



GOLDBERG SEGALLA ^{LLP}

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Court Holds That Railroads Were Entitled To A Jury Instruction Stating That It Is Plaintiff’s Burden To Prove That His Fear Of Cancer Was “Genuine And Serious”

In *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139 (U.S. 2009), plaintiff brought a suit against CSX Transportation (“CSXT”) for asbestosis. Plaintiff claimed that during the course of his employment, the railroad negligently caused him to contract asbestosis, a noncancerous scarring of lung tissue caused by long-term exposure to asbestos. Plaintiff brought his claims in Tennessee state court and sought damages for, among other things, his fear of developing lung cancer in the future.

As background, the Supreme Court in *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003), permitted damages for fear of developing cancer under the FELA without proof of physical manifestations of the claimed emotional distress. The Court however held that it was plaintiff’s burden to prove that his alleged fear is “genuine and serious.”

In *Hensley*, CSXT proposed two instructions related to plaintiff’s claim for fear-of-cancer damages. One of the requests was based on *Ayers*. The proposed instruction stated, “Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate . . . that the . . . fear is genuine and serious.” CSXT’s other proposed instruction contained factors that the jury could consider in applying the *Ayers* standard. The trial court denied both proposed instructions and gave no specific fear-of-cancer instructions. The jury found

for plaintiff and awarded him \$5 million in damages. The Tennessee Court of Appeals affirmed the trial court's rulings.

The Tennessee Court of Appeals held that *Ayers* “did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law.” 278 S. W. 3d, at 300. The Tennessee Court of Appeals also reasoned that “little if any purpose would be served by instructing the jury that the plaintiff’s fear must be ‘genuine and serious.’” *Id.* The Tennessee Court held that “the mere suggestion of the possibility of cancer has the potential to evoke raw emotions,” and “[a]ny juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*.” *Id.* Finally, the Tennessee Court of Appeals stated, “it is for the courts to serve as gatekeepers” by ensuring that fear-of-cancer claims “do not go to the jury unless there is credible evidence of a ‘genuine and serious’ fear.” *Id.*

CSXT petitioned for *certiorari*, arguing that Tennessee misread and misapplied the Court’s decision in *Ayers*. The Supreme Court agreed with CSXT reaffirming the *Ayers* decision and holding that “verdict control devices [are] available to the trial court when a FELA plaintiff seeks fear-of-cancer damages... Those include, on a defendant’s request, a charge that each plaintiff must prove any alleged fear to be genuine and serious.” 538 U.S., at 159 (2003).

The Court further held that “[i]nstructing the jury on the standard for fear-of-cancer damages would not have been futile. To the contrary, the fact that cancer claims could ‘evoke raw emotions’ is a powerful reason to instruct the jury on the proper legal standard. Giving the instruction on this point is particularly important in the FELA context. That is because of the volume of pending asbestos claims and also because the nature of those claims enhances the danger that a jury, without proper instructions, could award emotional-distress damages based on slight evidence of a plaintiff’s fear of contracting cancer.” 129 S. Ct. at 2141.

District Court Draws Longshore-FELA Line At The Incline Into Port

In *Demay v. Norfolk Southern Ry.*, 2009 U.S. Dist. LEXIS 34680 (E.D. Mo. Apr. 24, 2009), plaintiff, a conductor/switchman for Norfolk, was injured while working at Norfolk’s Lamberts Point Coal Terminal. Lamberts Point is a coal loading facility that is used solely to load coal onto oceangoing vessels. Plaintiff was directing a movement of rail cars loaded with coal and fell due to a defective grab iron, breaking several ribs.

Plaintiff filed a FELA lawsuit in Missouri state court. Norfolk removed the case to federal court asserting that there existed federal question subject matter jurisdiction. Norfolk asserted that based on the location of plaintiff’s activity at the time of his injury, plaintiff was engaged in maritime employment making the Longshore Act plaintiff’s exclusive remedy.

The court held that plaintiff’s injury was not covered by the Longshore Act. The court stated that in order for the Longshore Act to apply, it must be established that: 1) plaintiff was working at a maritime location, and 2) the plaintiff’s activity was considered maritime employment/maritime status. The court drew a physical line at the incline into port, a point that traditionally starts the loading process onto a ship.

While acknowledging that the loading or unloading of coal could be considered maritime employment, the court held that plaintiff's activities were those that preceded the loading process. Because plaintiff was moving railcars within the yard prior to the loading process (to be carried out by others) plaintiff's activity was not maritime in nature and thus his claim was correctly brought under the FELA.

Indiana Court Of Appeals Confirms That The FELA's Three Year Statute Of Limitations Is An Enforceable Substantive Right

In *Januchowski v. N. Ind. Commuter Transp. Dist.*, 905 N.E.2d 1041 (Ind. Ct. App. 2009), plaintiff, while working for the Northern Indiana Commuter Transportation District (NICTD) as a carman, was allegedly injured by shifting 100 to 200 pound panels.

Plaintiff brought his FELA claim more than two years, but less than three years, after the alleged injuries. NICTD brought a summary judgment motion to dismiss plaintiff's claim on the basis that Indiana's general two-year statute of limitation for personal injury torts applied because of the Indiana Tort Claims Act ("ITCA"), and that as a result, the employee's claim was time-barred under Indiana Code § 34-11-2-4.

The court denied NICTD's motion. The court held that because the ITCA does not expressly contain a statute of limitation, the court found no support for NICTD's argument that Indiana's two-year statute of limitation applied to all tort claims against the State no matter the type of tort. The court further reasoned that if the legislature had intended for that statute of limitation to apply to all claims under the ITCA, it would have inserted such a requirement into the ITCA.

Finally, the court added that the FELA's three-year statute of limitation is regarded as a substantive right. Thus, since plaintiff had complied with the three-year statute of limitation, his lawsuit was allowed to proceed.

Bad Case For Plaintiff Makes Good Law For The Railroads Holding Treating Physicians Lack Causation Expertise In Occupational Injury Case

In *Campbell v. CSX Transp., Inc.*, 2009 U.S. Dist. LEXIS 43549 (C.D. Ill. May 21, 2009), plaintiff brought a lawsuit in 2007 under the FELA against CSX Transportation Inc. ("CSXT") for injuries to his back and neck. Plaintiff alleged that his injuries were occupational in nature and stemmed from his responsibilities as a conductor, which included walking on tracks, riding on trains, walking on uneven surfaces and riding on rough equipment. Prior to his lawsuit plaintiff was terminated in 2006 for his second failed cocaine test and at the time of his termination did not have any work restrictions.

Within his responses to CSXT's interrogatories, plaintiff stated that he would call his treating doctors as non-retained expert witnesses, including Dr. Dearnbarger and Dr. Schoedinger. Plaintiff stated that Dr. Schoedinger would testify regarding medical issues such as permanency, pain, causation and related medical testimony concerning plaintiff's care and treatment. Plaintiff

also stated that Dr. Dearnbarger would testify regarding general medical issues concerning plaintiff's care and treatment.

Plaintiff saw Dr. Schoedinger for the first time on October 30, 2006. Dr. Schoedinger testified that plaintiff reported that he was employed as a railroad conductor until June 2006. Dr. Schoedinger performed surgery on plaintiff's cervical spine on May 21, 2008, and performed surgery on his lumbar spine on October 29, 2008. Dr. Schoedinger testified that the repetitive nature of the activities that plaintiff engaged in during his employment as a railroad conductor imposed stresses on the back, neck, knees, hips, ankles, elbows and shoulders to an extent greater than somebody who is engaged in sedentary work. Dr. Schoedinger testified that it was his opinion that at least a portion of plaintiff's injuries were based upon plaintiff's alleged longstanding exposure to repetitive stresses imposed on plaintiff's spine.

However, Dr. Schoedinger testified that plaintiff did not tell him about any particular work activities that he associated with his neck or back. Dr. Schoedinger also testified that he did not conduct an inquiry regarding the actual work plaintiff performed during his employment or observe the location where plaintiff worked. Dr. Schoedinger stated that he made an assumption about plaintiff's work activities based upon plaintiff's claim that he worked as a conductor and based upon his knowledge of what conductors do. Dr. Schoedinger further testified that in formulating his opinion, he did not conduct any testing to determine the forces on the spine or neck from activities associated with employment as a railroad conductor nor was he aware of any literature regarding this subject. Dr. Schoedinger testified that he did not ever ask plaintiff about any activities that he engaged in throughout his life outside of his railroad work.

Dr. Dearnbarger testified that he was plaintiff's family doctor. Dr. Dearnbarger opined that the cause of plaintiff's back and neck pain was multifactorial, including chronic lifting and hard work. Dr. Dearnbarger testified that he knew plaintiff had worked as a conductor but did not know exactly what his main functions were or what his duties were. Dr. Dearnbarger testified that he did not know how long plaintiff worked for the railroad, had never read any studies or literature on the job duties of railroad conductors, did not visit any of plaintiff's job sites and never observed plaintiff perform any of his job duties. Dr. Dearnbarger testified that he was not aware of any studies that measured the stress that railroad work places on the body. He also testified that he has not personally performed any measurements on the levels of stress that railroad work causes on the body.

Plaintiff did not disclose any other expert witnesses and the deadline for disclosure had passed.

CSXT moved to bar the testimony of Dr. Schoedinger and Dr. Dearnbarger on the basis that they did not meet the requirements of Rule 702 of the Federal Rules of Evidence ("FRCP") or the standard set out in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579.

The court granted CSXT's motion. The court stated that Rule 702 of the FRCP establishes two general admissibility requirements for expert testimony: (1) the expert must be qualified, and (2) the subject matter of the expert's testimony must consist of specialized knowledge that will be helpful or essential to the trier of fact in deciding the case. The court also stated that the expert's opinion must also be: (1) based upon sufficient facts or data; (2) the product of reliable procedures or methods; and (3) applied reliably to the facts of the case.

The court held that the testimony of Dr. Schoedinger and Dr. Dearnbarger demonstrated that any opinions regarding causation were not based upon testing or review of scientific data but were rather based upon assumption and speculation. The court further held that neither Dr. Schoedinger nor Dr. Dearnbarger used a methodology sufficient to meet the reliability prong of the *Daubert* analysis.

The court also granted CSXT's motion on causation. Since the court had ruled that plaintiff's expert testimony was inadmissible, plaintiff could not support a necessary element of his FELA claim, i.e. that CSXT's negligence and plaintiff's alleged injuries were causally connected. Therefore, CSXT was granted summary judgment.

Court Rebukes Novel Theory That State's Mere Participation in FRA's Enforcement Program Makes State's Employee Safety Statute Applicable to FELA

In *Fletcher v. Chi. Rail Link, L.L.C.*, 568 F.3d 638 (7th Cir. Ill. 2009), plaintiff, a railroad employee whose job required him to drive a utility vehicle that transports equipment for use in a railroad yard, was injured in a collision with another vehicle (driven by a person having no connection with the railroad) on a street in the yard. He sued the railroad under the FELA claiming that the accident was caused by the railroad's failure to maintain the SUV in a safe condition or warn him that it was unsafe.

The jury awarded plaintiff damages in excess of \$700,000, but also found that plaintiff's own negligence made him 50 percent responsible for the accident. The jury's finding should have cut the award in half. The district court ruled however that the railroad violated a state statute for "the safety of employees." As a result, any claim of contributory negligence/diminution of damages by the railroad was barred under the FELA, 45 U.S.C. §53 and §54 and thus plaintiff was entitled to a full recovery.

The district court judge ruled that the railroad had violated a regulation issued by the Illinois Commerce Commission which required that company motor vehicles used by railroad workers in their work be maintained in a safe condition. 92 Ill. Admin. Code § 1550.40. The district judge adopted the novel theory that **any** regulation of railroad worker safety (such as the vehicular-safety provision of the Illinois Administrative Code) issued by a state that participates in the investigative and surveillance activities specified in Section 20105, as Illinois does, was a safety statute encompassed by 45 U.S.C. § 54a. The district court agreed with plaintiff's argument that mere participation in the FRA's enforcement program as making any state safety regulation applicable to FELA claims.

The Seventh Circuit Court of Appeals reversed. The Seventh Circuit held that Section 54a of Title 45 and Section 20105(a) of Title 49, when read together, make it clear that state regulations, requirements, etc., are deemed federal safety regulations only when they support the state's participation in Federal Enforcement activities.

The Seventh Circuit held that the district judge erroneously assumed that since the Illinois regulation in question had been in force when Section 54a was enacted, the Illinois regulation did not have to relate to any federal regulations as required under Section 54a.

The Seventh Circuit held that the district judge's interpretation of Section 54a was neither a plausible interpretation nor one compelled by the language of the statute or its legislative history. The Seventh Circuit stated that Section 54a only applies state regulations that support or implement federal safety norms as if they were federal regulations, but there is no basis for thinking that the statute goes further than that.

As a result, the Seventh Circuit Court of Appeals held that damages should have been halved.

Court Denies Summary Judgment On Claim For Emotional Damages On Basis That Employee Was In The Zone Of Danger

In *Norfolk S. Ry. Co. v. Everett*, 2009 Ga. App. LEXIS 786 (Ga. Ct. App. July 7, 2009), plaintiff was employed as an engineer for Norfolk Southern and was tasked with moving a six-car train filled with auto parts down an incline into the Ford Hapeville auto plant. Plaintiff operated the locomotive that pushed the cars toward the Ford plant. One of the employees misinformed plaintiff that the train derailment device was in the "off" position when in fact it was in the "on" position. Acting at the direction of his supervisor, plaintiff moved the train forward, and, due to the position of the derailment device, the cars began derailing about 150 feet from the plant's entrance. The derailed cars continued toward the plant, and the train's emergency brakes immediately activated. Plaintiff was "slightly pulled" in his seat during the incident but suffered no physical injury. After the incident, plaintiff left for home and allegedly experienced severe emotional distress from the incident, resulting in temporary hospitalization.

Plaintiff sued Norfolk Southern under FELA alleging negligent infliction of mental distress. Plaintiff testified that during the incident, he became frightened that he and his co-workers might be killed through fire, through the building collapsing on them, through the train turning over, or through the train's fuel tanks becoming compromised and exploding.

Three physicians testified that the incident severely depressed plaintiff, resulting in nightmares, panic attacks, loss of weight, difficulty sleeping, an irritable and angry disposition, and suicidal ideations. Norfolk Southern moved for summary judgment, which the trial court denied.

The Court of Appeals of Georgia affirmed the trial court's denial of Norfolk's summary judgment motion. The Court of Appeals of Georgia relied upon language in the *Gottshall* case, citing the zone of danger test. The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.

The Georgia Court of Appeals held that plaintiff made a sufficient showing on the second aspect of the zone of danger test, i.e., whether the event placed him in "immediate risk of physical harm" to survive summary judgment. The court agreed with the trial court that plaintiff was placed in immediate risk of physical harm by the train derailment and building collision.

Court Flushes Away Plaintiff's Claim For Failing To Establish Notice

In *Szekeres v. CSX Transp., Inc.*, 2009 U.S. Dist. LEXIS 56850 (N.D. Ohio July 2, 2009), plaintiff filed a lawsuit against CSXT based upon a violation of the FELA and the LIA. Plaintiff alleged that his injuries flowed from a defective and unsanitary locomotive restroom. Plaintiff alleged he was forced to relieve himself near the tracks because the restroom was defective and unsanitary. While attempting to relieve himself, plaintiff injured his knee while walking on an allegedly muddy walkway.

The court denied both the LIA and FELA claims and dismissed plaintiff's action.

The court held that in order for plaintiff to establish a violation of the LIA and survive CSXT's summary judgment motion, plaintiff had to establish that CSX: (1) breached the absolute duty to maintain the parts and appurtenances of its locomotives in safe and proper condition; or (2) failed to comply with regulations promulgated under the Federal Railroad Administration ("FRA").

Plaintiff failed to establish a breach of CSX's absolute duty to maintain the parts and appurtenances of its locomotives in safe and proper condition. The condition of the restroom was absent from plaintiff's hand-written statement made the day of the incident. On the incident report completed by plaintiff six days later, he indicated that no defective tool or equipment caused his injury. The incident report contained no mention of a restroom, improper, unsafe or otherwise. Although plaintiff claims he alerted both co-workers about the poor condition of the restroom, neither he nor any other employee filed a maintenance complaint with CSX. Plaintiff did not supply any expert testimony that the locomotive was improper or unsafe, and plaintiff did not present any evidence or testimony from other employees establishing an improper or unsafe restroom. During his deposition, plaintiff admitted again that the restroom was not defective.

In contrast to plaintiff's lack of evidence, CSX provided three inspection reports, one of which was completed six days after the incident. The reports included inspections of the locomotive's restroom, and no restroom inspection indicated the existence of a defect, or any complaints about the restroom.

With regard to plaintiff's FELA claim, the court held that a plaintiff asserting an FELA claim of negligence against his employer must prove the traditional elements of negligence: duty, breach, foreseeability, and causation. The court further held that notice of a defective condition that caused the injury is also an essential element of plaintiff's negligence claim.

Since there was no notice regarding plaintiff's claim of a muddy walkway, plaintiff failed to raise any genuine issues of material fact regarding the duty and foreseeability elements of his negligence claim under FELA. As result CSXT's motion for summary judgment was granted.

Bankruptcy Court For The District Of Montana Finds That A Trustee Can Settle An FELA Claim As A Chapter 13 Asset

In re Stellingwerf, 2009 Bankr. LEXIS 1625 (Bankr. D. Mont. June 10, 2009), plaintiffs alleged injuries while employed by BNSF and filed an FELA action in 2006. Plaintiffs filed for Chapter 13 bankruptcy in 2005. It was found that plaintiffs' FELA claim accrued prior to their bankruptcy and that plaintiffs failed to list or amend the bankruptcy petition or schedules to reflect their pending lawsuit as an asset.

BNSF moved for summary judgment on the basis that plaintiffs should be estopped from asserting a FELA claim not properly identified as an asset during bankruptcy proceedings. After the trustee learned of the FELA claims and the motion for summary judgment, the Trustee filed a motion to modify the plaintiffs/debtors' confirmed Chapter 13 plan in order to administer the FELA claims and pursue the claims on behalf of the creditors.

The Trustee's proposed plan specifically provided that "Debtors will turnover to the Trustee any and all FELA claims to be pursued on behalf of the Bankruptcy Estate." With the plaintiffs/debtors' consent, the Trustee's proposed modified plan was approved on October 16, 2007. Afterwards, BNSF's motion for summary judgment was denied.

Following denial of BNSF's motions for summary judgment, prosecution of plaintiffs/debtors' FELA claims by the Trustee continued until the Trustee filed a Motion for an Order Authorizing Settlement on January 14, 2009, seeking to settle, for an amount disclosed under seal, plaintiffs/debtors' FELA actions.

Plaintiffs/debtors objected to the proposed settlement with BNSF on the grounds that the settlement amount was inadequate and that the Trustee did not have the authority to settle plaintiffs/debtors' FELA claims because the plaintiffs/debtors' alone have standing to prosecute their FELA lawsuits.

The Trustee countered that the plaintiffs/debtors' FELA claim was worth substantially less because: 1) although the Chapter 13 Trustee defeated BNSF's judicial estoppel claims, the plaintiffs/debtors may not have such success; and 2) the Chapter 13 Trustee believed that a rigorous defense by BNSF may result in a defense verdict given the plaintiffs/debtors' credibility.

Specifically, with regards to credibility, plaintiffs/debtors' failed to disclose their FELA claims in their bankruptcy case and made no effort to amend their Schedules to list such claims. Plaintiffs/debtors' also failed to disclose this bankruptcy proceeding to BNSF, even upon direct questioning about any such proceeding under oath. Finally, plaintiffs/debtors' failed to disclose in the BNSF litigation injuries she sustained in a car wreck. The Trustee contended that plaintiffs/debtors' failure to be forthcoming with all parties severely damaged the plaintiffs/debtors' credibility and in turn, damaged plaintiffs/debtors' claims against BNSF.

The court held that the Trustee did have the authority to settle the FELA claim pursuant to the bankruptcy code. In addition, the court agreed that the valuation of the case by the Trustee was not "grossly" inadequate and "vastly" undervalued.

Court's Application of Second Dismissal Rule To Settlement Agreement Threatens to Undermine All Occupational Settlement Agreements

In *Albert M. Wade v. Norfolk Southern Ry.*, 2009 Va. Cir. LEXIS 26 (Va. Cir. Ct. June 17, 2009), plaintiff signed a settlement for a claim of asbestosis in 1996. Later, plaintiff died of mesothelioma. Norfolk Southern, moved for summary judgment on the basis that decedent's prior settlement precluded recovery for decedent's mesothelioma. The settlement released Norfolk Southern "of and from all liability for all claims or actions for pulmonary-respiratory occupational diseases and/or other known injuries, physical, mental or financial, suffered or incurred by [Wade], including, but not limited to: . . . (d) increased risk of cancer, (e) fear of cancer (f) any and all forms of cancer, including mesothelioma (g) and all costs, expenses and damages whatsoever . . . arising in any manner whatever, either directly or indirectly, in whole or in part, arising out of: Exposure to toxic substances, including asbestos, silica, sand, dust, coal dust, work place dust and all other toxic dusts, fibers, fumes, vapors, or mists used by [NW] during [Wade's] employment by [NW]."

Since plaintiff had a case pending and the language of the release was very specific, the release should have survived pursuant to either *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3d Cir. 1998)(stands for the rule that the FELA permits a release that covers a "known risk", even if the specific injury was not known at the time the release was executed) or *Babbitt v. Norfolk & Western Railway Co.*, 104 F.3d 89 (6th Cir. 1997)(stands for the rule that the FELA bars a release as void unless the release was intended to resolve a claim of liability for the "specific injuries" in controversy). However, the court did not rely upon either *Wicker* or *Babbitt*

The court citing the "Second Disease Rule" and *Norfolk & Western Railway Co. v. Ayers*, interpreted *Ayers* for the proposition that in asbestosis suits like the one decedent filed and settled, a FELA plaintiff who has recovered for job-related asbestosis can maintain, and recover in, a second suit for later-developing mesothelioma caused by the same asbestos exposure.

The court sidestepped a *Wicker* or a *Babbitt* analysis holding that it believed that *Ayers*, a 2003 decision was more applicable. However, the court dismissed Norfolk Southern's *Wicker* argument by concluding that the damages, i.e. mesothelioma, were not in controversy during the settlement and thus the settlement was not valid under *Wicker*.

Railroad's Preemption Arguments Tripped Up By Coal

In *Uhl v. CSX Transp., Inc.*, 2009 U.S. Dist. LEXIS 51313 (S.D. W. Va. June 17, 2009), plaintiff, a conductor for CSX Transportation Inc. ("CSXT"), alleged that CSXT negligently permitted coal to accumulate on and cover the ballast comprising the track bed. As a result when plaintiff attempted to board the locomotive, his foot "rolled" on the coal, causing him to fall and injure his finger. CSXT moved to prevent plaintiff from introducing testimony or evidence regarding the accumulation of coal on the ballast on the basis that plaintiff's argument regarding coal accumulation was based on improper railroad ballast conditions and that such claims were preempted by the Federal Railroad Administration's regulations issued under the FRSA. CSXT made four different types of preemption arguments, and all four were denied.

First, CSXT argued that permitting plaintiff to offer evidence or testimony of coal accumulation on the ballast would contravene the FRSA's stated purpose of ensuring that "[l]aws, regulations,

and orders related to railroad safety shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1). CSXT argued that unless a state regulation is saved by one of the three saving conditions enumerated in 49 U.S.C. § 20106(a)(2), federal regulations covering the subject matter of the state regulation were preempted. The court rejected this argument holding that neither the cited statute nor the cases were on point. The court reasoned that plaintiff’s FELA claim did not seek to enforce “an additional or more stringent law, regulation, or order.” 49 U.S.C. § 20106(a)(2).

Second, CSXT argued that 49 C.F.R. § 213.103 alone governed ballast standards, and because plaintiff did not claim that CSXT did not comply with § 213.103, plaintiff could not claim a higher standard exists under the FELA. The court dismissed CSXT’s second argument on similar ground stating that plaintiff did not allege noncompliance with § 213.103, or any other regulation for that matter. Instead, plaintiff alleged that CSXT negligently permitted coal to accumulate in his work area, which, in this instance, happened to be immediately alongside the track on top of the supporting ballast. Therefore, CSXT’s apparent compliance with § 213.103 had no bearing on whether it was negligent if it allowed coal to accumulate on the ballast.

Third, CSXT argued that the FRA declined to issue regulations regarding trackside walkways. Therefore, since the FRA clearly has jurisdiction to issue such regulations, but continues to decline to do so, plaintiff could not maintain his claim that CSXT negligently permitted coal to accumulate on the ballast that formed the track bed immediately alongside the track. The court dismissed this argument on the basis that plaintiff did not allege that he slipped on a trackside walkway, or even that one was present. Thus, this case did not present any attempted regulation of a trackside walkway.

Fourth, and finally, CSXT argued that the FRA’s refusal to require or regulate trackside walkways left plaintiff’s claim “negatively preempted because the FRA has ‘covered’ the subject matter.” The court dismissed this argument on the same basis as the third argument, i.e. that plaintiff did not allege that he slipped on a trackside walkway, or even that one was present. Thus, this case did not present any attempted regulation of a trackside walkway.

Court Reaffirms Plaintiff’s Burden To Prove Present Value And Damages Calculations

In *Compton v. BNSF Ry. Co.*, 2009 U.S. Dist. LEXIS 50415 (N.D. Okla. June 16, 2009), the court was asked via motions in limine to determine which party bears the burden of producing evidence to assist the jury in reducing any award of future lost wages to present value in an FELA case.

The court held that in a FELA action: (1) the court must instruct the jury to reduce any award for future lost wages to present value, (2) in the absence of evidence from either party to assist the jury in reducing the future lost wages to present value, the court must instruct on present value and allow the jury to make the award based on its own experience, and (3) if the defendant wants the jury to consider evidence that would assist the jury in reducing a future lost wages award to its present value, the defendant bears the burden of producing such evidence.

As a result, the court stated that the most sensible approach was to require a plaintiff to present any evidence that would increase a future damages award, such as an inflation rate, and a

defendant was required to present any evidence that would reduce an award, such as a discount rate. Thus, plaintiff's failure to present evidence to assist the jury in reducing a future lost wages award to its present value would not preclude a future lost damages award in this case. However, this would not prohibit BNSF from challenging the general sufficiency of plaintiff's evidence regarding future damages at the close of its case-in-chief.

Court Makes Statement: What Not To Wear Pursuant To The LIA And FELA

In *Becraft v. Norfolk S. Ry. Co.*, 2009 U.S. Dist. LEXIS 47243 (N.D. Ind. June 5, 2009), plaintiff was injured after slipping and falling from a train operated by his employer, Norfolk Southern Railway Company. Norfolk maintained that plaintiff's FELA claim was precluded by the Locomotive Inspection Act ("LIA"). Norfolk sought summary judgment on this basis. However the court held that the LIA couldn't be read to preclude plaintiff's FELA claim and denied Norfolk's summary judgment motion.

Plaintiff alleged that while dismounting a train, he slipped as he stepped onto a metal platform and injured himself. Due to the winter weather conditions, plaintiff was wearing the required safety footwear with metal spikes. The platform was smooth steel with dimples.

Plaintiff's complaint alleged claims under the LIA; Safety Appliance Act, ("SAA") and a negligence claim pursuant to the FELA. Plaintiff eventually withdrew his LIA and SAA claim in response to Norfolk's motion for summary judgment. Thus, the only remaining issue was if the LIA precluded plaintiff's FELA claim.

The parties did not dispute that the LIA has some degree of preclusive effect on FELA claims; the question presented was how much and whether it encompassed plaintiff's entire complaint. The court, based upon its interpretation of *Waymire v. Norfolk and Western Ry. Co.*, assumed that where an issue raised by a FELA claim is directly covered by a regulation issued pursuant to the LIA, then plaintiff's claim would be precluded.

The court held that plaintiff's claim was not covered by the LIA because plaintiff's claim dealt with the safety of the footwear provided by Norfolk – not locomotive equipment. The court held that footwear was not an "integral or essential part of a completed locomotive," and was also not an "appurtenance" in any way since it was not connected to the train.

The court punctuated its ruling with a fashion statement: "[plaintiff] says Norfolk required him to wear shoes which were similar to wearing golf spikes on a tile floor. Norfolk argues that compliance with Section 229.119(c) makes this allegation meaningless. Not so. Suppose Norfolk had required [plaintiff] to wear eight inch stilettos and dance the Cha-cha. Norfolk surely would not be absolved of liability for resulting injuries because it comported with the LIA's requirement to keep its floors clean."

The court added that this conclusion might be less certain if there existed some written regulation pursuant to the LIA that addressed clothing and footwear requirements. Since Norfolk had not pointed to any such regulation, and the court had not found any itself, the court concluded that the LIA was not broad enough to occupy the field of footwear safety. Thus, since in the court's

opinion, plaintiff's claim was not covered under the LIA, the LIA could not have preclusive effect on plaintiff's FELA claim.

Innocent Destruction Of Missing Download Data Avoids Adverse Inference Charge

In *Veit v. Burlington N. Santa Fe Corp.*, 150 Wn. App. 369 (Wash. Ct. App. 2009), plaintiff was injured when a Burlington Northern Santa Fe ("BNSF") railroad freight train collided with her car at a railroad crossing in Bellingham. One of plaintiff's allegations was that the BNSF engineer negligently operated the train at an unreasonable and excessive speed. The trial court found that that the excessive speed claims were preempted by the Federal Railroad Safety Act of 1970 (FRSA).

Plaintiff also asserted that the trial court had abused its discretion by refusing to give a spoliation instruction to the jury that the missing event recorder data would have established the speed of the train. TWashington's Court of Appeals held that the trial court was correct in denying plaintiff's request for a jury instruction on spoliation. The court stated in deciding whether to give a spoliation instruction, the trial court must take into consideration (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party.

BNSF presented evidence, both before and during trial, explaining why the event recorder data no longer existed. The event recorder for the BNSF train was an eight-track tape that ran on a continuous loop and recorded for approximately 48 hours. Jim Kime, the BNSF employee who was responsible for analyzing the event recorder data in the event of an accident, stated that he downloaded the data from the tape to his laptop computer shortly after the collision. After downloading the information, Kime discovered that the eight-track tape did not properly record the data and the data was unusable. Kime destroyed the tape to prevent it from being used again. On November 16, 2001, someone broke into Kime's van and stole the laptop computer that contained the data he downloaded from the eight-track tape. Kime reported the theft, but did not recover the laptop. Approximately two years later, plaintiff filed her lawsuit against BNSF.

Because BNSF presented a satisfactory explanation for the loss of the event recorder data, the Court of Appeals of Washington found that the trial court did not abuse its discretion in denying plaintiff's request for a jury instruction on spoliation.

Rail Safety Improvement Act of 2008's New Hours of Service Regulations and Its Impact on Litigation

The Rail Safety Improvement Act of 2008, (Public Law No. 110-432, Division A)(effective as of July 16, 2009) includes major changes to the hours of service and consequently, a legal impact on the ability of counsel to interact with train and engine service employees. For example, one of the new provisions requires that employees receive 10 consecutive hours of undisturbed time off between duty tours. In addition, an unsolicited communication from employees, contractors or agents to the resting employee regarding company business will restart the 10 hour period, delaying the time when employee can begin the next duty tour.

Therefore, if an attorney as an agent of the railroad, attempts to contact an employee, regarding pending litigation, this would restart the 10 hour period of the employee and affect his work scheduling and accounting of his hours. As a result, careful coordination between legal counsel and the railroad will be necessary in order comply with the new act while attempting to efficiently move forward with any pending litigation.

[Goldberg Segalla LLP](#) is a Best Practices law firm¹ with offices in Pennsylvania (Philadelphia); New York (Buffalo, Syracuse, Albany, New York, Rochester, White Plains, and Long Island); New Jersey (Princeton); and Connecticut (Hartford).

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- Client satisfaction is a top priority at our firm;
- We have no room for those who put their personal agenda ahead of the interests of the clients or the office;
- The quality of supervision on client projects is uniformly high;
- The quality of the professionals in our office is as high as can be attained;
- Around here you are required, not just encouraged, to learn and develop new skills;
- People within our office always treat others with respect; and
- We recognize that each client has its own unique requirements and we strive to exceed each client's expectations in all regards.

The hallmark of Best Practices law firms, and of Goldberg Segalla's success, is identifying at the outset the client's concerns and needs and then tailoring legal services to meet them.

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