

No. 1-12-1958

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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LESLEY MARTINEZ,	)	
	)	Appeal from
Plaintiff-Appellant,	)	the Circuit Court
	)	of Cook County
v.	)	
	)	No. 09 L 10053
NORFOLK SOUTHERN RAILWAY	)	
COMPANY a/k/a NORFOLK SOUTHERN	)	Honorable
CORPORATION,	)	Lynn Egan
	)	Judge Presiding.
Defendant-Appellee.	)	

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JUSTICE QUINN delivered the judgment of the court.  
Justices Connors and Fitzgerald-Smith concurred in the judgment.

**ORDER**

¶1 *HELD:* The jury instructions on the issue of plaintiff’s failure to mitigate damages issue were clear and the court did not abuse its discretion in instructing the jury on this issue. The instructions clearly explained the effect on damages if plaintiff failed to mitigate and clearly placed the burden of proof on the defendant. The jury’s award on damages is consistent with the evidence presented and their role in resolving conflicting evidence. The court followed established FELA law on damages in rejecting plaintiff’s separate jury instruction on “loss of a normal life,” and therefore did not abuse its discretion.

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¶ 2

## I. INTRODUCTION

¶ 3 Plaintiff, Lesley Martinez sued her employer, defendant Norfolk Southern Railway Company, pursuant to the Federal Employers' Liability Act (FELA), (45 U.S.C. § 51 *et seq.* (2000)), after plaintiff injured her left knee and back on the job. The circuit court granted plaintiff's motion for summary judgment on the issue of defendant's liability for the accident. This appeal does not concern liability. A jury trial was held solely on the issues surrounding the amount of damages plaintiff should recover for injuries sustained in the accident. The jury returned a verdict in favor of the plaintiff in the total amount of \$242,000. That total sum represented the jury's combined award of \$92,000 for "[t]he pain and suffering experienced and reasonably certain to be experienced in the future" and \$150,000 for "[t]he value of earnings and benefits lost." For the line item in the jury's verdict for an award of "[t]he present cash value of the earnings and benefits reasonably certain to be lost in the future", the jury awarded \$0.

¶ 4 On appeal, plaintiff contends: (1) that the trial court erred in its instructions given to the jury on the issue of mitigation of damages; (2) that the jury's failure to award any damages for income certain to be lost in the future was against the manifest weight of the evidence, and finally, (3) that the court erred in refusing to give the plaintiff's proposed jury instruction regarding "loss of a normal life."

¶ 5

## II. STANDARD OF REVIEW

¶ 6 As to the first issue regarding mitigation of damages under FELA cases, both a trial court's decision as to whether to give a mitigation instruction (*LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 406 (1998)) and the form that the mitigation instruction takes is reviewed under an abuse-of-discretion

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standard. *Mikus v. Norfolk & Western Railway Co.*, 312 Ill. App. 3d 11, 25 (2000). This abuse-of-discretion standard of review also encompasses the second and third issues on appeal: whether the jury's \$0 damage award for future lost earnings was against the manifest weight of the evidence and whether the trial court committed reversible error in refusing plaintiff's proposed jury instruction on "loss of a normal life." *Schultz v. Northeast Illinois Regional Commuter Railroad Corp.*, 201 Ill. 2d 260, 273 (2002); *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453, 470 (2008).

¶ 7

### III. SUMMARY OF TRIAL ON DAMAGES

¶ 8 Plaintiff was injured on February 21, 2009. She was treated the same day in Chicago for her complaint of left knee and back pain and released to her home in Ohio. Two days later, plaintiff sought treatment at the University of Toledo Medical Center for her complaints. Although plaintiff had a recent history of injuries and treatment for her back, plaintiff did not return to her treating physicians, but sought out new doctors. She never informed her current medical professionals of her prior medical treatments for her back problems or that she was off work from the railroad from December 2005 through July 2006 and from September 2007 through March 2008 for her prior back problems. Both plaintiff's mother and daughter with whom she lived were also unaware that she was receiving medical treatment and was off work during that prior time.

¶ 9 There was conflicting medical testimony regarding the origin of plaintiff's current back pain. In March 2009, plaintiff's new treating physician, Dr. Ebraheim diagnosed degenerative spine changes and a sacroiliac sprain. In April 2009, another of plaintiff's new treating physicians, Dr. Farrell, excluded a sacroiliac joint condition as plaintiff's problem and believed plaintiff's back pain was caused by a bulging disc causing nerve impingement. Plaintiff never informed either physician

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of her prior medical history regarding her extensive treatments for back pain.

¶ 10 There was also evidence presented of plaintiff's left knee pain. An MRI report revealed fraying of the meniscus of plaintiff's left knee as well as other possible degenerative changes and a possible minor tear of the meniscus. Her treating physician could not state with medical certainty that the condition of plaintiff's left knee as reported in the MRI was the result of the accident on February 21, 2009. Plaintiff underwent surgery on her left knee to repair the torn meniscus and suffered a post-surgical complication of a blood clot for which she was treated with a blood thinner. All of her current physicians, including the physician who treated her blood clot, believed plaintiff was capable of sedentary or light duty work activities .

¶ 11 Plaintiff was further examined by Dr. Nolden of Northwestern Orthopedic Institute in July 2011. Dr. Nolden also reviewed plaintiff's prior MRIs taken of her back. Dr. Nolden was of the opinion that plaintiff's back pain was not caused by the accident of February 21, 2009, but was the result of degenerative changes observed in her 2006 and 2009 spine images. At most, Dr. Nolden believed the accident could have aggravated plaintiff's pre-existing back condition which could be resolved with further conservative treatment. Dr. Nolden believed plaintiff was capable of working.

¶ 12 Plaintiff has been employed with defendant since 1999. Although plaintiff was promoted to the position of engineer in 2007, on the date of the accident plaintiff was working as a conductor because defendant's business had slowed. Plaintiff's average gross earnings from 2004 through 2008 were \$46,900 per year.

¶ 13 Plaintiff presented testimony of her hired expert economist , David Gibson, who rendered his opinion regarding plaintiff's future wage losses resulting from the February 21, 2009 accident.

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He calculated plaintiff's pre-injury yearly earning at \$70,573 and her post-injury earning capacity at just around her average gross earnings from 2004 through 2008 - \$45,570. Gibson made a series of assumptions as follows: (1) plaintiff's disability is a result of the February 21, 2009 accident; (2) plaintiff's disability is permanent; (3) plaintiff's disability reduces her earning capacity; and (4) plaintiff would not return to work in any capacity for the defendant. Gibson also restricted the job market for plaintiff to rural Ohio to formulate his wage loss calculations. Gibson was not informed of plaintiff's prior medical treatments for back pain or the extent of plaintiff's past and recent job applications for positions across the country and that plaintiff never limited her applications to rural Ohio. Between May 2008 and February 2009, plaintiff submitted over 160 job applications with defendant for open positions across the country. After the February 21, 2009 accident, plaintiff submitted 3 job applications with defendant for open positions located in North Carolina, Virginia and Michigan.

¶ 14 Defendant assists its injured and ill employees in securing employment within their respective restrictions with the defendant or another employer. Defendant's program is entitled Vocational Rehabilitation Services. When plaintiff was offered these free services, she stated that she thought the defendant's program was a fraud and maintained a negative attitude toward the program despite the defendant's efforts to provide plaintiff guidance regarding tuition reimbursement for re-training and third-party vocational training and suggestions for plaintiff's submission of job applications.

¶ 15

#### IV. ANALYSIS

¶ 16

##### A. Mitigation Instructions

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¶ 17 FELA actions filed in state court are governed by state procedural law and federal substantive law. *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409, 411 (1985). In *Dickerson*, the United States Supreme Court made clear that “it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of ‘substance’ determined by federal law.” *Id.*

¶ 18 Under FELA, there is no question that plaintiff had a clear obligation to mitigate damages and to secure gainful employment within a reasonable time after her injury. *Mikus v. Norfolk & Western Railway*, 312 Ill. App. 3d 11, 28 (2000); see also *Fashauer v. New Jersey Transit Rail Operations*, 57 F. 3d 1269, 1288 (3rd Cir. 1996). Additionally, evidence of an employer’s efforts to provide “rehabilitation services for an injured employee is relevant to the issue of whether the employee mitigated his damages.” *Mikus v. Norfolk & Western Railway*, 312 Ill. App. 3d 11 (2000). The *Mikus* court also stated, correctly we believe, that an injured plaintiff’s failure to take part in railroad vocational rehabilitation programs is admissible to show that plaintiff has failed to mitigate his or her damages, without an added requirement that defendant demonstrate that plaintiff’s participation in the programs would have resulted in success. *Id.*; *Brown v. Chicago & N.W. Transportation Co.*, 162 Ill. App. 3d 926, 932-33 (1987). This type of evidence, and more, was admitted during the damages trial.

¶ 19 For the court to give a jury instruction on the mitigation issue, there must be some evidence to support defendant’s mitigation theory. *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453,467 (2008). There is no argument raised by plaintiff regarding whether or not there was evidence submitted by the defendant at trial that required a jury instruction on mitigation of damages.

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In other words, plaintiff impliedly concedes that a mitigation instruction was warranted by the evidence. Having reviewed the trial record, we agree. Plaintiff's sole complaint on this issue is that the jury was not properly informed of the effect on damages of plaintiff's failure to mitigate and of defendant's burden of proof on the issue of plaintiff's obligation to mitigate damages.

¶ 20 We agree that the defendant did have the burden of proof concerning plaintiff's failure to mitigate damages. *Chesapeake & Ohio Railroad Co. v. Kelly*, 241 U.S. 485, 491 (1916). The burden falls on the wrongdoer to prove that damages could have been lessened or eliminated by actions taken by the plaintiff. See generally Annot., 134 A.L.R. 242, 243 (1941).

¶ 21 We review jury instructions as a whole to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching a just decision. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1025-26 (2005) (reversal warranted on a ruling on jury instructions only if the trial court committed a clear abuse of discretion).

¶ 22 The court's charge on the issue of mitigation of damages caused by loss of earnings due to diminished capacity to work in the future was as follows:

“An injured party is under a legal obligation to mitigate her damages, that is, to minimize the economic loss resulting from her injury by resuming gainful employment as soon as such can be reasonably done.

If she does not resume available employment, even though she is physically able to do so, such person may not recover damages for earnings lost after the date on which she was or reasonably could

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have been able to return to some gainful employment.

Failure of the injured party to make a reasonable effort to minimize damages does not prevent all recovery for economic loss, but it does preclude recovery for damages or losses which could have been avoided had a reasonable effort to lessen damages been made.”

¶ 23 The court further instructed the jury on defendant’s affirmative defense that plaintiff failed to mitigate her damages as follows:

“In this case defendant has asserted affirmative defenses that plaintiff has failed to mitigate her damages and that plaintiff’s injuries are the result of a preexisting condition. The defendant has the burden of proving these affirmative defenses. If you find from your consideration of all the evidence that any one of defendant’s affirmative defenses have been proven, then you shall reduce the plaintiff’s damages in the manner stated to you in these instructions.”

¶ 24 Plaintiff complains that these instructions failed to clearly inform the jury of how to compute damages for plaintiff’s failure to mitigate her damages and failed to clearly place the burden on the defendant to prove the plaintiff’s failure to mitigate her damages.

¶ 25 There is no Illinois Pattern Jury Instruction for the issue of mitigation of damages under FELA. When there is no pattern instruction, a non-Illinois Pattern Jury Instruction may be formulated that is “simple, brief, impartial and free from argument.” Ill. Sup. Ct. Rule 239(a) (West 2010); *Roberts v. Norfolk & Western Railway Co.*, 229 Ill. App. 3d 706, 722 (1992). A reviewing

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court must consider the instructions in their entirety, (*Leonardi v. Loyola University*, 168 Ill. 2d 83, 100 (1995)) and should not overturn even faulty instructions unless there is clear evidence that the instructions as a whole misled the jury and resulted in prejudice to the complaining party. *Schultz v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, 201 Ill. 2d 260, 273-74 (2002); *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 464 (2001).

¶ 26 In this case, there is no evidence that the jury was misled or confused by the mitigation instructions. No questions were posed to the trial court by the jury regarding any difficulty they had in understanding the mitigation instructions. An unfavorable jury outcome for the plaintiff on the mitigation issue is insufficient to conclude that the jury was misled or confused. There was substantial evidence submitted at trial that plaintiff failed to mitigate her damages which supports the jury verdict on this issue. The jury instructions clearly and accurately stated and emphasized that plaintiff's failure to mitigate "does not prevent all recovery for economic loss, but it does preclude recovery for damages or losses which could have been avoided had a reasonable effort been made." This emphatic statement in the last portion of this instruction more than compensates for the portion of the jury instruction plaintiff complains of where the court instructed that "such person may not recover damages for earnings lost after the date on which she was or reasonably could have been able to return to some gainful employment." This section does not state that plaintiff can recover "no damages" as plaintiff argues. Although we agree that the drafting of this clause could have been better, when read in conjunction with the sentence that immediately followed that "[f]ailure of the injured party to make a reasonable effort to minimize damages does not prevent all recovery for economic loss, but it does preclude recovery for damages or losses which could have been avoided

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had a reasonable effort to lessen damages been made.” This portion of the instruction clearly stated the law that plaintiff was not barred from any recovery, but only from recovering losses that could have been avoided. At best, plaintiff complains of what amounts to harmless error.

¶ 27 Plaintiff also complains that the instructions to the jury were faulty because the placement of the defendant’s burden of proof to prove plaintiff’s failure to mitigate did not appear within the mitigation on damages instruction but appeared as a companion instruction that followed regarding defendant’s burden of proof on affirmative defenses, including plaintiff’s failure to mitigate damages.

¶ 28 Plaintiff’s complaint is without merit. This court has previously held that “the mitigation instruction *or companion instruction* should be structured so as to inform the jury that the burden of proving the failure of plaintiff to mitigate damages is on the defendant.” *Mikus v. Norfolk & Western Railway Co.*, 312 Ill. App. 3d 11, 22 (2000) (emphasis supplied). The companion jury instruction clearly and adequately placed the burden of proof on the defendant. There is no evidence that the jury was misled or confused as to who had the burden of proof on the issue of plaintiff’s failure to mitigate damages.

¶ 29 B. Jury Verdict of \$0 on One Element of Damages

¶ 30 On appeal, plaintiff seeks a new trial solely on damages, in part because she believes that the jury’s \$0 award for future lost wages was against the manifest weight of the evidence. Plaintiff asserted this same claim in a posttrial motion which the trial court denied.

¶ 31 Plaintiff argues that because the jury returned a verdict of \$0 for loss of future wages, the jury instructions had to have been faulty because plaintiff was entitled, at the very least, to the difference

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between her income at the time of injury and the income she could receive from other employment in the future. Because the jury awarded \$0 for this element of damages, plaintiff contends the jury instructions did not clearly explain that even if plaintiff could have worked post-injury and had the capacity to work in the future, the jury was still to award something for plaintiff's diminished capacity to earn what she earned pre-injury.

¶ 32 The evidence was that plaintiff could not resume her prior employment as an engineer or conductor on the railroad. While this may show some level of disability, the issue for the jury was what, if any, damages were appropriate for future loss of pay. We can only overturn a jury's award if there is: (1) proof that the jury ignored an element of damages, (2) acted out of passion or prejudice, or (3) made an award not reasonably related to the loss. *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996), quoting *Gill v. Foster*, 157 Ill. 2d 304, 315 (1993); *Snelson v. Kamm*, 204 Ill. 2d 1, 37 (2003). The fact that the jury awarded \$0 for "earnings and benefits reasonably certain to be lost in the future" while awarding \$150,000 for "[t]he value of earnings and benefits lost" is not proof, *ipse dixit*, that the jury ignored the element. *White v. Lueth*, 283 Ill. App. 3d 714, 718 (1996) (upheld jury award for medical expenses and pain and suffering but nothing for disability); *Snover v. McGraw*, 172 Ill. 2d 438, 447-48 (1996) (upheld jury award for damages for pain-related medical costs, but nothing for pain and suffering); *Orava v. Plunkett Furniture Co.*, 297 Ill. App. 3d 635, 636 (1998) (upheld jury award for damages for medical costs and aggravation of preexisting condition, but nothing for lost salary, disability or pain and suffering); *Zuder v. Gibson*, 288 Ill. App. 3d 329 (1997) (upheld jury award for medical expenses and pain and suffering but nothing for disfigurement and loss of normal life). It is hard to argue that the jury ignored this element since it was required

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to fill in an amount on the Verdict Form, which it did. Plaintiff is unhappy with the \$0 figure, but the jury did not ignore the element.

¶ 33 As to the second reason to overturn a jury's verdict, plaintiff makes no claim that the jury acted out of passion or prejudice.

¶ 34 Therefore, the issue surrounding the \$0 award for loss of future earnings comes down to the third reason for overturning a jury's award: was the award reasonably related to any disability plaintiff suffered in this accident which may affect plaintiff's future employment prospects? This issue is not related to the disabilities that plaintiff may have had previously or incurred in this accident that prevented her from returning to work in the job she held at the time of the accident. The jury, in fact, awarded \$150,000 damages for lost earnings and benefits. "[A] disability award is 'not as readily as calculable in money and jurors must draw on their real life experiences in making an award.'" *Dixon v. Union Pacific Railroad Co.*, 383 Ill. App. 3d 453, 471 (2008) quoting *Snover v. McGraw*, 172 Ill. 2d 438, 448-49 (1996). The evidence of record certainly permitted the jury to conclude that plaintiff was not so disabled currently and would not be in the future that it would adversely affect her ability to earn an equivalent salary as in her prior job. The jury was free to draw reasonable inferences about plaintiff's abilities in the past, present and future especially because it is the role of the jury to make its own credibility determinations about any restrictions plaintiff may have testified about and accept or reject the testimony. *Snover v. McGraw*, 172 Ill. 2d 438, 448 (1996) ("The jury determines the credibility of witnesses and the weight to be given their testimony"); *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1029 (2005) (a jury is free to disbelieve the subjective testimony of the plaintiff).

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¶ 35 Therefore, we hold that it was not an abuse of the trial court’s discretion to deny plaintiff’s posttrial motion requesting a new trial because plaintiff was awarded no money for this element of damages.

¶ 36 C. Refusal To Give A “Loss of a Normal Life” Jury Instruction

¶ 37 Plaintiff is also requesting a new trial on the issue of damages arguing that the trial court erred in refusing plaintiff’s proposed jury instruction that she can recover for a “loss of a normal life.” As stated earlier in this order, the issues of damages in a FELA case and the accompanying jury instructions are substantive issues and are governed by federal law. *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980) . Pursuant to established federal law, loss of a normal life is included as part of pain and suffering and is not a separate element of damages all its own. *Dugas v. Kansas City Southern Railway Lines*, 473 F. 3d 821, 827-27 (5th Cir. 1973) (the effects of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one \*\*\*. It is not a factor to be separately measured as an independent ground for damages.”) Our courts have consistently recognized that damages for loss of a normal life in a FELA case are included as part of pain and suffering, and not as a separate item. *Van Holt v. National Railroad Passenger Corp.*, 283 Ill. App. 3d 62, 73-79 (1996); *Hendricks v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill. App. 3d 800,(2000) (bench trial verdict reversed because the court assessed separate awards for loss of normal life and for pain and suffering). The *Van Holt* court specifically cautioned that “ ‘loss of a normal life’ should not be considered as an independent ground for damages.” *Van Holt v. National Railroad Passenger Corp.*, 283 Ill. App. 3d 62, 74 (1996).

¶ 38 Pursuant to both the *Hendricks* and *Van Holt* holdings, *supra*, the trial court properly rejected

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plaintiff's proposed jury instruction on loss of a normal life as a separate element of damages for the jury to consider. Plaintiff's attorney during closing argument was not prevented or restricted in any way by the trial court from arguing this item of damages to the jury.

¶ 39 We hold that the trial court followed the established law regarding how damages are treated in a FELA trial when it rejected the plaintiff's proposed separate jury instruction on "loss of a normal life."

¶ 40

#### V. CONCLUSION

¶ 41 For the reasons stated above, we find that the trial court did not abuse its discretion in giving the mitigation instruction it did to the jury or when it denied plaintiff's posttrial motion to vacate the jury award because the jury awarded \$0 damages for future lost wages and benefits. Further, the trial court did not abuse its discretion when it refused to give plaintiff's proposed jury instruction regarding "loss of a normal life."

¶ 42 Affirmed.