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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001380-MR

CSX TRANSPORTATION, INC. APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 03-CI-00184

JOHN X. BEGLEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

DIXON, JUDGE: CSX Transportation, Inc., appeals from a judgment of the Perry Circuit Court following a jury verdict awarding damages to CSX's former employee, John X. Begley, pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA").

Begley, who was born in 1942, began working for CSX at its railroad yard in Hazard, Kentucky, in June 1970. For twenty years, Begley's job duties

required him to jump out of slow-moving train cars, landing on the large gravel, or ballast, surrounding the tracks.[1] Begley retired from CSX in 1998, and thereafter sought treatment for pain in his knees, hips, and back. In March 2003, Begley filed suit against CSX pursuant to FELA, alleging CSX failed to provide a safe working environment, which caused Begley to develop debilitating osteoarthritis in his knees and hips. Following a lengthy discovery period, a jury trial commenced on April 9, 2007.

Begley testified at trial and called several witnesses, including his treating physician, Dr. James Chaney, and Tyler Kress, Ph.D., an engineering expert. CSX called several witnesses, including Dr. Robert Love, an orthopedic surgeon, who had performed two independent medical examinations of Begley.

The four-day trial concluded on April 16, 2007. The jury returned a verdict awarding Begley $250,000.00 for pain and suffering, but also assessed Begley's comparative fault at 50%. Accordingly, the trial court entered judgment in favor of Begley for the sum of $125,000.00. CSX moved for judgment notwithstanding the verdict, or alternatively, a new trial. The court denied the post-trial motions, and this appeal followed.

FELA states that, "[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 . . . resulting in whole or in part from the negligence of []

[1] CSX discontinued the requirement of dismounting moving trains in 1990.

the . . . carrier." 45 U.S.C. § 51. In *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006), a panel of this Court addressed FELA:

> What constitutes 'negligence' under FELA 'is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decisional law formulating and applying the concept governs.' *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L. Ed. 1282 (1949). It is well-established that FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases. *See Harbin v. Burlington Northern R. Co.*, 921 F.2d 129, 131 (7th Cir.1990). A key difference between a statutory FELA action and a common law negligence action is that in order to satisfy the causation element in a FELA action, a plaintiff need only show that the employer 'in whole or in part' caused his or her injury. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957). The United States Supreme Court has specifically described the FELA plaintiff's burden as follows: 'Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' *Id.*, 352 U.S. at 506, 77 S.Ct. at 448. Accordingly, FELA actions are 'significantly different' from the ordinary negligence claim. *Id*., 352 U.S. at 509-10, 77 S.Ct. at 450.

On appeal, CSX alleges that Begley's causation evidence was insufficient and that the trial court erroneously failed to instruct the jury on several issues. After thoroughly reviewing the record before us, we disagree.

I. Causation Evidence

CSX first argues that Dr. Chaney's medical causation testimony was inadmissible pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and Kentucky Rules of Evidence 702. However, this argument was not raised before the trial court; consequently, we decline to address it here. *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986).

CSX alternatively argues it was entitled to a directed verdict because Dr. Chaney's testimony was insufficient to submit the case to the jury. As the basis for its argument, CSX opines that Dr. Chaney's testimony as to medical causation was rendered unreliable on cross-examination when Dr. Chaney conceded that he was unaware the practice of dismounting moving trains was abandoned in 1990, eight years before Begley retired. CSX contends Dr. Chaney's erroneous assumption as to duration of exposure precludes a finding of causation. We disagree.

After reviewing the record, it is clear that Dr. Chaney believed Begley's occupation contributed to his condition. Although his testimony was inconsistent on cross-examination, Dr. Chaney reiterated that mounting and dismounting the moving train cars contributed to Begley's osteoarthritis, "a degenerative, progressive illness." Despite CSX's complaints, it was within the province of the jury to weigh the credibility of Dr. Chaney's testimony. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Furthermore, contrary to CSX's assertion, we do not perceive this case as so complex that specialized medical testimony, other than that offered by

Dr. Chaney, was required for the jury to infer a causal connection between dismounting moving trains and Begley's degenerative osteoarthritis. *See Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 59-60 (2nd Cir. 1996) ("[T]he trier of fact could reasonably determine, without expert testimony, that prolonged exposure to paint fumes would cause headache, nausea, and dizziness."). Likewise, the jury also heard scientific testimony from Tyler Kress, Ph.D., regarding the risks of dismounting moving trains and the potential for cumulative trauma injuries.

"'The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.'" *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 85 (Ky. App. 2006) (*quoting Rogers*, 352 U.S. at 508, 77 S.Ct. 443, 449). In the case at bar, sufficient evidence was submitted for the jury to infer causation. We conclude the trial court did not err by denying CSX's motion for a directed verdict.

II. Jury Instructions

"Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Hamilton*, 208 S.W.3d at 275 (citations and quotation marks omitted.).

A. Proximate Cause

CSX argues that the trial court erred by refusing to give the jury a proximate cause instruction. This argument is without merit.

In *Hamilton*, *supra*, a panel of this Court acknowledged that the United States Supreme Court's decision in *Rogers*, *supra*, "depart[ed] from traditional common-law tests of proximate causation." *Hamilton*, 208 S.W.3d at 278. We reiterate that *Rogers* enunciated the relaxed standard for a FELA claim: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part*, *even the slightest*, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506, 77 S.Ct. at 448 (emphasis added); *Hamilton*, 208 S.W.3d at 275. CSX urges us to revisit our decision in *Hamilton*, *supra*, pursuant to the concurring opinion in a recent United States Supreme Court decision, *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799, 66 L.Ed.2d 638 (2007). However, we are not persuaded by CSX's reliance on the concurring opinion in S*orrell*. Consequently, we decline to revisit *Hamilton*, and we conclude the trial court properly denied CSX's requested instruction on proximate causation.

B. Foreseeability

CSX next argues that the trial court erred when it refused to give the jury a separate foreseeability instruction. CSX points out "that reasonable foreseeability of harm is an essential ingredient of [FELA] negligence." *Gallick v. Baltimore & Ohio R. R. Co.*, 372 U.S. 108, 117, 83 S.Ct. 659, 665, 9 L.Ed.2d 618 (1963). While we agree with CSX that foreseeability is a necessary component of

any negligence case, we conclude the trial court adequately instructed the jury without issuing a separate foreseeability instruction.

"If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Hamilton*, 208 S.W.3d at 275 (citation and quotation marks omitted). Here, instruction number five advised the jury as to CSX's duty of care and stated in part: "This duty included the duty to guard against risks or dangers of which it knew, or by the exercise of ordinary care should have known." We conclude the "knew" and "should have known" language was accurate and sufficiently advised the jury as to foreseeability of harm. The trial court did not err.

C. Taxation of Damages

CSX contends the trial court committed reversible error by refusing to instruct the jury that an award of damages is non-taxable. CSX relies on *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), where the Court found it was reversible error to refuse a non-taxable instruction in a wrongful death case under FELA. *Id*. at 498, 100 S.Ct. at 759. While there are factual differences between *Liepelt* and the case at bar, the Court's holding is clear:

> We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to

> either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

Id., 100 S.Ct. at 759-60.

CSX contends that, pursuant to *Liepelt*, it is entitled to a new trial on damages. Begley, however, contends the omission of the non-taxable instruction was not prejudicial to CSX and constituted harmless error. *See* Kentucky Rules of Civil Procedure (CR) 61.01. Begley points out that, although he sought $500,000.00 in damages, the jury awarded $250,000.00 and apportioned Begley's comparative fault at 50%. Furthermore, we find instructive an Eighth Circuit Court of Appeals opinion which suggested that "the prejudicial effect of a failure to give a nontaxability instruction should be decided on the existence of evidence that the jury did, in fact, operate under a false impression of the tax laws." *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980) (citation omitted). The record in this case fails to reveal evidence that the jury inflated the award of damages to compensate for income taxes. Consequently, we find CSX suffered no prejudice, and we conclude the error was harmless.

D. Duty to Mitigate

Next, CSX claims the trial court committed reversible error by failing to instruct the jury as to Begley's duty to mitigate his damages. CSX cites *Jones v. Consolidated Rail Corp.*, 800 F.2d 590 (6th Cir. 1986), where the Court "acknowledge[d] the well-established rule that an injured plaintiff has a duty to

mitigate his damages." *Id*. at 593 (citation omitted). However, the Court went on to state that, "we see no reason, and defendant has presented us with no reason, to create in FELA cases an exception to the general rule that the defendant has the burden of proving that the plaintiff could, *with reasonable effort*, have mitigated his damages." *Id*. at 594 (emphasis added).

Here, CSX claims that Begley failed to follow reasonable medical advice to undergo knee and hip replacement surgery and lose weight. Curiously, in its appellate brief, CSX failed to cite any specific evidence in the record supporting its assertions. CR 76.12(4)(c)(v). After reviewing the record, we find no evidence to support an instruction that Begley unreasonably failed to mitigate his damages. Accordingly, the court did not err by refusing to instruct the jury on mitigation.

E. Reduction of Damages to Present Value

Finally, CSX contends the court erroneously refused to instruct the jury that damages for future pain and suffering must be reduced to present value. CSX relies on *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536-37, 103 S.Ct. 2541, 2550, 76 L.Ed.2d 768 (1983), where the Court stated:

> It has been settled since our decision in *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L. Ed. 1117 (1916) that 'in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.' *Id*., at 490, 36 S.Ct., at 632.

However, Begley argues that CSX construes *Pfeifer* too broadly, as that case specifically addressed the proper method for valuating the "impaired

earning capacity" of a disabled worker. *Id*. at 533, 103. S.Ct. at 2548. Indeed, *Kelly*, *supra*, cited by the *Pfeifer* Court, addressed valuating the "deprivation of future benefits" to the decedent's family. *Kelly*, 241 U.S. at 491, 36 S.Ct. at 632.

In *Paducah Area Public Library v. Terry*, 655 S.W.2d 19 (Ky. App. 1983), an automobile negligence case, this Court discussed valuation of future damages. *Id*. at 24. This Court stated:

> We are well aware of the rule, almost universally applied, in Federal Employers' Liability cases, (45 U.S.C. § 51 et seq. (1981)), and Jones Act cases, (46 U.S.C. § 688 (1979)), that awards for future loss of income must be reduced to their present worth. Evidence is received with this objective in mind. The defendant, if plaintiff fails to do so, may adduce his own proof on present value by direct evidence or by cross-examination. The jury is instructed that their award shall be in present worth, *but the present worth rule does not apply to any award for pain and suffering*.

Id. (emphasis added), citing *Louisville & Nashville R.R. Co. v. Gayle*, 204 Ky. 142, 263 S.W. 763 (Ky. 1924), and *Kelly*, *supra*. Furthermore, in *O'Byrne v. St. Louis Southwestern Ry. Co.*, 632 F.2d 1285, 1286 (5th Cir. 1980), the Court stated, "while awards for future earnings and medical expenses should be reduced to present value, damages for future pain and suffering should not." Finally, in *Flanigan*, 632 F.2d at 886, the Eighth Circuit concluded a present value instruction as to pain and suffering was inappropriate. The Court held:

> The same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty. Requiring the reduction of an award for pain and suffering to its present value would improperly allow

> a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation.

Id.; *See also Taylor v. Denver & Rio Grande Western R.R.*, 438 F.2d 351, 352-53 (10th Cir. 1971).

Based upon the foregoing, we conclude CSX was not entitled to a present value instruction. Accordingly, the trial court did not err in refusing the instruction tendered by CSX.

For the reasons stated herein, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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