

RENDERED: SEPTEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000163-MR
&
NO. 2008-CA-000219-MR

JAMES WALKER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 03-CI-011013

CSX TRANSPORTATION, INC.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: This appeal and cross-appeal stem from a personal injury suit James Walker brought against CSX Transportation, Inc. A jury returned a verdict in favor of CSX. Mr. Walker is appealing allegedly erroneous evidentiary rulings. In the event that we reverse the lower court's judgment, CSX cross-appeals the

jury instructions given by the court. We find that the evidentiary rulings were proper and affirm, thus rendering the cross-appeal moot.

Mr. Walker filed suit against CSX pursuant to the Federal Employers Liability Act (“FELA”), 45 U.S.C. § 51 et seq. Mr. Walker alleged that CSX failed to provide a reasonably safe work place in that it failed to educate and warn its employees about carpal tunnel syndrome, which Mr. Walker developed. CSX maintained that Mr. Walker’s injuries were unforeseeable and denied negligence.

A trial by jury began on December 5, 2007, in the Jefferson Circuit Court. Mr. Walker’s first witness was CSX employee Jessie Skinner, the CSX General Foreman of Locomotives. Mr. Walker’s counsel attempted to ask Mr. Skinner about other employees who had developed carpal tunnel syndrome. Counsel for CSX objected to any testimony regarding other incidents of carpal tunnel syndrome and the court sustained the objection.

Later, Mr. Walker called Warren VanMeter and Mike Monohan. Mr. Walker alleges these two witnesses were to testify about other incidents of carpal tunnel syndrome. Because of the trial court’s previous ruling regarding other instances of carpal tunnel syndrome, they did not testify to such. Mr. Walker argues that this was improper and he should have been allowed to introduce evidence of other instances of employees developing carpal tunnel syndrome.¹ We disagree.

¹ Appellant also presented the argument that CSX opened the door to this testimony through a statement during opening argument that the incident rate among railroad employees was 6%. Counsel for Appellant properly notified this Court that this statement was in error and withdrew the argument following oral argument. We commend counsel for his diligence and candor.

During the preliminary phases of this case, CSX made a motion in limine to exclude any evidence of other employees developing carpal tunnel syndrome. In his response, Mr. Walker agreed not to introduce co-worker testimony regarding carpal tunnel syndrome. Mr. Walker therefore waived this issue. Further, he did not offer avowal testimony as to what the three witnesses would have said. In order for this Court to properly review excluded testimony, the issue must be preserved by avowal. *Caldwell v. Commonwealth*, 133 S.W.3d 445, 450 (Ky. 2004). His argument regarding this issue, therefore, lacks merit.

Mr. Walker also argues that a letter he received from CSX should not have been admitted into evidence because it contained information about collateral source benefits. Mr. Walker objected to the introduction of this letter and then moved for a mistrial. The court rejected his arguments.

As to evidentiary rulings, “[t]he standard of review is whether there has been an abuse of that discretion. The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)(citation omitted). The collateral source rule “precludes the admission of evidence of benefits received by the plaintiff, other than compensation for the injury from the defendant itself, when such evidence could be misused by the jury to reduce an award. . . .” *Norfolk Southern Ry. Corp. v. Henry Tiller*, 944 A.2d 1272, 1288 (Md. App. 2008).

We find that the trial court did not abuse its discretion in admitting the letter into evidence. During direct examination, Mr. Walker's counsel discussed the letter with Mr. Walker. The discussion appears to suggest that the letter was sent improperly and was part of a scheme of wrongdoing on behalf of CSX.

The letter discusses a vocational rehabilitation program available to Mr. Walker to help him return to work. It also talks about contacting his doctor if he should want to return to work. The part of the letter objectionable to Mr. Walker is “[t]he Railroad Retirement Board has sent us a ‘Job Information Form’ indicating that you have applied for an Occupational Disability Benefit. . . .” He argues that the letter violates the collateral source rule because it mentions the disability benefit and therefore should have been excluded. We disagree.

The letter was not introduced for purposes of introducing evidence of a collateral source. When questioning Mr. Walker, counsel for CSX never mentioned the application for disability benefits. The letter was brought up to rebut Mr. Walker's testimony of wrongdoing in the handling of his injury. Mr. Walker opened the door for the introduction of the letter. Further, the letter does not state that Mr. Walker was *receiving* benefits, only that he had *applied* for benefits. Finally, the judge gave the jury an admonition telling the members not to consider any other benefits Mr. Walker might have been eligible for. The trial court did not abuse its discretion in allowing the letter into evidence.

As for CSX's cross-appeal, since we are affirming the judgment in its favor, it is moot.

We therefore affirm the judgment of the Jefferson Circuit Court in favor of CSX.

ALL CONCUR.

Derek Humfleet

Linsey W. West