[Cite as *Dayton v. CSX Transp., Inc.*, 2013-Ohio-3845.]

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

Luckie Dayton	Court of Appeals No. L-12-1038
Appellant	Trial Court No. CI0200907897
v.	
CSX Transportation, Inc.	**DECISION AND JUDGMENT**
Appellee	Decided: August 30, 2013

* * * * *

Michael T. Blotevogel and D. Lee Johnson, for appellant.

James R. Carnes and Rebecca E. Shope, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Luckie Dayton, appeals the January 6, 2012 judgment of the Lucas County Court of Common Pleas which denied his motion for judgment notwithstanding the jury's defense verdict or for a new trial on his claims stemming from his employer CSX Transportation, Inc.'s (CSX) alleged violations of the Federal Employers' Liability

Act (FELA) and the Locomotive Inspection Act (LIA). Because we find that the trial court did not err, we affirm.

{¶ 2} This action commenced on October 30, 2009, when appellant filed a complaint against his employer, CSX, alleging that it violated the FELA, 45 U.S.C. 51 et seq. Appellant alleged that CSX failed to provide him with a reasonably safe workplace by requiring him to wear a remote control module on a vest which caused "excessive stress, strain and force" on his neck, shoulders and back. Appellant claimed that as a result of the condition of the vest, he had and would be required to undergo medical, hospital, surgical, and therapeutic care.

{¶ 3} Thereafter, on September 9, 2010, appellant filed an amended complaint adding a claim under the FELA and LIA, 45 U.S.C. 20701, for an alleged injury which occurred on April 15, 2010, while appellant was acting as conductor on a train for CSX. Appellant alleged that while riding on a locomotive he experienced a "violent jolt" and was injured due to the improper condition of the locomotive.

{¶ 4} The case proceeded to a jury trial on October 24, 2011. A summary of the trial evidence and disputed judicial rulings are as follows. Appellant, 33 years old at the time of trial, began his employment with CSX in 2005. Appellant's job as a freight conductor was classified as medium to heavy work, or work which required lifting up to 83 pounds.

{¶ 5} Appellant's initial assignment was in the Toledo, Ohio area. He was a yard conductor which involved putting trains together with the use of a remote control module.

Beginning in 2007, he wore the module on a vest which went around his shoulders. The equipment weighed approximately four pounds. Appellant testified that he began to notice that his back was hurting, especially after longer work shifts. In March 2007, appellant saw Dr. Rebecca Marshall for lower back pain; she prescribed anti-inflammatories and a muscle relaxer. In June 2008, appellant returned to her office with the same complaint. At appellant's August 2008 appointment, he complained of intense pain in his lower back and a burning sensation. His final visit with Dr. Marshall was on September 2, 2008, and appellant was complaining of neck and right shoulder pain with numbness. Dr. Marshall referred him to a neurosurgeon. In November 2008, an MRI was conducted which showed a bulge in the C5-6 interspace. Dr. Marshall stated that she believed that appellant's complaints could have been related to the remote control module. Dr. Marshall mistakenly stated that the unit weighed 20 pounds or that there was "significant weight to it." Dr. Marshall clarified that whether it was ten or 20 pounds it would have caused similar symptoms.

{¶ 6} The majority of the testimony and evidence focused on the lateral motion incident of April 15, 2010. At that time, appellant had been relocated and was working in Marysville, Ohio, as a road conductor which entailed taking trains from the Marysville Honda yard to Garrett, Indiana. Appellant stated that he was not aware of a history of lateral motion issues with the locomotive. Appellant and engineer Terry Forson were approximately halfway to Garrett when the train needed to be slowed. In order to use a method called dynamic breaking, the engine must be in idle for eight to ten seconds.

Appellant stated that this was when the first lateral motion incident occurred; six to eight seconds of fast shaking. They were taken by surprise.

{¶ 7} Appellant stated that they contacted the dispatcher; Forson and the dispatcher discussed some options including reducing the speed to ten miles per hour for the rest of the trip. They decide to use a method called power or stretch braking for the remainder of the trip. First, however, they decided to determine if the motion was caused by the train or the rail. The train was proceeding at a higher rate of speed when the locomotive was again placed in idle. Appellant stated that the shaking was much stronger than the first incident. There were no further incidents for the balance of the trip.

{¶ 8} Once in Garrett, Indiana, the two were returned to Marysville by company van. Appellant slept a few hours in the van and woke up feeling stiff. Appellant went home after his shift and did not report the incident until the next day. Appellant stated that his delay in reporting his injury to CSX was because he believed that he was required to complete his mandated rest period.

{¶ 9} Appellant testified that he returned home at nine or ten in the morning and went to bed. After lying down, he experienced increasing pain in his neck. Appellant went to the emergency room and was referred to Dr. Peter Hoy whom he saw on April 19, 2010. Dr. Hoy explained that prior to the injury, appellant had a 12 to 18-month history of a cervical bulging disc and had been referred to the Ohio State University

Spine Center; the appointment was scheduled to May 7, 2010. Hoy initially diagnosed appellant with "cervical lumbar strain."

{¶ 10} Dr. Hoy ordered an MRI which was done on April 30, 2010. The results showed "evidence of a focal disc protrusion on the left side between C4 and C5." The result noted a change from appellant's MRI of March 24, 2010. Dr. Hoy believed that appellant could return to work on May 24, 2010. Appellant stated that he stopped treatment with Dr. Hoy because he "wasn't too interested in my case."

{¶ 11} On May 7, 2010, appellant met with Dr. Mini Goddard at Ohio State. Dr. Goddard was the patient intake coordinator and also provided nonsurgical treatments. If more invasive treatments were required, she would refer the patient to the proper department of the spine center. Dr. Goddard stated that appellant complained of neck pain with upper left extremity tingling and numbness. Appellant relayed that his left arm symptoms did not begin until after the April 15 incident. Dr. Goddard stated that she compared the March and late April MRIs and that the latter showed a disc protrusion. Goddard opined that such a protrusion can occur due to trauma or due to degenerative disc disease. Dr. Goddard stated that she advised appellant that he needed to remain off of work for a least three more weeks and then be reevaluated. Appellant did not show up for further appointments and indicated that he did not want her to refer him yet again.

{¶ 12} Appellant stated that, after performing an internet search, he found orthopedic surgeon, Dr. George Schoedinger, in St. Louis, Missouri. Appellant denied being referred to Schoedinger by his attorneys who, coincidentally, were also from St.

Louis and had referred prior clients. Dr. Schoedinger stated that over 90 percent of his patients are involved in lawsuits.

{¶ 13} Dr. Schoedinger first saw appellant on May 25, 2010; he conducted a physical examination and took a patient history. Schoedinger acknowledged that appellant did not admit to having any neck or back problems prior to April 15, 2010. The examination revealed that his range of motion was decreased. An MRI was conducted on May 27, 2010, and showed a disc protrusion at C4-5 and C5-6. Due to appellant's continued discomfort, on July 29, 2010, a discectomy was performed at the C5-6 level. Dr. Schoedinger stated that it was a success and that appellant "had been relieved of the symptoms that he had before surgery."

{¶ 14} On April 26, 2011, Dr. Schoedinger referred appellant to complete a functional capacity evaluation (FCE) in order to determine if appellant could return to CSX as a conductor. The test revealed that although appellant gave consistent effort, he met 13 of the expected 17 effort categories; in other words, four test categories revealed possible submaximal effort. Overall the test was considered valid and the tester placed appellant in the medium work category. His conductor position was classified as medium to heavy.

{¶ 15} Schoedinger testified that to a reasonable degree of medical certainty, appellant's neck and low back symptoms were either caused or made symptomatic by the April 15, 2010 incident. Dr. Schoedinger further stated that he did not believe that appellant could return to CSX as a conductor.

{¶ 16} CSX expert, Dr. Thomas Lieser, conducted an independent medical examination of appellant. After reviewing appellant's medical history and examining appellant, Dr. Lieser concluded that appellant was suffering from degenerative arthritis and degenerative disc disease affecting both the cervical and lumbar spine. Dr. Lieser explained that the degenerative process can begin in the teen years. Based on appellant's medical records, Dr. Lieser opined that the degeneration began in 2003. Lieser further noted that during the examination, appellant was not giving maximum effort.

{¶ 17} Regarding the April 15, 2010 lateral motion incident, Dr. Lieser testified that based on the fact that appellant had been having neck and back complaints for years leading up to the incident, the fact that appellant did not immediately experience pain after the incident, and upon reviewing a videotape of the first incident, no acute injury occurred. Dr. Lieser believed that appellant was physically able to return to work as a conductor.

{¶ 18} Appellant testified that following the April 15, 2010 incident and July 2010 surgery his symptoms had improved but he was not pain free. He stated that he could not carry his young children and has weakness in his right hand. Appellant did acknowledge that CSX had offered vocational training but that he could not go to school because his son was diagnosed with leukemia. Appellant worked as a server at a restaurant for a period but could not be on his feet carrying heavy trays. Appellant stated that he applied at various businesses but had not found work. Despite several disciplinary actions with CSX and his failure to maintain mandatory union member status, appellant stated that he

was happy working at CSX and, but for his injury, would have stayed there indefinitely. Appellant's wife's testimony corroborated appellant's pain complaints. She did admit that while appellant was working at CSX, he was taking classes towards a business degree and subsequently planned to go into paralegal studies.

{¶ 19} Terry Forson, the CSX engineer riding with appellant during the April 15, 2010 incident, testified that about 20 miles outside of Marysville, Ohio, the engine was in idle and began shaking "pretty hard" and that his paperwork fell to the floor. He stated that this was not normal. After speaking with the dispatcher, Forson stated that they decided to bring it up to track speed, go into idle and see if the lateral motion would repeat. Forson testified that the motion repeated and that it was more violent than the first episode but that it was expected and he was able to brace for it. Forson concluded that the locomotive had worn suspension parts that needed to be replaced. They contacted the dispatcher and all determined that they would engage in stretch braking as an alternate method of slowing the train without placing it in idle. They arrived at their destination without further incident. Forson stated that after going through the tests they conducted, he did not believe that the locomotive was safe to operate.

{¶ 20} Appellant's expert, Thomas Johnson, P.E., testified that the locomotive at issue was manufactured in 1989 and was scheduled for an overhaul in 2004, which in 2010, had not been done. Johnson stated that the maintenance records contained notes regarding excessive wear. In 2006 and 2007, there were notes regarding lateral motion problems. In January 2010, it was reported to have lateral motion problems and the right

rear shock was changed. On February 22, 2010, excessive lateral motion was reported and the log indicated that repairs were made and the problem was fixed. Johnson indicated that the repeated repairs were indicative of the locomotive needing an overhaul. Following the April 15, 2010 incident, the work report noted that the R-2 shock mount was broken. On May 4, 2010, the locomotive incident history noted lateral motion problems and noted "unsafe for leader" or for use as the lead locomotive.

{¶ 21} Johnson opined that the provisions of the Code of Federal Regulations which related to coil springs and shocks were violated and that that locomotive was not safe to operate without danger to "life and limb." Johnson acknowledged that any complaints were addressed and repaired but that they represented an "ongoing problem." He indicated that the regulations do not provide a specific timeline for overhauls and that they are permitted to have some broken coil springs.

{¶ 22} At the close of all the evidence appellant moved for a directed verdict on the alleged violation of the LIA with respect to the lateral motion of the locomotive. Appellant argued that it was undisputed that the locomotive was not in proper working condition and, thus, CSX as a matter of law violated its duty to keep its locomotive in proper repair and safe to operate without unnecessary peril to life and limb. Conversely, CSX argued that there was evidence presented that appellant and Forson continued to operate the locomotive as it did not pose a safety risk.

{¶ 23} The court denied the motion finding that the extent of the lateral motion was at issue based on the testimony of various witnesses and was a credibility issue for

the jury. Following deliberations, the jury found that CSX did not violate the LIA with respect to the lateral motion incident. They also concluded that CSX did not violate the FELA with respect to the remote control module claim.

{¶ 24} On November 9, 2011, appellant filed a motion for judgment notwithstanding the verdict or, alternatively for a new trial, based on his argument that the LIA claim regarding lateral motion had been uncontroverted. The court denied the motion and this appeal followed.

{¶ 25} Appellant raises three assignments of error for our review:

I. The trial court erred to the prejudice of plaintiff/appellant in denying plaintiff's motion for a directed verdict made at the close of all the evidence.

II. The trial court erred to the prejudice of plaintiff/appellant in denying plaintiff's motion for judgment notwithstanding the verdict (JNOV).

III. The trial court erred to the prejudice of plaintiff/appellant in denying plaintiff's motion, in the alternative, for a new trial.

{¶ 26} In appellant's first and second assignments of error, he contends that the trial court erred when it denied his motion for a directed verdict and motion for judgment notwithstanding the verdict as to his LIA claim. Specifically, appellant contends that he established a violation of the LIA and that CSX failed to present any opposing evidence. Appellant's third assignment of error alternatively argues that the court erred when it denied his motion for a new trial where the jury's verdict was not supported by the manifest weight of the evidence.

{¶ 27} Because the substance of the arguments is the same, we will simultaneously address the alleged errors. Our review of the grant or denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict is de novo. *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 14 (8th Dist.); *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399 (1987).

{¶ 28} Civ.R. 50 sets forth the standards for granting a motion for a directed verdict and a motion for judgment notwithstanding the verdict and provides, in part:

> (A)(4) When a motion for 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 and direct a verdict for the moving party as to that issue.
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> (B) Whether or not a motion to direct a verdict has been made or overruled * * * a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned, such party, * * * may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

{¶ 29} An appellate court reviews a court's ruling on a motion for a new trial under an abuse of discretion standard. *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 35; *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995). That is, we will not reverse the court's decision unless it is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Civ.R. 59(A)(6) provides that a new trial may be granted where "[t]he judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case[.]"

{¶ 30} FELA provides that an employee may recover for injuries caused "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. 51.

{¶ 31} Such negligence includes a violation of the LIA. In order to prove a violation of the LIA, a claimant must show either "(1) breaching the * * * broad duty to keep its locomotives' 'parts and appurtenances * * * in proper condition and safe to operate without unnecessary danger of personal injury' or (2) failing to comply with additional specific regulations issued by the FRA." (Citations omitted.) *Kelm v. Consol. Rail Corp.*, 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 687, ¶ 34 (6th Dist.).

{¶ 32} Appellant cites a Sixth Appellate District decision to support his claim that the violation of a safety regulation constitutes negligence per se. In *Battaglia v. Conrail*, 6th Dist. Lucas No. L-08-1332, 2009-Ohio-5505, we determined a per se violation of the safety regulation where the appellant "never suggested that the conditions experienced by appellee were in any way the result of unusual operating conditions, nor has it presented any evidence contradicting appellee's assertion of [toxic exhaust emissions] exposure." *Id.* at ¶ 39. It was uncontroverted that the fumes caused the appellant's asthma. *Id.*

{¶ 33} Courts have explained that the LIA "does not prohibit a locomotive from having non-functioning components that may impose some danger on employees. Rather the LIA imposes a violation when the non-functioning component presents an unnecessary peril to life or limb." *Stierwalt v. CSX Transp., Inc.*, N.D.Ohio No. 3:06CV1656, 2007 WL 3046456 (Oct. 16, 2007). The *Stierwalt* court concluded that although the locomotive was not in proper working condition, appellant's own decision "while acting as the person with ultimate authority to make such a determination," that it could be operated, could not be ignored. *Id.* at *6.

{¶ 34} As in *Stierwalt,* appellant, as the conductor on the locomotive, had the overall responsibility for the safe operation of the train. Appellant conferred and agreed with the dispatcher and engineer Forson to recreate the conditions in order to determine the cause of the lateral motion. Appellant further admitted that stretch braking, as suggested by the dispatcher, did alleviate the problem.

{¶ 35} Appellant further contends that he was entitled to a directed verdict under the theory that the locomotive was in violation of various federal regulations. At trial appellant's theory of liability was that CSX violated the broad duty under the LIA. This was evidenced during trial and clarified for the jury in the uncontested instructions which provided that the LIA was violated if they determined:

> [T]he locomotive at issue in this case was not in proper condition and safe to operate without unnecessary peril to life or limb in that it: One, experienced excessive lateral motion on April 15th or 16th, 2010; or, two, had a defective suspension system; or, three, had lateral motion problems previously that had not been resolved by any repair, modification or overhaul; or, four, it was overdue for a double truck change; or, five, it had worn wear pads; or it had broken coil springs; or it had excessive wheel wear.

{¶ 36} More importantly, appellant never requested a jury instruction or instructions specific to any Federal Railroad Administration ("FRA") regulation. In *Kelm*, we noted that where evidence was presented of a violation of the FRA's "operate as intended" language, the court's refusal to give the instruction could have affected the jury's verdict and was an abuse of discretion. *Kelm*, 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 689 at ¶ 59-61. However, failure to request a jury instruction waives the issue. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997).

{¶ 37} Further, in the present case there was testimony presented that appellant's injury was not caused by the lateral motion of the train. Appellant did not immediately

feel pain and slept most of the way back to Marysville. Appellant did not even assert that there were two lateral motion incidents and that he was injured after the second one until months into the legal proceedings. Further, during trial it was revealed that appellant failed to inform at least one treating physician of his lengthy history of back and neck problems. There was also evidence presented to suggest that appellant "shopped" for a physician who would corroborate that the lateral motion incident caused his injuries.

{¶ 38} Based on the foregoing, we conclude that the trial court did not err when it denied appellant's motion for a directed verdict or subsequent motion for judgment notwithstanding the verdict. We further find that the jury's verdict was not against the weight of the evidence and the court did not abuse its discretion when it denied appellant's motion for a new trial. Accordingly, appellant's first, second, and third assignments of error are not well-taken.

{¶ 39} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE