RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001721-MR

EMMETT E. COOMER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE M. CLAYTON, JUDGE
ACTION NO. 01-CI-006866

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In October 2001, Emmett Coomer brought suit against CSX Transportation, Inc., a railroad company, under the Federal Employers' Liability Act ("FELA"),[1] He alleged that the company had negligently failed to provide him reasonably safe working conditions and that the negligence had caused him to develop bilateral carpal tunnel syndrome and ulnar neuropathy (a

[1] 45 U.S.C. §§ 51 *et seq.*

disorder of the ulnar nerve that caused Coomer pain in his elbow). By summary judgment entered July 22, 2003, the Jefferson Circuit Court dismissed the complaint because, in the court's judgment, Coomer had failed to come forward with any evidence of the company's negligence. It is from that judgment that Coomer has appealed. He contends that the trial court erred by denying his request for a continuance to conduct additional discovery and by disregarding sufficient evidence of the company's negligence to withstand the motion for summary judgment. We affirm.

Coomer began working for CSX in 1976, and until August 2001, he was engaged primarily as a laborer on track-maintenance crews. His duties frequently required him to use heavy, vibrating pneumatic tools and to perform strenuous repetitive motions with his arms and wrists. He alleges that the cumulative trauma of this work resulted in the nerve problems he has experienced and that CSX failed to do all it should have done to minimize the risk of such injuries.

The trial of this matter was twice continued, once at the request of either party. In October 2002, following the second continuance, the trial court set July 29, 2003, as the new trial date and ordered that witnesses and exhibits be identified by June 13, 2003. CSX filed its motion for summary judgment on April 30, 2003.

A few days later, on May 5, Coomer informed CSX that he wished to have an ergonomist inspect his work site and tools. He asked that the inspection take place on either June 4 or June 5. On May 7, CSX replied that those were inconvenient dates and proposed three others. Coomer did not immediately respond. Instead, on May 22, arguing that CSX had been obstructive, he moved for another continuance. The court denied the motion by order entered May 28. At the same time it extended the deadline for Coomer's response to the summary judgment motion, but it refused to extend the deadline for identifying witnesses and exhibits. Coomer immediately moved the court to reconsider his request for a continuance.

On May 30, Coomer rejected CSX's proposed inspection dates and requested another, June 3. On June 2, CSX again replied that that was an inconvenient date and proposed others. Apparently convinced that an inspection any later than June 3 would leave him too little time to meet the witness-and-exhibit deadline, on June 3 Coomer rejected CSX's proposals and suggested no alternatives.

On June 13, the court denied Coomer's motion for reconsideration. Coomer responded to the summary judgment motion on June 20. The court heard oral arguments at the pre-trial conference on July 1, and granted the motion by order entered July 22. Coomer contends that the court abused its

discretion by denying him a continuance to conduct the site inspection. We disagree.

As the parties note, an application for a continuance is addressed to the trial court's sound discretion.[2] Factors courts have considered in exercising that discretion include length of delay; previous continuances; inconvenience to litigants, witnesses, counsel, and the court; whether the delay is purposeful or is caused by the movant; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.[3]

Here, the case had been pending for about eighteen months and had already been continued twice, once at Coomer's request. The trial court could reasonably believe that Coomer had been afforded ample opportunity to arrange for a site inspection, that he knew or should have known following similar difficulties scheduling depositions that scheduling the inspection might require considerably advanced planning, and thus that his failure to arrange the inspection within the deadline for identifying witnesses and exhibits was a problem of his own making. The court did not abuse its discretion, therefore, by denying Coomer's request for yet another continuance.

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[2] Wells v. Salyer, Ky., 452 S.W.2d 392 (1970).

[3] Pendleton v. Commonwealth, Ky., 83 S.W.3d 522 (2002).

Nor did the court err by granting CSX's motion for summary judgment. A FELA claimant is obliged to prove that he was injured as a result of his employer's negligence, and summary dismissal is proper unless he proffers more than a scintilla of evidence in support of each element of his claim.[4] Coomer was thus obliged to proffer at least some evidence that CSX knew or should have known that the particular conditions of his workplace posed an unreasonable risk of cumulative-trauma injury.[5] We agree with the trial court that Coomer failed to meet this burden.

Coomer testified at his deposition that some of the equipment he used vibrated such that it "would shake you all over." He argues that this testimony together with the fact that he is a large man weighing in excess of 400 pounds would permit a juror to infer that the vibrations to which he was exposed were excessive and apt to be injury causing. We do not believe, however, that a lay juror would be qualified to reach this conclusion, for the long-term effects of vibration are not within the average person's experience. Nor would those facts permit an inference that CSX knew or should have known that the

[4] Doty v. Illinois Central Railroad Company, 162 F.3d 460 (7th Cir. 1998); Aparicio v. Norfolk & Western Railroad Company, 84 F.3d 803 (6th Cir. 1996), *abrogated on other grounds by* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

[5] Doty v. Illinois Central Railroad Company, *supra.*

risk of injury posed by the equipment was unreasonable. Coomer conceded as much in his motion for a continuance when he argued that the ergonimist's testimony would be essential to his claim. Coomer thus having failed to proffer more than a scintilla of evidence that CSX was negligent, the trial court did not err by granting its motion for summary judgment. Accordingly, we affirm the July 22, 2003, judgment of the Jefferson Circuit Court.

ALL CONCUR.

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