Loy v. Norfolk Southern Railway Company Doc. 94

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

KRISTOFER LOY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.: 3:12-CV-96-TLS
	)	
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
	)	
Defendant.	)	

OPINION AND ORDER

The Plaintiff, Kristofer Loy, sued the Defendant, Norfolk Southern, under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, after Loy suffered a workplace injury. The case was tried to a jury over five days. The jury returned a verdict for Loy and awarded him $1,250,000 in compensatory damages, but because the jury also found that Loy's own negligence caused twenty-five percent of his damages, his recovery was reduced to $937,500. Before the jury returned its verdict, Norfolk Southern asked the Court to withhold entering judgment to allow Norfolk Southern to calculate any amounts to be deducted from the judgment. On March 10, 2016, the Court held an on-the-record telephone conference with the parties and directed them to file briefs on an expedited schedule [ECF No. 86]. On March 21, 2016, Norfolk Southern filed its Memorandum in Support of Deductions and Withholdings at Time of Satisfaction of Judgment [ECF No. 89], along with accompanying exhibits [ECF Nos. 89-1 through 89-2, 90, 89-4 through 89-8]. On March 24, 2016, Loy filed his Response [ECF No. 91]. On April 7, 2016, Norfolk Southern filed a Submission of Additional Authorities [ECF No. 93] to inform the Court of two additional authorities issued after it filed its Memorandum in Support

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of Deductions and Withholdings. With this matter now fully briefed, the Court resolves the issues presented and will enter judgment on the verdict.

DISCUSSION

Norfolk Southern argues that it may deduct and withhold payment on three amounts when the judgment is satisfied. Norfolk Southern identified the following items: (1) cash advances totaling $40,000 made by Norfolk Southern to Loy; (2) a $23,838.73 Railroad Retirement Board (RRB) lien for short-term disability benefits; and (3) $29,247.25 in withholding taxes owed under the Railroad Retirement Tax Act (RRTA) and Medicare, which Norfolk Southern pays to the IRS. Loy agrees that the RRB lien of $23,838.73 should be withheld from the net verdict under the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351–369. Therefore, this Court only addresses the cash advances and the withholding taxes.

A. Cash Advances

Norfolk Southern asserts that, between April 20, 2009, and July 8, 2010, it made fifteen cash advances to Loy. These cash advances totaled $40,000, and each time Loy received a cash advance, he signed a receipt that stated, "I agree that the total amount of advance shall be credited against any settlement made with or any judgment rendered against Norfolk Southern Railway Company or others on account of this incident." (Receipts for Advance 1–15, ECF No. 89-1.) At his deposition, Loy testified that he was aware of this debt and that it must be repaid. Loy's counsel does not dispute the existence of these cash advances, but argues that this Court should deny Norfolk Southern's request to deduct this amount from the verdict because "Norfolk

Southern failed to provide a scintilla of evidence that any cash advances were obtained by Mr. Loy during trial. The trial record is devoid of any testimony or exhibits which support this post-trial request." (Pl.'s Resp. Def.'s Mot. Deductions & Withholdings at Time of Satisfaction of J. 2.) Further, Loy's counsel analogizes Norfolk Southern's request as identical to a plaintiff who forgot to submit $40,000 in medical bills during trial later asking the Court for additur to account for those unpresented damages.

As the parties are likely well aware, "railroads are . . . free to follow the humane course of advancing money for living expenses to claimants, but they cannot exact as the price thereof either an agreement limiting venue or a promise to repay such advances before suit is brought." William H. DeParcq, Litigation under the Federal Employers' Liability Act, 11 Am. Jur. Trials 397, at § 83 (1966); *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 263–66 (1949) (per curiam) (discussing the limitations on advancements). Although it would be convenient for Norfolk Southern to deduct the cash advances when it pays the judgment, it has not provided any explanation for why that must be the case. *Contra Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 709–10 (7th Cir. 1990) (noting that after the railroad employee won his FELA case, the railroad moved to set off money that the railroad had paid to the employee, but the district court denied the motion and suggested that the railroad bring a separate suit on the contract). Should the parties not be able to resolve Loy's $40,000 debt after judgment is entered, Norfolk Southern would not be without recourse. *Id.* at 710, 712–14 (holding that the railroad's claim to recover the value of the benefits it provided its worker was not a compulsory counterclaim that the railroad needed to raise in the first case and the railroad was entitled to a set off in its subsequent suit).

Given this, the Court denies Norfolk Southern's request to withhold $40,000 from the verdict to satisfy the cash advances.

B. Withholding Taxes

Norfolk Southern argues that it is obligated to deduct $29,247.25 from Loy's award to account for his portion of RRTA withholdings. Norfolk Southern states that, in addition to paying its own share to the IRS, it is required to report payment for time lost and withhold Loy's applicable withholding tax obligations due on the judgment. This is based on Norfolk Southern's view that a FELA award that includes lost wages is compensation under the RRTA. Norfolk Southern asserts that if Loy's share is not deducted from the verdict, then it would have to pay for itself and Loy. In response, Loy argues that the verdict is a personal injury award that is exempt from RRTA withholdings.

Norfolk Southern's argument requires interpreting the RRA, 45 U.S.C. §§ 231–231v, and the RRTA, 26 U.S.C. §§ 3201–3241. The RRB administers the RRA, which applies to railroad companies and their employees. 45 U.S.C. § 231f. Under the RRA, railroad employees receive retirement and disability benefits. *BNSF Ry. Co. v. United States*, 775 F.3d 743, 750 (5th Cir. 2015). The RRTA is a part of the Internal Revenue Code and funds raised through it pay retirement benefits under the RRA. *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 522 (6th Cir. 2009). The RRTA taxes compensation earned by railroad employees through a two-tier system, where railroad employers withhold both their tax shares and their employees' tax shares, and then provide the IRS with those shares. 26 U.S.C. §§ 3201–3202, 3221(a)–(b). Tier I benefits are almost identical to FICA and take the place of social security. *BNSF Ry. Co. v. United States*,

775 F.3d 743, 750 (5th Cir. 2015). "Tier II benefits are similar to those that workers would receive from a private multi-employer pension fund." *Hance*, 571 F.3d at 522. There are also certain Medicare withholdings.

Norfolk Southern contends that the RRTA's definition of compensation,"any form of money remuneration paid to an individual for services rendered as an employee to one or more employers," 26 U.S.C. § 3231(e), clearly shows that RRTA payroll taxes apply to a general verdict in a FELA case where damages accounted for time lost. In support, Norfolk Southern provides extensive citation to statutes, regulations, cases, and agency interpretations to support its argument that FELA verdicts are subject to RRTA taxation. *See* Jeffrey R. White, *The Taxman Cometh . . . To Your FELA Judgment*, Trial, Apr. 2014, at 16, 18 (noting that the first reported decision to adopt this view is *Heckman v. BNSF Ry. Co.*, 837 N.W.2d 532, 540 (Neb. 2013)). Although some courts have accepted this position, Norfolk Southern's cited authorities are not conclusive, and it has cited no cases that bind this Court. Other courts have rejected those holdings, and Loy relies upon *Cowden v. BNSF Ry. Co.*, No. 4:08CV01534 ERW, 2014 WL 3096867 (E.D. Mo. July 7, 2014) and *Marlin v. BNSF Ry. Co.*, — F. Supp. 3d — , No. 4:14-cv-98–JEG, 2016 WL 825146 (S.D. Iowa Jan. 29, 2016) to support his position that RRTA withholding does not apply to his verdict. The Court is persuaded by the reasoning and thoroughness of *Cowden*, which *Marlin* largely embraced. These cases provide a more faithful interpretation of the relevant statues, and their holdings are equally instructive in this matter.

In both *Cowden* and *Marlin*, an employee sued the railroad under FELA for injuries suffered based on the railroad's alleged failure to provide a safe place to work. *Cowden*, 2014 WL 3096867, at *1; *Marlin*, — F. Supp. 3d — , 2016 WL 825146, at *2. After jury trials, these

plaintiffs received a damages award through a general verdict, which accounted for personal physical injuries and past and future wage loss because of those injuries. *Cowden*, 2014 WL 3096867, at *11; *Marlin*, — F. Supp. 3d — , 2016 WL 825146, at *4. These courts rejected the railroads' argument that it had to deduct from the judgment the employee portion of RRTA withholdings, and instead found that RRTA withholdings do not apply to personal injury awards. *Cowden*, 2014 WL 3096867, at *3, *12; *Marlin*, — F. Supp. 3d — , 2016 WL 825146, at *2, *5

To arrive at this conclusion, *Cowden* answered questions that are equally relevant to this case: "(1) whether 'compensation' under the RRTA includes an award of lost pay; (2) if so, whether Plaintiff's award is subject to any exclusions from taxation; and (3) if Plaintiff's award is subject to RRTA taxation, what portion of the award is taxed." *Cowden*, 2014 WL 3096867, at *3.

As in *Cowden* and *Marlin*, Norfolk Southern argues that Loy's verdict is subject to RRTA withholding because it is "compensation" under the RRTA. To answer this question, *Cowden* observed that the RRA and RRTA define compensation differently. *Marlin*, — F. Supp. 3d — , 2016 WL 825146, at *2; *see also Cowden*, 2014 WL 3096867, at *5 (noting that even if the RRA is the benefit statute and the RRTA is the taxing statute for a program, they are distinct statutes with their own, separate provisions, similar to how the Social Security Act and FICA must also be interpreted differently). Under the RRA, personal injury payments are specifically included in its definition of compensation. *Cowden*, 2014 WL 3096867, at *4 ("The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee . . . including remuneration paid for time lost as an employee . . . ." (quoting 45 U.S.C. § 231(h)(1))); *id.* ("If payment is made by an employer with respect to a personal injury and

includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost." (quoting 45 U.S.C. § 231(h)(2))). Thus, a general verdict that includes pay for "time lost" would be "compensation" under the RRA.

Despite the RRA's definition, because Norfolk Southern argues that it must withhold taxes from Loy's verdict, the RRTA's definition of compensation would be most relevant. To understand the definition of compensation under the RRTA, the *Cowden* court:

> (1) reviewed the prior and current definitions of compensation in the RRTA, [*Cowden*, 2014 WL 3096867,] at *5 ("The term 'compensation' [is currently defined as] any form of money remuneration paid to an individual for services rendered as an employee . . . ." (quoting 26 U.S.C. § 3231(e)(1)); (2) considered the congressional intent behind amendments to the RRTA that removed language addressing payments for time lost and payments for personal injury, *id.* at *5–6; (3) afforded *Chevron* deference to U.S. Treasury Department updates to regulations pertaining to the RRTA, which include pay for time lost in the definition of compensation, *id.* at *6–8 ("Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost" (quoting 26 C.F.R. § 31.3231(e)–1(a)(3)–(4)); (4) considered relevant guidance by the Fifth Circuit Court of Appeals defining wages for purposes of determining the propriety of the former employer deducting FICA wage withholdings from a Title VII jury award, *id.* at *8 ("[B]oth back pay and front pay are 'wages' as defined by the [IRC]." (second alteration in original) (quoting *Noel v. N.Y. Office of Mental Health Cent. N.Y. Psychiatric Ctr.*, 697 F.3d 209, 2013 (5th Cir. 2012)); and (5) applied a recent Supreme Court decision that noted "'wages' under FICA are defined broadly,'" *id.* at *9 (quoting *United States v. Quality Stores, Inc.*, — U.S. — , 134 S. Ct. 1395, 1399–1400 (2014)).

Marlin, — F. Supp. 3d — , 2016 WL 825146, at *2 (footnote omitted). Based on these authorities, *Cowden* concluded that "FELA judgments for lost pay fall within the definition of 'compensation' for RRTA purposes." *Id.* (quoting *Cowden*, 2014 WL 3096867, at *9).

Loy does not contest this finding, but argues that his award falls within the personal injury exclusion of 26 U.S.C. § 104(a)(2), which reads as follows:

> In general.—Except in the case of amounts attributable to (and not in excess of) deduction allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include . . . (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.

When presented with this question in *Marlin* and *Cowden*, those courts agreed with the plaintiffs. They reasoned,

> The term "income" is broader than "wages." *Anderson v. United States*, 929 F.2d 648, 650 (Fed. Cir. 1991); *Rowan Cos., Inc. v. United States*, 452 U.S. 247, 254 (1981) ("In short, 'wages' is a narrower concept than 'income[.]'"). Therefore, if Plaintiff's verdict qualifies as an exclusion from income, it must also qualify as an exclusion from wages. *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991) ("Our conclusion that Redfield's 'economic damages' were excluded from the definition of 'gross income' dictates a conclusion that the sums were not subject to FICA withholding either."). In addition, the RRTA imposes a tax "on . . . income[.]" 26 U.S.C. § 3201(a)–(b). Defendant does not, and cannot, dispute Plaintiff's verdict, in part, constitutes "damages . . . on account of personal physical injuries or physical sickness[.]" 26 U.S.C. § 104(a)(2). Thus, the Court finds, because wages are a subset of income, the personal injury exclusion must apply.

Marlin, — F. Supp. 3d — , 2016 WL 825146, at *3 (alterations in original) (quoting *Cowden*, 2014 WL 3096867, at *10). Loy's situation is indistinguishable, and likewise, the personal injury exclusion applies.

The fact that Loy's award was returned on a general verdict does not mean that Norfolk Southern may ignore that part of the verdict compensated for personal injury. As in *Marlin* and *Cowden*, "the jury returned a general verdict that included both 'taxable compensation for lost pay and excludable damages for personal injury.'" *Id.* (quoting *Cowden*, 2014 WL 3096867, at

*11). "[T]he case law and regulatory rulings have made it clear that when an award is received for a personal injury in a tort or tort-type proceeding, the whole award is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for lost earnings." *Cowden*, 2014 WL 3096867, at *11 (quoting *Jelly v. Sec'y of Health & Human Servs.*, No. 94-646V, 1998 WL 211913, at *4 (Fed. Cl. Apr. 6, 1998)); *see also id.* ("[T]he Tax Court has long held that '[i]f a taxpayer receives a damage award for a physical injury, which almost by definition is personal, the entire award is excluded from income [under § 104(a)(2)] even if all or part of the recovery is determined with reference to the income lost because of the injury.'" (alterations in original) (quoting *Rickel v. Comm'r of Internal Revenue*, 900 F.2d 655, 658 (3d Cir. 1990))). Therefore, Loy's entire verdict is excluded from RRTA withholdings. *Marlin*, 2016 WL 825146, at *3; *Cowden*, 2014 WL 3096867, at *11.

Norfolk Southern relies upon *Heckman v. BNSF Ry. Co.*, 837 N.W.2d 532 (Neb. 2013) and *Phillips v. Chi. Cent. & Pac. R.R. Co.*, 853 N.W.2d 636 (Iowa 2014), and asserts that this Court would err by not agreeing with those holdings. In *Phillips*, the Iowa Supreme Court reviewed the various sources discussed in *Cowden,* and decided that the railroad properly withheld RRTA taxes from the former-employee plaintiff's general verdict for personal injuries, which included bodily harm and lost past and future wages, stemming from the railroad's failure to provide a safe workplace. 853 N.W.2d at 638, 652, 645. *Heckman* arrived at the same conclusion on similar facts. 837 N.W.2d at 539–40, 543. However, *Phillips* and *Heckman* did not even consider the personal injury exclusion in 26 U.S.C. § 104(a)(2). *Marlin*, — F. Supp. 3d — , 2016 WL 825146, at *3; *Cowden*, 2014 WL 3096867, at *12; *see also Mickey v. BNSF Ry. Co.*, 437 S.W.3d 207, 208, 213–14 (Mo. 2014) (holding, on facts indistinguishable from *Phillips*, that

"even assuming that the term 'compensation' including other types of pay for lost wages, damages for lost wages due to personal injury are treated differently than are other wages under both section 104(a)(2) . . . and federal case law," and faulting *Phillips* for not even mentioning "that amounts recovered in suits or settlements for personal injury are not included within the definition of income or wages, and are not subject to income or FICA taxes"). This Court is not persuaded by *Phillips* and *Heckman* when the relevant statutes suggest a different outcome, which is supported by thorough analysis in other courts showing that the personal injury exclusion applies.

For a recovery to be excluded under § 104(a)(2), it must be received "(1) through the prosecution of an action or the settlement entered into in lieu of prosecution of an action based upon tort or tort-type rights and (2) on account of personal injuries or sickness." *Pipitone v. United States*, 180 F.3d 859, 862 (7th Cir. 1999). Based the evidence presented at trial, the entire award that Loy received was based upon a physical injury. This type of damage award is almost by definition personal. *Rickel*, 900 F.2d at 658. At trial, Loy's evidence showed that he suffered a physical injury at work due to Norfolk Southern's negligence, and this physical injury resulted in past wage loss and may cause future wage loss. This Court followed Seventh Circuit Pattern Jury Instruction 9.01, which states the elements of a FELA negligence claim. (Final Jury Instructions & Verdict Form 22, ECF No. 82.) Likewise, the Court used Seventh Circuit Pattern Jury Instruction 9.04 when explaining damages. (*Id.* at 27.) Based on this, the jury returned a general verdict of $1,250,000 in compensatory damages for Norfolk Southern's negligence, but reduced the recovery to $937,500 after finding Loy partially responsible. Adopting the rationale in *Marlin* and *Cowden*, this Court finds Loy's entire jury award is based on his physical injury and is

excludable from RRTA withholdings under § 104(a)(2).

CONCLUSION

For the foregoing reasons, Norfolk Southern's Oral Motion to Make Deductions and Withholdings at the Time of Satisfaction of Judgment is GRANTED IN PART, and DENIED IN PART. The Court directs Norfolk Southern to withhold and deduct $23,838.73 owed on a RRB lien, but denies Norfolk Southern's request to deduct and withhold $40,000 in cash advances and $29,247.25 in RRTA taxes.

SO ORDERED on April 12, 2016.

s/ Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT
FORT WAYNE DIVISION