2012 IL App (5th) 110558-U

NO. 5-11-0558

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FRANK HORN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 09-L-487
	)	
UNION PACIFIC RAILROAD COMPANY,	)	Honorable
	)	Andrew J. Gleeson,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Spomer and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: In this action for damages, the trial court did not err where it denied the plaintiff's motion for new trial, as the verdict was not against the manifest weight of the evidence, and its refusal to discharge a juror and seat the alternate was not an abuse of discretion.

¶ 2 The plaintiff, Frank Horn, appeals from a judgment entered by the circuit court of St. Clair County on July 25, 2011, following a jury verdict in favor of the defendant, Union Pacific Railroad Company (Union Pacific), in plaintiff's action for damages under the Federal Employers' Liability Act (FELA) (45 U.S.C. §§ 51-60 (2006)). On August 16, 2011, the plaintiff filed a motion for new trial, arguing that (1) the jury's verdict was against the manifest weight of the evidence, and (2) the trial court abused its discretion by refusing to discharge a juror with whom defense counsel's wife had a conversation while the trial was pending. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 On September 15, 2009, the plaintiff filed his one-count complaint against the

defendant, seeking damages for cumulative trauma injuries to his shoulders and back. The plaintiff worked for the defendant from 1977 until 2008 as a brakeman and conductor. The plaintiff alleged that his injuries were sustained as a result of the defendant's negligent failure to provide reasonably safe methods of performing his job duties, which required getting on and off moving equipment (GOOME), namely, the defendant's railroad cars and locomotives.

¶ 4 The following relevant evidence was presented before a jury from July 11 to July 14, 2011. The plaintiff's coworker, Stephen Agnew, testified that a brakeman and a switchman performed similar functions in the yard. He stated that a switchman would GOOME, on average, 40 to 50 times a day, and that switchmen in the 1970s were taught and trained to do this at speeds between 5 and 10 miles per hour. He testified that GOOME causes a jerking force from the "slack action" that stresses the shoulders and upper extremities. Agnew testified that company rules at the time prohibited GOOME at an "unsafe speed." Though no one ever told Agnew what constituted a "safe" speed, he testified that the conductor was the boss and responsible for the safety of the switchmen, and no one would GOOME if the train was moving at an unsafe speed. Agnew also testified as to the labor-intensive demands of typical switchmen's work.

¶ 5 The plaintiff testified that he worked for Union Pacific from 1977 until 2008 as a brakeman and conductor. From 1977 to 1995, he worked through-freight jobs, yard jobs, and locals. He stated that yard jobs and locals required GOOME, and that he was trained and instructed to GOOME in those job duties. The plaintiff testified that depending on the job he was performing, he would GOOME between 40 and 50 times per day, at speeds up to 10 miles per hour, though around 1991 Union Pacific implemented a rule that capped GOOME at 4 miles per hour, and by 2004 had prohibited the activity altogether. On cross-examination, the plaintiff stated that he was taught and required to step off equipment using a three-point contact method, that this was considered the safe way to GOOME, and that he

always verified he had safe footing before stepping off moving equipment. The plaintiff also testified that 75% of his career was roadwork, which required comparatively less GOOME than switchman or brakeman work. The plaintiff also agreed that his claim in this case was that his injuries were cumulatively caused by GOOME; he had no specific occasion he could point to as the cause of his injuries.

¶ 6 George Page, the defendant's corporate designee, testified that the railroad industry was aware in the 1980s that GOOME activity could cause employees to suffer strains and sprains to the lower extremities. However, Page also said he was not aware of Union Pacific's or the railroad industry's knowledge of whether or not such exposure causes any kind of non-acute trauma injuries. Page stated that GOOME is a safe activity if done correctly.

¶ 7 Dr. Tyler Kress, a biomedical and biomechanical engineer, testified that GOOME exposed the plaintiff to ergonomic risk factors associated with cumulative trauma disorders. The plaintiff presented Dr. Kress with evidence of industry group awareness of the high risk of GOOME injuries.[1] Dr. Kress opined that, based on Union Pacific's knowledge of GOOME dangers, it was unreasonable for the defendant to expose the plaintiff to those risk factors, and the practice should have been stopped.

¶ 8 The defendant presented testimony from Bill Boyles, a Union Pacific representative

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[1]The plaintiff presented Exhibit 62(a), a 1948 Railroad Industry Group report about knee injuries due to GOOME; Exhibit 72, a segment from the 1958 Missouri Pacific Railroad rule book, indicating GOOME was the number one cause of injuries in the workplace; and Exhibits 251, 256, and 356(a), a study produced by Burlington Northern Railroad indicating GOOME resulted in high ergonomic forces on the body. Union Pacific continued to allow employees to GOOME, even after becoming aware that Burlington Northern Railroad had deemed it a dangerous activity and had prohibited the practice as to their employees.

who was once the plaintiff's supervisor. Boyles had also worked as a conductor and brakeman. He testified as to the activities and physical demands of the work, stating that trainmen do not "jump off" trains, and that he was taught and trained to step off while maintaining three-point contact with the train. Boyles did not feel GOOME was inherently unsafe, and that because the brakeman was in charge of making the signal to the conductor indicating the speed at which the train should travel, GOOME at higher speeds versus lower speeds was "at [the trainman's] peril."

¶ 9 Greg Weames, an expert witness in the field of ergonomics, testified that there are no inherent ergonomic risk factors in the task of GOOME, if the person is using the prescribed technique and dismounting under the rules of walking speed. Weames also testified that through-freight conductors do not have a higher incidence of shoulder or back problems compared to the general population.

¶ 10 As to the plaintiff's physical injuries, Dr. James McKechnie, an orthopedic surgeon and the plaintiff's treating physician, testified for the plaintiff. Dr. McKechnie's preoperative diagnosis of the plaintiff's injuries was a tear of the right rotator cuff and traumatic arthritis of the acromioclavicular joint. Dr. McKechnie performed surgery on the plaintiff's right shoulder in January 2009 and on his left shoulder in June 2009. Dr. McKechnie testified that it is generally accepted in his field that repeated shocks or jarring of the shoulders can cause or contribute to injuries such as rotator cuff tears. The plaintiff was also diagnosed with spondylolisthesis, a congenital condition that may lead to degenerative changes in the lower spine. Dr. McKechnie opined that repeatedly jumping or climbing on moving equipment can aggravate degenerative changes, though he agreed such actions cannot cause spondylolisthesis, and the degenerative changes could have been aggravated by other lifestyle factors. Dr. McKechnie opined that the type of stresses described by GOOME contributed to the shoulder problems for which the plaintiff was treated. He testified that the plaintiff's

continuing pain was related to his shoulder injuries and was likely permanent. He testified that he did not believe the plaintiff had the physical ability to return to his former work as a conductor.

¶ 11 The defendant presented testimony from Dr. Richard Lehman, an orthopedic surgeon hired by the defendant to perform an independent medical evaluation. Dr. Lehman found no unusual physical limitations or restrictions for a man of the plaintiff's age and lifestyle, and noted that the plaintiff was physically able to return to work as a conductor. Dr. Lehman opined that the plaintiff's shoulder problems were related to age and lifestyle-related degenerative arthritis and not related to his work activities. However, Dr. Lehman agreed that arthritis can be caused by cumulative trauma injuries, depending on the level of stress dissipated into the shoulder.

¶ 12 Dr. Peter Mirkin, an orthopedic surgeon who interviewed and examined the plaintiff on behalf of the defendant, also testified that the plaintiff's spondylolisthesis was not causally related to his work for the defendant. Dr. Mirkin explained that spondylolisthesis is a relatively common congenital condition, with which one is born or which develops early in life, and opined that the plaintiff's degenerative changes were caused by his age, tobacco use, and obesity. Dr. Mirkin also felt that the plaintiff's physical exam findings were essentially normal, and that the plaintiff was able to return to work as a conductor.

¶ 13 The plaintiff testified that before November 2008, he had never had treatment for shoulder problems, but in September 2008, his back began bothering him while performing his job duties. The plaintiff testified that his family physician referred him to Dr. McKechnie, who recommended physical therapy and surgery. The plaintiff testified that he continued to suffer from back pain when he is required to bend, but that he does not suffer shoulder pain unless he is required to do heavy lifting. At the time of the trial, the plaintiff had not been released by Dr. McKechnie to return to work as a conductor. The plaintiff

stated that he did not feel capable of performing the physical demands of conductor work.

¶ 14 The plaintiff's wife, Robin Horn, testified that the plaintiff continued to suffer pain when he is required to lift his shoulders, and he seemed to have lost some strength.

¶ 15 The defendant presented testimony from James England, a board-certified rehabilitation counselor. England testified that based on his own evaluation, a review of the plaintiff's deposition and medical records, and a review of the evaluations of Dr. Lehman and Dr. Mirkin, the plaintiff had several options in returning to work, and that his best option was to return to his work as a conductor. England noted that there was a 5-pound difference between the plaintiff's most recently measured functional capacity and the capacity required to perform conductor work, as the plaintiff's lifting capacity was measured at 75 pounds, while a conductor's job requires the ability to lift 80 pounds occasionally. However, England noted the plaintiff's records indicated that additional therapy could probably improve his lifting capacity. England also noted that the plaintiff could potentially utilize his bachelor's degree in sociology, but agreed that the plaintiff does not have transferable skills outside railroad work.

¶ 16 During the course of the trial, the wife of Tom Jones, the defendant's counsel, was present as an observer. During a morning recess on July 13, 2011, Mrs. Jones spoke with Kathryn Dragich, one of the jurors. The next morning, Mr. Jones informed the court and the plaintiff's counsel of the occurrence. Mr. Jones reported that Mrs. Jones and Dragich conversed about Dragich's sister, who attended high school with the Jones's daughter, and about Dragich's current pursuit of a degree from the University of Illinois. The court felt that no inappropriate contact had occurred, as there was no discussion of the parties or the litigation, but left it up to the plaintiff's counsel to decide how to proceed. The plaintiff's counsel requested that Dragich be dismissed and substituted with the alternate juror; however, the court refused to dismiss Dragich without first submitting her to *voir dire*

concerning the conversation. Agreeing with the court that *voir dire* might negatively and unnecessarily highlight the occurrence in Dragich's mind, the plaintiff's counsel decided to proceed without further action. The plaintiff appeals.

¶ 17 The plaintiff argues on appeal that the trial court erred when it denied his motion for new trial, as the verdict was against the manifest weight of the evidence, and that the trial court erred when it refused to discharge Dragich and seat the alternate juror after learning that the defense counsel's wife had conversed with her while the trial was pending. We will address each of these arguments in turn.

¶ 18 On a motion for a new trial, a reviewing court will set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A verdict is against the manifest weight of the evidence when the opposite conclusion is clearly evident, or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. *Id*. at 454. A court's ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that the court clearly abused its discretion. *Id.* at 455. In determining whether the trial court abused its discretion, the reviewing court considers whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial, bearing in mind that the presiding judge had the benefit of his observations. *Id*. at 456.

¶ 19 Here, we cannot conclude that the jury's verdict in favor of the defendant is not supported by the evidence, or that the plaintiff was denied a fair trial. In this case, the plaintiff's cause of action required him to demonstrate that (1) his injury occurred in the scope of his employment, (2) his employment was in furtherance of the defendant's interstate transportation business, (3) the defendant was negligent, and (4) the defendant's negligence played some part in causing the injury for which compensation is sought. FELA, § 1 *et seq.*, 45 U.S.C. §§ 51-60 (2006); see also *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330

(1958). While the plaintiff properly points out the relaxed standard of proof regarding causation–that only "some injury," not the exact injury that happened, might result from the working condition–FELA does not lessen the plaintiff's burden to prove the elements of negligence. *Van Gorder v. Grand Trunk Western R.R.*, 509 F.3d 265, 269 (6th Cir. 2007). As noted in this court's review of the facts, the jury was presented with conflicting evidence regarding the ability of GOOME to contribute to shoulder and back injuries, and conflicting medical testimony as to the cause of the plaintiff's injuries. Because there was a general verdict, the jury apparently concluded either that Union Pacific did not fail to provide Horn with a reasonably safe method of work or that Union Pacific did not contribute to Horn's injuries. Based on the foregoing, this court does not find that conclusion to be unreasonable or arbitrary. Therefore, we will not disturb the trial court's decision to deny the plaintiff's motion for a new trial based on the manifest weight of the evidence.

¶ 20 Additionally, the plaintiff argues that the trial court abused its discretion when it denied his motion to dismiss a juror, Kathryn Dragich. The plaintiff contends that a conversation outside the court's presence between the defense counsel's wife and a juror gives the appearance of impropriety, and that the plaintiff should not have been put in the position of wondering about Dragich's resulting bias or prejudice when there was an alternate juror available. The defendant argues that because the plaintiff's counsel chose not to go forward with an interview of Dragich, declining to pursue the matter further constituted waiver of the issue. In his reply brief, the plaintiff argues that his counsel took sufficient action by requesting that Dragich be replaced by the alternate.

¶ 21 The discharge of a juror is at the discretion of the trial judge, and prejudice must be shown in order to warrant reversal. *Lowe v. Norfolk & Western Ry. Co.*, 124 Ill. App. 3d 80, 105 (1984). In response to the plaintiff's argument, the defendant offered *People v. Turner*, 143 Ill. App. 3d 417 (1986). In *Turner*, a State's Attorney's aide asked a juror something akin

to "[w]hen are you going to reconvene?" on the second day of jury deliberations. *Id.* at 426. The trial judge advised both sides that they could take an appropriate action, but the defendant's attorney declined the judge's offer to interview the jurors. *Id.* The First District noted that a jury verdict will not be set aside where it is apparent that no injury or prejudice has resulted from a communication to the jury. *Id*. Since the defendant declined an opportunity to question the jurors and showed no resulting prejudice from the communication, the First District held that no reversible error had occurred. *Id*.

¶ 22 We find the First District's reasoning in *Turner* persuasive. Like *Turner*, the trial court initially found nothing untoward about the conversation between Mrs. Jones and Dragich, but explicitly left the decision of how to proceed to the plaintiff's counsel. The plaintiff's counsel chose not to pursue the issue when the court made it clear that an interview must first be conducted to determine any potential bias that would require Dragich's removal from the jury. While we understand the plaintiff's concern that Dragich might have gained bias or prejudice that otherwise was not present if his counsel went forward with the interview, the fact remains that the plaintiff was given a reasonable choice: confirm or deny any suspicion of prejudice through an interview, risking Dragich's potential dislike of the plaintiff or his counsel after being subjected to such questioning, or proceed with the trial court's initial determination, without Dragich's knowledge of the plaintiff's concern and therefore without her explanation of the conversation. Though the plaintiff's counsel indeed initiated action by requesting Dragich's replacement, he became unwilling to pursue this route when it was conditioned on an interview. Thus, the plaintiff has not demonstrated any prejudice warranting reversal. The trial court's treatment of the issue appears wholly reasonable, and therefore we find no abuse of discretion in this instance.

¶ 23 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 24 Affirmed.