Dooley v. Bnsf Ry. Co.

Eighth Judicial District Court of Montana, Cascade County

February 7, 2019, Decided

Cause No. DDV-15-523(c)

Reporter
2019 Mont. Dist. LEXIS 1 *

CHUCK D. DOOLEY, Plaintiff, v. BNSF RAILWAY COMPANY, a Delaware Corporation, Defendant.

Core Terms

admissible, Railroad, Retirement, right shoulder, photographs, concedes, earning, rule rule rule, apportionment, benefits, reliable, shoulder, collateral, conditions, symptoms, damages, parties, assumption of risk, left shoulder, preexisting, complaints, disability, divisible, phrased, train, causation, scenarios, DENIES, Limine, depict

Judges: [*1] John A. Kutzman, District Court Judge.

Opinion by: John A. Kutzman

Opinion

ORDER ON MOTIONS *IN LIMINE*

The Court heard oral argument on the parties' respective motions on January 17, 2018. The trial date then had to be continued twice. It is now set for February 11, 2019. The Court now issues the following rulings on the parties' respective motions *in limine*.

I. Mr. Dooley's Motions *in Limine*

1. Unrelated Medical Conditions or Injuries.

BNSF does not resist this motion as phrased. The only real dispute is a single 1997 chart note referring to right arm and shoulder symptoms. BNSF's Rule 35 expert does not rely on this chart note but counsel wants to cross examine Mr. Dooley about it. The motion is **GRANTED** as phrased. However, the admissibility of the 1997 right arm/shoulder chart note will depend on the foundation laid for it in Mr. Dooley's direct and cross examination.

2. Retirement Age.

The collateral source rule definitely precludes evidence of the plaintiff's receipt of Railroad Retirement Board ("RRB") disability benefits. *Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 255 (1963). However, ***un***-injured railroaders with 30 years of service may choose to retire and receive a standard RRB monthly annuity at age 60. FELA defendants seek to admit this to refute the plaintiff's **[*2]** argument that he or she is entitled to lost earning capacity benefits representing wages and benefits earned after age 60.

Some courts allow this but others reason it presents too much risk of jurors equating the retirement annuity with railroad income. *Griesser v. Amtrak*, 761 A.2d 606, 612-613 (Pa. Super. 2000). Maryland does not allow it:

> Evidence of future retirement [benefits] is not admissible on the issue of when an employee, but for the accident, would have been expected to stop working . . . Evidence bearing on the expected work-life of the employee is not a cognizable exception to the collateral source rule.

Norfolk S. Ry. Corp. v. Tiller, 944 A.2d 1272, 1286-1287 (Md. Spec. App. 2008).

But in a later case, the same court clarified that it would *not* violate the collateral source rule if the railroad presented ***non***-RRB industry statistics showing when most railroaders retire. *CSX Transp., Inc. v. Pitts*, 61 A.3d 767, 792 (Md. 2013). This strikes a sensible balance between the collateral source rule and the railroad's legitimate need to defend itself against the

claim for lost earning capacity. *Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 723-724 (Iowa 2014). It is also consistent with how BNSF typically cross-examines FELA plaintiffs in this jurisdiction about their earning capacity claims.

Accordingly, this motion is **GRANTED IN PART** and **DENIED IN PART**. BNSF may present statistical and other evidence about when most railroaders retire. **[*3]** It may not present evidence of the 30-60 RRB annuity.

3. Surveillance.

BNSF concedes this motion. The Court accordingly **GRANTS** it.

4. Character Evidence.

This motion is **DENIED AS PHRASED**, without prejudice to timely renewal and/or timely trial objections.

5. BNSF Lottery.

This type of argument led to reversal and remand in *Anderson v. BNSF Ry.*, 2015 MT 240, 380 Mont. 319, 354 P.3d 1248, *cert. denied*, 136 S.Ct. 1493 (2016). The Court accordingly **GRANTS** this motion.

6. Assumption of Risk.

The FELA permits comparative negligence as a defense but not assumption of risk. 45 U.S.C. §§ 53 & 54. Courts carefully police the boundary between these defenses to prevent defendants from presenting assumption of risk in the guise of comparative negligence. *See, e.g., Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943) ("Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name").

> [A]n employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties constitutes an assumption of risk. (Cite omitted). Contributory negligence, in contrast, is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist.

Kalanick v. Burlington Northern R. Co., 242 Mont. 45, 50, 788 P.2d 901, 904 (1990)(internal citations omitted in original) **[*4]** (quoting *Taylor v. Burlington Northern R. Co.*, 787 P.2d 1309, 1317 (9th Cir. 1987)).

The question is accordingly whether Mr. Dooley did or failed to do anything that added to whatever hazards BNSF permitted to exist at the work location. The parties do not fully agree about why Mr. Dooley and his engineer pulled their train up to the northeast end of Mainline 6 before detaching their power to make their pick up in the yard.

The Court will allow both sides to present evidence about why this occurred, and the relative safety consequences of doing the work where it occurred versus other locations at Hauser. The Court will not, however, allow BNSF to argue that Mr. Dooley was "empowered" to do this work anywhere he wanted or to refuse to do it at all. The motion is accordingly **GRANTED IN PART** and **DENIED IN PART**.

7. Apportionment.

BNSF's Rule 35 expert Dr. Righetti concedes that the mechanics of the injury Mr. Dooley has described would be sufficient to cause a *temporary* strain injury to Mr. Dooley's left shoulder. However, Dr. Rightetti says a strain injury should have fully healed shortly after the event. He further opines that Mr. Dooley had preexisting arthritis in the left shoulder, and that intra-operative findings on that shoulder are inconsistent with the **[*5]** November 2013 mechanism of injury. Therefore he attributes "virtually 100 percent" of Mr. Dooley's pain and disability to pre-existing conditions in his left and right shoulders.

In its most recent consideration of apportionment to preexisting conditions, the Montana Supreme Court said:

> The plaintiff has the burden of establishing causation. . . . A defendant "may submit evidence of other injuries to negate allegations that he or she is the cause or sole cause of the current injury, subject to the trial court's application of traditional evidentiary considerations." . . . Or, a defendant may attempt to prove he or she is liable only for a portion of the plaintiff's damages by *proving "by a reasonable medical probability, that the injury is divisible*." Thus, *only where a defendant seeks to apportion an injury, as opposed to rebut causation, does he or she have to prove to a reasonable medical probability that the injury is divisible*.

Cheff v. BNSF Ry. Co., 2010 MT 235, ¶ 36, 358 Mont. 144, 243 P.3d 1115 (emphasis added, internal citations omitted).

The problem here is that Dr. Righetti's "virtually 100 percent" opinion straddles both branches of the *Cheff* dichotomy: it teeters on the brink of non-cause but keeps its powder dry with the word "virtually." BNSF **[*6]** keys on this. It refuses to move away from "virtually" onto the *Cheff*-sanctioned solid ground of non-cause. BNSF's Opposition Brf at 7-8.

The parties supplement their positions with non-Montana authority. BNSF relies on *Sauer v. Burlington Northern R.R.*, 106 F.3d 1490, 1496 (10th Cir. 1996), for the proposition that federal courts require only "a rough practical apportionment," not "mathematical precision or great exactitude." Mr. Dooley relies on *McLaughlin v. BNSF Ry. Co.*, 300 P.3d 925 (Colo. App. 2012), for the proposition that the "aggravation doctrine" (which that court treated as synonymous with apportionment to a preexisting condition) applies only "where the plaintiff had a symptomatic pre-existing condition that had already caused pain or disability." *McLaughlin*, ¶¶ 40-41.

This Court believes *Sauer* merely knocks down a straw man. Under *Cheff*, the key inquiry is whether "the injury is divisible," *Cheff*, ¶ 36, not whether the doctor expresses the divisibility in mathematical percentages. If *McLaughlin* actually does conflict with *Sauer*, this Court suspects the Montana Supreme Court would find *McLaughlin*'s careful balancing of the eggshell plaintiff and apportionment rules consistent with the FELA's remedial purpose. *See Anderson*, ¶¶ 17-19.

But this Court need not reach that issue here because it must follow **[*7]** *Cheff*. Dr. Righetti's opinion that Mr. Dooley suffered only a strain that should have healed soon after the incident is not an apportionment opinion and does not violate *Cheff*. Dr. Righetti's opinion that the intra-operative findings were inconsistent with an acute single incident in November of 2013 is not an apportionment opinion and does not violate *Cheff*. But his further opinion that "virtually 100 percent" of the pain and disability can be apportioned requires proof of divisibility which his report does not disclose. This motion is accordingly **GRANTED IN PART**.

8. Secondary Gain.

True secondary gain evidence is testimony by a medical doctor or other expert about the *motivation* for a mismatch between the plaintiff's objective findings and the plaintiff's subjective reports of symptoms. The *fact* of the *mismatch* is admissible but the *motivation* for it is not. *Linden v. Huestis*, 247 Mont. 383, 388, 807 P.2d 185, 188 (1991); *Dahlin v. Holmquist*, 235 Mont. 17, 20-21, 766 P.2d 239, 241 (1988).

Here, no doctor on either side has opined that secondary gain is motivating Mr. Dooley. As the Court understands it, no doctor has even identified a mismatch between objective findings and subjective symptom reports. The Court accordingly **GRANTS** this motion.

9. Collateral Sources.

The general rule barring evidence of collateral **[*8]** sources applies to FELA litigation. *Eichel, supra*. Therefore BNSF generally concedes this motion with respect to all but a single disability claim form on which Mr. Dooley allegedly reported that his right shoulder symptoms were ***not*** work related. BNSF concedes that insurance references would have to be redacted from this document before it could even potentially be admissible.

But there is potentially a separate foundational problem that may preclude the admissibility of this claim form. Mr. Dooley denies representing to this insurer or anyone else that his right shoulder problems were not work-related. He says someone else put that information on the form.

The form bears his ***electronic signature*** but it is presently unclear whether he authorized the form before or after the addition of the information about his right shoulder problems not being work-related. The document is admissible, if at all, only as an admission by Mr. Dooley. Therefore whether the Court receives it into evidence depends on BNSF establishing either that Mr. Dooley actually told this insurer the right shoulder issues were unrelated, or that he signed the form or authorized it after the insertion of that information. The Court **[*9]** accordingly **RESERVES RULING** on this motion.

10. Safety-Conscious Company.

The Court intends to follow Judge Macek's ruling in *Viall v. BNSF*, 8th Jud. Dist. Cause No. BDV-08-035 (9/15/2010): BNSF can defend with portions of its overall safety program that refute Mr. Dooley's claims and evidence, but cannot introduce portions unrelated to

the case at hand. The Court will not permit either side to try to compare BNSF's safety record and or injury statistics with other railroads or other industries. The motion is accordingly **GRANTED IN PART**.

11. Tier I and Tier II Railroad Retirement Benefits.

By separate order, the Court has concluded that Mr. Dooley seeks damages for future lost earning *capacity*, not lost future *earnings*. Mr. Dooley disavows any claim for the value of his Railroad Retirement Tier I and Tier II Railroad Retirement Benefits. The minutiae of how those benefits work, who funds them, and how much they are worth are immaterial to the claim Mr. Dooley is actually making. Further, BNSF says it is entitled to a post-trial setoff but disavows any intent to introduce such details in front of the jury. It says it will notify the Court and Mr. Dooley if it believes anyone has opened **[*10]** the door to this information. The Court accordingly **GRANTS** this motion subject to re-visitation outside the presence of the jury if BNSF believes the door has opened.

12. BNSF's Biomechanical Expert E. Paul France

Montana state-court trial judges like the undersigned have less freedom than their federal counterparts to micro-manage expert testimony. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶¶ 16 and 19, 380 Mont. 204, 354 P.3d 604.

The three-part expert admissibility test that generally applies in Montana asks

> (1) whether the expert field is reliable, (2) whether the expert is qualified, and (3) whether the qualified expert reliably applied the reliable field to the facts.

McClue, ¶ 16. If the Court answers the first two of these questions affirmatively, the jury answers the third. *Id.*

> First, the district court determines whether the expert field is reliable. The district court then determines whether the witness is qualified as an expert in that reliable field. *If the court deems the expert qualified, the testimony based on the results of his examination of the facts is admissible - shaky as that evidence may be*. The question *whether a qualified expert reliably applied the principles of that reliable field to the facts of the case is for the finder of fact allowing **[*11]** vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof*.

Harris v. Hanson, 2009 MT 13, ¶ 36, 349 Mont. 29, 201 P.3d 151 (emphasis added). *See also Beehler v. E. Radiological Assocs.*, P.C., 2012 MT 260, ¶ 35, 367 Mont. 21, 289 P.3d 131; and *State v. Clifford*, 2005 MT 219, ¶ 28, 328 Mont. 300, 121 P.3d 489. Mr. Dooley does not seriously contend that biomechanical engineering is unreliable or that Mr. France is not appropriately credentialed within it.

BNSF correctly observes that the testimony of a qualified biomechanical engineer is admissible so long as the expert does not try to testify about specific medical causation. BNSF's Opposition Brf at 7-8 (quoting *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997). *See also Bowers v. Norfolk Southern Corp.*, 537 F.Supp.2d 1343, 1375-1377 (M.D.Ga. 2007).

Beyond this, the Montana Supreme Court's paradigm for evaluating expert testimony does not warrant the Court involving itself in BNSF's direct examination of Mr. France. From his report and the supplied deposition excerpts it appears that the details in the various accounts Mr. Dooley has given of the injury do not perfectly align. Obviously BNSF will cross-examine Mr. Dooley about what it will depict as inconsistencies. It will subsequently ask Mr. France to opine about the safety and injury-causing potential of the various scenarios. Nothing about this is improper.

It does not change the situation that Mr. France concedes there is little to no evidence to support some of these **[*12]** scenarios. The Court cannot and will not prevent BNSF from testing Mr. Dooley's credibility by exploring subtle variations in his account of the incident. Once that happens, the various accounts are fair game for Mr. France. At that point the various accounts will be before the jury because they are admissions by Mr. Dooley, not because Mr. France does not know what happened.

Mr. Dooley has a deposition transcript with which to impeach Mr. France if he tries to disavow any of his previous concessions about which scenarios are and are not supported by independent evidence. Moreover, it appears to the Court that not allowing Mr. France to at least summarize the scenarios he considered would leave him vulnerable to argument or insinuation that he rushed to judgment.

The Court accordingly **DENIES** this motion without prejudice to timely trial objections.

II. BNSF's Motions *in Limine*

1. BNSF's Size/Berkshire Hathaway/Warren Buffet.

Mr. Dooley concedes this motion. The Court accordingly **GRANTS** it.

2. FELA as Plaintiff's Sole Remedy.

Mr. Dooley concedes this motion. The Court accordingly **GRANTS** it.

3. FELA's Legislative History and Remedial Purpose.

Mr. Dooley concedes this motion. The Court accordingly **[*13] GRANTS** it.

4. Profits Over Safety.

The parties vigorously dispute whether it was necessary or appropriate for eastbound crews to make pickups off of Mains 4, 5, and 6. Mr. Dooley insists the necessary ground work could only be done safely in the yard. BNSF counters that traffic congestion resulting from the necessary full-train movements into and out of the yard would seriously delay eastbound departures. It says the train crews themselves did not want that delay.

These timing issues are relevant to the fundamental FELA question of whether the injury location was a ***reasonably*** safe place to work. The Court will accordingly permit Mr. Dooley to prove and argue that ordering or permitting train crews to tie down trains on Mains 4, 5, and 6 saved time. The Court will not permit Mr. Dooley to take this to the next step and argue that BNSF was trying to save money or that it was elevating profits over safety. The motion is accordingly **GRANTED AS PHRASED**.

5. Referring to Railroading as Inherently Dangerous.

Mr. Dooley concedes this motion. The Court accordingly **GRANTS** it.

6. Right Shoulder Injury and Damages.

Mr. Dooley's initial symptoms were in his ***left*** shoulder. He seeks damages for injuries **[*14]** to both shoulders. He says his right shoulder issues result in whole or in part from overusing that shoulder to compensate for pain and weakness in the left shoulder. Retained physiatrist Dr. Balouch supports this.

BNSF, however, characterizes the right shoulder claim as an unpled negligent assignment claim. *See generally Anderson, supra*, ¶¶ 22 and 26-27. BNSF insists the physicians who treated the ***left*** shoulder released Mr. Dooley to return to work without restrictions, and that he never told BNSF he was having any problems that were causing him to overuse the ***right*** shoulder. BNSF says it would have intervened if it had known he was still suffering symptoms in either shoulder. Therefore, it argues, Mr. Dooley is now sandbagging BNSF with right shoulder complaints that he did not permit BNSF to address.

The Court disagrees. Under the FELA, BNSF is liable for all damages resulting from any work-related injury that results in whole or in part from BNSF's negligence. 45 U.S.C. § 51; *Anderson*, ¶ 18; *CSX Transp., Inc. v. McBride, CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691-692 (2011); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-507 (1957).

The parallel state-law principle is that once the tortfeasor breaches its duty to the plaintiff, it becomes liable for "all the detriment proximately caused thereby, whether it could have been anticipated **[*15]** or not." Mont. Code Ann. § 27-1-317. The Court knows of no authority establishing a different rule in FELA cases, and in fact any such different rule would conflict irreconcilably with the FELA's causation in whole or part/slightest-degree principle. *McBride, supra*; *Rogers, supra*.

The Court accordingly **DENIES** this motion without prejudice to BNSF's recharacterizing Mr. Dooley's alleged failure to notify it of his ongoing problems as either contributory negligence or failure to mitigate his damages, both of which are permissible defenses.

7. "Future Lost Wages"

In a separate order, the Court has concluded that Mr. Dooley seeks lost future earning *capacity* rather than lost future *earnings*, has **DENIED** this motion on that basis, but has also restricted the scope of Dr. Balouch's testimony about lost future earning *capacity*.

8. Post-Incident Complaints About Main 6

Mr. Dooley contends it was negligent for BNSF to have train crews do pickups and set outs on Main 6. He says he and his co-workers complained about this before and after his incident. Obviously, all else being equal, *pre*-injury complaints tend to show notice of a hazard and are likely to be admissible.

Post-injury complaints stand on different footing. What is relevant here is what BNSF **[*16]** knew or should have known *before* Mr. Dooley's injury. Safety complaints lodged *after* the injury shed no light on whether BNSF had a sufficiently culpable state of mind *before* the injury.

The only exception the Court can see to this would be post-incident evidence showing the feasibility of alternative work methods or locations. M.R.Evid. 407. But in that event what would be admissible would be the *fact* of the *alternative*, not the filing of a safety complaint about it. The Court cannot now foresee all the possible nuances surrounding how or why such evidence might be offered, and accordingly **RESERVES RULING** on this motion.

9. Post-Incident Photographs.

BNSF took photographs at various locations along Main 6 soon after Mr. Dooley reported his injury. At this point it is unclear whether BNSF photographed the exact injury location in Hauser, because Mr. Dooley did not report the injury until after he arrived in Whitefish. He was accordingly far from Hauser when he reported the injury and unable to show BNSF investigators exactly where it happened. Despite this, BNSF says its photographs are the only accurate photographs. It says Mr. Dooley's photographs, taken at various times in the years **[*17]** following the incident, do not accurately depict the time-of-injury conditions and will confuse the jury.

"The only positive" foundational requirement to admit a photograph is "that it correctly represent the scene it purports to depict as viewed by the witness *and that any changes be pointed out*." *Pickett v. Kyger*, 151 Mont. 87, 97, 439 P.2d 57, 62 (1968)(emphasis added). Changes in the depicted conditions go to the weight of the photograph, not its admissibility. *Id.*

The Court accordingly **DENIES** this motion *as phrased*, without prejudice to other timely objections such as Rule 407's prohibition of subsequent remedial measures. BNSF previously suggested these disputes could be narrowed or eliminated following full exchange and discussion of all photographs each side actually intends to introduce. If that exchange and discussion has not yet occurred, the Court now **ORDERS** the parties to engage in and complete it forthwith.

DATED this 7th day of February, 2019.

/s/ John A. Kutzman

District Court Judge

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