STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DAVID R. ABOUNADER,

Plaintiff,

-against-

CSX TRANSPORTATION, INC. and
CONSOLIDATED RAIL CORPORATION,

Defendants.

DECISION and ORDER
INDEX NO. 2134-11
RJI NO. 01-11-105109

Supreme Court Albany County All Purpose Term, May 17, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:
David Lockard & Associates, PC
Attn: David L. Lockard, Esq.
Attorney for Plaintiff
15 West Highland Avenue
Philadelphia, PA 19118

Eckert, Seamans, Cherin & Mellott, LLC
Attn: Lawrence R. Bailey, Jr., Esq.
Attorney for Defendants
10 Bank Street, Suite 700
White Plains, New York 10606

TERESI, J.:

For over thirty five years Plaintiff worked for Defendants as a railroad conductor and engineer. Plaintiff alleges that over the course of his employment his back was severely damaged from exposure to work related ergonomic risks, seats that were not properly braced or maintained, jolts, shocks, motions and vibrations. Plaintiff commenced this action pursuant to the Federal Employer's Liability Act (FELA) (45 USC §51, et seq.) and the Federal Locomotive Inspection Act (FLIA) (49 USC §20701) to recover his damages. Issue was joined, discovery is

complete and the trial of this action is scheduled to begin on July 29, 2013.

Defendants now move, in limine, to preclude Plaintiff: from offering evidence "of better or safer seats..." and "inflammatory statements...", from arguing "but for causation" or from offering the expert testimony of Johanning and Lawrence.[1] Defendants also seek an Order granting its "omnibus motion in limine." Plaintiff opposes the motions, each of which will be addressed separately below.

Defendants' "better or safer seats" motion in limine[2]

Contrary to Defendants' arguments, Plaintiff's evidence of "better or safer seats" is not irrelevant as a matter of law.

Plaintiff's damages claims are based, in part, upon Defendants' purported failure to properly mount, brace or maintain the seats he was required to use in performing his work related tasks. "[S]ince FELA requires that Plaintiff prove that Defendants' failed to provide him with a safe place to work, the issue of whether or not Defendants could have employed a safer method of maintaining the workplace [and his seat] could be relevant to the issue of reasonable care." (Campbell v Consol. Rail Corp., 22 OSH Cas (BNA) 1697, 2009 WL 36889 [ND NY Jan. 6, 2009, No. 1:05-CV-1501 (GTS/GJD)]). So long as Plaintiff establishes at trial, with expert proof, a nexus between the purported "better or safer" equipment and a decreased likelihood of

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[1] "Johanning" will refer to Dr. Eckardt Johanning; "Lawrence" will refer to James Lawrence, M.D. While Defendants also sought to preclude the testimony of Robert Andres, Ph.D. (Andres), because Plaintiff explicitly advised this Court that he will not call Andres, this portion of Defendants' motion is granted as unopposed.

[2] Defendants raised a similar argument within their "omnibus" motion in limine, and all such claims will be addressed in this subsection.

injury, his proposed "better or safer" equipment or maintenance proof would be relevant and admissible on the reasonable care issue.

Accordingly, this portion of Defendants' motion is denied.

Defendants' "inflammatory statements" motion in limine

On this record, Defendants failed to demonstrate their entitlement to a pre trial ruling precluding "inflammatory statements."

The specific statements Defendants seek to preclude were made by Andres in a report submitted in another unrelated action. Plaintiff, however, unequivocally stated that he will not be calling Andres as a witness at trial. As such, Plaintiff has conceded that he will not be introducing the specific "inflammatory statements" Defendants seek to preclude.

While Plaintiff's opposition alleges that he will offer his co-worker's testimony relative to Defendants' discouraging safety reporting, without context Defendants have not demonstrated that such testimony has no "tendency in reason to prove the existence of any material fact." (People v Scarola, 71 NY2d 769 [1988]).

Accordingly, this portion of Defendants' motion is denied.

Defendants' "but for" motion in limine

Defendants reliance on CSX Transp., Inc. v McBride, 131 S Ct 2630 [2011] to preclude Plaintiff from arguing "but for" causation to the jury is wholly unavailing.

Contrary to Defendants interpretation, the McBride Court did not provide a blanket prohibition against a Plaintiff arguing "but for" causation before a jury considering a FELA case.

Rather, the Court explicitly qualified its "but for" analysis by stating that "juries would have no warrant to award damages in far out 'but for' scenarios." (Id. at 2643 [emphasis added]). Defendants offered no proof that Plaintiff has stated such a "far out" scenario. Rather than tighten the proof necessary to demonstrate FELA causation, the McBride Court recognized that this statute's causation language "is as broad as could be framed." (Id. at 2636, quoting Urie v Thompson, 69 S Ct 1018 [1949]). The Court explained that juries in the FELA context must be "instructed that a defendant railroad caused or contributed to a railroad worker's injury if [the railroad's] negligence played a part - no matter how small - in bringing about the injury." (Id. at 2644, quoting Rogers v Missouri Pac. R. Co., 77 S Ct 443 [1957][internal quotation marks omitted]).

Accordingly, this portion of Defendants' motion is denied.

Defendants' motion to preclude Johanning and Lawrence's expert testimony

While Defendants failed to demonstrate their entitlement to an Order precluding any portion of Johanning's testimony or evidence, they did establish their entitlement to an Order limiting Lawrence's testimony.

Defendants' first claim, that Johanning's testimony would be duplicative of Lawrence's testimony, is contradicted by the record. As Plaintiff's disclosures reveal, Johanning is an occupational medicine specialist while Lawrence is a certified orthopaedist. While Johanning has examined Plaintiff, he is not Plaintiff's treating physician. Johanning's testimony will focus on Plaintiff's working conditions and railroad vibrations, and their effect on Plaintiff's spine. Lawrence, in contrast, is one of Plaintiff's treating physicians. He has treated Plaintiff's spine

injuries, including performing a lumbar decompression and spinal fusion. These witnesses are not duplicative.

Defendants also wrongly seek to preclude Johanning's use of demonstrative evidence. Defendants' speculative assertions about what demonstrative evidence Johanning will offer at the trial of this matter are entirely unavailing and failed to establish a basis for pre-trial preclusion. Plaintiff alleges that Johanning will use demonstrative evidence at trial "to aid the jury in understanding shock, vibration, etc." Use of such demonstrative evidence by experts is well recognized (Hinlicky v Dreyfuss, 6 NY3d 636 [2006]; Flah's, Inc. v Richard Rosette Elec., Inc., 155 AD2d 772 [3d Dept 1989]), and on this record will not be prohibited pre-trial.

Defendants similarly failed to demonstrate that Johanning's testimony is inadmissible because his disclosures do not establish a causal nexus between Plaintiff's injuries and Defendants' alleged negligence. Conspicuously absent from Defendants' challenge is a claim that Johanning's causation testimony is inadmissible under Frye v United States (Frye) (293 F 1013 [DC Cir 1923]).[3] Rather, Defendants specify individual phrases in Plaintiff's Expert Witness Disclosure and Johanning's Report to argue that Johanning's testimony cannot establish causation specific to Plaintiff. Such argument, however, is too restrictive. Johanning need not specify the precise defect or occurrence that injured Plaintiff. Instead, the methods he "uses to establish causation [must be] generally accepted in the scientific community." (Cornell v 360 W.

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[3] Such absence is even more pronounced as Defendants made a Frye challenge to Andres' testimony in their initial motion. To the extent Defendants' Reply, for the first time, seeks a Frye hearing on Johanning's testimony, such request is impermissible, untimely and rejected. (Schissler v Athens Assoc., 19 AD3d 979 [3d Dept 2005]; Crawmer v Mills, 239 AD2d 844 [3d Dept1997]; Albany County Dept. of Social Services v Rossi, 62 AD3d 1049 [3d Dept 2009]; E.W. Tompkins Co., Inc. v State University of New York, 61 AD3d 1248 [3d Dept 2009]).

51st St. Realty, LLC, 95 AD3d 50, 59 [1st Dept 2012], quoting Parker v Mobil Oil Corp., 7 NY3d 434 [2006]). As Defendants offered no proof, or even argument, that Johanning's methods are not generally accepted in the scientific community, Defendants failed to demonstrate their entitlement to preclusion of Johanning's testimony.

Accordingly, Defendants' motion to limit Johanning's testimony and evidence is denied in its entirety.

Defendants demonstrated, however, their entitlement to an Order precluding Lawrence from testifying about the causal nexus between Plaintiff's injury and Defendants' negligence. Again, Defendants challenge to Lawrence's testimony seeks neither a Frye hearing nor preclusion pursuant to Frye. Instead, relying solely on Lawrence's Disclosure and Report, they demonstrated that he made no causation allegation relevant to Defendants' alleged negligence. Lawrence's causation allegations all focus on how Plaintiff's "work contributed to and/or caused Plaintiff's spinal injuries/conditions." (emphasis added). Allegations of Plaintiff's work alone, however, are not enough. Absent from the Disclosure and Report are any allegations that Defendants' failure to provide a reasonably safe place to work, i.e. Defendants' negligence, caused Plaintiff's injury. Because Plaintiff's have not properly disclosed (CPLR §3101[d]) that Lawrence will testify that Defendants' negligence caused Plaintiff's injury, this portion of Defendants' motion is granted. (Krimkevitch v Imperiale, 104 AD3d 649 [2d Dept 2013]; Caccioppoli v City of New York, 50 AD3d 1079 [2d Dept 2008]).

Accordingly, Lawrence is hereby precluded from testifying at the trial of this matter about the causal connection between Plaintiff's injury and Defendants' negligence. However, so long as a proper foundation is laid at trial, Lawrence's testimony is not otherwise restricted.

Defendants' "omnibus" motion in limine

Preliminarily, because Plaintiff concedes that he will argue neither FELA's congressional intent nor the parties' relative financial conditions, these portions of Defendants' omnibus motion in limine are granted as unopposed.

Defendants seek an Order precluding Plaintiff's counsel from making any remarks concerning the non-applicability of Workers' Compensation benefits or that this action is Plaintiff's sole remedy. (*see* Stillman v Norfolk & W. Ry. Co., 811 F2d 834 [4th Cir 1987]). In opposition, Plaintiff agrees not to make any statement to the effect that this action is his sole remedy; but seeks instead a jury instruction reading: "This is not a worker's compensation case. Plaintiff is not covered by workers' compensation." In recognizing the competing interests, while excluding irrelevant arguments and proof and preventing jury confusion, several trial courts have recently adopted a similar jury instruction in FELA cases. (Abernathy v Union Pac. R. Co., 4:08CV04187-BRW, 2011 WL 1773087 [ED Ark May 9, 2011]; Johnson v Union Pac. R. Co., 8:05CV373, 2007 WL 2914886 [D Neb Oct. 4, 2007]; Battaglia v Conrail, 2009-Ohio-5505 [Ohio Ct App Oct. 16, 2009]). The reasoning of such Courts is equally applicable here. Accordingly, Plaintiff is hereby prohibited from making any Worker's Compensation benefits or "sole remedy" remarks, but is entitled to the above jury charge.

Defendants next seek an Order prohibiting Plaintiff from offering evidence of his medical expenses that were paid for by either Plaintiff's insurance or Defendants themselves. Notwithstanding the non-New York case law relied on by Defendants, this evidentiary/ procedural issue is governed by New York law. (Able Cycle Engines, Inc. v Allstate Ins. Co., 84 AD2d 140 [2d Dept 1981]; Intercontinental Planning, Ltd. v Daystrom, Inc., 24 NY2d 372

[1969]). Applicable here, CPLR §4545(a) explicitly permits Plaintiff to prove his medical "expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery." To the extent Defendants seek to reduce Plaintiff's recovery by the medical expenses they or Plaintiff's insurance have paid, their application is premature. They must later comply with CPLR §4545's collateral source procedures. Accordingly, this portion of Defendants' motion is denied.

Defendants' motion for an Order prohibiting Plaintiff from introducing evidence of other "claims or suits involving Defendants" is, on this record, likewise unavailing. The broad, sweeping ruling Defendants seek would prohibit Plaintiff from offering potentially probative evidence of Defendants' notice. "Generally, evidence of prior lawsuits or claims against Defendants is relevant [in a FELA action] in that it demonstrates that Defendants were on notice that exposing employees to certain conditions, appliances and/or work environments may cause injuries." (Campbell v Consol. Rail Corp., 22 OSH Cas (BNA) 1697, 6 [NDNY Jan. 6, 2009]; First Sec. Bank v Union Pac. R.R. Co., 152 F3d 877, 879 [8th Cir 1998]; Lockley v CSX Transp. Inc., 2010 PA Super 167, 5 A3d 383, 395 [Pa Super Ct 2010]). Such proof is admissible at trial if Plaintiff demonstrates that the claim or suit to be offered is "sufficiently similar in time, place or circumstances to be probative." (First Sec. Bank v Union Pac. R.R. Co., supra at 879, quoting Thomas v. Chrysler Corp., 717 F2d 1223 [8th Cir1983]; Brown v Natl. R.R. Passenger Co., 221 F3d 1338 [7th Cir 2000]). Here, because Defendants specify no specific claim or suit they seek to preclude, no "sufficiently similar" analysis can be conducted. Accordingly, Defendants' motion is denied. At trial, however, Plaintiff will have the burden to demonstrate "substantial similarity" between any prior claims or suits he seeks to offer and his own.

Defendants' motion to preclude statements of the "dangerousness" of the railroad is similarly premature and over broad. To the extent Plaintiff's counsel offers such evidence or makes such statement at trial, Defendants may object to its relevance within the context of the trial proffer. Accordingly, this portion of Defendants' motion is denied.

Lastly, Defendants failed to demonstrate their entitlement to an Order prohibiting Plaintiff from, as clarified by their reply, "mak[ing] a negligence claim under the [FLIA.]" As set forth above, Plaintiff has asserted both FELA and FLIA causes of action. It has long been recognized that "[a]n employee injured as a result of a violation of the FLIA may bring an action under the FELA based upon the FLIA violation." (Dougherty v CSX Transp. Inc., 10195 OF 2006 [Pa Com Pl Apr. 30, 2010], citing Lilly v Grand Trunk W. R. Co., 317 US 481 [1943]). "Liability under FELA is absolute upon (1) proof of a violation of FLIA and (2) proof that the FLIA violation was the cause of the injuries suffered. Because an action based on an alleged violation of FLIA operates through FELA, the FELA causation standard applies to both [of Plaintiff's] FELA and FLIA claims." (Raab v Utah Ry. Co., 2009 UT 61, 221 P3d 219 [2009]). While Defendants are correct that Plaintiff's negligence claim is not being made under FLIA, as clarified above, by this portion of their motion Defendants wholly failed to demonstrate the necessity for a pre-trial ruling on "anticipated inadmissible, immaterial, or prejudicial evidence." (State v Metz, 241 AD2d 192, 198 [1st Dept 1998]). Accordingly, this portion of Defendants' motion is denied.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or moot.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 9, 2013
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 17, 2013; Affirmation of Lawrence Bailey, dated April 17, 2013; Affirmation of Lawrence Bailey, dated April 17, 2013, with attached Exhibits A-B; Affirmation of Lawrence Bailey, dated April 17, 2013; Affirmation of Lawrence Bailey, dated April 17, 2013, ; Affirmation of Lawrence Bailey, dated April 17, 2013, with attached Exhibits C-I; Affirmation of Lawrence Bailey, dated April 17, 2013, with attached Exhibits J-N; Affirmation of Lawrence Bailey, dated April 17, 2013, with attached Exhibits O-P;
2. Affidavit of David Lockard, dated May 10, 2013; "Response" of David Lockard, undated; "Response" of David Lockard, undated; "Response" of David Lockard, undated; Affirmation of David Lockard, dated May 10, 2013, with attached Exhibits 1-2; Affirmation of David Lockard, dated May 10, 2013, with attached Exhibits 1-2; "Response" of David Lockard, undated, with attached Exhibits 1-2.
3. Affirmation of Lawrence Bailey, dated May 16, 2013, with attached Exhibits Q-V.