther Hospital nor the Pain Clinic of Northwestern Wisconsin were included on Adams' bankruptcy schedules, the court did not include their medical bills in its reduction.

¶53 Kado contends that medical bills discharged in bankruptcy are not recoverable because the collateral source rule does not apply. *See* ***Oliver v. Heritage Mut. Ins. Co.***, 179 Wis. 2d 1, 23-24, 505 N.W.2d 452 (Ct. App. 1993). He argues that the court erred when it failed to deduct those medical bills incurred as health care providers whom Adams had failed to list as creditors in his bankruptcy filing. He argues that because Adams had a no asset bankruptcy, all pre-filing debts were discharged, regardless whether Adams listed the creditors, citing ***Judd v. Wolfe***, 78 F.3d 110, 114 (3rd Cir. 1996).

¶54 Adams offers no contrary legal authority. He agrees that if all pre-petition expenses were discharged, the award for past health care expenses should be reduced by $7,340.50, reflecting bills from Luther Hospital and Pain Clinic of

Northwestern Wisconsin, who were not listed as creditors. Because Adams offers no contrary legal authority, we conclude Kado must prevail on this issue. However, in his reply brief, Kado disputes the amount of the pre-petition debt. He claims that the amount should be $9,673, not $7,340.50. Thus, we reverse the award for past medical expenses and remand with directions to the trial court to determine the amount that reflects all of Adams' pre-petition debt and reduce the award of past health care expenses accordingly.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.