IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NORANDA ALUMINUM HOLDING COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N17C-01-152 WCC CCLD
XL INSURANCE AMERICA, INC., ET AL.,	)	
Defendants.	)	

Submitted: August 2, 2019
Decided: October 7, 2019

Defendants' Motion for a Judgment as a Matter of Law or a New Trial

GRANTED IN PART – DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

I. INTRODUCTION

Before the Court is Defendant Insurers' ("Defendants") Motion for a Judgment as a Matter of Law or a New Trial. Defendants' Motion relates to matters on which the Court previously ruled in its decision on summary judgment, in the various motions *in limine*, or at the trial. The reasons for those decisions are set forth in those Opinions or in the Court's comments during the trial. While the Court appreciates that Defendants believe those decisions were incorrect, with the exception of the issue of electricity which the Court will discuss below, the Court is convinced that there is no basis to change the jury's verdict in this matter. Defendants were given a full opportunity to present their case and to convince the jury that their position as to Noranda's ("Plaintiff") recovery was correct. This includes attempting to convince the jury that no coverage was warranted due to the financial difficulty facing Plaintiff. The jury decided to give more credibility to the witnesses and experts of Plaintiff and that was clearly within the jury's province to do. Candidly, the Court is not surprised by the verdict in light of testimony provided by Defendants' witnesses, which at times displayed such an unfettered bias it undermined their credibility. In any event, the Motion for a Judgment as a Matter of Law or a New Trial will be denied except for the changes noted further in this Opinion.

II. FACTUAL & PROCEDURAL BACKGROUND

The Court has rehashed the factual background of this case several times in prior Opinions, and it will only provide a brief recitation of the facts most relevant to the pending Motion.

This litigation stems from a property insurance policy ("the Policy") that Defendants issued to Plaintiff for the period of May 18, 2015 to May 18, 2016. The Policy included coverage for property damage and resulting time element losses at Noranda's aluminum plant in New Madrid, Missouri ("New Madrid Plant").

On August 4, 2015, a casthouse explosion occurred at the New Madrid Plant, "causing extensive property damage to the facility and equipment, necessitating significant repair costs, and resulting in lost revenue due to business interruption while production was halted by the explosion and the damage it caused."[1] After the explosion, Noranda tendered a claim to Defendants for the property damage and time element losses purportedly caused by the accident.[2] However, Defendants refused to pay most of Plaintiff's time element losses.[3]

Several months later, on January 7, 2016, two of three potlines at the New Madrid Plant froze due to a switchgear failure, which also caused "a sizeable time element loss."[4] Plaintiff subsequently tendered another claim to Defendants for the

[1] Compl. ¶ 35.
[2] *Id.* ¶ 36.
[3] *Id.*
[4] *Id.* ¶ 37.

potline freeze, and the insurers refused to make any payment for Noranda's related time element losses.[5]

On February 8, 2016, Noranda filed a petition for Chapter 11 bankruptcy.[6] Approximately one month later, on March 12, 2016, Plaintiff idled the New Madrid Plant to comply with the terms of its debtor-in-possession financing. In November 2016, Noranda ultimately sold the New Madrid Plant "as part of a bankruptcy restructuring that resulted in the liquidation of certain … assets."[7]

On January 6, 2017, Plaintiff filed its Complaint against Defendants, alleging that they "breached the Policies by failing to make the required payments for Noranda's time element losses."[8] The parties went to trial, and on July 3, 2019, a jury awarded Noranda $14,762,187.00 in time element damages for the casthouse explosion and $20,727,946.50 for the potline freeze.[9] As a result, Defendants have filed a Motion for Judgment as a Matter of Law or a New Trial.

III. MOTION FOR A JUDGMENT AS A MATTER OF LAW

A. Standard of Review

Pursuant to Superior Court Civil Rule 50(b):

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later

[5] *Id.* ¶ 38.
[6] *Id.* ¶ 40.
[7] Compl. ¶ 40.
[8] *Id.* ¶ 42.
[9] *See* Verdict Sheet; D.I. 334.

> determination of the legal questions raised by the motion ... If a verdict was returned, the Court may ... allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.[10]

Under Rule 50, this Court is required to view the evidence in a light most favorable to the nonmoving party.[11] In order to grant Defendants' Motion, this Court must find that "'there is no legally sufficient evidentiary basis for a reasonable jury to find for'" Plaintiff.[12] Thus, "the factual findings of a jury will not be disturbed if there is *any* competent evidence upon which the verdict could reasonably be based."[13]

B. Payroll

The issue of how to measure Plaintiff's losses under the Policy has been an issue of contention since this litigation began. It is not surprising that Defendants suggest that their expert's calculations are correct, that his method is the only appropriate way to calculate losses under the Policy, and as such, Plaintiff is not entitled to any recovery. While Defendants' position has fluctuated at times during the litigation, it seems they agree that if a business does not rebuild after an accident, the Policy would cover lost earnings during the time it would hypothetically be

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[10] Del. Super. Ct. Civ. R. 50(b).
[11] *Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Ct. Jan. 31, 2003).
[12] Del. Super. Ct. Civ. R. 50(a).
[13] *Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Ct. Jan. 31, 2003) (citing *Delaware Elec. Coop. Inc. v. Pitts*, 1993 WL 445474, at *1 (Del. 1993) (quoting *Mercedes-Benz v. Norman Gershman's*, 596 A.2d 1358 (Del. 1991)) (emphasis added).

required to rebuild the plant. Plaintiff obviously suffered a corresponding loss of earning power with the loss of two of their three potlines, and as such, their earnings would be significantly reduced when the accident occurred. Accordingly, the loss of these earnings is what the Plaintiff paid a significant premium to protect. In contrast, if the plant were hypothetically being rebuilt and pots were being placed back in service, Plaintiff would begin receiving income again, causing its losses covered by the Policy to gradually be reduced until the plant was again fully operational. Both parties, and their respective experts, seem to agree on this point.[14]

The real breakdown is to what extent workers who were originally let go after the accident, but who would be needed again to operate the plant if the facility were being rebuilt, should be considered in the gross earnings lost calculation when under the hypothetical rebuild that expense would never actually be incurred. Obviously, as more employees are brought back to work during a hypothetical rebuild, there would be an offset of earnings. Under the insurers' view of the Policy, they get the benefit of the production increase as the plant is rebuilt, which would reduce the Plaintiff's loss, as well as the benefit of not having to reduce those earnings by the payroll cost necessary to gain that production since those expenses were not incurred. The effect of such a position is that the earnings/losses that the insurers would cover during the timeframe of the hypothetical rebuild would be dramatically

[14] *See* Pl.'s Opp'n & Answ. To Defs.' Post-Trial Mot. for J. as a Matter of Law or a New Trial, at 5.

reduced. In fact, it is the Defendants' expert opinion that this would lead to no recovery under the Policy for their business interruption coverage. As to this issue, the Court found and continues to believe that the Defendants' interpretation is simply incorrect and would lead to an absurd and unfair result that would never have been contemplated by the parties. Plaintiff's expert ("Mr. Hess") and Defendants' expert ("Mr. Karutz") were allowed to testify regarding their calculations of the hypothetical rebuild and how it affected the determination of lost earnings. The Court does not find the testimony of Mr. Hess or Mr. Karutz to be inconsistent with the Court's previous ruling. In consideration of this Motion, the Court has again read the testimony of both experts, including the extensive voir dire that was allowed, and believes its previous ruling continues to be correct. This is simply two experts making calculations with the underlying assumptions fully presented to the jury.

What Defendants are really complaining about here is the Court preventing Mr. Karutz from testifying that, under **his** interpretation of the Policy, Noranda was not entitled to recover lost payroll because it had not been incurred and paid by Noranda.[15] He does not point to a particular provision of the Policy to support his "expert" opinion, but simply has relied upon what the insurers' counsel told him he should assume in making his calculations. The Defendants' argument again points

[15] *See* Defs.' Brief in Support of Their Post-Trial Mot. for J. as a Matter of Law or a New Trial, at 9.

to the gross earnings provision in the Policy that was addressed by the Court in its March 21, 2019 Opinion,[16] as well as in the comments above. As the Court mentioned in that Opinion, there is a dispute as to the meaning of subsection (e) of the gross earnings provision and whether it is applicable to the losses that were incurred here.[17] The Court certainly agrees that this section of the Policy is poorly written and that there is a disconnect between subsection (e) and the other sections of the gross earnings provision. While there is no phrase connecting subsection (e) to the other sections of the gross earnings calculation, it does appear to the Court that, if anything, it references "other charges and taxes" related to payroll and not the exclusion of payroll itself. The Court continues to believe that under the hypothetical rebuild, as pots would be placed back on line, payroll would be incurred and earned by workers and should be taken into account in determining losses or earnings, regardless of whether the plant was rebuilt or not. If Defendants wanted to ensure they never paid for workers who were let go and the plant was not rebuilt, they could have easily written the Policy to reflect that position. They have not done so and cannot now look to the Court to accept their lawyers' interpretation to rewrite this provision.

The Court believes the issues surrounding the rebuild, and the costs associated with it, were fully presented to the jury. Noranda's economic distress was raised to

[16] *Noranda Aluminum Holding Co. v. XL Ins. Am., Inc.*, 2019 WL 1399956, at *6 (Del. Super. Ct. Mar. 21, 2019).
[17] *See id.* at *5.

the jury, as well as Defendants' calculations of nearly no recovery under any theory of the case. The issues were fairly and appropriately allowed to be presented and there is no basis to overturn the jury's verdict on this issue. And before the insurers assert some prejudice to an appellate court, let us not forget that even with the limitations imposed by the Court, the jury was told by the defense expert that the amount due to the Plaintiff by his calculation was around $5,000. It is laughable to think the Court ruling on this issue in any way affected the insurers' ability to fairly present their case or affected the outcome of the jury's verdict.

C. Electricity

Next, Defendants argue that the total electrical charges of $7,461,117.00, which would be associated with the theoretical restart of the pots, should not have been presented to the jury as potential damages.[18] This issue was raised during the trial, and the Court, while expressing reservations, reserved decision and allowed the figure to be presented to the jury. The parties seemed to agree that in their calculation of damages, the jury included the 7 million dollar figure in the damage amount.

Plaintiff argues that this is an allowable expense as it is the electrical cost associated with the hypothetical restarting of the pots. They assert, therefore, it should be included as part of the gross earnings calculations.[19] However, after

[18] *See* Defs.' Brief in Support of Their Post-Trial Mot. for J. as a Matter of Law or a New Trial, at 16-17.
[19] Pl.'s Opp'n & Answ. To Defs.' Post-Trial Mot. for J. as a Matter of Law or a New Trial, at 11.

careful consideration, the Court disagrees with Plaintiff and will grant JNOV as to the electrical cost.

This electrical expense is not the normal cost associated with the operation of the pots. This is the additional electric cost that would be needed to bring the pots back on line. In calculating those earnings, the Policy contemplates compensation of Plaintiff for losses it suffered while the pots were out of service. As such, the earnings and routine expenses are included in the calculation, but it is not intended to cover non-routine extra expenses unrelated to the normal operation of the business. The 7 million dollar figure does not fit within the definition of routine expense. Consequently, even if the Court agrees that this expense would be necessary to restart the pots, the Court simply cannot find where it is covered in the Policy. Although there is an extra expense provision in the Policy, even Plaintiff agrees this expense would not be covered by that provision. Electricity is a key component in the operation of this plant and Plaintiff should have anticipated this need and included it in the Policy. They did not, and as in the Court's ruling on payroll above, it will not create coverage where none is clearly set forth in the Policy. As a result, the jury's verdict will be amended to subtract the $7,461,117.00 from the damage amount awarded.

D. Previous Settlement/Actual Loss/Date of Sale

There was clearly a dispute regarding what labor was included in the prior settlement of the property damage claim. Primarily through the parties' experts, the parties' respective positions were presented to the jury and the Court has no basis to overturn the verdict on this issue. The Court does point out that no testimony from the attorneys who actually negotiated the settlement or from the key players who were actually involved in the settlement negotiations was provided, which the Court would normally have expected to address this issue. However, there was sufficient evidence presented to the jury for them to determine what was included in the settlement of the property damage claim and the limitation it would have placed on recovery in this litigation.

The Court also finds Defendants' argument regarding actual loss to be unpersuasive. Plaintiff was awarded what was allowed under the Policy, and if Defendants wanted to clearly limit damages for a company in financial distress, they should have included such a limitation in the Policy. The Court notes the Policy is a document created by Defendants; certainly, somewhere in the 80 pages, they could have clearly articulated an actual loss provision.

Finally, the Court stands by its findings as to the sale of the facility as set forth in its summary judgment decision. Accordingly, as to the above areas, the Court finds no basis to overturn the jury's verdict.

E. Idle Period

The simple answer to Defendants' idle period exclusion argument is that Defendants had a full opportunity to present this issue to the jury and the jury found it unpersuasive. No one, not even Plaintiff, disputes the company was in financial distress, but there was clearly a disagreement regarding whether factors beyond the explosions caused the ultimate facility failure. Regardless of what was asserted in other forums, the evidence presented to the jury is controlling.

IV. NEW TRIAL

A. Standard of Review

"A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative."[20] In considering a motion for a new trial, the Court should give the jury's verdict "enormous deference,"[21] and "should not set aside a verdict … unless, on review of all the evidence, [it] preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[22] "A new trial should be granted only when the great weight of the evidence is against the jury verdict."[23]

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[20] Del. Super. Ct. Civ. R. 50(b).
[21] *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008).
[22] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *see also Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).
[23] *Patterson v. Coffin*, 2004 WL 1656514, at *2 (Del. 2004).

B. Jury Instruction

The argument on jury instructions is simply without merit. In their Motion, Defendants argue that the Court erred when it failed to instruct the jury that Plaintiff's expert's approach in the calculation of damages was incorrect and should be ignored.[24] Such an instruction would be an improper comment on the evidence and would be an intrusion into what is appropriate for the jury to decide. The instructions that were given in this case were fair and correct statements of law and provide no basis for a new trial. To the extent that Defendants argue that the instructions regarding electrical expenses should not have been included, that has been remedied by this Opinion.

C. Motions *in Limine*

The Court held extensive voir dire regarding the expected testimony of Mr. Karutz. It did so after reviewing his expert report and providing Defendants a full opportunity to argue their position. Candidly, Defendants are fortunate the Court did not exclude the testimony of Mr. Karutz based upon the manner it was presented. Besides at times being nearly incomprehensible and confusing, Mr. Karutz's testimony often reflected an expert who refused to respond to relevant common

[24] *See* Defs.' Brief in Support of Their Post-Trial Mot. for J. as a Matter of Law or a New Trial, at 22.

sense questions and whose independent judgment was clouded by his willingness to simply be the mouthpiece for the insurers. If Defendants did not get to present all the testimony they wanted from Mr. Karutz to the jury, they have only themselves to blame. The Court's decision on what he was allowed to include in his testimony was fair and balanced. And while they complain about the Court's limitation on Mr. Karutz's testimony, the reality is that they fully presented to the jury their position that Plaintiff was not entitled to recovery under any theory. The Court strongly doubts that the difference between no recovery, under Defendants' theory that payroll was not incurred, or of recovering $5,000 in damages, under Defendants' hypothetical rebuild calculation, made a significant difference in the outcome of the case. Unsurprisingly, the jury was not persuaded by this expert's testimony.

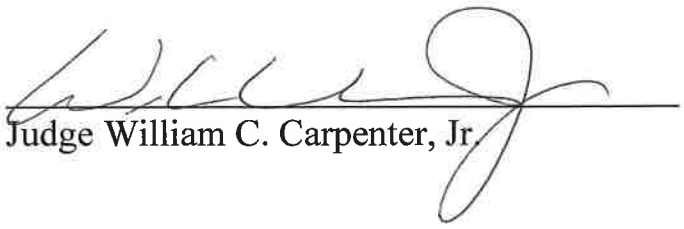
D. Damage Award/Idle Period

The arguments here are simply a rehash of all the assertions previously raised by Defendants. The Court finds, beyond the electric issue discussed above, the verdicts are consistent with the evidence presented.

V. CONCLUSION

Based upon the above, Defendants' Motion for a Judgment as a Matter of Law, as to the electrical damage only, is GRANTED. In all other respects, the Motion is DENIED. Defendants' Motion for a New Trial is DENIED.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.