

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

Roger Weith

Court of Appeals No. L-10-1114

Appellant

Trial Court No. CI0200708276

v.

CSX Transportation, Inc.

DECISION AND JUDGMENT

Appellee

Decided: February 11, 2011

* * * * *

E. J. Leizerman and Michael Jay Leizerman for appellant.

Mark D. Weeks and Michael W. Jackson for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a directed verdict issued by the Lucas County Court of Common Pleas during a jury trial on a Federal Employers' Liability Act claim. For the reasons that follow, we reverse.

{¶ 2} Appellant, Roger Weith, was a locomotive engineer, employed by appellee, CSX Transportation, Inc., out of the railroad's Stanley yard in Walbridge, Ohio. On

December 22, 2004, appellant was assigned to make a dual locomotive configuration for that night's work.

{¶ 3} Configuring dual locomotives requires three connections; a mechanical coupler between the engines, an electrical connection that permits the engineer in one of the locomotives to operate the other as a slave unit and a hose coupling to supply air for the brakes. Air between the engines is provided by a hose which is on the right side of the mechanical couplers. After the mechanical couplers are engaged, the air hoses must pass under the mechanical couplers and be mated by a clasp like device, a glad hand, on the end of each hose. The glad hand is designed to interlock and be held in place by gravity while the train is moving. To engage the interlock, one of the hoses must be bent to an "up" position and mated with the glad hand connector of the other. This task becomes more difficult, perhaps impossible, if the connectors are skewed from parallel. If properly aligned, the connection "just drops right in place."

{¶ 4} On the evening of December 22, appellant attempted to mate the glad hand. After two attempts, appellant perceived a problem:

{¶ 5} "It still wouldn't go, and I'm watching it. What seems to be the problem here, and I could see there was a little gap. Normally, they're parallel. These were just a little bit unparallel. Well, I didn't know if I was doing something wrong or maybe it's just the position I'm in, so I repositioned a little bit, give it another try and a little twist, and that's when I felt the pop in my shoulder."

{¶ 6} Appellant later testified that after experiencing the "pop" in his shoulder, he shook off the pain and attempted to connect the glad hand again. Again he was unsuccessful. Appellant then walked around one of the locomotives and again attempted to connect, bending the air hose from the other locomotive. He was successful on the first try.

{¶ 7} Appellant maintains that the "pop" he experienced in his shoulder that night was the result of a rotator cuff injury that, despite treatment, over time became more debilitating, eventually causing his early retirement. In 2007, appellant sued appellee under Section 51, et seq., Title 45, U.S. Code, the Federal Employer's Liability Act ("FELA"), claiming appellee's negligence caused his on the job injury. Specifically, appellant argued at trial that appellee had violated the federal Locomotive Inspection Act, Section 20701, Title 49, U.S. Code, resulting in appellee's negligence per se.

{¶ 8} The matter proceeded to a trial before a jury. At the close of appellant's case in chief, appellee moved for a directed verdict on the Locomotive Inspection Act claim. The court granted the motion, finding that, "[t]here was no testimony whatsoever that the hose of this particular engine or engines on either end was so poorly out of line or so misaligned, if you will. Couple[d] [with] the fact that he was able to [couple] it without much problem from the other side suggests that this wasn't anything out of the normal * * *. So there is no evidence before the jury that this [is] what's been referred to as twisting or later misalignment was so dangerous as to create a problem under the [Locomotive] Inspection Act * * *."

{¶ 9} The broader FELA claim, without the allegation of a Locomotive Inspection Act violation, was later submitted to the jury, which returned a verdict for appellee. The trial court entered judgment on the verdict. It is from this judgment that appellant brings this appeal. Appellant sets forth the following single assignment of error:

{¶ 10} "The trial court erred to the prejudice of the plaintiff by granting the defendant railroad's motion for a directed verdict under the Locomotive Inspection Act."

{¶ 11} "The strict standard for granting a directed verdict is found in Civ.R. 50(A)(4): When a motion for a directed verdict has been properly made, and the 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, the court shall sustain the motion * * *." *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 109. However, "* * * where there is substantial competent evidence to support [the non-movant's] side of the case, upon which reasonable minds might reach different conclusions, the motion should be denied." *Kellerman v. J. S. Durig Co.* (1964), 176 Ohio St. 320, paragraph one of the syllabus. "[I]t is well established that the court must neither consider the weight of the evidence nor the credibility of the witnesses in disposing of a directed verdict motion." *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119, quoting *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 284-285.

{¶ 12} FELA was enacted by Congress in the early twentieth century as a broad remedial measure to aid railroad employees when they sustain injury caused by the employer's negligence. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-562. Both FELA and the Boiler Inspection Act, nka Locomotive Inspection Act, are to be construed liberally in favor of the injured railroad employee. *Urie v. Thompson* (1949), 337 U.S. 163, 180; *Lilly v. Grand Trunk R. Co.* (1943), 317 U.S. 481, 486.

{¶ 13} In material part FELA provides, "[e]very common carrier by railroad while engaging in [interstate] commerce * * * shall be liable to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the [carrier's] negligence." Section 51, Title 45, U.S.Code. The question in FELA cases is ordinarily, "* * * whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Rogers v. Missouri Pac. R. Co.* (1957), 352 U.S. 500, 508.

{¶ 14} The Locomotive Inspection Act, "* * * contains a broad duty to maintain equipment in good and safe working order: 'A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances * * * are in proper condition and safe to operate without unnecessary danger of personal injury.' Section 20701, Title 49 U.S.Code. The LIA regulations also include this broad duty. See Section 229.7, Title 49 C.F.R. (requiring a locomotive and its appurtenances to be 'in proper condition and safe to operate in the

service to which they are put without unnecessary peril to life or limb'); Section 229.45, Title 49, C.F.R. (requiring that '[a]ll systems and components on a locomotive * * * be free of conditions that endanger the safety of the crew * * *'.) These two regulations impose upon railroads a general duty to maintain its parts and appurtenances. *Lilly v. Grand Trunk W. R.R.* (1943), 317 U.S. 481, 485, 63 S.Ct. 347, 87 L.Ed. 411; see *Engvall v. Soo Line R.R.* (Minn. 2000), 605 N.W.2d 738, 739 n. 1, (noting that the LIA 'imposes an absolute requirement that employers provide safe equipment'); see, also, *Herold v. Burlington Northern, Inc.* (8th Cir.1985), 761 F.2d 1241, 1246." *Klem v. Consol. Rail Corp.* (2010), 6th Dist. No. L-09-1223, 2010-Ohio-3330, ¶ 33.

{¶ 15} The difference in the acts is that the Locomotive Inspection Act does not confer a right of action on an injured employee. The Locomotive Inspection Act, however, has been deemed to be an amendment to FELA to the extent that a violation of the inspection act shows negligence as a matter of law under FELA. *Id.* at ¶ 32, citing *Urie*, *supra*, at 188-189.

{¶ 16} The parties dispute the standard of review from a directed verdict in a FELA/Locomotive Inspection Act case. Appellant, citing *Aparicio v. Norfolk & Western Ry. Co.* (C.A. 6 1996), 84 F.3d 803, 807, argues that a relaxed standard applies, because in a FELA/Locomotive Inspection Act case the burden of a plaintiff in showing a violation requires only, "* * * more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Id.* at 810. Accord, *Shesler v. Consol. Rail Corp.*, 151 Ohio App. 3d 462, 2003-Ohio-320, ¶ 62.

{¶ 17} Appellee responds that appellant's assertion that there should be a "relaxed" standard in this matter is erroneous. While federal law governs substantive issues in FELA cases, when the claim is made in an Ohio court, it is Ohio procedural rules that apply. Accordingly, the standard to be applied is governed by Ohio's Civ.R. 50, as opposed to Fed.R.Civ.P. 50. Ohio, appellee insists, has never recognized any "relaxed" directed verdict standard with respect to FELA or anything else.

{¶ 18} The parties' positions are not relevant to our consideration. The cases discussing the "relaxed" standard deal with the finding of negligence in a FELA action. Since FELA imposes liability on the railroad employer, even when the employer's negligence contribution is minimal; little, only "more than a scintilla," of evidence is required to put the issue of negligence before a jury. In this matter, negligence is per se, if there is competent evidence of a violation of the Locomotive Inspection Act.

{¶ 19} On a motion for a directed verdict, the court must construe the evidence most favorably toward the nonmoving party and, without weighing the evidence or considering the credibility of the witnesses; the court must conclude that no reasonable mind could find, on the evidence submitted, a violation of the Locomotive Inspection Act. Appellant testified that the glad hand hose appeared to be slightly misaligned and did not respond as it should in coupling. This is testimony by which a reasonable trier of fact could infer that the hose was not in proper condition for safe operation.

{¶ 20} The trial court concluded that because appellant also testified that he was able to make the glad hand connection by moving to the other side of the mechanical

connector "suggests that this wasn't anything out of the normal." This is an improper weighing of the evidence. Moreover, a trier of fact could reasonably conclude from the same set of facts that, because appellant was able to successfully couple the glad hand by bending a different hose, the first hose was not functioning properly.

{¶ 21} We conclude that, because there was more than one conclusion reasonably derivative from the facts presented and the trial court improperly weighed the evidence in granting the directed verdict motion, the decision on the motion was erroneous. Accordingly, appellant's sole assignment of error is well-taken.

{¶ 22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs pursuant to App.R. 24.

JUDGMENT REVERSED.

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, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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