

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ADRIENNE R. WILLIAMS,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
CSX TRANSPORTATION, INC., et al.,	:	
Defendants and	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
J.D. MORRISSEY, INC., and	:	
NATIONAL RAILROAD	:	
CONTRACTORS,	:	No. 01-3433
Third Party Defendants.	:	

MEMORANDUM AND ORDER

SCHILLER, J.

November , 2002

I. BACKGROUND

Plaintiff Adrienne Williams brings suit against Defendants CSX Transportation, Inc. (“CSXT”) and CSX Intermodal, Inc. (“CSXI”) under the Federal Employer’s Liability Act (“FELA”), 45 U.S.C. § 51 et seq., and common law negligence.¹ Defendants filed a third party complaint asserting claims of indemnity, contribution, and insurance coverage against Third Party Defendants J.D. Morrissey, Inc. (“Morrissey”) and National Railroad, Inc. (“National”). On July 25,

¹ Plaintiff’s claims under the Federal Safety Appliances Act, 49 U.S.C. § 20301 et. seq., and the Federal Boiler Inspection act, 49 U.S.C. § 20701 et seq., have been dismissed by agreement of the parties. See Order dated November 4, 2002, *Williams v. CSX Transportation, Inc. et al.*, Civ. A. No. 01-3433.

2000, Plaintiff was working at the Greenwich Rail Yard in Philadelphia, when she allegedly slipped on ore pellets and ballasts, and sustained injuries. At that time, Greenwich Rail Yard was owned by CSXT and leased to CSXI. On July 1, 1998, CSXI had entered into a written contract with Morrissey to perform terminal improvements (referred to hereafter as the “Morrissey Contract”) at the Greenwich Rail Yard. Subsequently, Morrissey subcontracted with National to perform all of the track work required under the Morrissey Contract. On April 14, 2000, CSXI entered into a separate direct contract with National Railroad to perform services at the Greenwich Yard (“National Contract”). When Plaintiff allegedly sustained her injuries, she was an employee of National, working either pursuant to the Morrissey Contract and/or the National Contract.² Now before the Court is: (1) Defendants CSXT and CSXI’s motion for summary judgment on Plaintiff’s claims; (2) cross motions for summary judgment on the Third Party complaint; (3) Third Party Defendant National’s unopposed motion for severance of Third Party claims and cross-claims pursuant to Federal Rule of Civil Procedure 42(b); and (4) Plaintiff’s motion for a *Daubert* hearing. For the reasons stated below, I grant in part and deny in part the Defendant’s motion for summary judgment, grant National’s Rule 42(b) motion, and deny Plaintiff’s motion for a *Daubert* hearing.

I will not address the cross motions for summary judgment on the Third Party Complaint because disposition of these issues will be addressed after the trial on Plaintiff’s claims.

II. DISCUSSION

A. Motion for Severance

Pursuant to Federal Rule of Civil Procedure 42(b), National moves for severance of the Third

² The issues in the motions for summary judgment on the Third Party Complaint will not be addressed in at this time for the reasons stated below.

Party claims and cross-claims from the Plaintiff's claims against the Defendants. Federal Rule of Civil Procedure 42(b) states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution, or as given by a statute of the United States.

FED. R. CIV. P. 42(b). The decision to order separate trials is left to the trial court's informed discretion. *See Lis v. Robert Packer Hospital*, 579 F.2d 819, 824 (3d Cir. 1978); *see also Idzajtich v. Pennsylvania Railroad Co.*, 456 F.2d 1228, 1230 (3d Cir. 1971). In making this decision, "the Court is required to balance 'the convenience of the parties, avoidance of prejudice to either party, and promotion of the expeditious resolution of the litigation.'" *Johnson v. King Media, Inc.*, Civ. A. No. 01-2311, 2002 WL 1372363, 2002 U.S. Dist. LEXIS 11322, at *6 (E.D. Pa. June 24, 2002) (quoting *Official Comm. of Unsecured Creditors v. Shapiro*, 190 F.R.D. 352, 355 (E.D. Pa. 2000)).

The Court also should consider the following factors:

(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance will be prejudiced if it is granted, and (4) whether the party requesting the severance will be prejudiced if it is not granted.

Id.

In this case, the third party claims and cross-claims hinge on issues of indemnification, obligation to insure, and contribution that are contingent upon the underlying claim of negligence between Plaintiff and the Defendants. I find that the issues of law are sufficiently separate and

distinct and that the proof for first party claims and the third party claims are sufficiently different to warrant separate trials. Although Defendants' success on Plaintiff's claims will not make the Third Party claims completely moot, disposition of Plaintiff's claim may change the nature of the Third Party claims. For these reasons, I grant National's motion under Federal Rule of Civil Procedure 42(b) and order that a bench trial on the Third Party claims will be held after trial on Plaintiff's claims. Because the Third Party claims will be decided upon after the disposition of the Plaintiff's claims, I address only the summary judgment motion by Defendants as to Plaintiff's claims.

B. Motion for Summary Judgment as to Plaintiff's Claims

Defendants CSXT and CSXI move for summary judgment on Plaintiff's claims, arguing that: (1) Plaintiff cannot assert a claim under FELA because she was not an "employee" of CSXT and CSXI is not a common carrier as required by the Act; and (2) Plaintiff cannot assert a claim of common law negligence against CSXT because it was a landlord out of possession.

1. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of identifying those portions of the record that it believes shows the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party has the burden of proof on a particular issue at trial, the

moving party meets its burden by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” *Id.* at 325. Once the moving party meets this burden, the non-moving party must demonstrate that there are disputes of material fact that should proceed to trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *See Celotex*, 477 U.S. at 324. A court may grant summary judgment if the non-moving party fails to make a factual showing “sufficient to establish an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. In making this determination, the non-moving party is entitled to all reasonable inferences, and the evidence is viewed in the light most favorable to that party. *See Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986).

2. Plaintiff’s Claims Under FELA

In order to recover damages under FELA, a plaintiff must establish four elements: (1) defendant is a common carrier by railroad engaged in interstate commerce; (2) she was employed by defendant; (3) her injury occurred while she was employed by defendant; and (4) defendant’s negligence caused her injuries. *See Felton v. SEPTA*, 952 F.2d 59, 62 (3d Cir. 1991). The “threshold issue” is whether Plaintiff was employed by a common carrier by railroad engaged in interstate commerce when she was allegedly injured. Although the negligence and causation elements have a “relaxed standard of proof,” the other elements are not subject these relaxed standards. *See Denney v. CSX Transp., Inc.*, Civ. A. No. 01-4520, 2002 WL 1340409, 2002 U.S. Dist. LEXIS 10872, at *5 n.2 (E.D. Pa., June 19, 2002) (citing *Hines v. Consol. Rail Corp.*, 926 F.2d

262, 268 (3d Cir. 1991)). First, CSXI argues it is entitled to summary judgment because it is not a common carrier by railroad as required by the Act. Second, CSXT argues that it is entitled to summary judgment because it was not Plaintiff's employer. Although it is undisputed that Plaintiff was employed by National at the time of the accident, Plaintiff asserts that she was also "employed" by CSXT and CSXI for the purposes of FELA.

a. Common Carrier by Railroad

Plaintiff cannot sustain a claim under FELA against CSXI because it is not a "common carrier by railroad" within the meaning of the Act. *See* 45 U.S.C. § 51 (2002). First, Plaintiff seems to concede in her opposition to summary judgment that only "CSXT is liable for the damages sustained by Ms. Williams. . . ." (Pl. Opp. Summ. J. at 9.) Second, as CSXI's Assistant Corporate Secretary points out in her certification, CSXI "does not operate locomotives or rail transportation in its daily business operations," rather it is a "broker of transportation with a trucking division that transports freight to and from rail terminals in the United States." (Harvey Certification, ¶¶2-4.) Even assuming that CSXI is affiliated with CSXT, an interstate common carrier subject to the FELA, Congress did not intend FELA to extend to such entities. *See Felton*, 952 F.2d at 61 (holding that "Congress did not intend to extend FELA to employees of an intrastate transportation entit[ies]. . . , even though [they are] organizationally affiliated with an interstate carrier, which is subject to FELA"). Thus, I grant summary judgment on the FELA claim asserted against CSXI.

b. Employed Under FELA

In order to prove a claim against CSXT, Plaintiff must establish that she was "employed" by CSXT for the purposes of FELA. There are three ways in which Plaintiff can prove that she was employed by a rail carrier under the FELA. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324

(1974). Plaintiff could prove that he was serving as: (1) a borrowed servant; (2) a dual servant; or (3) a subservant of the railroad. *See id.* (citing Restatement (Second) of Agency § 227; *Linstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28 (1928); *Williams v. Pa. R. Co.*, 313 F.2d 303, 209 (2d Cir. 1963); Restatement § 5(2); *Schroeder v. Pa. R. Co.*, 397 F.2d 452 (7th Cir. 1968)). In determining whether Plaintiff was employed by CSXT within the meaning of the Act, the Court must consider “whether the [defendant] had the power to direct, control and supervise the plaintiff in the performance of his work at the time he was injured.” *Williamson v. CONRAIL*, 926 F.2d 1344, 1350 (3d Cir. 1991) (citing *Tarboro v. Reading Co.*, 396 F.2d 941, 943 (3d Cir. 1968)). Although “full supervisory control” is not required, the railroad must “play ‘a significant role’ as to the work of the injured employee.” *See id.* (quoting *Lindsey v. Louisville & Nashville R.R. Co.*, 775 F.2d 1322, 1324 (5th Cir. 1985)). Additionally, “the relevant factors to be considered are: who selected and engaged the plaintiff to do the work; who paid his wages for performing it; who had the power to terminate his employment; who furnished the tools with which the work was performed and the place of work.” *See id.*

In this case, Plaintiff was undisputedly employed by National. (Williams Dep. at 21.) Plaintiff, however, has come forth with affirmative evidence in the record to create a genuine issue of material fact as to whether she was also “employed” by CSXT. Viewing the facts in a light most favorable to Plaintiff, evidence suggests that Michael Irby, a CSXT employee who was a foreman at the Greenwich Yard, played a supervisory role to Plaintiff while she was working in the Greenwich Yard. (Irby Dep. at 3-7, 47.) Although CSXT could not hire or fire Plaintiff, Mr. Irby spoke with the National employees on the daily basis, conducted safety meetings, provided some

tools and gear to the crew, and inspected their work to ensure that it complied with CSX standards.³ (*Id.*) Additionally, each morning Mr. Irby spoke with someone from National about the work that was to be performed by Plaintiff and those in her crew. (*Id.* at 45.) However, it is disputed whether Mr. Irby or others from CSXT instructed National about what work to was to be performed or vice versa.⁴ Thus, there is a genuine issue of material fact as to whether CSXT had the right to control

³ Mr. Irby testified in his deposition as follows:

Q: Would you actually tell the crew or tell the crew's foreman how the work had to be changed or modified in order to comply with [CSX] standards?

A: Yes.

Q: Would you do that on a day-to-day basis?

A: Yes. If I seen something - I would have walked the tracks a lot, and if I would have seen something, I would tell them, 'Hey, we better tighten this up' something like that.

Irby Dep. at 47.

⁴ Compare Williams Dep. at 25,105-106

Q: On a day-to-day basis when you were working out at Greenwich, who would make the decision as to what type of work you would do that day?

A. When I come in the morning, Joe Sr. [senior authority for National Railroad] is having a meeting with CSX. And Joe comes out and tells our foreman what we're going to do, and we go and do the job.

Q: Did Joe ever tell you whether anyone from CSX would tell him what would be done? A: Right, everyday, yes."

with Irby Dep. at 45

Q: And when you would meet with the crew from National

or direct National and/or its employees.

c. Negligence and Causation Under FELA

The negligence and causation elements of a FELA claim are judged by a lower standard on summary judgment. As the Third Circuit has held, ““a trial court is justified in withdrawing . . . issue[s] from the jury’s consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee.”” *Hines*, 926 F.2d at 268 (quoting *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697, 699-700 (3d Cir. 1970)). Viewing the facts in a light most favorable to Plaintiff, it seems that CSXT had notice of the conditions at the yard that may have contributed to Plaintiff’s injury. (Irby Dep. at 35-36, 42-43.) Thus, I cannot find that there is “zero probability” of any negligence that contributed to Plaintiff’s injury.

Therefore, I grant Defendant CSXI’s motion for summary judgment on Plaintiff’s FELA claim against CSXI but I deny CSXT’s motion for summary judgment on Plaintiff’s FELA claim against CSXT as a genuine issue of material fact exists on the present record. However, I deny the FELA claim against CSXT without prejudice to the Defendants to raise this issue again at the end of the Plaintiff’s case based on trial evidence.

3. Common Law Negligence

Railroad, would you meet with them on a daily basis?

A: Every morning.

Q: Would you tell them what type of work was going to be done that day?

A: They told me.

Defendants argue that CSXT is entitled to summary judgment on Plaintiff's negligence claim because it is a landlord out of possession. Generally, under Pennsylvania law, a landlord out of possession is not responsible for injuries suffered by third parties on the leased premises. *See Dorsey v. Continental Assocs.*, 591 A.2d 716, 718-19 (Pa. Super. Ct. 1991). Despite this general rule, a landlord may be liable:

(1) if he has reserved control over a defective portion of the demised premises, (2) if the demised premises are so dangerously constructed that the premises are a nuisance per se, (3) if the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee, (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee, (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs, or (6) if the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises.

Henze v. Texaco, Inc., 508 A.2d 1200, 1202 (Pa. Super. Ct. 1986) (citations omitted). Plaintiff correctly argues that the deposition evidence supports its contention that sixth exception applies. (Irby Dep. at 35-36, 40-44.) That is, there is evidence that although CSXT was a landlord out of possession, Mr. Irby had notified CSXT officials about the conditions of the yard at least four months in advance of Plaintiff's incident but CSXT did not remedy the allegedly dangerous condition on the premises. (*Id.*) Thus, viewing the evidence in a light most favorable to the Plaintiff, I cannot conclude that CSXT is entitled to judgment as a matter of law.

C. Motion for a *Daubert* Hearing

In her motion for a *Daubert* hearing, Plaintiff objects to the testimony of defense expert Dr. Osterholm. Specifically, Plaintiff objects to Dr. Osterholm's testimony that Plaintiff's lumbar disk

injury could not have been caused by her accident. Plaintiff argues that: (1) Dr. Osterholm's opinion is based on biomechanical injury science that is "junk science;" and (2) Dr. Osterholm, as a neurosurgeon, is not qualified to testify on this subject. Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), when faced with an objection to expert testimony, a trial judge determine "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." See 509 U.S. at 591-592. Applying a reliability analysis to an expert's opinion, the Court is required to evaluate whether that the opinion is based on the "methods and procedures of science" rather than on "subjective belief or unsupported speculation." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (1994) (quoting *Daubert*, 509 U.S. at 590). That is, whether the expert has "good grounds" for his belief.⁵ *Id.* at 741-42.

After reading Dr. Osterholm's report, I do not find that his opinion is based on biomechanical injury science, rather it was based on medical records and depositions and was rendered based on his experience as a neurosurgeon and medical doctor. I do not find, contrary to Plaintiff's assertions, that Dr. Osterholm's opinion contains evidence that Plaintiff's injuries could not be produced by the

⁵ Specifically, there are eight criteria to determine the reliability of expert testimony: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. See *Paoli*, 35 F.3d at 742 n.8. These factors do not constitute a "definitive checklist or test." *Kumho Tire v. Carmichael*, 526 U.S. 137, 150 (1999) (quoting *U.S. v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). Other than Plaintiff's objection regarding biomechanical injury science, which is not the basis for Dr. Osterholm's report, Plaintiff does not contend that Dr. Osterholm's testimony will not otherwise satisfy these eight factors.

body movement she alleges. Dr. Osterholm's report contends that her injuries were not caused by the accident because there is a "discordance between the neuroanatomical and clinical data," and/or because her injuries could have been caused by an ovarian cyst or the onset of arthritis. Thus, I find that Dr. Osterholm's opinion is reliable because it is based on his expertise as a neurosurgeon and medical doctor. Any challenge that Plaintiff has about his testimony can be explored on cross examination of this witness. Therefore, I deny Plaintiff's motion for a *Daubert* hearing.

III. CONCLUSION

For the foregoing reasons, I grant Third Party Defendant National's motion for severance under Federal Rule of Civil Procedure 42(b), grant in part and deny in part Defendants' motion for summary judgment as to Plaintiff's claims, and deny Plaintiff's motion for a *Daubert* hearing. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ADRIENNE R. WILLIAMS,	:	
Plaintiff,	:	CIVIL ACTION
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v.	:	
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CSX TRANSPORTATION, INC., et al.,	:	
Defendants and	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
J.D. MORRISSEY, INC., and	:	
NATIONAL RAILROAD	:	
CONTRACTORS,	:	No. 01-3433
Third Party Defendants.	:	

ORDER

AND NOW, this day of **November, 2002**, upon consideration of Defendants' motion for summary judgment as to Plaintiff's claims and the response thereto, Third Party

Defendant National Railroad's motion for severance, Plaintiff's motion for a *Daubert* hearing, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Third Party Defendant National Railroad's Motion for Severance (document no. 51) is **GRANTED** .
2. Defendants' Motion for Summary Judgment as to Plaintiff's Claims (document no. 42) is **GRANTED IN PART AND DENIED IN PART** as follows:
 - a. Defendant CSX Intermodal, Inc.'s motion for summary judgment as to Count I of Plaintiff's Complaint under the FELA is **GRANTED**.
 - b. Defendant CSX Transportation, Inc.'s motion for summary judgment on Count I of Plaintiff's Amended Complaint under the FELA is **DENIED WITHOUT PREJUDICE**.
 - c. Defendants CSXT's motion for summary judgment on Count II of Plaintiff's Amended Complaint under common law negligence is **DENIED**.
3. Plaintiff's Motion for *Daubert* Hearing (document no. 70) is **DENIED**.
4. A jury trial on Plaintiff's claims shall commence on November 18, 2002 at 9:30 a.m.

BY THE COURT:

Berle M. Schiller, J.