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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

BURLEY D. TOMPKINS,

No. 2:12-CV-1481-CMK

Plaintiff,

vs.

PRE-TRIAL ORDER

UNION PACIFIC RAILROAD
COMPANY,

Defendant.

_____ /

Plaintiff brings this civil action under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq. Pursuant to the written consent of all parties, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). The parties have submitted separate pre-trial statements (Docs. 67 and 68) and appeared for a pre-trial conference on June 24, 2015.

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1 **I. BACKGROUND & LEGAL ISSUES**

2 This action proceeds on the first amended complaint (Doc. 17). Of the seven
3 claims raised, five remain following the court’s March 8, 2013, order (Doc. 22) dismissing
4 plaintiff’s second claim for violation of 49 C.F.R. § 225.33 with prejudice, and the court’s June
5 24, 2015, order (Doc. 69) granting summary adjudication on plaintiff’s first claim for negligence.

6 The remaining claims for negligence (based on alleged breach of common law
7 duties as well as alleged violations of federal statutes and regulations) arise from an incident
8 occurring on June 28, 2011. At that time, plaintiff was riding on a train traveling from Sparks,
9 Nevada, to Elko, Nevada, when the train made what the parties characterize as an “undesired
10 emergency stop” or “undesired braking application.” Plaintiff claims this resulted in injury.

11 Plaintiff seeks past and future economic and general damages, costs of suit, post-
12 judgment interest, and attorneys’ fees and costs.

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14 **II. STIPULATED FACTS**

15 The parties have not submitted a list of any stipulated facts.

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17 **III. DISPUTED FACTUAL ISSUES**

18 Based on the parties’ separate pre-trial statements, the following factual issues
19 appear to be in dispute with respect to the June 2011 incident:

- 20 1. Whether plaintiff was injured in the June 2011 incident and, if so, the
21 nature and extent of such injury.
- 22 2. Whether any injury was caused by the June 2011 incident.
- 23 3. Whether defendant exercised ordinary care to provide plaintiff a
24 reasonably safe work environment, with reasonably safe equipment, tools,
25 methods, and procedures, on June 28, 2011.
- 26 4. Whether defendant violated the Safety Appliance Act, 49 U.S.C. § 20302,
et seq.

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- 1 5. Whether defendant violated the Locomotive Inspection Act, 49 U.S.C.
2 § 20701, et seq.
- 3 6. Whether defendant violated 49 C.F.R. § 229.45.
- 4 7. Whether defendant violated 49 C.F.R. § 229.13.
- 5 8. Whether plaintiff's claimed medical special damages are reasonable and
6 necessary.
- 7 9. Whether plaintiff mitigated damages.

8 **IV. DISPUTED EVIDENTIARY ISSUES**

9 Plaintiff states that disputed evidentiary issues can be resolved by way of motions
10 in limine, as follows:

- 11 1. Motion to exclude evidence of collateral source payments received by
12 plaintiff.
- 13 2. Motion to exclude evidence suggesting jobs or job offers for plaintiff at
14 Union Pacific Railroad Company.
- 15 3. Motion to exclude evidence of defendant's "empowerment policy."
- 16 4. Motion to exclude evidence of plaintiff's eligibility to retire at age 60.
- 17 5. Motion to exclude evidence of any medical expenses paid by defendant.
- 18 6. Motion to exclude evidence not previously produced of surveillance.
- 19 7. Motion to exclude evidence suggesting an inference that plaintiff was
20 addicted to pain medication and/or sold his prescriptions.
- 21 8. Motion to exclude evidence of unrelated medical conditions.
- 22 9. Motion to exclude evidence that plaintiff had a reduced work-life capacity
23 prior to the June 2011 incident.
- 24 10. Motion to exclude evidence suggesting that defendant's attorneys
25 represent all employees of Union Pacific Railroad.
- 26 11. Motion to exclude evidence from improperly designated rebuttal experts.
12. Daubert motions regarding defendant's experts.
13. Motion to exclude evidence of any biomechanical or causation opinions by
Mark Pollan.

1 14. Motion to exclude evidence suggesting that plaintiff failed to mitigate
2 damages.

3 15. Motion to exclude evidence of medicinal marijuana use by plaintiff.

4 Defendant states that disputed evidentiary issues can be resolved by way of
5 motions in limine, as follows:

6 1. Motion to exclude evidence not previously disclosed.

7 2. Motions to exclude witnesses not previously disclosed, specifically Jim
8 Ambrose, Ed Bird, Mike Hardisty, Brian Koepnick, Tom Martin, Jeff
Whisler, and Lloyd Wilson.

9 3. Motion to exclude evidence of other personal injury or employment claims
10 by Union Pacific Railroad employees.

11 4. Motion to exclude evidence or argument that locomotive vibration or other
12 aspects of plaintiff's work environment caused or contributed to his
injuries and that defendant was negligent with regard to same.

13 5. Motion to exclude character evidence of Harold Marvin Dunn and other
Union Pacific Railroad managers.

14 6. Motion to exclude character evidence of plaintiff being a "good
15 employee."

16 7. Motion to exclude evidence of statement allegedly made by Dr. Whitney
to plaintiff.

17 8. Motions to exclude evidence of opinions from plaintiff's retained experts
18 Jerel Glassman, D.O., William Hughes, Robert Johnson, and Carol
Hyland.

19 9. Motions to exclude evidence from plaintiff's non-retained experts James
20 Olson, M.D., Kenneth Pitman, M.D., and Denise Trease, Ph.D.

21 10. Motions to exclude hearsay statements from plaintiff's wife as well as Eric
Bennett.

22 11. Motion to exclude evidence of plaintiff's wife's medical condition and
23 testimony by plaintiff and his wife that plaintiff's wife's epilepsy was
caused by plaintiff's back injury.

24 12. Motion to exclude evidence of speculative future medical treatment
25 including surgery.

26 13. Motion to exclude evidence of plaintiff's financial condition.

1 **IX. OBJECTIONS TO PRE-TRIAL ORDER**

2 If timely objections to this pre-trial order are not filed, the order will become final
3 without further order of the court. Once final, no objections to this order will be considered.
4

5 **X. CONCLUSION AND ORDERS**

6 1. The court makes the following orders concerning witnesses:

7 a. Documents may be authenticated by appropriate
8 declarations submitted at time of trial;

9 b. Each party may call any witnesses designated by the
10 other;

11 c. Witnesses not specified in this order will not be
12 permitted to testify unless: (i) the party offering such unlisted witness
13 demonstrates that the witness is for the purpose of rebutting evidence
14 which could not be reasonably anticipated at the pre-trial conference; or
15 (ii) the witness was discovered after the pre-trial order issued and the
16 proffering party makes the showing outlined below;

17 d. Upon discovery of witnesses following issuance of
18 this pre-trial order, the party shall promptly inform the court and the
19 opposing party of the existence of the unlisted witnesses so that the court
20 may consider at trial whether the witnesses shall be permitted to testify;
21 and

22 e. Such newly discovered witnesses will not be
23 permitted to testify unless: (i) the witnesses could not reasonably have
24 been discovered prior to trial; (ii) the court and the opposing party were
25 promptly notified upon discovery of the witnesses; (iii) if time permitted,
26 the party proffered the witnesses for deposition; (iv) if time did not permit,
a reasonable summary of the witnesses' testimony was provided to the
opposing party.

21 2. The court makes the following orders concerning exhibits:

22 a. If not already submitted to the court, the parties are
23 directed to bring the original and three copies of each exhibit to trial;

24 b. If not already done, the parties shall be prepared to
25 exchange copies of their exhibits at the commencement of trial;

26 c. Plaintiff will use numbers 1 through 499 to mark
exhibits;

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1 d. Defendant will use numbers 500 through 999 to
2 mark exhibits;

3 e. No exhibits other than those specified in this order
4 will be permitted to be introduced unless: (i) the party proffering the
5 exhibit demonstrates that the exhibit is for the purpose of rebutting
6 evidence which could not have been reasonably anticipated; or (ii) the
7 exhibit was discovered after the issuance of this order and the proffering
8 party makes the showing required below;

9 f. Upon the discovery of new exhibits, the parties shall
10 promptly inform the court and opposing party of the existence of such
11 exhibits so that the court may consider at trial their admissibility;

12 g. Such exhibits will not be received unless the
13 proffering party demonstrates: (i) the exhibits could not reasonably have
14 been discovered earlier; (ii) the court and the opposing party were
15 promptly informed of their existence; (iii) the proffering party forwarded a
16 copy of the exhibit(s) (if physically possible) to the opposing party;

17 h. If exhibits may not be copied, the proffering party
18 must show that he has made the exhibits reasonably available for
19 inspection by the opposing party; and

20 i. The original exhibits become the property of the
21 court for purposes of trial.

22 3. The parties may file motions in limine by August 10, 2015. Opposition to
23 motions in limine may be filed by August 17, 2015. **Upon stipulation of the parties**, motions in
24 limine will be heard on August 21, 2015, at 10:00 a.m. in Redding, California. Absent a
25 stipulation, motions in limine will be heard on August 24, 2015, at 9:00 a.m. in Sacramento,
26 California.

4. The parties shall file proposed voir dire and jury instructions by August
18, 2015.

5. A jury trial is confirmed for commencement on August 24, 2015, at 9:00
a.m. in Courtroom 4, 15th Floor, in Sacramento, California.

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6. Objections to this pre-trial order, if any, shall be filed by August 17, 2015.

DATED: August 10, 2015



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

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