[Cite as *Shepard v. Grand Trunk W. RR. Inc.*, 2010-Ohio-1853.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92711

WILLIAM E. SHEPARD

PLAINTIFF-APPELLEE

vs.

GRAND TRUNK WESTERN RAILROAD, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-558055

BEFORE: McMonagle, P.J., Sweeney, J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Grand Trunk Western Railroad, Inc., appeals from the trial court's judgments denying its motions for (1) summary judgment, (2) a directed verdict, (3) judgment notwithstanding the verdict (JNOV), or alternatively, a new trial, and (4) remittitur. Grand Trunk also challenges a portion of the court's jury instructions.

Procedural History

{¶ 2} In March 2005, plaintiff-appellee, William E. Shepard, filed this action under the Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act (LIA). Shepard alleged that during his employment with the railroad, he was exposed to asbestos and diesel fumes in violation of the FELA and the LIA, and that as a result of such exposure, he developed chronic obstructive pulmonary disease (COPD), heart conditions, and laryngeal cancer.

{¶ 3} Grand Trunk filed a motion for summary in which it alleged that the action was filed outside of the three-year statute of limitations under the FELA. The motion was denied. The case proceeded to a jury trial. The railroad moved for a directed verdict at the conclusion of both Shepard's case and the presentation of all the evidence; both motions were denied. The jury returned a verdict in favor of Shepard, finding that the railroad had violated

the FELA and the LIA, and awarded $872,756 to Shepard. The trial court subsequently entered a judgment in that amount in favor of Shepard. Grand Trunk filed motions for JNOV, or alternatively, a new trial, and remittitur, which were denied.

Facts

{¶ 4} Shepard began his employment with the railroad in 1950 and worked there continuously until his retirement in 1991.[1] Initially, he worked as a fireman on steam engines, and in 1954, became an engineer on the diesel engines until his retirement. He alleged that in both capacities he was exposed to asbestos and diesel exhaust fumes. Specifically, Shepard testified that as a fireman, he was exposed to asbestos and asbestos dust while working on the engines and in the buildings, especially in the roundhouse where the steam engines were repaired. According to Shepard, the asbestos lining the steam engine pipes where he worked were "raggedy" and asbestos was on the floor and piled against the walls in the roundhouse. He described "walking through" loose asbestos in the roundhouse. Shepard also testified that he was exposed to asbestos on the pipes of the diesel engines when he worked as an engineer.

[1]He started with the Detroit & Toledo Shoreline Railroad; it merged with Grand Trunk in 1989 or 1990.

{¶ 5} Shepard further described his exposure to diesel fumes. He testified that many times the diesel fumes "would come into your cab and just about suffocate you." According to Shepard, the fumes would enter the cab through leaky windows and doors, as well as through the floorboards. He described how he and his coworkers would sometimes stuff the cracks with paper towels. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 6} Shepard began having breathing problems at least by 1986. He was diagnosed with COPD in December 1986, had heart surgery in the late 1980's, and was diagnosed with laryngeal cancer in August 2000. He testified that sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment. He further testified, however, that he never told the doctor what he did for a living and he only saw that doctor on one occasion. According to Shepard, no other doctor or health care provider told him that his problems were related to his work.

{¶ 7} Shepard testified that he did not know, or have reason to know, that the substances he was exposed to were harmful to his health. He explained that the first time he became aware of the harmful effects of the substances was in 2005 when he was at a picnic for the railroad's retirees, saw a sign posted about breathing problems, and heard some other retirees discussing it.

{¶ 8} Shepard admitted to a long history of heavy cigarette smoking. Further facts will be developed in addressing the assignments of error.

Law and Analysis

The FELA and LIA

{¶ 9} A brief review of the FELA and LIA will be helpful. The FELA provides, in relevant part, that: "[e]very common carrier by railroad while engaging in [interstate] commerce * * * shall be liable to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the [carrier's] negligence." 45 U.S.C. §51.

{¶ 10} To recover damages under the FELA, the plaintiff's injury must occur while acting within the scope of his employment and in furtherance of the employer's interstate business. See *Green v. River Terminal Ry. Co.* (C.A.6, 1985), 763 F.2d 805, 808. The employer's negligent conduct must also play a role in causing the employee's injury. Id.

{¶ 11} Congress enacted the FELA as a "broad remedial statute" to assist railroad employees when an employer's negligence causes injury. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-62, 107 S.Ct. 1410, 94 L.Ed.2d 563. The FELA is a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety."

Sinkler v. Missouri Pacific RR. Co. (1958), 356 U.S. 326, 329, 78 S.Ct. 758, 2 L.Ed.2d 799. The Act is intended to be read liberally in favor of injured railroad employees. *Urie v. Thompson* (1949), 337 U.S. 163, 180, 69 S.Ct. 1018, 93 L.Ed. 1282.

{¶ 12} To supplement the FELA and to "facilitat[e] employee recovery," Congress enacted the LIA.[2] *Urie* at 189, 191; 49 U.S.C. §20701. The LIA requires that a locomotive must be "safe to operate without unnecessary danger of personal injury." Id. The LIA additionally empowers the Secretary of Transportation to prescribe regulations applicable to the railroad industry. When an employee can prove an employer has violated the LIA or a rule or regulation promulgated under the LIA, this "is effective to show negligence as a matter of law"; the employee need not show that the defendant employer's conduct was unreasonable. *Urie* at 189. So while the FELA generally requires that negligence be shown, a violation of LIA and its regulations suffices to prove negligence.

{¶ 13} The FELA and LIA should be read together as companion statutes. *Baltimore & O.R. Co. v. Groeger* (1925), 226 U.S. 521, 528, 45 S.Ct. 169, 69 L.Ed. 419. Because the LIA does not create an independent cause of action for personal injuries, injured parties rely on the FELA to recover

[2]Formerly known as the Locomotive Boiler Inspection Act.

damages caused by a LIA violation. *Matson v. Burlington N. Santa Fe RR.* (C.A.10, 2001), 240 F.3d 1233, 1235.

Motion for Summary Judgment

{¶ 14} In its first assignment of error, the railroad contends that the trial court erred by denying its motion for summary judgment.

{¶ 15} Appellate review of the trial court's ruling on a motion for summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. The Ohio Supreme Court enunciated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-70, 1998-Ohio-389, 696 N.E.2d 201, as follows:

{¶ 16} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor."

{¶ 17} Grand Trunk's motion for summary judgment was based on its claim that Shepard filed his case outside of the applicable statute of limitations. We disagree.

{¶ 18} The FELA provides that "no action shall be maintained under this act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. §56. Courts have consistently used "the discovery rule"

to determine when the statute of limitations for a FELA claim begins to run. *Urie* at 170; *Campbell v. Grand Trunk W. RR. Co.* (C.A.6, 2001), 238 F.3d 772, 775; *Shesler v. Consol. Rail Corp.*, 151 Ohio App.3d 462, 2003-Ohio-320, 784 N.E.2d 725, ¶76. Under the discovery rule, the statute of limitations "begins to run when the reasonable person knows, or in the exercise of due diligence should have known, both his injury and the cause of that injury." *Campbell* at 775.

{¶ 19} Grand Trunk argues that at least by the late-1980's, in regard to the COPD, and by August 2000, in regard to the laryngeal cancer, Shepard had an affirmative duty to investigate the cause of his illnesses. In support of its claim, the railroad relies solely on Shepard's admission that, sometime prior to 1987, a doctor told him that his breathing problems could have been caused by his environment.

{¶ 20} Shepard, however, testified and averred (in a discovery deposition and affidavit) that he only saw that doctor on one occasion, he never told him what he did for a living, and no other doctors or health care providers ever alerted him to the cause of his health problems. Shepard further testified that although he knew what asbestos was and that he was working with it, he did not know it, or the diesel fumes, were harmful and the railroad never provided any warnings or indication to its employees that they were. Further, Shepard had a long history of heavy cigarette smoking. In fact, in

regard to Shepard's laryngeal cancer, the railroad's expert on this issue, Dr. Pierre Lavertu, was of the opinion that "the relationship between asbestos and laryngeal cancer is still controversial" and that Shepard's cancer was "secondary to his smoking habits." Thus, had Shepard seen Dr. Lavertu upon being diagnosed with laryngeal cancer, he would not have been told that his cancer was related to his asbestos exposure.

{¶ 21} On this record, the trial court did not err by denying Grand Trunk's summary judgment motion. The first assignment of error is overruled.

Motions for Directed Verdict and JNOV

{¶ 22} For its second assigned error, Grand Trunk contends that the trial court erred by denying its motions for a directed verdict and JNOV.

{¶ 23} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

{¶ 24} "When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 25} The same standard applies to a motion for judgment notwithstanding the verdict. *Chem. Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 207, 556 N.E.2d 490. We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

1. Diesel Exhaust

{¶ 26} The railroad maintains that Shepard failed to demonstrate an injury based on exposure to diesel exhaust. Specifically, it claims that Shepard failed to demonstrate that the locomotives on which he worked were not in proper condition and were not safe to operate.

{¶ 27} The LIA provides that: "A railroad carrier may use or allow to be used a locomotive or tender on its railroad lines only when the locomotive or tender and its parts and appurtenances —

{¶ 28} "(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

{¶ 29} "(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

{¶ 30} "(3) can withstand every test prescribed by the Secretary under this chapter." 49 U.S.C. §20701.

{¶ 31} This court has held that "the LIA may be violated in two ways: (1) by failing to comply with Federal Railway Regulations, or (2) by fail[ing] to keep the locomotive in safe working condition." *Hager v. Norfolk & W. Ry. Co.*, Cuyahoga App. No. 87553, 2006-Ohio-6580, ¶31, citing *Mosco v. Baltimore & Ohio RR.* (C.A.4, 1987), 817 F.2d 1088, 1091; *Reed v. Norfolk S. Ry. Co.* (N.D.Ohio, 2004), 312 F.Supp.2d 924, 926.

{¶ 32} Shepard's claim relative to exposure to diesel fumes was based on 49 C.F.R. §229.43(a), which provides that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating circumstances."

{¶ 33} In *Hager*, supra, this court found that the denial of a railroad's motion for a directed verdict on the plaintiff's claim of injury due to exposure to diesel fumes was proper. The employee offered the testimony of Dr. Leonard Vance, an industrial hygienist, who also testified for Shepard in this case. His opinion in this case was the same as in *Hager*: "Well, the Federal Railroad Administration has a regulation that prohibits diesel exhaust from coming into the cab of a locomotive, and what [Shepard] told me in his testimony in his deposition was consistent with that, was that it was a commonplace thing; that routinely happened that the cab would get diesel

exhaust in. So I offered an opinion on whether or not the railroad had complied with that regulation. The opinion was that it hadn't." See, also, *Hager* at ¶34.

{¶ 34} Grand Trunk argues that *Hager* is not dispositive because: (1) it conflicts with this court's opinion in *Shesler*, supra, which stated that "[t]o establish a violation of the LIA, a plaintiff must show that the carrier's equipment is defective[,]" (citations omitted) id. at ¶62, and (2) there was testimony in this case that the fumes entered the cabs through windows opened by employees — a circumstance beyond the control of the railroad. We are not persuaded.

{¶ 35} First, although this court in *Shesler* did cite a 1948 Second Circuit case for the proposition that a plaintiff must demonstrate that a carrier's equipment was defective to show a violation of the LIA, this court also stated that "[f]urther, the jury could find that the conditions to which the appellees were exposed on the appellant's railroad posed the very 'unnecessary danger of personal injury' contemplated by [the] LIA. 'Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.'" *Shesler* at ¶66, quoting 49 U.S.C. §20702(1), and *Lavender v. Kurn* (1946), 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed.2d 916.

{¶ 36} Second, the testimony of Shepard's coworker, Larry Berger, that sometimes fumes came into the cabs because employees opened the windows,

must be taken in context. Specifically, Berger testified that the fumes would come in through cracks that were present throughout the cab. He described that “[t]he smoke comes from everywhere feasible. There is no way to escape it. It’s an impossibility to escape.” Berger therefore testified that the only way to ventilate the cab was to open the windows.

{¶ 37} Similarly, Shepard described the fumes as “suffocating,” and testified that he and his coworkers would sometimes stuff the cracks with paper towels. Moreover, one of Grand Trunk’s experts, Edward English, admitted that under the circumstances described by Shepard and Berger, a violation of the LIA occurred. Shepard further testified that he was exposed to diesel fumes when he worked in the yard where the engines operated.

{¶ 38} On this record, the trial court properly denied the railroad’s motions for a directed verdict and JNOV as to Shepard’s claim based on exposure to diesel fumes.

2. Asbestos Exposure

{¶ 39} Grand Trunk also claims that Shepard failed to demonstrate an injury based on asbestos exposure. In support of its claim, the railroad argues that the mere presence of asbestos on a locomotive is not a violation of any federal regulation, as admitted by Shepard’s expert, Dr. Vance. The evidence presented by Shepard went beyond the mere presence of asbestos, however. For example, Shepard testified about pipes on the locomotives

wrapped in "raggedy" asbestos insulation and that asbestos was "piled up" in a tool cage in the roundhouse. Berger, Shepard's co-worker, also testified to asbestos being out in the open.

{¶ 40} On this record, the trial court properly denied Grand Trunk's motions for a directed verdict and JNOV on Shepard's LIA claim based on asbestos exposure.

{¶ 41} In light of the above, the second assignment of error is overruled.

Jury Instructions

{¶ 42} Grand Trunk contends that, over its objection, the trial court improperly quantified the degree of causation in its negligence instruction to the jury. Specifically, the trial court included the phrases "however slight," "no matter how slight," and "even the slightest" in its causation instruction. The railroad sought to have the court instruct with the phrase "in whole or part." The railroad largely relies on two United States Supreme Court cases in support of its contention that the instruction given was in error: *Norfolk S. Ry. Co. v. Sorrell* (2007), 549 U.S. 158, 127 S.Ct. 799, 166 L.Ed.2d 638, and *CSX Transp., Inc. v. Hensley* (2009), ___U.S.___, 129 S.Ct. 2139, 173 L.Ed.2d 1184. The railroad further argues that this court's decision in *Hager*, supra, which supports the instruction given, is flawed. We disagree.

{¶ 43} In *Sorrell*, the Supreme Court *declined* to address what standard for railroad negligence and employee contributory negligence should be used

in instructing a jury in a case brought under the FELA. Rather, the Court held "that the causation standard should be the same for both categories of negligence[.]" Id. at 160.[3] Further, *Hensley* is not helpful to this case. Grand Trunk quotes with emphasis as follows from *Hensley*: "'* * * the nature of [asbestos] claims enhance the danger that a jury, without proper instruction, could award * * * damages based on slight evidence * * *.'" Grand Trunk's Brief at pg. 25, quoting *Hensley* at 2141. That quote, however, must be considered in context.

{¶ 44} Hensley brought suit against the railroad under the FELA for injuries sustained from his exposure to asbestos and a cleaning agent. He sought pain-and-suffering damages based on, among other things, his fear of developing lung cancer in the future. The trial court denied the railroad's proposed jury instruction that "'[i]n order to recover, Plaintiff must demonstrate * * * that the * * * fear is genuine and serious.'" Id. at 2140, quoting defendant's proposed jury instruction no. 30. The Supreme Court held that the trial court erred by not giving the instruction, stating:

{¶ 45} "Instructing the jury on the standard for fear-of-cancer damages would not have been futile. To the contrary, the fact that cancer claims could

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[3]As noted by Grand Trunk, the trial court did not use the same phraseology it used when instructing on the railroad's negligence as when instructing on Shepard's negligence. We find the error to be harmless, however, in light of the fact that the jury found Shepard 82% negligent for his COPD and heart condition and 85% negligent for his laryngeal cancer.

‘evoke raw emotions’ is a powerful reason to instruct the jury on the proper legal standard. Giving the instruction on this point is particularly important in the FELA context. That is because of the volume of pending asbestos claims and also because the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff's fear of contracting cancer. But as this Court said in [*Norfolk & W. Ry. Co. v.*] *Ayers* [(2003), 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261], more is required. Although plaintiffs can seek fear-of-cancer damages in some FELA cases, they must satisfy a high standard in order to obtain them. 538 U.S., at 157-158, and n. 17, 123 S.Ct. 1210. Refusing defendants’ requests to instruct the jury as to that high standard would render it all but meaningless.” *Hensley* at 2141.

{¶ 46} Because the *Hensley* Court was concerned with jury instructions for the unique aspect of emotional-distress damages based on the fear of developing cancer in the future, Grand Trunk’s citation to that case is misplaced.

{¶ 47} In *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, the United States Supreme Court considered whether, under a claim based on the FELA, the probative facts of the case warranted submission of the case to the jury. The court held that “the test of a jury case is simply whether the proofs justify with reason the conclusion

that [employer] negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Id. at 506. Citing *Rogers*, this court in *Hager*, supra, upheld jury instructions in a FELA railroad case containing the phrase "even the slightest." We similarly uphold the instructions given in this case. Accordingly, the third assignment of error is overruled.

Motion for New Trial

{¶ 48} In its fourth assigned error, Grand Trunk contends that the trial court committed numerous errors, all involving the admission or exclusion of evidence, the cumulative effect of which entitled it to a new trial.

{¶ 49} The decision to grant or deny a motion for new trial rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224, 649 N.E.2d 1219. The admission or exclusion of evidence is likewise within the sound discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶20. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

1. Disparate Application of Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division[4]

{¶ 50} Grand Trunk contends that the trial court disparately applied the rule because it precluded the railroad's expert from testifying about the lack of studies linking Shepard's cancer to asbestos exposure, but allowed Shepard's expert to testify as to his prognosis of death, which was not contained in his expert report. The primary purpose of the rule is "to avoid prejudicial surprise resulting from noncompliance with the report requirement." *Blandford v. A-Best Products*, Cuyahoga App. Nos. 85710 and 86214, 2006-Ohio-1332, ¶14.

{¶ 51} The railroad's expert, Dr. Pierre Lavertu, acknowledged in his expert report that there were studies showing a "possible association" between laryngeal cancer and asbestos exposure. The railroad sought to have him testify at trial that there were *no* studies linking asbestos exposure to laryngeal cancer and that the studies finding a causal link between the two did not involve any throat specialists. The testimony the railroad sought to elicit was contrary to Dr. Lavertu's report. The trial court therefore did not abuse its discretion by not allowing it.

[4]The rule provides in relevant part as follows: "A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. * * * The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report."

{¶ 52} Likewise, the trial court did not abuse its discretion by allowing Shepard's expert, Dr. Shakil Khan, to testify as to Shepard's prognosis of death. The trial court reasoned that, although such prognosis was not contained in Dr. Khan's report, the prognosis would not "come [ ] as any great surprise to the defense." This court has previously held that application of Loc.R. 21.1 "must be determined on a case-by-case basis." *O'Connor v. Cleveland Clinic Found.*, 161 Ohio App.3d 43, 2005-Ohio-2328, 829 N.E.2d 350, ¶21. With that in mind, and affording due deference to the trial court as we must, there was no abuse of discretion by allowing Dr. Khan's testimony.

<u>2. Testimony From Shepard's Expert, Dr. Arthur Frank, Regarding the Causal Relationship Between Shepard's Cancer and his Asbestos Exposure</u>

{¶ 53} The railroad contends that Dr. Frank's testimony and opinion regarding Shepard's laryngeal cancer were not based on reliable scientific, technical, or other specialized information as required under Evid.R. 702. We disagree.

{¶ 54} Dr. Frank relied on several sound scientific sources, including the National Academy of Science and the Journal of the American Medical Association, in forming his opinion. He admitted that there were reliable and valid sources rendering opinions on both sides of the issue of whether there is a causal relationship between laryngeal cancer and asbestos

exposure. Even the railroad's expert on this issue, Dr. Lavertu, testified that "although the relationship between asbestos and laryngeal cancer is still controversial many studies have [shown] a possible association with a risk factor around 1.5." Dr. Frank's testimony was proper under Evid.R. 702, and the trial court did not abuse its discretion by allowing it.

3. Photographs and the United Transportation Union Complaint Letter

{¶ 55} Three photographs of locomotives were admitted into evidence over the railroad's objection. The locomotives in the photographs were not ones on which Shepard had worked, but he testified that they depicted the working conditions under which he had worked. Grand Trunk contends that the photographs were (1) not authenticated under Evid.R. 901(A), (2) irrelevant, and (3) highly prejudicial.

{¶ 56} Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Shepard testified what the photographs depicted and that the conditions shown in the images were fair and accurate representations of the locomotives and roundhouses on and in which he worked. The photographs were therefore authenticated.

{¶ 57} Further, the conditions under which Shepard worked were relevant and the probative value of the photographs was not "substantially

outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). Moreover, prior to the use of the photographs, the trial court gave a limiting instruction to the jury, in which it explained that there was no indication that the photographs were of locomotives on which Shepard actually worked and cautioned the jury that "[t]hey are solely given to you because Mr. Shepard says, '[t]his looks like what I was working under,' but it's for you ultimately to decide whether or not you want to accept that." On this record, the trial court did not abuse its discretion by admitting the photographs into evidence.

{¶ 58} The Union letter, dated December 17, 1971, which was read by Dr. Vance (Shepard's expert) during his testimony, refers to a complaint about diesel fumes made by employees at Grand Trunk's Pontiac, Michigan site.[5] Grand Trunk objected to the letter on the grounds that (1) it was unauthenticated, (2) it was irrelevant because Shepard never worked at the Pontiac, Michigan site, (3) it was highly prejudicial.

{¶ 59} Documents can be authenticated under the ancient documents rule contained in Evid.R. 901(B)(8) if, "[e]vidence that a document * * *, in any form, (a) is in such condition as to create no suspicion concerning its

[5]The letter was not admitted into evidence, but Grand Trunk contends that "the harm was already done as the jury was made aware of the contents of this unauthenticated, irrelevant and prejudicial letter through Dr. Vance's testimony."

authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered."

{¶ 60} The letter was obtained by Shepard's counsel from Grand Trunk through discovery in another case. There was no evidence creating suspicion about its authenticity, and it was more than 20 years old at the time it was used. On this record, the letter was authenticated. Moreover, as with the photographs, the letter was relevant and its probative value was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶ 61} In light of the above, the trial court did not abuse its discretion by admitting the photographs into evidence and allowing Dr. Vance to read the Union letter during his testimony.

4. Exclusion of the Locomotive Crash Worthiness and Cab Working Conditions Report for Purposes of Cross-Examining Dr. Vance

{¶ 62} The Report was created in 1996 by the Federal Railroad Administration and contained the investigative results performed by General Electric and the Electromotive Division of General Motors (the same manufacturers used by Grand Trunk during the period of Shepard's employment) regarding the asbestos exposure in locomotive cabs.

{¶ 63} In *Hager*, supra, this court addressed the use of the Report in cases where the employee retired before its creation, stating that "the report

was published in 1996, nine years after [the employee] ended his employment with the railroad. There was no evidence presented that any of the statements contained in the report accurately represented the working conditions encountered by [the employee] between 1943 and 1987." Id. at ¶23.

{¶ 64} Here, Shepard retired from Grand Trunk in 1991, five years before the Report was created. Thus, on the authority of *Hager*, the report was properly excluded.

5. Dr. Vance's Reading to Jury Portions of Shepard's Discovery Deposition

{¶ 65} At trial, Dr. Vance read a portion of Shepard's discovery deposition and testified that he relied on that portion of the deposition in forming his opinion. The railroad objected because Dr. Vance's testimony came after Shepard's trial testimony, Shepard did not testify at trial to the portion of his discovery deposition read by Dr. Vance and, therefore, the railroad was not able to cross-examine him on this testimony.[6]

{¶ 66} The railroad cites *Hager* in support of its contention. There, the defendant railroad sought to present evidence of the employee's prior lawsuits and to read his interrogatory answers and his depositions from those lawsuits to impeach his credibility. The trial court refused the request, and this

[6] Specifically, Shepard testified at deposition that "I would be walking through the roundhouse on a sunny day. It was so dusty with asbestos that you couldn't see your hand in front of your face."

court affirmed, stating "[t]he trial court properly refused to allow [the railroad] to introduce evidence regarding [the employee's] prior lawsuits after his trial testimony had been completed. The proper time to have pursued this matter would have been when [the employee] was cross-examined. However, [the railroad] failed to ask him regarding his other lawsuits during cross-examination. [The railroad] could not then attempt to impeach him by reading his interrogatories and depositions from other lawsuits because this would prevent [the employee] the opportunity to provide further explanation. Because of his health problems, [the employee] was not present at the trial, and could not have been called to rebut this evidence." Id. at ¶20.

{¶ 67} Here, the testimony was not offered for the purpose of impeachment; rather, it was offered as an explanation of the basis of Dr. Vance's opinion. Evid.R. 705 provides that "[t]he expert may testify in terms of opinion or inference and give the expert's reasons therefor after disclosure of the underlying facts or data." The rule requires disclosure to "insure that the trier of facts is aware of the facts upon which the [expert's] opinion rests, so that in the event that the trier of facts rejects these facts as not having been established by the evidence, it will then be warranted in rejecting the opinion also." *Mayhorn v. Pavey* (1982), 8 Ohio App.3d 189, 191, 456 N.E.2d 1222.

{¶ 68} Further, the trial court gave a cautionary instruction to the jury, advising it that Dr. Vance was reading from Shepard's discovery deposition, not his trial testimony, and it would be up to the jury to determine whether Shepard's testimony was reliable. Moreover, Dr. Vance's report provided that, in forming his opinions, he "talked with Mr. Shepard and read his [discovery] deposition." Thus, the railroad was put on notice that the basis of Dr. Vance's opinions would be disclosed at trial. Accordingly, the trial court did not abuse its discretion by allowing Dr. Vance to read a portion of Shepard's deposition testimony.

<u>6. Shepard's and Berger's Testimony about the Asbestos Content of Dust and Pipe Covering</u>

{¶ 69} The Railroad contends that the trial court improperly allowed Shepard and his co-worker, Berger, to testify about their exposure to asbestos and asbestos-containing products because a foundation was not laid to demonstrate that they had personal knowledge of asbestos.

{¶ 70} Evid.R. 602 provides in part that, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

{¶ 71} This court addressed this argument in *Shesler*, supra, where the defendant railroad contended that testimony given by the plaintiffs about

their exposure to asbestos lacked a proper foundation. The two plaintiffs testified that they became familiar with asbestos during their 40-plus years working for the railroad. Further, one plaintiff testified that he saw the word "asbestos" marked on materials being used. Both plaintiffs testified that they saw asbestos in the cabs of the locomotives on which they worked and witnessed other employees working with it around the yard.

{¶ 72} This court found that the testimony was properly admitted because "it [was] clear that the [plaintiffs] offered sufficient evidence to establish their personal knowledge of asbestos products, specifically, their personal exposure to products containing asbestos while employed on the railroad." Id. at ¶23. This court distinguished that case from *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 514 N.E.2d 691, a case relied on by Grand Trunk here.

{¶ 73} In *Goldman*, the Ohio Supreme Court held that the wife of a former bakery worker could not offer affidavits from several witnesses that they "believed" and "were told" that certain products in the bakery contained asbestos because they were not based on the personal knowledge of the witnesses.

{¶ 74} This court held that "there is a marked difference in the testimony of the [plaintiffs] based on personal knowledge which specifically referred to asbestos as opposed to the situation in *Goldman*, which was based

largely on speculation and allegations by secondary witnesses." *Shesler* at ¶21. Likewise, here, Shepard and Berger had personal knowledge of the presence of asbestos from their extensive railroad careers — 40-plus years for Shepard and almost 30 years for Berger. Both testified that they knew what asbestos looked like, they knew it was used on the railroad, and it was present on the railroad throughout their careers. On this record, the trial court properly allowed Shepard's and Berger's testimony.

7. The 1995 Deposition Testimony of Robert Yeager and the 1999 Videotape Deposition Testimony of Dr. Vincent Gallant

{¶ 75} Grand Trunk's final two grounds for a new trial were based on the trial court allowing Shepard to (1) read into evidence portions of the 1995 deposition testimony of Robert Yeager and (2) play the 1999 videotape deposition testimony of Dr. Vincent Gallant. The witnesses were declared unavailable and their testimony was therefore exempted from the hearsay rule. Grand Trunk contends that their testimony should have been excluded because they were not deposed for this case, and their testimony was irrelevant and unfairly prejudicial.

{¶ 76} Evid.R. 804 governs hearsay exceptions when a witness is unavailable. Subsection A of the rule defines unavailability and "includes any of the following situations in which the declarant: * * * (4) is unable to be present or to testify at the hearing because of death or then-existing physical

or mental illness or infirmity[.]" If the proponent of the testimony can demonstrate unavailability, Evid.R. 804(B)(1) allows testimony given at another hearing of a different proceeding to come into evidence "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

{¶ 77} Yeager, who was deceased at the time of the trial here, had been a co-worker witness in a Michigan asbestos case against Grand Trunk. Because Yeager was deceased at the time of trial, he was an unavailable witness under Evid.R. 804(A)(4). Dr. Gallant, who was the former Grand Trunk medical director, a Michigan resident, and had previously testified in a Michigan asbestos case (a different case from Yeager's), indicated to Shepard that he would not appear in court to testify because of his advanced age of 80 and poor health. Because of his physical illness or infirmity, Dr. Gallant was also an unavailable witness under Evid.R. 804(A)(4). We therefore consider whether Grand Trunk had an opportunity and similar motive to develop Yeager's and Dr. Gallant's testimony in the Michigan cases as required under Evid.R. 804(B)(1). Upon review, we find that it did.

{¶ 78} Specifically, both Michigan cases involved work injuries stemming from asbestos exposure on Grand Trunk's railroad. The witnesses' testimony in the Michigan cases was presented to prove that the railroad's locomotives

contained asbestos (Yeager), and the railroad was aware of the asbestos and its harmful affects, and to show what, if any, training, education, or protection it gave to its employees (Dr. Gallant). On this record, Grand Trunk had an opportunity and similar motive to develop the testimony. Moreover, the testimony was relevant and was edited so that only the pertinent portions were admitted. Finally, the probative value of the testimony was not "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). On this record, the trial court did not abuse its discretion by allowing the testimony.

{¶ 79} In light of the above, the trial court did not abuse its discretion by denying Grand Trunk's motion for a new trial, and the fourth assignment of error is overruled.

Motion for Remittitur

{¶ 80} For its fifth and final assigned error, Grand Trunk contends that the jury's award was manifestly excessive and subject to remittitur. We disagree.

{¶ 81} We review a trial court's decision to deny remittitur under an abuse of discretion standard. See *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App.3d 211, 218, 644 N.E.2d 1058. "The assessment of damages is a matter within the province of the jury." *Carter v. Simpson* (1984), 16 Ohio

App.3d 420, 423, 476 N.E.2d 705. It is not proper for the reviewing court to substitute its opinion for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 44, 495 N.E.2d 462. The denial of a motion for remittitur is not erroneous unless the award is so excessive as to appear to be the result of passion or prejudice on the part of the jury, or unless the amount awarded is excessive and against the manifest weight of the evidence. Id. To reverse the jury's damage award, it must appear to be "so disproportionate as to shock reasonable sensibilities." *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246, 258, 598 N.E.2d 1174.

{¶ 82} The jury awarded Shepard $775,000 in unliquidated damages ($650,000 for his COPD and heart condition and $125,000 for his laryngeal cancer). It is Grand Trunk's contention that the award should have been reduced by Shepard's negligence.

{¶ 83} This court addressed this issue of apportionment of damages in *Ball v. Consol. Rail Corp.* (2001), 142 Ohio App.3d 748, 756 N.E.2d 1280:

{¶ 84} "The FELA allows workers to recover if an employer's negligence or statutory violation contributed in any way to their injuries. *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The statute also requires a parallel apportionment of damages whenever the evidence shows a worker's contributory negligence caused any part of his injuries. *Dixon v. Penn Cent. Co.* (C.A.6, 1973), 481 F.2d 833, 835.

Apportionment is not allowed, however, where an employer is liable for violating certain safety statutes, including the Locomotive Boiler Inspection Act ("LBIA"). *Rogers*, 352 U.S. at 506, fn. 12. Because the jury found an LBIA violation, [the railroad] was not entitled to apportionment for contributory negligence * * *." (Parallel pinpoint cites omitted.) Id. at 754.

{¶ 85} Here, the jury was specifically instructed that Shepard alleged that two statutory violations were at issue: (1) the FELA, which requires negligence and provides for comparative negligence and (2) the LIA, which imposes absolute liability. Under FELA, the jury found Grand Trunk negligent and also found Shepard comparatively negligent. But because the jury further found that the railroad had violated the LIA, under well-settled law, it was not entitled to apportionment of damages under a comparative negligence defense.

{¶ 86} The award was not excessive in light of Shepard's health problems. He suffered with cancer, which was resolved after two years of extensive radiation treatments. He suffers with severe and debilitating breathing problems, has been totally oxygen dependent since 2006, was hospitalized three times in 2008, and was placed on a mechanical ventilator at least once. Moreover, Grand Trunk's contention that the post-verdict discussions with the jury demonstrated that they believed the award was

going to be reduced is not persuasive — a party many not challenge the validity of the verdict using post-verdict discussions with jurors. *Cleveland Elec. Illuminating Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 274, 480 N.E.2d 794, citing Evid.R. 606(B). The jury was properly instructed and is presumed to have followed those instructions. *Nolan v. Conseca Health Ins. Co.*, Jefferson App. Nos. 07 JE 30, 07 JE 31, 2008-Ohio-3332, ¶196.

{¶ 87} In light of the above, the fifth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR