IN THE COURT OF APPEALS OF IOWA

No. 7-967 / 07-0810
Filed January 16, 2008

RICHARD J. COLLINS,
Plaintiff-Appellee,

vs.

IOWA, CHICAGO & EASTERN RAILROAD, a Delaware Corporation,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary McKenrick, Judge.

Iowa, Chicago & Eastern Railroad Corporation appeals from a jury verdict entered in favor of the plaintiff, Richard Collins, on his negligence claim. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Brian J. Donahoe and Onna B. Houck of Cutler & Donahoe, L.L.P., Sioux Falls, South Dakota, for appellant.

John Haraldson, West Des Moines, and Paul M. Jossart and Christopher J. Moreland of Yaeger, Jungbauer & Barczak, P.L.C., Minneapolis, Minnesota, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Iowa, Chicago & Eastern Railroad Corporation (IC&E) appeals from a jury verdict entered in favor of the plaintiff, Richard Collins, on his negligence claim. IC&E claims the damages awarded by the jury were contrary to the partial directed verdict, excessive, not supported by the evidence, and wrongly influenced by passion and prejudice.

I. Background Facts and Prior Proceedings

Richard Collins was approximately sixty years old when he began working at IC&E as a locomotive mechanic in the summer of 2002. Before working for IC&E, Collins had worked in numerous positions ranging from a welder fabricator to a supervisory boilermaker.

On December 29, 2003, Collins felt sharp pain in his shoulders while he and a coworker lifted a large piece of a locomotive engine. The pain in his shoulders persisted, so he went to his family doctor. His family doctor sent him to an orthopedic surgeon. An MRI revealed a torn rotator cuff in his left shoulder, and the orthopedic surgeon recommended surgery. When he informed his supervisors about the surgery, Collins was reprimanded for allegedly failing to properly report the work injury in a timely manner.

Collins continued to work until April 16, 2004, the day of surgery. IC&E paid for the surgery and therapy. Collins experienced significant pain during physical therapy and was unable to work after the surgery. However, IC&E continued to pay him his regular wages for six months, until approximately October 2004. In December 2004 Collins reached maximum medical improvement and participated in a functional capacity examination (hereinafter

"FCE"). The FCE report indicated Collins was unable to lift his left shoulder above a ninety-degree angle without difficulty and substitution and that his ability to lift from waist to shoulder level was significantly reduced. Because his job as a locomotive mechanic was classified as a "very heavy" position, the FCE concluded he would only be able to return to his position if modifications were made to accommodate his shoulder limitations.

IC&E refused to pay for the FCE, so Collins did not supply IC&E with a copy of the report. In July 2005 Collins received notice that IC&E had terminated his health benefits because he was "Out of Service." Collins began to pay for his own insurance via the COBRA program. Collins's surgeon eventually discovered and operated on a similar injury in his right shoulder.

In January 2006 Collins filed the present action, pursuant to the Federal Employers' Liability Act, claiming IC&E was negligent in failing to provide him with a safe work environment. *See* 45 U.S.C. § 51 (stating "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"). Collins sought damages for injuries to both of his shoulders. IC&E denied liability, and the matter proceeded to a jury trial in January 2007.

At trial the orthopedic surgeon linked the left shoulder injury and resulting surgery to the December 29, 2003 incident. The surgeon also linked the right shoulder injury to the same incident, but was not willing to state that the incident caused the tear that precipitated the right-shoulder surgery.

At the close of Collins's evidence, IC&E moved for a directed verdict on all claims. The district court granted a limited directed verdict with regard to the damages related to the "surgical repair and recovery from surgical repair" of the rotator cuff tear in his *right* shoulder, but denied the other issues raised in the motion.

During its closing statement, IC&E told the jury the right shoulder surgery was "out" of the case and "doesn't have anything to do with what [Collins] claims is the negligence or fault of the railroad." However, IC&E neither requested nor received any specific jury instruction relating to the right shoulder surgery and the partial directed verdict.

The jury returned a verdict finding IC&E negligent and awarding Collins $8000 for loss of function, $17,500 for future loss of function, $20,000 for past pain and suffering, $43,750 for future pain and suffering, $76,169.96 for past economic losses, and $402 for past medical services. The district court entered judgment on the verdict and denied IC&E's motion for new trial or remittitur.

On appeal, IC&E does not challenge the liability finding. Instead, it challenges the jury's decision to award $165,821.96 in damages. IC&E claims the damages awarded by the jury were contrary to the partial directed verdict, excessive, not supported by the evidence, and wrongly influenced by passion and prejudice.

II. Standard of Review

We review the denial of a motion for new trial for correction of errors at law. *Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 635 (Iowa 1997). However, if the motion is based on a discretionary ground, we review for abuse

of discretion. *Id.* A ruling on a motion for new trial following a jury verdict is a matter for the trial court's discretion. *Id.* In ruling upon such motions for new trial the trial court has broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(*c*). We accord weight to the fact the trial judge saw and heard the witnesses, observed the jury, and had before it all the incidents of trial before ruling on a motion for a new trial. *Kautman v. Mar-Mac Cmty. Sch. Dist.*, 255 N.W.2d 146, 147-48 (Iowa 1977).

Traditionally, assessment of damages is a jury function. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). Only for the most compelling reasons will we disturb the jury's award. *Id.* If the verdict falls within a range reasonably supported by the evidence, it is not the court's role to usurp the jury's function and judgment. *See Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969). We will set aside or reduce an award only if it is

> (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.

Id. If a verdict meets this standard or fails to do substantial justice between the parties, we must either grant a new trial or enter a remittitur. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994). In reviewing the motion for new trial, "[w]e view the evidence in the light most favorable to the verdict and need only consider the evidence favorable to plaintiff whether it is contradicted or not." *Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975).

III. Partial Directed Verdict

IC&E first claims the awarded judgment is "inconsistent" with the partial directed verdict. Because no jury instruction was given to inform the jury of the partial directed verdict, IC&E speculates that some of the damages awarded for past economic loss and loss of function were improperly related to the right shoulder surgery.[1]

We find no merit to this argument. The evidence pertaining to the right shoulder surgery was limited in this case. Also, as stated IC&E's brief, "There was simply no evidence that Collins suffered any loss of function to his right shoulder." The vast majority of the evidence centered on Collins's left shoulder, how the damage to this shoulder limited Collins's ability to use his left arm, and how the surgery and physical therapy associated with this shoulder caused him tremendous pain.

Counsel for both parties also focused their attention on the left shoulder during closing arguments. IC&E specifically told the jury to disregard the right shoulder surgery. Similarly, Collins's closing statement only directed the jury to consider loss of function for the left arm.

Upon our review of the evidence and arguments presented at trial, we find no reason to conclude the jury's verdict was inconsistent with the partial directed verdict. IC&E's mere speculation that some of the damages awarded for past

[1] IC&E acknowledges that it failed to request jury instructions explaining the partial directed verdict and failed to object when the court issued instructions that did not address the partial directed verdict. Therefore, it concedes this appeal is not based on whether the court properly *instructed* the jury as to the partial directed verdict. Instead, IC&E argues the court failed to enter judgment "reflective of" or consistent with the partial directed verdict.

economic loss and loss of function were improperly related to the right shoulder surgery is not sufficient to warrant a new trial in this case.

IV. Excessive, Unsupported, and Based on Passion and Prejudice

IC&E also contends the damage awards for past economic loss, medical expenses, and future pain and suffering were excessive, unsupported by the evidence, and based upon passion or prejudice.

A. Past Economic Loss

IC&E claims there is insufficient evidence to support the award of $76,169.96 for past economic losses. IC&E argues the jury's award for past economic losses should have been limited to the eight-month period between the date of the left shoulder surgery and the date of the FCE, when Collins could have allegedly returned to work.

The key issue in this argument is whether Collins could have returned to work on December 17, 2004, the date of the FCE report. At trial, an IC&E manager testified that, had he known about the FCE, accommodations would have been made so that Collins could have returned to work. The manager went so far as to say that Collins could return to work "tomorrow" with accommodations to satisfy his limitations. Collins responded by disputing whether IC&E truly would have accommodated his limitations. Collins pointed out that IC&E refused to pay for the very examination that would determine whether he could return to work. Also, a former IC&E mechanic explained that the "majority" of the job of a locomotive mechanic entails working with your arms above your head. Finally, Collins pointed out that IC&E made no effort, prior to

trial, to inform him that it would make accommodations so that he could return to work.

Whether Collins could have returned to work on December 17, 2004, is a factual issue. Collins presented substantial evidence that his left shoulder was permanently injured and that his ability to perform the routine tasks of a locomotive mechanic was severely compromised. The jury was free to believe or disbelieve IC&E's claim that it would have been willing and able to accommodate Collins's injured shoulder so that he could return to work as a locomotive mechanic. *See Dennis v. Denver & R.G.W.R. Co.*, 375 U.S. 208, 210, 84 S. Ct. 291, 293, 11 L. Ed. 2d 256, 258 (1963) ("[I]n FELA cases this Court has repeatedly held that where 'there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.'" (citation omitted)). Based on the jury's significant award of damages for past economic losses, it is reasonable to conclude the jury did not believe IC&E was willing and able to provide accommodations so that Collins could return to work. Therefore we reject IC&E's claim that the potential damages for past economic loss were limited to the eight-month period between the surgery and the FCE.

After a thorough review of the evidence presented as to the amount of wages he would have earned prior to trial, the amount of insurance premiums he had to pay once IC&E terminated his insurance policy, and the mileage he

incurred to participate in physical therapy, we find there is substantial evidentiary support to sustain the jury award for past economic losses.[2]

B. Future Pain and Suffering

IC&E contends the jury award of $43,750 for future pain and suffering was not supported by the evidence. IC&E concedes the record contains evidence regarding Collins's past pain and suffering, but claims there is nothing to support an award for future pain and suffering.

"Physical pain and suffering includes bodily suffering, sensation or discomfort." *Estate of Pearson v. Interstate Power & Light Co.*, 700 N.W.2d 333, 347 (Iowa 2005). "Mental pain and suffering includes mental anguish anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress." *Id.* Because fixing the amount of damages is a function for the jury, we are "loath to interfere with a jury verdict." *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988). In considering a contention that the jury verdict is excessive, the evidence must be viewed in the light most favorable to the plaintiff. *Id.* The verdict must not be set aside merely because the reviewing court would have reached a different conclusion. *Id.*

Upon our review of the record, taking the facts in the light most favorable to the plaintiff, we find there was substantial evidence to support the jury's verdict.

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[2] We find no merit to IC&E's additional claim that it is entitled to a set-off for the six months of wages it paid Collins after the surgery. Collins specifically testified that he only sought wages for the period beginning after IC&E stopped paying his monthly wage. We also find meritless IC&E's claim that Collins failed to prove he incurred the actual mileage presented to the jury.

Collins presented evidence that his left shoulder fatigues quickly and he is unable to use it above shoulder level. This injury has also limited his ability to do other things in life that he used to enjoy. For example, prior to the accident he could do his own carpentry work around the house, but now his carpentry is limited to "very small things" that do not require him to reach out in front of his body or lift his arm over his head. Because his left shoulder has reached the maximum level of medical improvement, the limitations set forth in the FCE and the accompanying feelings of uselessness will persist for the rest of his life.

While there is no exact mathematical measurement to calculate pain and suffering, *Estate of Pearson*, 700 N.W.2d at 347, mathematical calculations can still be useful when analyzing whether a jury award is excessive in light of the length of the injury. This jury was instructed that, based on standard mortality tables, Collins was expected to live for 17.54 more years. When the $43,750 award for future pain and suffering is divided by the projected number of years Collins will live with this shoulder injury, the result is that the jury awarded him less than $2500 per year in future pain and suffering. We find this award falls within the permissible range of the evidence. It does not shock the conscience, and it does not appear to be the result of passion or prejudice. For these reasons, we affirm the jury's award for future pain and suffering.

C. Past Medical Expenses

IC&E claims the $402 awarded for past medical expenses was not supported by the evidence. IC&E argues that Collins did not present any evidence, testimonial or otherwise, regarding the cost of any allegedly unpaid medical expenses.

Collins concedes that the only unpaid medical expense was the cost of the FCE. Collins's appellate brief states that the FCE cost $848. The brief also states that Collins introduced an exhibit itemizing this cost to the jury. Collins directs the court to three pages in the appendix to support these statements, but none of the cited pages itemizes or in anyway describes the cost of the FCE. Also, our review of the appendix does not reveal any evidence describing the cost of the FCE.

Rule 6.14(7) of the Iowa Rules of Appellate Procedure requires parties to support their factual assertions by specific references to the record. Collins failed to direct this court to any evidence supporting its claim that the FCE cost $848. "We are not bound to consider a party's position when the brief fails to comply with our rules of appellate procedure." *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002). Collins did not direct this court to any evidence to support the jury award for medical expenses, and we will not assume the role of an advocate by further reviewing the voluminous record to determine whether there is any evidence of the cost of the FCE. Consequently, we find Collins has waived any argument on this issue and find the court erred when it entered judgment for $402 in damages for past medical expenses.

While there is no procedure to simply reduce a jury's award, a court may conditionally grant a motion for new trial and allow the plaintiff to avoid a new trial if the plaintiff agrees to remit a specified amount of damages. *See* Iowa R. Civ. P. 1.1010(1) (stating "[t]he district court may permit a party to avoid a new trial . . . by agreeing to such terms or conditions as it may impose"). This court is also free to impose its own conditions for granting a conditional new trial. *Mead*

v. Adrian, 670 N.W.2d 174, 180 (Iowa 2003). Accordingly, we grant a conditional new trial on the issue of damages.[3] This new trial is conditional because Collins may avoid the new trial by agreeing to accept a remittitur in the amount of $402 in past medical expenses.

D. Wrongfully Influenced by Passion and Prejudice

Because we find the jury verdict was supported by the evidence presented at trial and not inconsistent with the partial directed verdict, we find no merit to IC&E's remaining argument that the jury verdict was influenced by passion and prejudice because of allegedly inappropriate comments made during closing arguments.

V. Conclusion

Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we hereby order a conditional new trial and remand this case to the district court for further proceedings consistent with this opinion. Collins may avoid the new trial by agreeing to accept a remittitur of the verdict from $165,821.96 to $165,419.96. In the event that reduction is agreed to, interest on the remaining award shall be computed as provided in the original judgment. The election to accept the remittitur must be made within thirty days of the filing of the procedendo.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[3] Because liability was not challenged on appeal, we limit the conditional new trial to *all* damage issues. *See Householder v. Town of Clayton*, 221 N.W.2d 488, 493 (Iowa 1974) (holding new trials are generally granted on all issues, unless a defendant's liability is definitely established).