

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

PATRICK H. KIMMEN,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 97-7890
	:	
v.	:	
	:	
CONSOLIDATED RAIL CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

March 17, 1999

Presently before the Court is Defendant's Motion for a New Trial pursuant to Fed. R. Civ. P. 59. For the reasons discussed below, Defendant's motion is DENIED in its entirety.

I. BACKGROUND

Plaintiff Patrick H. Kimmen brought this negligence action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., alleging that he suffered injuries when he fell trying to avoid overgrown vegetation and brush while inspecting cars in Defendant Consolidated Rail Corporation's storage yard located in Altoona, Pennsylvania. A four-day jury trial on liability and damages ensued beginning on December 15, 1998. Plaintiff presented seven witnesses; Defendant presented six witnesses and also played the videotaped depositions of two physicians and several minutes of a surveillance videotape.

After the jury was charged, it deliberated for the remainder of the fourth day, continued deliberating the following Monday, and returned with a verdict on December 21, 1998 for Plaintiff in the amount of \$1,100,000. Judgment was entered for Plaintiff that same day.

II. NEW TRIAL OR REMITTITUR

A. Standards of Review

A new trial may be granted when there is legally sufficient evidence to support the verdict, thus foreclosing judgment as a matter of law, but the verdict is contrary to the great weight of the evidence; that is, “where ‘a miscarriage of justice would result if the verdict were to stand.’” Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3d Cir. 1993) (quoting Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992)). Although the decision whether to grant a new trial “is confided almost entirely to the discretion of the district court,” Blancha v. Raymark Indus., 972 F.2d 507, 512 (3d Cir. 1992), the trial court may not substitute its “judgment of the facts and the credibility of the witnesses for that of the jury,” Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.) (in banc), cert. denied, 364 U.S. 835 (1960). Additionally, a jury verdict may not be overturned as against the clear weight of the evidence unless “the verdict, on the record, cries out to be overturned or shocks our conscience.” Wilburn v. Maritrans GP Inc., 139 F.3d 350, 364 (3d Cir. 1998) (internal quotations and citation omitted). It is an insufficient basis to reverse a jury’s award of damages simply because the court finds that an award is extremely generous, or that the court would have found the damages to be considerably less. See Walters v. Mintec/Int’l, 758 F.2d 73, 80 (3d Cir. 1985).

When the basis of a motion for a new trial is an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide latitude in ruling on the motion. See Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 921-22 (3d Cir. 1986). The court must determine (1) whether an error was in fact made, and (2) whether the error was so prejudicial that a refusal to grant a new trial would be "inconsistent with substantial justice." Fed. R. Civ. P. 61. To constitute proper grounds for granting a new trial the error or defect must "affect the substantial rights of the parties." Id.

Defendant moves for a new trial or remittitur pursuant to Fed. R. Civ. P. 59 on a host of pretrial and trial issues. With respect to pretrial matters, Defendant contends it was error for this Court to (1) deny its motion to compel Plaintiff to attend a psychiatric examination, and subsequently deny its motion for reconsideration of that order; (2) deny its motion in limine to preclude the report and testimony of Bunin Associates, and allow Plaintiff's economist to testify using the total offset method in a FELA suit; (3) deny its motion in limine to preclude the report and testimony of Wallace F. Holl, and to allow Mr. Holl to testify at trial; and (4) grant Plaintiff's motion in limine to preclude evidence of retirement pension benefits, and preclude Dr. Brian Sullivan from testifying as to the reasonable age for retirement of railroad workers.

As for the actual trial, Defendant further contends that (1) the evidence does not support the verdict and the damages awarded are excessive; (2) a remittitur is warranted as the damages awarded are excessive and shock the conscience; (3) it was error to allow witnesses Larry Repko, Thomas Lutton, and Leo Johnston to testify or, in the alternative, to allow Plaintiff's counsel, Mr. Barish, to use any information obtained from these witnesses; (4) it was

error in allowing Plaintiff's counsel to enter irrelevant character evidence about Plaintiffs' work ethics, honesty, and lack of prior claim history; (5) it was error to allow Plaintiff's economist to testify and use the wage of \$5.50 per hour as Plaintiff's future earnings capacity; (6) it was error to deny a mistrial based on the outrageous conduct of Mr. Barish during trial; and (7) it was error to omit a jury charge on mitigation of damages.

B. Pretrial Issues

1. Motion to Compel Plaintiff to Attend a Psychiatric Examination

Defendant first contends it was error for this Court to deny its motion to compel Plaintiff to attend a psychiatric examination, and subsequently deny its motion for reconsideration of that order. See Def.'s Mem. at 3. After considering this issue (for a third time), the Court concludes that no error was in fact made.

It is well established that a plaintiff may not be compelled to undergo a psychiatric examination pursuant to Fed. R. Civ. P. 35 unless his/her mental condition has been placed in controversy by the pleadings or proof, and there is good cause for such an order. See generally Schlagenhauf v. Holder, 379 U.S. 104 (1964). Here, Plaintiff did not make allegations in the complaint placing his mental condition in controversy, and the proceedings at trial plainly demonstrated that his mental condition was, in fact, not in controversy. A new trial will not be granted on this ground.

2. Motions in Limine

Defendant next contends that this Court erred in ruling on several motions in limine. Specifically, according to Defendant, it was error to (1) deny its motion in limine to preclude the report and testimony of Bunin Associates, and allow Plaintiff's economist to testify using the total offset method in a FELA suit; (2) deny its motion in limine to preclude the report and testimony of Wallace F. Holl, and to allow Mr. Holl to testify at trial; and (3) grant Plaintiff's motion in limine to preclude evidence of retirement pension benefits, and preclude Dr. Brian Sullivan from testifying as to the reasonable age for retirement of railroad workers. See Def.'s Mem. at 3-7. After careful reconsideration of these evidentiary rulings, the Court concludes that no error was in fact made. Even assuming that an error had been made on any or all of the aforementioned grounds, the Court cannot conclude that a refusal to grant a new trial would be "inconsistent with substantial justice," after taking note of all the evidence in the record.

First, federal decisional law has made clear that there is no one preferred method of calculating lost earnings capacity under FELA. See, e.g., Monessen Southwestern Ry. v. Morgan, 486 U.S. 330 (1988) ("It is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect preempt the jury's function."). However, it is error to fail "to instruct the jury that present value is the proper measure of a damages award." St. Louis Southwestern R.R. Co. v. Dickerson, 470 U.S. 409, 412 (1985) (per curiam). Admittedly, this Court neglected to instruct the jury that it needed to determine a present value for the damages awarded. However, Defendant's counsel also failed to object before the jury retired, as required under Fed. R. Civ. P. 51. See Trial Tr. (Dec. 18, 1998) at 174-75. In any event, Mr. Bunin's report and testimony sufficiently explained how the

total offset method operates, see id. (Dec. 16, 1998) at 161-62, and the testimony of Defendant's economist educated the jury on how present value calculations are made, and the difference between that methodology and the total offset method, see id. (Dec. 18, 1998) at 42-46. These testimonies gave the jury an ample basis for arriving at a properly valued numerical assessment of lost earnings capacity.

Second, while the subject matter of this litigation is simple and within a layman's understanding, Mr. Holl's specialized knowledge of railroad storage yards, and the impact of railroad track safety standards on the maintenance of such locations, is not. Accordingly, the Court concluded that Mr. Holl's report and testimony would be of assistance to the trier of fact in accordance with Fed. R. Evid. 702.

Finally, the evidence of retirement pension benefits and certain portions of Dr. Sullivan's anticipated testimony were excluded because their probative value would be substantially outweighed by the danger of unfair prejudice to Plaintiff. See, e.g., Eichel v. New York Central R.R. Co., 375 U.S. 253, 255-56 (1963) (per curiam) (stating that "the likelihood of misuse by the jury clearly outweighs the value of" evidence of collateral benefits).

C. Trial Issues

1. Against the Evidence, Excessive Damages, and Remittitur

Defendant maintains that a new trial is warranted because the evidence does not support the verdict and the damages awarded are excessive. In the alternative, Defendant contends that a remittitur is warranted as the damages awarded shock the conscience. See Def.'s Mem. at 7-10. Under the unique facts and circumstances of this case, which included abundant

expert testimony and extensive averments concerning Plaintiff's pain and suffering, the Court finds that the verdict neither "cries out to be overturned," nor does it "shock the conscience." Indeed, it cannot be said that the verdict is against the clear weight of the evidence and thus, neither a new trial nor a remittitur will be granted.

2. Contact with Defendant's Employees

Defendant next maintains that it was error to allow witnesses Larry Repko, Thomas Lutton, and Leo Johnston to testify or, in the alternative, to allow Mr. Barish to use any information obtained from these witnesses because all three are employees of Defendant and met impermissibly with Mr. Barish in violation of the Pennsylvania Rules of Professional Conduct 4.2. See Def.'s Mem. at 10-13. From the material presented in Defendant's moving papers, it seems apparent that Mr. Barish does contact employees of defendant railroad companies as part of an investigation of his clients' claims, at times in violation of his professional conduct obligations. However, under the circumstances presented by this case, Mr. Barish has not similarly committed such a transgression. The three individuals here were all non-managerial level employees and none of them committed acts or omissions in connection with the subject matter of this lawsuit that may be imputed to Defendant. Thus, a new trial is not warranted based on Mr. Barish's contact with these three employees.

3. Character Evidence

With respect to these same three individuals, Defendant contends that it was error to allow Plaintiff's counsel to enter irrelevant character evidence about Plaintiff's work ethics, honesty, and lack of prior claim history. See Def.'s Mem. at 21-22. While an error may have

been made, it was subsequently rendered harmless and, in fact, cured before the end of Plaintiff's case-in-chief such that the error was not prejudicial to Defendant. See Fed. R. Civ. P. 61.

During the testimony of Thomas Lutton, character evidence about Plaintiff was received into evidence by the jury. See Trial Tr. (Dec. 15, 1999) at 129. This was not only generally improper, but Plaintiff's character had also not yet been attacked. See Fed. R. Evid. 404, 608. Defendant's counsel objected on relevancy grounds, and although the Court sustained the objection, Defendant's counsel notably did not move to have the testimony stricken from the record. See Trial Tr. (Dec. 15, 1999) at 129. In any event, Plaintiff's character and credibility were subsequently attacked on cross-examination. See generally id. (Dec. 16, 1998) at 77-128. Thus, while an error may have been made in not precluding from the witness' anticipated testimony any reference to Plaintiff's character after Defendant's counsel had objected prior to that witness taking the stand, see id. (Dec. 15, 1998) at 98-100, the Court cannot conclude that the error was prejudicial to Defendant in light of the subsequent proceedings.

4. Plaintiff's Future Earnings Capacity

Defendant next maintains that it was error to allow Plaintiff's economist to testify and use the wage of \$5.50 per hour as Plaintiff's future earning capacity. See Def.'s Mem. at 20-21. Mr. Bunin's entire testimony, see Trial Tr. (Dec. 16, 1998) at 156-82, however, supports Plaintiff's showing "that his injury has caused a diminution in his ability to earn a living." Gorniak v. National Passenger R.R. Corp., 889 F.2d 481, 484 (3d Cir. 1989). Specifically, sufficient evidence was presented to the jury that Plaintiff's future earnings capacity was fairly evaluated at \$5.50 per hour based on the extent and scope of his injuries, and his actual experience in procuring a position in the Altoona area. In any event, the admission of this

testimony was not so prejudicial to Defendant such that a new trial is warranted in light of Defendant having proffered its own expert, Dr. Spergel, who testified that there were jobs within Plaintiff's transferrable skills in the same area that pay \$10-15 per hour. See Trial Tr. (Dec. 18, 1998) at 16.

5. Conduct of Mr. Barish

Defendant also contends that it was error to deny a mistrial based on the conduct of Mr. Barish during the trial. See Def.'s Mem. at 13-19. Upon a considered review of the entire record in context, the Court concludes that, while Mr. Barish's courtroom behavior may not have been exemplary, it did not rise to such a level as to taint the jury's verdict. Accordingly, a mistrial is not warranted in this case.

6. Jury Charge on Mitigation of Damages

Finally, Defendant claims that it was error to omit a jury charge on mitigation of damages. See Def.'s Mem. at 19-20. However, the evidence in the record did not warrant such an instruction to the jury. See Trial Tr. (Dec. 18, 1998) at 174-75. In any event, because Defendant's counsel did not properly object to this ruling, as required under Fed. R. Civ. P. 51, the Court declines to grant a new trial on this ground. See id.

III. CONCLUSION

For the foregoing reasons, Defendant's motion for a new trial or remittitur is DENIED in its entirety. An appropriate order follows.

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

PATRICK H. KIMMEN,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 97-7890
	:	
v.	:	
	:	
CONSOLIDATED RAIL CORPORATION,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 17th day of March 1999, upon consideration of Defendant's Motion for a New Trial (Docket Nos. 41 and 51) and Plaintiff's response thereto (Docket Nos. 46 and 52), it is hereby ORDERED that Defendant's motion is DENIED in its entirety, in accordance with the accompanying memorandum.

The Clerk of Court shall mark this case CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.