IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 2000 Session

WALTER J. BIDDLE, SR. v. NORFOLK SOUTHERN RAILWAY COMPANY

Appeal from the Circuit Court for Hamilton County
No. 97C2682 Hon. Samuel H. Payne, Judge

FILED AUGUST 22, 2000

No. E1999-025840-COA-R3-CV

Plaintiff injured his feet and ankles by walking on large rock ballast in his employer's train yard and brought suit against this Defendant for those injuries in 1991. That suit was resolved. The current suit was brought by Plaintiff in 1997, alleging injury to his back from the same cause. In this case, Plaintiff testified that he had several incidents at work which caused strain to his back but that those resolved, and that walking on the rock caused his permanent back impairment. Co-workers testified for Plaintiff that the rock was too large and therefore unsafe. Supervisors testified that the rock was not dangerous. Two physicians gave ambiguous testimony as to causation. The jury found that the rock in the train yard was too large, and, therefore, Defendant was negligent. The jury also found that Plaintiff had failed to prove that his back condition was caused by Defendant's negligence. Plaintiff appealed, asking this Court to find that the jury verdict was not supported by the evidence and that the Trial Court had erred in an evidentiary ruling. We hold the Trial Court did not abuse its discretion in its evidentiary ruling and that the jury verdict is supported by material evidence. We affirm.

T.R.A.P. Rule 3; Judgment of the Trial Court Affirmed.

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J. and CHARLES D. SUSANO, JR., J., joined.

Clarence E. Walker, Chattanooga, Tennessee, and Patrick S. O'Brien, St. Louis, Missouri, for the Appellant, Walter J. Biddle, Jr.

Everett B. Gibson and Scott B. Peatross, Memphis, Tennessee, for the Appellee, Norfolk Southern Railway Company.

OPINION

Background

Walter J. Biddle (Plaintiff) worked for Norfolk Southern Railway Company (Defendant) from 1967 until August 1996. His job as a carman required him to walk around the train yard inspecting and repairing freight cars on the tracks. His work area was covered with rocks called "ballast." Plaintiff walked on the ballast daily. There are various sizes or grades of ballast for various uses. The ballast used on the main train line is normally larger than the ballast in the yard. The company standard required that ballast on the main line be #3 ballast, rocks up to two inches in diameter. In the yard, the ballast was to be #5 ballast, rocks no larger than 3/4 inch in diameter. In Defendant's train yard in Chattanooga, the company standard was not met, as the ballast in that particular train yard generally was #3 ballast, not #5. For many years employees complained about the size of the ballast and the potential for ankle injuries and asked the company to replace the #3 ballast with smaller ballast, but this change was never made. Plaintiff injured his feet and ankles while working on the ballast in 1987, and his 1989 claim for that injury was addressed by this Court in an earlier lawsuit in 1997.[1] Plaintiff brought this second suit under the Federal Employers' Liability Act (FELA) against Defendant on December 24, 1997, alleging injury to his back from working on the large ballast in the train yard.

Plaintiff sought medical treatment for back pain from neurologist Dr. David Rankine in June 1996. Dr. Rankine's medical records indicate that Plaintiff came to see him on September 3, 1996, complaining of "back pain on and off for years." He was 54 years old. MRI of the lumbar spine revealed L4-5 disc degeneration with minimal annular bulging and L5-S1 disc degeneration with bulging of the disc across the canal. MRI of the thoracic spine revealed moderate thoracic kyphosis[2] and diffuse degenerative changes and end plate spurring but no herniation. MRI of the cervical spine revealed no significant abnormalities. Plaintiff soon left his job, and Dr. Rankine agreed with his assertion that he was unable to do the work because of pain in his back.

When Dr. Rankine was questioned, he was told to assume that Plaintiff had a prior injury to his feet and ankles from working on large ballast. He was then asked to state his medical opinion as to whether Plaintiff's back problems were also related to working on large ballast. He replied:

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[1] In the current case, on the fourth day of trial, the parties announced the following stipulation to the jury: "Ladies and gentlemen, it's stipulated that, on January 25, 1991, Mr. Biddle filed suit against Norfolk Southern Railway Company in the Circuit Court in Memphis, Shelby County, and claimed injuries because of the negligence of the Railroad by requiring him to walk upon large, unevenly shaped, hard and unstable rock. And the injury was - - was not a back injury. The injury, rather, was severe bruising, contusion and straining of both feet with bruising, contusion, wrenching, spraining, straining, twisting, tearing, herniation of and trauma to the nerves, tissues, ligaments, vessels, muscles, fibers and joints thereof, with resulting traumatic arthritis of his ankles and neuromas of both feet."

[2] Dr. Rankine testified that kyphosis "is a fancy medical way of saying a kinking of the spine."

> . . . the injuries that Mr. Biddle has suffered have been related to surface contact and working contact including his feet, his ankle, and his knee injuries simply to paraphrase the ankle bone is connected to the knee bone, the knee bone is connected to the hip bone, the hip bone is connected to the lower back and basically the forces which are felt in your feet have to be generated and expelled in some manner and they will be transmitted into your axial and lower spine.

Dr. Rankine referred Plaintiff to Dr. Shah, a rheumatologist, who diagnosed polymyalgia rheumatica and prescribed anti-inflammatory medication. Dr. Rankine also referred Plaintiff to neurosurgeon Dr. Michael Gallagher, who ordered a whole body bone scan to further evaluate Plaintiff's complaints of back pain. The results of that scan showed active degenerative changes of the thoracic spine. Dr. Gallagher treated him conservatively and last saw him on February 26, 1998, with diagnoses of "thoracic kyphosis[3] suspected secondary to osteoporosis" and lumbar pain. Plaintiff had multiple areas of degenerative disk changes, particularly in the thoracic area, but also disk disease at L5-S1 with a diffuse disk protrusion. Plaintiff was to continue conservative measures including analgesic medication and physical therapy and return as needed. Dr. Gallagher was asked about any causal relationship between Plaintiff's work and his back condition. He responded thusly:

> It's difficult to scientifically precisely delineate the cause of degenerative changes in the spine in that different sub-populations of patients who have different work environments may all have - - may have a similar appearing MRI scan for example; in other words, someone could be a banker and have a similar MRI scan as Mr. Biddle conceivably. However, I believe the other side of that coin so to speak is that certainly someone who has a lot of mechanical demand upon their back, there probably is some role in those mechanical or environmental factors if you will in the evolution of degenerative change and potentially the production of symptoms that can be associated with that.
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> To phrase it differently in realistic terms most likely anyone with multicentric degenerative changes and chronic symptoms of the character that we're discussing here, probably the genesis of that sort of picture is multifactorial and to definitively be able to say that factor A or B or C is a cause is I think extremely difficult. However, I would not find it unrealistic to say that someone who has a job that places heavy mechanical demands on their back may incur some sort of degenerative change and pain on that basis.

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[3] Dr. Gallagher defined "kyphosis" as "someone who has a stooped type of posture if you will such as, for example, an elderly woman with severe osteoporosis who develops a really hunched back would be an extreme example."

Former employees Tim Miller and James Wright testified at trial that they had worked for Norfolk Southern for many years in the train yard and that the ballast was too large to safely work around because a worker would slide on it and twist an ankle or fall. Miller testified that he had injured his feet and ankles by working on the ballast in the train yard and is bringing suit against Norfolk and Southern because of those injuries.

Employee Phillip Brashear testified that he had worked with Plaintiff in the train yard for over twenty-five years and that the rock in that particular yard always contained at least 60 to 70 percent large rock, over one inch in diameter. Numerous employees complained to the Defendant about the size of the rock but it was never replaced with smaller rock. Brashear left his job for medical reasons in 1998 and filed suit against the Defendant alleging work-related disability.

Coburn ("Tom") Radar testified that he has been employed by the Defendant in various jobs since 1978. He was an inspector for about fourteen years. This job required him to walk on the large ballast where Plaintiff worked. He testified that the ballast was big, the walking area was unlevel, and there were a lot of obstacles to trip over, such as old brake shoes, air hoses and pulp wood. "Your feet will rock on it, and, you know, some of it you may even trip on or stumble on. Your footing is just not sure." Some of the older employees complained to Defendant about the walking conditions but no changes were made. After he worked in the yard and then was transferred to a different job for several years, he returned to the yard and began walking on the large ballast again. It made his feet, ankles and knees hurt, and he complained "to anybody who would listen," including Charles Higgins, a supervisor, and at monthly safety meetings.

William Ellison testified that he started working for Defendant in 1972 and has worked most of the time in the train yards in Chattanooga. He had problems working in the yard because of large ballast. He complained to supervisors about the large rock in the yard and about loose ballast, feed that spilled and mud and water in the yard, but nothing was ever done. He testified that the only medical problem he has had from working in the yard is callouses on his feet. He did sprain an ankle once and fell several times trying to walk, but he never sustained a major injury, only a bruise.

David Poe testified that he started working for Defendant in 1972 at the same job as Plaintiff, and worked in the train yards in Chattanooga until April 1996, when he left the job and filed a claim against the Defendant for a back injury he alleged was caused by working in the yard. He testified that he always had problems with his ankles and legs which he attributed to walking on the large ballast. He and others complained in safety meetings and he complained to the union, but nothing was ever done. Plaintiff later called David Poe for an offer of proof concerning his knowledge of other employees who had allegedly sustained injuries caused by working on the large ballast in the train yard. Poe testified that employees Benny Moon and Wayne Honeycutt, and another employee whose name he could not remember, had been so injured. The Trial Court declined to permit this testimony to be heard by the jury.

Avery Durwood Buckner testified that he had worked for the Defendant from 1948 until his retirement in 1991. He testified that the safety committee was established in 1969 and

complaints were made to that committee every week in the 1970's and 1980's about the ballast in the train yard. He testified that the ballast was unsafe because "it was not stable. It would roll with you. Your ankle would turn on it. You didn't have a solid footing." He further testified that over the years he had suffered knee and ankle problems which he attributed to walking on the large ballast.

Plaintiff testified that he is 57 years old and began working for Defendant in 1967. He stated that, in the early 1980's, the employees were encouraged to complain about any safety issues related to their work, and they immediately began to complain at safety meetings about the large ballast in the train yard. He started having problems with his knees and ultimately had surgery on his ankle and feet in 1992. He filed a claim against the Defendant and that claim was resolved. He went back to work and continued to complain about the ballast to Mr. Higgins. The large rocks caused unstable footing "and you'd stump your toes and your ankles would rock back and forth a lot." He further testified about bending, stooping or squatting on the rock:

> . . . [it] would affect, of course, your knees and your ankles and the lower part of your back and while you were in that position you might be putting on a brake shoe and, of course, that would put more pressure on your upper part of your body, your back, neck.

Plaintiff testified that he started having trouble with his back in June 1996. He felt pressure in his lower back and pain between his shoulders and his midback as if something were pressing against his back, and it felt as if "needle sticks or pins" were sticking him in the lower part of his neck. He went to see Dr. Rankine, who ran some tests and referred him to Dr. Gallagher. He tried to continue working from June 1996 until August 1996 but was unable to work due to pain. Dr. Rankine notified the Defendant that the Plaintiff could not continue to work because of his back problems. Plaintiff testified that on an average day, "anything causes me discomfort . . . usually the middle of my back will be the first thing that starts hurting . . . if I'm walking it would be my legs that start hurting first." He has back pain every day, and he can only walk about 100 feet before he has to sit down. He has not tried to find other work since he left the railroad because he hasn't found anything that he could do on a regular basis. He testified that before he began having back problems, he hunted deer and turkey every other weekend in season for many years with his friends. Since 1996, when he began having back pain, he has only been able to go hunting seven or eight times a season. On cross-examination, he testified that he had injured his back at work in 1991 when a garage door came down and hit him "in the front part of the hardhat." He experienced pain in the back and neck but did not consult a doctor, and he has recovered from that incident. He also has strained his back occasionally at work, including one occasion when he fell over a rail anchor and another time when he was picking up debris.

Charles Higgins, Defendant's Senior General Foreman, testified by deposition that he discussed the conditions of the train yard with Defendant's assistant division engineer and the engineer toured the yard, but he does not know whether any written report or management discussion resulted. William Mason, another supervisor, testified that he supervised Plaintiff throughout most of his career. In that capacity, he listened to the employees' complaints about safety concerns in the train yard. Although the employees complained about the size of the ballast and the uneven surface

in the train yard, he never found it to be an unsafe place to work. He reviewed safety meeting reports for the years 1994, 1995 and half of 1996 and testified that large ballast was mentioned only three times during that two and one-half year time frame. He did not know until 1994 that there were standards for the sizes of ballast to be used in different parts of Norfolk Southern Railway property.

Floyd Smith, a track supervisor employed by Defendant, testified that he supervised the inspection and safety repairs in the train yard from 1989 through 1995. During that time, he mainly received complaints about mud in the yard, which his crew corrected several times. He first drained the mud and put in smaller ballast, but that did not solve the problem, so he drained it again and put in larger ballast. He testified that he only put the larger ballast between the tracks, not in the walkways. He stated that he also received complaints about the size of the rock, and his crew "went in and some places we took the rock, you know, picked the track up, tamped it off, tamped it up under the ties. Other places we took a grade-all machine with a big dump truck and cleaned it up, hauled it out." His crews routinely put ballast wherever needed on Defendant's property, and when they fill the main line with large ballast, some of those rocks stay in the train car that hauls the ballast. Then when they put smaller ballast in that car and empty it onto the walkways in the yard, the large rocks mix with it. The large ballast is hauled 75 percent of the time, so there is frequently leftover large ballast in the train car when smaller ballast is put in for the train yards. His job requires him to walk on the large ballast on the main line frequently, and he has walked many miles on it. He opined that walking on the larger rock is "better footing. It's more stable, it has better compaction and it also has better drainage."

Donald Cleland testified that he is an assistant division engineer in the Division of Track Maintenance for Defendant. He is responsible for 1200 miles of track including main line tracks and yards between Bristol and Memphis. In December 1995 he replaced Floyd Smith, and worked at that job until October 1998. Some time between December 1995 and August 1996, he received a complaint from the local chairman of the carman's union about large ballast in the train yard. He inspected the area, removed the stone in the area complained about, and resurfaced it with smaller ballast.

At the close of all the proof, Plaintiff and Defendant each moved for directed verdict. The Trial Court denied both motions. The jury retired and, upon deliberation, returned a verdict finding Defendant negligent but also finding that Defendant's negligence did not cause or contribute to Plaintiff's back injury. Judgment for Defendant was entered.

Discussion

Plaintiff appeals and raises the following issues, which we quote:

> 1. Was the verdict returned by the jury finding that the Defendant was negligent but that Defendant's negligence did not cause or contribute to cause Plaintiff's injury unsupported by material evidence . . . .

2. Did the Court err in refusing to allow evidence of prior injuries of Wayne Honeycutt and Benny Moon to show the fact that working on large ballast did indeed cause physical injury?

3. Did the Court err in not granting a directed verdict to Plaintiff at the close of the case?

Congress has granted federal and state courts concurrent jurisdiction to determine claims under the FELA. *See* 45 U.S.C.A. § 56 (West 1986). In FELA cases tried in state courts, the applicable state rules generally govern procedural matters, while federal law controls as to all matters of substantive law. *Jennings v. Illinois Cent. R. Co.*, 993 S.W.2d 66, 70 (Tenn. Ct. App. 1998). Our state appellate procedural rules provide that findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict. Rule 13(d), Tennessee Rules of Appellate Procedure. Therefore, our standard of review as to Plaintiff's first issue is limited to a determination of whether there is any material evidence to support the jury verdict. *Shivers v. Ramsey*, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996).

The United States Supreme Court has held that a jury's determination in a Federal Employers' Liability Act (FELA) case is entitled to great weight on appeal:

> Only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear.

Dennis v. Denver & Rio Grande Western R.R. Co., 375 U.S. 208, 84 S. Ct. 291, 293, 11 L. Ed. 2d 256 (1963) (quoting *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 744, 90 L. Ed. 916 (1946)). In *Lavender*, the Court stated that in an FELA case, where the circumstances evidence a reasonable basis for the jury's verdict, an appellate court may not weigh the evidence or assess the credibility of witnesses and arrive at a contrary conclusion. *Lavender*, 66 S. Ct. at 744. The Court further noted:

> The appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Id. The federal FELA standard for appellate review of a jury verdict, which requires reversal only if "there is a complete absence of probative facts to support the conclusion reached by the jury," may give even more deference to jury verdicts than the state standard which requires reversal only if there is "no material evidence to support the jury verdict." We need not decide whether these standards are different because Tennessee procedural standards apply, and in any event, both standards are met in this case.

The jury found that Defendant was negligent due to the size ballast used by the Defendant in its yard. That jury determination is not questioned in this appeal. What is challenged is the jury's determination that the Defendant's negligence did not cause Plaintiff's back injuries.

Plaintiff argues that the medical testimony shows that working on large ballast caused or contributed to his back injury and that there was no rebuttal of the treating doctors' testimony. We have carefully reviewed the testimony of Drs. Rankine and Gallagher and find their testimony to be equivocal on the issue of causation. The jury did not find the medical testimony supported a finding that working on the large ballast caused or contributed to Plaintiff's back problems. Plaintiff admitted that he had suffered other accidents at work which might have contributed to his back problems. He injured his back when a garage door came down and hit him in the head, he strained his back occasionally at work, and he fell over a rail anchor. We hold the record contains material evidence from which the jury could have concluded that Defendant's negligence did not play any part, "even the slightest," in Plaintiff's back injury. Our role is confined to determining whether the record reflects material evidence from which the jury could have reached the conclusion that it did.

Plaintiff next raises the issue that the Trial Court erred in "refusing to allow evidence of prior injuries of Wayne Honeycutt and Benny Moon to show the fact that working on large ballast did indeed cause physical injury." Our standard of review of the Trial Court's evidentiary rulings is whether the Trial Court abused its discretion:

> In Tennessee, admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). The Trial Court refused to allow testimony that Plaintiff's co-workers, Benny Moon and Wayne Honeycutt, had been injured by working on large ballast in the train yard. The Court held that the proffered testimony was not relevant, since "[i]t has nothing to do with this case. We're not going to try three or four cases. We're going to try one." The jury found that the Defendant was negligent. The determinative issue lost by the Plaintiff in this case was whether the ballast caused Plaintiff's particular back injury. Second-hand testimony about injuries allegedly sustained by other employees would have added nothing to Appellant's case on that causation issue. The issue presented to the jury was not whether other employees had been injured on the job, or even whether Plaintiff had suffered a back injury because of his work for the Defendant, but rather whether or not Plaintiff's back injury was casually connected to Defendant's negligence. We find the Trial Court did not abuse its discretion in refusing to allow such testimony.

Finally, Plaintiff raises the issue that the Trial Court erred "in not granting a directed verdict to Plaintiff at the close of the case." This Court summarized our standard of review of a trial

court's decision on a motion for directed verdict in *State Farm General Ins. Co. v. Wood,* 1 S.W.3d 658 (Tenn. Ct. App. 1999):

> A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. *Eaton v. McLain,* 891 S.W.2d 587, 590 (Tenn. 1994); *Long v. Mattingly,* 797 S.W.2d 889, 892 (Tenn. Ct. App. 1990). We must "take the strongest legitimate view of the evidence favoring the opponent of the motion." *Id.* In addition, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. *Eaton,* 891 S.W.2d at 590; *Long,* 797 S.W.2d at 892.

State Farm General Ins. Co. v. Wood, 1 S.W.3d 658, 663 (Tenn. Ct. App. 1999). Applying this standard and taking the strongest legitimate view of the evidence favoring Defendant, we hold that the evidence in this case is susceptible to more than one conclusion. Accordingly, the evidence was susceptible to a conclusion contrary to that proposed by the Plaintiff, and the Trial Court did not err in refusing to grant Plaintiff a directed verdict.

CONCLUSION

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Walter J. Biddle, Sr.

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D. MICHAEL SWINEY, JUDGE