[Cite as *Battaglia v. Conrail*, 2009-Ohio-5505.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Francis Battaglia	Court of Appeals No. L-08-1332
Appellee	Trial Court No. CI 05-5191
v.	
Conrail, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: October 16, 2009

* * * * *

E. J. Leizerman and Michael Jay Leizerman, for appellee.

David A. Damico and Colleen A. Mountcastle, for appellant.

* * * * *

SINGER, J.

{¶ 1} A railroad appeals a $2.6 million workplace injury award issued in the Lucas County Court of Common Pleas to a former railroad employee. For the reasons that follow, we affirm.

{¶ 2} Appellee, Francis Battaglia, began work for appellant, Consolidated Rail Corp. ("Conrail") in 1976 as a brakeman. In 1979, appellant furloughed him. He did not

work for any railroad again until 1988, when he was called back. Between 1988 and 1993, he was a brakeman and a conductor. Following training, in 1993, appellee became a locomotive engineer, a position he held until 2007, when he received medical leave.

{¶ 3} According to appellee, during his tenure with the railroad, he was continuously exposed to diesel exhaust which would infiltrate into the locomotive cab through holes in the floor, cracks in improperly sealed windows and doors and through the equipment compartment. In his deposition testimony, appellee reported that he frequently complained about this condition, but repairs were ineffective.

{¶ 4} At some point, appellee began to experience respiratory distress. On consultation, a pulmonologist diagnosed appellee with asthma. According to appellee, the physician advised him to retire from the railroad to escape further exposure to diesel exhaust.

{¶ 5} On September 9, 2005, appellee instituted the suit that underlines this appeal. In his complaint, appellee alleged that appellant negligently caused the conditions that caused his asthma, a claim under the Federal Employees Liability Act ("FELA"); and, in doing so, violated the terms of the Locomotive Inspection Act ("LIA"), 49 U.S.C. 20701, and regulatory railroad safety standards as articulated in Section 229 et seq., Title 49 C.F.R. Appellant responded, denying liability.

{¶ 6} Following some discovery, appellee moved for partial summary judgment. Appellant filed a memorandum in opposition. On June 15, 2007, the court granted appellee's motion, concluding that appellee's assertion of prolonged exposure to diesel

exhaust fumes in the cab of his locomotive was unrefuted, as was his physician's affidavit that such exposure was a cause of his asthma. Moreover, the court concluded, the existence of diesel exhaust was a violation of the unambiguous requirements of Section 229.43 (a), Title 49 C.F.R., constituting per se negligence under the LIA. Since any degree of negligence is sufficient under FELA to establish causation for an injury, the court granted appellee's motion for partial summary judgment. The court denied appellant's motion for reconsideration.

{¶ 7} On August 21, 2007, appellee moved for partial summary judgment on its FELA claim on the ground that the judgment of a violation of the LIA, already entered, constituted a per se violation of FELA. On April 8, 2008, the court granted appellee's motion and the matter went forward for a jury trial on damages only. At the conclusion of the trial, the jury awarded appellee $2.6 million. The trial court entered judgment on the verdict and denied appellant's motions for a J.N.O.V., new trial and remittitur. This appeal followed.

{¶ 8} Appellant sets forth the following nine assignments of error:

{¶ 9} "I. The trial court erred in granting summary judgment in favor of Battaglia on his LIA claim

{¶ 10} "II. The trial court erred in granting summary judgment on the issue of liability under the FELA and limiting the trial to damages only

{¶ 11} "III. The trial court erred in denying Conrail's motion or a continuance of trial due to discovery abuses

{¶ 12} "IV. The trial court erred in denying Conrail's motion to prelude [sic] the testimony of Dr. DeLara and Dr. Kelly

{¶ 13} "V. The trial court erroneously permitting [sic] exposure testimony in a damages only trial

{¶ 14} "VI. The trial court improperly instructed the jury regarding workers' compensation, emphysema, assumption of the risk and other liability points of law

{¶ 15} "VII. The trial court erred in denying Conrail's motion for directed verdict and judgment notwithstanding the verdict because of Battaglia's failure to present evidence relating to lost wages with reasonable certainty

{¶ 16} "VIII. The jury's verdict should be reversed because it did not calculate net present value, and did not deduct local, state and federal taxes, personal consumption or other required deductions

{¶ 17} "IX. The award of $2,600,000 is against the manifest weight of the evidence, the result of speculation and undue passion and prejudice"

I. Summary Judgment

{¶ 18} In its first two assignments of error, appellant insists that the trial court's decision to grant partial summary judgment on both the LIA and FELA claims was erroneous.

{¶ 19} An appellate court examines an award of summary judgment de novo, employing the same standard as a trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 20} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67; Civ.R. 56(C).

{¶ 21} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts as would be admissible in evidence showing that there is a genuine issue of material fact. Civ.R. 56(E); *Green v. B.F. Goodrich* Co. (1993), 85 Ohio App.3d 223, 228; *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 22} Appellee submitted his initial motion for summary judgment accompanied by his affidavit and that of a co-worker averring that the cabs in the locomotives in which

they worked were regularly, over a prolonged period, infiltrated with diesel exhaust. Also with the motion was the affidavit of physician R. Michael Kelly who stated that he had, "* * * concluded to a reasonable degree of medical certainty that Mr. Battaglia's ongoing and regular exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma[.]"

{¶ 23} Appellee, citing *Lilly v. Grand Trunk Western R.R. Co.* (1943), 317 U.S. 481, 485, insisted that the Locomotive Inspection Act, originally known as the Boiler Inspection Act, imposes on a railroad an absolute duty to operate locomotives safely. Statutorily, this includes an obligation to operate a locomotive, "* * * only when the locomotive or tender and its parts and appurtenances-- (1) are in proper condition and safe to operate without unnecessary danger of personal injury[.]" Section 20701(1), Title 49, U.S. Code.

{¶ 24} Moreover, appellee asserted, diesel exhaust infiltration into a locomotive cab is also an express violation of a federal safety regulation which provides:

{¶ 25} "(a) Products of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." Section 229.43 (a), Title 49 C.F.R.

{¶ 26} Appellee insisted that the unrefuted presence of diesel exhaust in the locomotive cabs in which he worked constituted a breach of an absolute duty imposed by law. Pursuant to *Rogers v. Missouri Pacific R. Co.* (1957), 352 U.S. 500, 508, when a

railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad. As a result, appellee maintained, appellant is liable for his asthma and he was entitled to summary judgment on his LIA claim.

{¶ 27} Appellant responded, asserting that there were questions of fact in three areas which would preclude summary judgment: (1) whether appellee was "exposed" to diesel exhaust, (2) whether the exhaust in the locomotive cab in which appellee worked constituted a violation of the Locomotive Inspection Act, and (3) whether appellee's asthma was caused by his exposure diesel exhaust.

{¶ 28} Appellant maintained that Section 229.43 (a), Title 49 C.F.R. is ambiguous and should be interpreted in a manner consistent with that adopted by the administrative agency tasked with enforcing the rule, the Federal Railroad Administration ("FRA"). According to an affidavit and documents from a former FRA administrator, the agency recognized that it would not be possible to eliminate all diesel fumes from the locomotive cab in some conditions.

{¶ 29} Rather than develop its own rules for limits on the concentration of fumes or regulations for air exchange rates for locomotive cabs, the agency chose to use standards promulgated by the Occupational Safety and Health Administration ("OSHA"). Since appellee failed to show that the conditions in the locomotives in which he worked exceeded the permissible exposure levels or time weight averages established by OSHA, appellant argued, appellee neither established that he was "exposed" to diesel fumes, nor

that there was a violation of the regulation. Therefore, appellant failed to show a violation of the LIA.

{¶ 30} Concerning causation, appellant attached a document from an environmental expert who opined that appellee's exposure to exhaust was not likely excessive and was not at levels known to cause asthma. The asthma was likely triggered by other things, including a smoking habit that had ended 31 years earlier. Appellant also submitted a letter from a physician who opined that causation for appellee's asthma was "multifactoral," but not related to the railroad.

{¶ 31} In appellee's response, he reiterated his arguments concerning the violation of the regulation and pointed out that the reports on which appellant relied to contradict appellee's physician on the issue of causation were unauthenticated by affidavit or otherwise. Appellant, even though it filed a sur-reply and an amended sur-reply, failed to remedy the lack of authentication for its expert reports.

{¶ 32} In its decision on appellee's motion for partial summary judgment on his LIA claim, the court concluded that Section 229.43 (a), Title 49 C.F.R. is "* * * clear and unambiguous – products of combustion shall be released entirely outside the cab." Since the unrefuted affidavits of appellee and his co-worker sufficiently established that diesel exhaust was released into the cab, the court found that appellant had violated the safety regulation.

{¶ 33} Relying on *Aparicio v. Norfolk & Western Ry. Co.* (C.A.6 1996), 84 F.3d 803, for the proposition that the railroad is liable if the exhaust exposure contributed to

any degree, "even the slightest" to appellee's asthma, the court found that such a nexus had been established by Dr. Kelly's affidavit. The court stated that it could not and did not consider the contradictory reports submitted by appellant, because these reports were unauthenticated by affidavit and were, thus, not in conformity with Civ.R. 56(E). On these conclusions, the court granted appellee's motion for partial summary judgment on the LIA violation claim. Appellant's motion for reconsideration and request to resubmit newly authenticated reports were rejected.

{¶ 34} Appellee subsequently moved for partial summary judgment on its FELA claim on the ground that the LIA violation triggered per se liability under FELA. This motion too was granted.

{¶ 35} Appellant claims that the trial court was wrong when it refused to consider the administrative interpretation of Section 229.43 (a), Title 49 C.F.R and in rejecting consideration of their unauthenticated expert opinions on the question of causation. It also suggests that the trial court should have accepted their resubmission with accompanying affidavits presented after summary judgment was granted.

{¶ 36} It has long been held that where a statute is unambiguous, "* * * there is no occasion for resorting to the rules of statutory interpretation. To interpret what is already plain is not interpretation, but legislation * * *. An unambiguous statute is to be applied, not interpreted." *Sears v. Weimer* (1943), 143 Ohio St. 312, 316; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106; *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973,

¶ 10, fn 1. The same applies to administrative rules properly promulgated under statutory authority. *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 10.

{¶ 37} Appellant has directed us to no authority that found Section 229.43 (a), Title 49 C.F.R. ambiguous as it relates to a lead locomotive cab. It points to *Dixson v. Burlington Northern R. Co.* (D. Nebraska 1992), 795 F.Supp. 939, but there the district court concluded that it was not clear if the rule applies to *trailing* locomotives. Appellee points to *Norfolk Southern R. Co. v. Baker* (1999), 237 Ga.App. 292, which holds that the provision is unambiguous, but appears to do so on the basis of an evidentiary deficiency. Neither of these cases is particularly useful to our analysis.

{¶ 38} The plain language of the rule is more persuasive. Although appellant argues that the thrust of the rule is about stack heights, it is clear that the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions. It is directed that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or provide "other means" to prevent the exhaust from entering the cabin in normal operation. We see no ambiguity here. Clearly, if during normal operation exhaust enters the cab, the rule is violated.

{¶ 39} Appellant has never suggested that the conditions experienced by appellee were in any way the result of unusual operating conditions, nor has it presented evidence contradicting appellee's assertion of exposure. Consequently, appellee's exposure to such exhaust is a violation of a safety regulation.

{¶ 40} An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages. *Rogers v. Missouri Pac. R. Co.* (1957) 352 U.S. 500, 508; *Aparicio v. Norfolk & Western Ry. Co.* supra, at 808. A violation of a safety regulation constitutes negligence per se. *Walden v. Illinois Cent. Gulf R.R.* (C.A. 7 1992), 975 F.2d 361, 364, citing *Kernan v. American Dredging Co.* (1958), 355 U.S. 426, 432-433. Consequently, appellant's violation of a safety regulation establishes its negligence.

{¶ 41} Concerning causation, appellant insists that there is a question of material fact, pointing to the unsworn contradictory opinions of its medical experts. Had the court not erroneously excluded consideration of these documents, appellant maintains, there would have been a triable issue.

{¶ 42} "Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial." *Green v. B.F. Goodrich Co*. (1933), 85 Ohio App.3d 223, 228; *Citizens Ins. Co. v. Burkes* (1978), 56 Ohio App.2d 88, 95-96.

{¶ 43} Accordingly, the trial court properly excluded appellant's documents from consideration when the motion for summary judgment became decisional. Moreover, since appellant was given notice of the insufficiency of its proofs prior to its last response to the summary judgment motion and failed to remedy the deficiency, the trial court acted well within its discretion in denying it yet another bite of that apple. As a result, the court

properly granted summary judgment to appellee on its LIA claim. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 44} Since liability under the LIA and FELA is coextensive, violation of the former constitutes a claim under the latter. *Urie v. Thompson* (1949), 337 U.S. 164, 194; *Lilly v. Grand Trunk Western R. Co.* (1943), 317 U.S. 481, 486. Accordingly, appellant's second assignment of error is not well-taken.

II. Motion to Continue Trial

{¶ 45} Trial on the issue of damages only was scheduled to begin on April 21, 2008. On April 14, 2008, appellant filed a motion to continue the trial asserting a lengthy enumeration of purported discovery violations. The motion was apparently argued in an off the record telephone conference prior to trial. The trial court tacitly denied the motion by directing that the trial continue as scheduled. In its third assignment of error, appellant insists that the court's denial of a continuance was erroneous.

{¶ 46} The decision whether to grant a continuance is within the sound discretion of the trial court, and will not be grounds for reversal absent an abuse of that discretion. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9. An abuse of discretion is more than a mistake of law or an error in judgment. The term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 47} The parties argued at length as to whether there were discovery violations, seemingly contesting every detail. Notwithstanding these allegations and counter-

allegations, by the time appellant's continuance motion was filed, this case had been on the court's docket for nearly three years. A trial date of April 14, 2008 was first set on September 27, 2007, and rescheduled for April 21 on January 8, 2008. Absent clear and compelling indicia to the contrary, a court acts within its discretion when it adheres to its own scheduling order. Moreover, other than subsequent references to the telephone conference, there is no record, so the regularity of the proceeding must be presumed. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Accordingly, appellant's third assignment of error is not well-taken.

III. Expert Witnesses

{¶ 48} Prior to trial, appellant moved in limine to bar the testimony of appellee's treating physicians, Dr. Antonio DeLara and Dr. R. Michael Kelly. Dr. DeLara should not testify, appellant insisted, in sanction of discovery violations. Dr. Kelly's testimony should not be permitted because he failed to articulate a proper differential diagnosis for appellee and his anticipated testimony that asthma developed into emphysema was speculative.

{¶ 49} A trial court has broad discretion in determining the admissibility of expert testimony. The determination of the court on such issues will not be disturbed absent an abuse of discretion. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 16.

{¶ 50} With respect to Dr. DeLara, the trial court either found that the discovery violations of which appellant complained were not proven or concluded that any violation did not operate to appellant's prejudice. Appellant has failed to articulate how these

decisions constituted an arbitrary, unreasonable or unconscionable attitude by the court. *Blakemore*, supra.

{¶ 51} Concerning Dr. Kelly, any issue of differential diagnosis as a determinant of scientific reliability goes to causation. *Cutlip v. Norfolk Southern Corp.*, 6th Dist. No. L-02-1052, 2003-Ohio-1862, ¶ 45. In the present matter, causation was properly determined on summary judgment and was not at issue in trial.

{¶ 52} Dr. Kelly's testimony regarding the relationship between asthma and emphysema was in response to appellant's assertion during trial that it was emphysema rather that asthma that accounted for appellee's breathing difficulties. Being as this was an issue that appellant inserted into trial, it can hardly claim prejudice if its opposition presents opposing testimony.

{¶ 53} Accordingly, appellant's fourth assignment of error is not well-taken.

IV. Exposure Testimony

{¶ 54} During trial appellant attempted to block testimony from appellee and other railroad workers as to their regular daily exposure to diesel exhaust in the cabs of appellee's locomotives. Since causation had already been established, appellant insisted, testimony as to exposure to exhaust was irrelevant and its introduction served only to arouse the passion of the jury. The trial court admitted such testimony over appellant's objection.

{¶ 55} Appellee maintains that the exposure testimony went not to causation, but to refute appellant's assertion that his asthma was mild rather than severe as maintained

by appellee's treating physicians. Showing the frequency of exposure corroborated his doctors' assessment of his condition, appellee suggests. Moreover, according to appellee, his daily exposure to diesel exhaust was relevant to his request for an award of damages for pain and suffering and mental anguish for the time he was forced to breathe these fumes.

{¶ 56} Evidence which is permissible for one purpose may be admitted, even though there may be a purpose for which such evidence is inadmissible. *Dorsten v. Lawrence* (1969), 20 Ohio App.2d 297, 302; Evid.R. 105. When this occurs, the rule requires a trial court to issue a limiting instruction to the jury if an opposing party requests such an instruction. Id. If no such instruction is requested, however, any error is waived. *Lewicky v. Accurate Bldg. Sys.* (Dec. 3, 1998), 8th Dist. No. 72906.

{¶ 57} In this matter, evidence as to appellee's exposure to diesel exhaust was admissible on the issue of the severity of appellee's condition and to establish pain and suffering. Appellant failed to request any limiting instruction. Accordingly, appellant's fifth assignment of error is not well-taken.

V. Jury Instructions

{¶ 58} In its sixth assignment of error, appellant complains that it was prejudiced by the trial court's instruction that workers' compensation did not apply to appellee; that, if the jury could not differentiate between damages resulting from emphysema and those from asthma, appellant was liable for the whole; and that assumption of the risk was not a defense.

{¶ 59} "A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. The trial court is vested with broad discretion in fashioning the language of the charge and its determination as to the propriety of the instructions will not be disturbed absent an abuse of that discretion. *Garbers v. Rachwal*, 6th Dist. No. L-06-1212, 2007-Ohio-4903, ¶ 19.

A. Workers' Compensation

{¶ 60} Prior to deliberation the trial court, in its instructions, advised the jury that appellee brought the suit against appellant, "* * * for injuries and damages he received while in the course of his employment as a locomotive engineer. *Railroad employees are not covered by workers' compensation.* Congress has passed federal legislation requiring railroad employees to bring these actions in Court * * *. [Appellee] has done so." (Emphasis added.)

{¶ 61} Appellant does not contend that this instruction is an inaccurate statement of the law. Rather, it claims that by advising the jury that workers' compensation is unavailable to railroad workers, the court violated a corollary to the collateral source rule and that this violation operated to its prejudice. Appellant cites to cases in several foreign jurisdictions which, it claims, find introduction of this information reversible error.

{¶ 62} Appellee insists that the instruction belongs in the case because most jurors assume that railroad workers are eligible for workers' compensation and may improperly

adjust an award to take such compensation into account. Moreover, appellee maintains, it is local custom in both state and federal courts to include such language.

{¶ 63} In *Eichel v. New York Central R. Co.* (1963), 375 U.S. 253, a railroad worker pursued a FELA claim for injuries sustained on the job. When the worker prevailed at trial, the railroad appealed, arguing that it should have been permitted to introduce as evidence of a motive for not returning to work testimony that the plaintiff was receiving disability payments. The appeals court reversed on this ground and ordered a new trial on damages. (2 C.A.1963), 319 F.2d 12, 14. On further appeal, however, the Supreme Court of the United States reversed the court of appeals, concluding that the likelihood of the misuse of this information by the jury outweighed its probative value and could operate to the plaintiff's prejudice. 375 U.S. at 255.

{¶ 64} A corollary of the *Eichel* ruling forms the basis for the cases upon which appellant relies. In *Weinell v. McKeesport Connecting R. Co.* (3 C.A.1969), 411 F2d 510, a railroad employee prevailed in a FELA suit after a jury trial. The railroad appealed on a number of grounds, including the trial court's refusal to instruct the jury that FELA was not the only source by which the plaintiff could recover for his injury. This instruction was requested in response to the statement of plaintiff's counsel during opening that FELA, "* * * provides the only method by which a railroad employee * * * may recover damages * * *." The appeals court reversed the verdict, not on this ground, but because the court had issued to the deliberating jury a "dynamite instruction" that, if they were unable to reach a verdict, it would be an "* * * an encouragement to the Communists * *

." Id. at 513. In passing, the court noted that it considered plaintiff's opening comments "improper" and " * * we assume will not be made again." Id. at 512.

{¶ 65} In *Stillman v. Norfolk & Western R. Co.* (4 C.A.1987), 811 F.2d 834, 838, an unsuccessful FELA plaintiff argued that the trial court erred in refusing his proposed instruction that recovery under FELA was his only possible remedy and that he would receive no workers' compensation benefits. The appellate court rejected this argument, finding workers' compensation "* * * completely irrelevant to the issues in the case, and allowing the jury to consider such information could have prejudiced the railroad." Moreover, citing *Eichel*, the court noted that defendants in FELA cases are not allowed to inform a jury that a plaintiff has received benefits from a collateral source. "We perceive no reason for a different rule when the plaintiff in a FELA case seeks to inform the jury of the absence of benefits from a collateral source." Id.

{¶ 66} *Stillman* was followed, and perhaps expanded, in *Hileman v. The Pittsburgh and Lake Erie R. Co.* (1996), 546 Pa. 433, 437 ("Railroad employees do not automatically receive worker's [sic] compensation payments * * *" deemed an erroneous charge.); *Kansas City Southern R. Co. v. Stokes* (Texas App., 2000), 20 S.W.3d 45, 48-50 ("* * * not entitled to benefits under Texas Workers Compensation laws, and the Federal Employers Liability Act is his exclusive remedy * * *" instruction was reversible error.); *Schmitz v. Canadian Pacific R. Co.* (7 C.A.2006), 454 F.3d 678, 685 (Trial court properly refused to answer jury question as to whether plaintiff received workers' compensation benefits.)

{¶ 67} None of the cases appellant cites are binding upon this court. Ultimately, our question is whether instructions containing language reflecting a correct statement of the law is so prejudicial to the railroad that its inclusion constitutes an abuse of discretion. Pursuant to *Eichel,* at 255, this involves an analysis of whether the likelihood that the jury will misuse this information outweighs its value.

{¶ 68} In *Eichel*, the court concluded that the introduction of evidence of the plaintiff's disability pension payments was improper. Such payments could in no way be used in mitigation of other damages and the use of such evidence in support of the proposition that such payments might precipitate malingering was, at best, tenuous. Inclusion of such evidence, then, would result in a potential for misuse by the jury that outweighed the value of the evidence. Id.

{¶ 69} This rule, according to appellant, has now morphed into a flat rule that any mention of workers' compensation payments, or the lack thereof, in a FELA case is per se reversible error. We are perplexed at this purported result.

{¶ 70} In *Weinell*, at 512, in dicta and without any analysis or citation to authority, the appeals court disapproves telling the jury that a FELA action is the "only way" a railroad worker may be compensated for an on-the-job injury. *Stillman,* at 838, echoes this conclusion and, citing *Eichel* for the proposition that a defendant may not inform a jury of collateral benefits, essentially finds that what is good for the goose is good for the gander. *Stillman* also deals with whether a jury may be informed that FELA is the

plaintiff's "only possible remedy." *Stokes* is also an exclusive remedy case. *Hileman* and *Schmitz* are pure "no mention" of workers' compensation cases.

{¶ 71} The most persuasive of these cases, in our view, is *Schmitz* because it involves a question from a jury as to whether a FELA plaintiff can collect workers' compensation. This question lends considerable credence to appellee's argument that uninstructed jurors might assume that a FELA plaintiff is entitled to other compensation. It seems to us that, just as a jury informed of collateral disability payments might improperly reduce an award, so too might a jury that mistakenly assumes that a FELA plaintiff will receive collateral workers' compensation benefits be tempted to adjust its award. Given this potential mischief, we cannot say that the trial court acted arbitrarily, unreasonably or unconscionably when it instructed the jury that appellee was not eligible for workers' compensation on this claim.

B. Emphysema

{¶ 72} The court instructed the jury:

{¶ 73} "If you award damages, you shall award Plaintiff such a sum as you believe will fairly and justly compensate him for his asthma. If you find that Plaintiff's pulmonary or lung injuries also involve emphysema, you shall award no sum for the emphysema. If you cannot separate asthma from emphysema with respect to the Plaintiff's pulmonary and lung damage, the Plaintiff is – the Defendant is liable for all such pulmonary and lung damage."

{¶ 74} Appellant insists that this instruction unfairly holds it responsible for appellee's emphysema even though asthma was the sole basis of liability.

{¶ 75} Appellee responds that it was appellant who brought emphysema into the case, positing it as a cause for some or all of appellee's debility. Since it was appellant who asserts that emphysema, not asthma, caused appellee's diminished health, the burden of proof should be on appellant to demonstrate the degree of emphysema's influence on appellee's health. Moreover, appellee maintains, emphysema should not have been permitted in the case at all, because FELA holds a railroad responsible for an employee's injury irrespective of the degree of the railroad's relative fault.

{¶ 76} "Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad regardless of whether the injury was also caused 'in part' by the actions of a third party." *Norfolk & Western R. Co. v. Ayers* (2003), 538 U.S. 135, 165-166. "FELA allows an injured worker to recover his entire damages from the railroad whose negligence jointly caused an injury, thus placing on the railroad the burden of seeking contribution from other tortfeasors." *Hess v. Norfolk Southern R. Co.*, 153 Ohio App.3d 580, 2003-Ohio-4172, ¶ 55, rev., in part, on other grounds, 106 Ohio St.3d 389.

{¶ 77} This issue must be considered in the specific factual and procedural posture of the case. The jury heard conflicting testimony from experts who testified that emphysema was a progression of asthma and that it was not. The same experts divided on the question of whether appellee's emphysema was a recent development or had

existed coextensively with his asthma for some time. The sole basis of liability had already been determined to have been asthma and, indeed, appellee attempted to limit the damages trial to evidence concerning only asthma.

{¶ 78} We do not believe that in this context *Ayers* and *Hess* are applicable. Those cases dealt with a single injury that may have had been caused by one or more agents in addition to the railroad. Here, there was testimony submitted, if believed, by which the jury could have found that appellee had two distinct conditions. Of these two injuries, it had been determined on summary judgment that appellant was only responsible for one.

{¶ 79} Nevertheless, we conclude that the instruction was proper. It was appellant that advanced the theory that its damages should be mitigated because emphysema rather than asthma was at their root. It seems reasonable that the proponent of such a position should have the burden to demonstrate the degree to which this might be so. See *Minnich v. Ashland Oil Co.* (1984), 15 Ohio St.3d 396, syllabus. This is the effect of the challenged instruction.

C. Assumption of the Risk

{¶ 80} The court charged the jury:

{¶ 81} "You are further instructed that assumption of the risk is no bar to recovery under the Federal Employers' Liability Act or the Locomotive Inspection Act.

{¶ 82} "[Appellant], cannot require [appellee] to assume the risk of injury while working for the railroad, and [appellant] may not argue that it is not liable or that its liability should not [sic] be reduced because of [appellee's] assumption of the risk."

{¶ 83} Appellant argues that an instruction on assumption of the risk goes to liability, which had already been determined on summary judgment. Appellant suggests that the instruction was irrelevant and operated to its prejudice.

{¶ 84} We agree with appellant that the instruction was surplusage in a damages-only trial, but we fail to see, and appellant fails to articulate, in what manner this charge operated to its prejudice.

{¶ 85} Accordingly, appellant's sixth assignment of error is not well-taken.

VI. Expert Wage Testimony

{¶ 86} In its seventh assignment of error, appellant suggests that the trial court erred in denying its motion for a directed verdict or a J.N.O.V. because appellee failed to present expert testimony on the issue of his lost wages.

{¶ 87} A motion for a directed verdict shall be granted if a trial court, "* * * after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." Civ.R. 50(A)(4). A motion for a judgment notwithstanding the verdict may be sustained, "* * * only if there was insufficient evidence to permit reasonable minds to reach different conclusions, and conversely, the trial court had a duty to overrule the motion for judgment notwithstanding the verdict if there was sufficient evidence to permit reasonable minds to reach different conclusions." *McComis v. Baker* (1973), 40

Ohio App.2d 332, 335, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215 at paragraph four of the syllabus.

{¶ 88} Appellant insists that a plaintiff's recovery for lost wages must be established with reasonable certainty and may not be permitted when the evidence is subject to speculation and conjecture. Such certainty may only be achieved, according to appellant, by testimony of an expert in such matters. In support of this proposition, appellant cites *Sampson v. Missouri Pacific R. Co.* (Mo.1978), 560 S.W.2d 573, 589.

{¶ 89} Appellee responds that he testified to the wages he had been making, the date he could no longer work for the railroad and the amount of time that he intended to continue working. Appellee insists that all of this testimony was within his knowledge and it was all the jury needed to compute his lost wages. No expert testimony was necessary, and certainly not mandated.

{¶ 90} *Sampson* is not a FELA case. It is a Missouri tort action and, as nearly as we can ascertain, premised wholly on Missouri law. It is not binding precedent for this court, nor do we find it particularly persuasive. Appellant cites no other authority for its assertion that mandatory expert testimony must be offered to prove lost wages.

{¶ 91} Appellee was competent to testify to all of the elements necessary to compute lost wages. Appellant had the opportunity to cross examine appellee and was free to call its own expert if it so chose. Like the trial court, we find no grounds to support a directed verdict or a J.N.O.V. Accordingly, appellant's seventh assignment of error is not well-taken.

VII. Damage Calculations

{¶ 92} In its eighth assignment of error, appellant contends that the jury improperly computed its award because appellee failed to present evidence of either a method to reduce the award to present value or information detailing his state and federal income taxes so as to allow the jury to non-speculatively exclude such items from the award. Appellee responds that nothing in the law mandates that he present testimony on either of these issues.

{¶ 93} An award for wage loss from future earnings under FELA is computed by taking estimated gross wages, less federal and state taxes that would not be incurred because the amount is a tort award rather than earnings. *Norfolk & Western R. Co. v. Liepelt* (1980), 444 U.S. 490, 493. The product of this calculation is then reduced to present value. *St. Louis Southwestern R. Co. v. Dickerson* (1985), 470 U.S. 409, 411-412.

{¶ 94} While it has been held to be error to deny a FELA defendant the right to put on evidence about reducing an award by taxes or adjusting to present value, *Liepelt* at 494; *Monessen Southwestern R. Co. v. Morgan* (1988), 486 U.S. 330, 340, appellant presents us with no compelling authority of a concomitant duty of a FELA plaintiff to come forth with such evidence. Indeed the approved method for dealing with these issues is a jury charge. *Liepelt* at 498; *Monessen* at 342.

{¶ 95} In this matter, the trial court instructed the jury:

{¶ 96} "If your verdict is in favor of the Plaintiff, you will not add any sum of money to the amount of the verdict to account for income taxes * * * because the amount awarded to the Plaintiff by your verdict is not taxable income to the Plaintiff, and you should not consider income taxes in fixing the amount of your award."

{¶ 97} The court also instructed at length on how to reduce the award to present value and provided the jury with present value tables as a suggested method of computing present value.

{¶ 98} Both of these instructions are in conformity with the charges upheld in the cases. If, as it is presumed to do, *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, the jury followed the instructions of the court, its award computations were proper. Accordingly, appellant's eighth assignment of error is not well-taken.

VIII. Manifest Weight

{¶ 99} In its final assignment of error, appellant asserts that the verdict was against the manifest weight of the evidence and the award of $2.6 million was "clearly excessive."

{¶ 100} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Great deference is given to the jury who, by virtue of its ability to observe the demeanor of the witnesses and test the witnesses' credibility, is presumed

to have delivered a correct verdict. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 101} We have carefully examined the transcripts of these proceedings. There was clearly evidence submitted which, if believed, supported all of the elements necessary to award appellee damages for his injury. As far as the amount of the award, appellant's only argument seems to be that $2.6 million is a lot of money, so obviously the jury lost its way or succumbed to the throes passion.

{¶ 102} Appellee presented evidence tending to show that for more than two decades he had been exposed to diesel exhaust in his workplace, that this exposure caused and then exacerbated his asthma and that his condition would eventually worsen, almost certainly reducing his lifespan. Given this, we cannot say that the jury's award was excessive.

{¶ 103} Accordingly, appellant's ninth assignment of error is not well-taken.

{¶ 104} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Mary J. Boyle, J. _____
CONCUR.
JUDGE

Judge Mary J. Boyle, Eighth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.