STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Vickie L. Akers,
Plaintiff Below, Petitioner

FILED
September 25, 2012
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0385 (Cabell County 08-C-0656)

CSX Transportation, Inc.,
Defendant Below, Respondent

MEMORANDUM DECISION

The petitioner, Vickie L. Akers, by counsel, Robert F. Daley, appeals the order of the Circuit Court of Cabell County entered January 31, 2011, denying the petitioner's motion for a new trial. The respondent, CSX Transportation, Inc., ("CSXT") filed its response by counsel, Marc E. Williams and Melissa G. Foster Bird. The petitioner filed a reply to the respondent's brief.

This Court has considered the parties' briefs, the record on appeal as well as the oral arguments of the parties. Upon consideration of the foregoing, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioner filed suit against the respondent alleging, *inter alia*, claims of negligence resulting in cumulative trauma injuries caused by repetitious physical activities performed in the course of her employment as a utility worker for the respondent. The petitioner's job was in the Huntington locomotive shop, where locomotives were repaired. The petitioner's duties were to clean the locomotives and other areas of the shop. The petitioner began working for the respondent in 2000, and ended her employment in 2006.

The matter was tried before a jury beginning on September 20, 2010, and concluded on September 23, 2010. At the trial of this action, the respondent utilized an expert witness in ergonomics, Todd Brown, to counter the petitioner's claims of negligence.[1] Part of this expert's testimony dealt with the lack of repetitive physical

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[1] Ergonomics, as defined by the witness, is the study of the human body, what its capabilities are, what its limitations are—both physically and mentally—and applying
(continued . . .)

activities in the petitioner's job duties. This witness also testified about safety programs within the respondent's workplace. During the cross-examination of this witness, the petitioner attempted to utilize a document containing a safety assessment of the Huntington rail yard. This document was prepared by an employee of the respondent and detailed responses to a survey taken of employees in the transportation department in March of 1994. The survey period was six years prior to the petitioner's employment in a different division of the respondent. The petitioner sought to use this document to rebut the ergonomics expert's testimony regarding workplace safety and argued that the survey responses cast a negative light upon the respondent's claims of a safe work environment.

The respondent objected to the use of this document, arguing that the document was irrelevant because it was a survey of employees in a different department than the petitioner's and that the survey pre-dated Ms. Akers' employment for the respondent. The respondent further argued that the report was unfairly prejudicial because it contained inflammatory negative comments that would have confused the jury and outweighed any probative value. The circuit court sustained the respondent's objection, finding that the survey contained conclusions that were not supported by the survey responses themselves and used empirical data that was contrary to the survey results.

The jury returned a verdict in favor of CSXT and awarded the petitioner nothing on her claim. On October 13, 2010, the final judgment order was entered by the Circuit Court of Cabell County.

The petitioner filed a motion for new trial, alleging that the circuit court committed error in not admitting into evidence the 1994 safety assessment report. As noted, the petitioner wanted to admit this report during the cross-examination of the respondent's expert witness so as to impeach his credibility and rebut one of the company's defenses to the claim. The circuit court denied the motion for new trial. The appeal of the petitioner to this Court followed.

We review the circuit court's rulings on a motion for a new trial on an abuse of discretion standard. We have explained that in regard to our standard for reviewing a circuit court's ruling on a motion for a new trial that

> "[a]s a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion

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those factors to the design of work, equipment and products that make it easier for people to accomplish work goals. This witness testified about how he examined the jobs being performed by the respondent's employees and the various programs in place to combat workplace injuries.

> standard. *In re State Public Building Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). . . . Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995). Furthermore, "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W.Va. 624, 630, 499 S.E.2d 846, 852 (1997) (quoting Syl. pt. 4, *Sanders v. Georgia–Pac. Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)).

Williams v. Charleston Area Medical Center, Inc., 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003).

Our review, therefore, of the underlying decision is discretionary. Under the particular facts and circumstances of this proceeding, we find no error in the circuit court's decision to prohibit the petitioner from cross-examining the respondent's expert witness using the report of a 1994 safety assessment report of another division of the respondent. The record clearly supports the conclusion that the circuit court weighed the relevance of the report to the evidence and found it to be irrelevant. We cannot conclude that the circuit court's failure to allow cross-examination was wrong. The circuit court's decision is affirmed.

Affirmed.

ISSUED: September 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh