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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0966**

Jason Carlson,
Appellant,

vs.

BNSF Railway Company,
Respondent.

**Filed May 20, 2019
Reversed and remanded
Bratvold, Judge**

Hennepin County District Court
File No. 27-CV-16-11771

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Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and
Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BRATVOLD, Judge

In an appeal from a final judgment on his claim for damages under the Federal Employers' Liability Act (FELA), 42 U.S.C. §§ 51-60 (2012), appellant argues that the district court erred by granting respondent's motion for judgment as a matter of law (JMOL) on the jury's award for loss of earning capacity. Because the evidence was legally sufficient to submit the issue to the jury, we reverse and remand for entry of an amended judgment in favor of appellant.

FACTS

BNSF Railway Company (BNSF) hired appellant Jason Carlson in 2006. For about 12 years, Carlson primarily worked as a locomotive conductor, which required him to handle paperwork and perform physical tasks such as tying handbrakes, throwing switches, walking over railway crossing platforms, and performing air brake tests. Carlson's position generally required a significant amount of walking throughout the four seasons and in "[d]usty, uneven" conditions.

A. The November 2015 and May 2016 incidents and Carlson's medical care

On November 11, 2015, Carlson conducted a locomotive traveling from the Northtown railyard in Minneapolis to Dilworth. The departing crew told Carlson and his co-worker, an engineer, that the locomotive had a bad toilet, and that they had reported the problem. Before the locomotive left the railyard, Carlson noticed a "citrus smell," and saw a "blue puddle" underneath the toilet. Carlson reported the problem. The smell became worse after the locomotive starting moving. Carlson described the cab as "really confined."

Carlson also stated that he had observed “clumps on the [toilet] floor” and the cab conditions were “nasty.” During the trip, Carlson felt nauseated, had a headache, and was sweating. Carlson again reported the toilet problem; mechanical told him the toilet would be checked later. Overall, Carlson travelled under the described conditions for “well over 12 hours.”

When Carlson arrived in Dilworth on November 12, he had a headache, a “really tight throat,” and felt nauseated. Even after he left the locomotive, Carlson was “coughing up phlegm” and “couldn’t sleep.” Carlson returned to work as scheduled but his symptoms persisted. For example, soon after the November 11 incident, Carlson’s knees became weak, he felt dizzy, and started to sweat. When this happened a second time, he went to the emergency room on November 17 and the physician prescribed a steroid nebulizer and an inhaler.

On November 18, Carlson returned to the emergency room because he “wasn’t getting any relief from the initial symptoms.” The emergency room physician recommended that Carlson see a primary care doctor. Carlson then saw a primary care doctor, who ordered additional respiratory medications. Carlson testified that he continued to experience symptoms, for which he sought medical treatment and was “searching for what was going on four to five months.” Carlson also testified that, during this time, he was “missing a lot of work.”

In April 2016, Carlson sought treatment from Dr. Karin Pacheco at National Jewish Health, which is a Denver hospital that is affiliated with the University of Colorado and is known for its treatment of respiratory diseases. Dr. Pacheco specializes in

occupational/environmental medicine. Carlson submitted to various medical tests, after which Dr. Pacheco diagnosed him with reactive airways dysfunction syndrome (RADS), which is “the new onset of asthma related to irritant exposures.” He was also diagnosed with “some vocal cord dysfunction.”

At about the time he started to see Dr. Pacheco, Carlson began using a face mask while at work and continued using an inhaler. Carlson nonetheless sometimes experienced choking or burning eyes while he was working.

On May 3, 2016, the cab in Carlson’s locomotive “became full of smoke.” Soon after, Carlson sought medical treatment at an emergency room. After this visit to the emergency room, the BNSF medical department placed Carlson on unpaid medical leave for 30 days. Carlson returned to work without restrictions in June 2016.

B. Carlson’s lawsuit and medical testimony at trial

Carlson sued BNSF in July 2016 under FELA, asserting that BNSF had violated the Locomotive Inspection Act (LIA), 49 U.S.C. §§ 20701-20703 (2012), and other safety regulations, that BNSF negligently caused his injuries in the November 11, 2015, and May 3, 2016, incidents, and that BNSF was liable for his resulting damages, including past and future pain and suffering, health care expenses, loss of income, and loss of earning capacity. Carlson’s case was tried to a jury in October 2017.

During trial, Carlson testified that he saw Dr. Pacheco “every three months” during 2016, two times in 2017, and was still receiving treatment. Carlson also testified that he was continuing treatment with his primary care doctor as well as taking six prescribed

medications. Before the November 11 incident, Carlson did not take any of these medications.

Carlson offered into evidence Dr. Pacheco's video trial deposition, which was recorded in September 2017. Dr. Pacheco testified that Carlson should continue to take his currently-prescribed medications for the foreseeable future. She also stated that, based on her physical examination of Carlson and his test results, along with other information, that

[Carlson] had developed RADS. He met the criteria. He had an irritant exposure, he had the immediate onset of symptoms, he had the demonstration of asthma by [testing]. And then he had irritant-triggered vocal cord dysfunction. We could see it. And also he behaved clinically in terms of the triggering by various irritants and the fact that he found the speech therapy techniques useful.

Dr. Pacheco also testified that, in her medical opinion, Carlson had sustained an injury during the November 11, 2015, incident, which resulted in his RADS and irritant-induced vocal-cord dysfunction. Dr. Pacheco testified that Carlson's RADS was likely permanent, even though she had initially told Carlson that RADS "typically resolve[s] over time." Dr. Pacheco testified that she did not limit or restrict Carlson's work as a conductor and explained that Carlson's health was generally better than when he first began treating with her because he was managing his asthma with his inhaler by using it about "once a day at work." Dr. Pacheco also testified that she "didn't have a lot of concerns" about Carlson continuing to work as a locomotive conductor, in part, because he "started to use a mask to reduce his inhalational exposures."

C. Evidence regarding Carlson's lost earning capacity

Dr. Pacheco wrote two letters in 2016 about Carlson's injuries and his return to work, both of which were received into evidence during trial. She testified about a June 2016 letter, in which she stated that Carlson may "need a change in his work environment" if his symptoms did not improve but he was "currently fit to return to duty." In a November 2016 letter, which was received during Carlson's testimony, Dr. Pacheco stated that Carlson could return to work without limitations but "[h]is asthma may be triggered by irritants, and he may benefit in the future from a job environment that limits exposure to vapors, dusts, gases, and fumes."

The jury also received evidence from a treating physician who did not testify, Dr. David Yehl. In May 2016, shortly after Carlson's second locomotive incident, Dr. Yehl's letter to BNSF stated that Carlson "suffers from asthma that is exacerbated by exposure to workplace chemicals" and that he would "benefit [from] a job environment that limits future potential exposure to any chemicals or inhalants."

Carlson offered evidence that, at the time of his injury, his wages averaged \$494 per day, but the amount he earned depended on how many locomotive trips he conducted, which, in turn, depended on which "pool" he was assigned. Because of his seniority, Carlson could opt to work for either of two pools: the "extra board" or the "long haul." When working for the extra-board pool, Carlson had "random" assignments that sometimes involved working in the railyard. When working for the long-haul pool, Carlson conducted a locomotive from one point to another on a specific schedule. Working in the extra-board pool allowed Carlson to take more locomotive trips because he could return to work within

12 hours, which increased his earnings. Working in the long-haul pool required Carlson to take fewer locomotive trips, because he had to take 24 to 48 hours off between shifts.

Before the November 2015 incident, Carlson chose to work in the extra-board pool to increase his earnings. After November 2015, Carlson used his seniority status to switch to the long-haul pool, which allowed him to follow Dr. Pacheco's advice and take a "break from the industrial environment." Carlson testified that he found the long-haul pool less industrial for two reasons. First, the long-haul locomotives generally had newer cabs; and second, Carlson avoided exposing himself to the industrial environment of the railyard. As a result of this change in his work pool, Carlson testified that he now works about half as many locomotive trips, which decreased his earnings.

D. BNSF's JMOL motions

After Carlson rested and BNSF had begun to present its witnesses, BNSF moved for JMOL on the issue of causation, arguing that Dr. Pacheco's causation testimony was not supported by evidence. The district court denied the motion, noting that it was a "close call," but adding that "there is sufficient evidence for the case to go to the jury."

After the close of all evidence, the parties reviewed the proposed jury instructions and special-verdict form. Relevant to the issue on appeal, Carlson's proposed jury instruction on damages, which the district court substantially adopted, asked the jury to determine what sum "will fairly and justly compensate [Carlson] for any damages you find [he] sustained and is reasonably certain to sustain in the future as a direct result of the occurrence described in the evidence." Carlson's proposed instruction also asked the jury to consider several elements, including "[t]he earnings [Carlson] has lost to date and the

present value of earnings [he] is reasonably certain to lose in the future.” The proposed verdict form asked the jury to determine what amount of money would fairly compensate Carlson for his damages, including “future loss of income.” Neither Carlson nor BNSF objected to either the damages instruction or the special-verdict form.

The jury returned a verdict in favor of Carlson. In its answers on the special-verdict form, the jury found that BNSF was negligent and had violated LIA and/or safety regulations on November 11, 2015, and that BNSF’s negligence caused, in whole or in part, Carlson’s injuries. The jury also found that the May 3, 2016, incident was not a cause of Carlson’s injuries. The jury awarded Carlson \$39,515.33 for past health-care expenses; \$6,911.10 for past loss of income; \$100,000 for future pain, disability, and emotional distress; \$159,328.30 for future health-care expenses; and \$207,333 for “future loss of income.” On October 30, 2017, the district court directed entry of judgment in the amount of \$513,087.73.

BNSF moved for JMOL or, in the alternative, for a new trial or remittitur. BNSF first argued that there was insufficient evidence to support the jury’s verdict on causation. Alternatively, BNSF asked to amend the judgment by removing damages for Carlson’s future medical expenses and loss of earning capacity because the trial evidence “failed to establish the reasonable certainty or amount of either.” The district court granted BNSF’s motion on the damages for loss of earning capacity, but denied relief with respect to future medical expenses and causation. The district court directed entry of an amended judgment in the reduced amount of \$268,506.72. After the district court denied Carlson’s request for reconsideration, this appeal follows.

DECISION

A moving party seeking JMOL after a jury verdict need not have “moved for judgment as a matter of law before submission of the case to the jury.” Minn. R. Civ. P. 50.02(a); *see also Evanson v. Jerowski*, 241 N.W.2d 636, 639 (Minn. 1976). The standard for granting JMOL is whether there is “no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” Minn. R. Civ. P. 50.01(a). In granting a motion for JMOL, the district court may “(1) allow the judgment to stand, (2) order a new trial, or (3) direct entry of judgment as a matter of law.” Minn. R. Civ. P. 50.02(a).

Appellate courts review the district court’s decision to grant a motion for JMOL *de novo*. *See Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018). “[W]e construe the evidence in the light most favorable to the prevailing party and ask whether there is a legally sufficient evidentiary basis for a reasonable jury to find for the prevailing party.” *Karl v. Uptown Drink, LLC*, 835 N.W.2d 14, 17 (Minn. 2013) (quotation omitted). A district court should only grant JMOL in “unequivocal cases” where the verdict is “manifestly against the entire evidence” or is “contrary to the law applicable to the case.” *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted); *see also Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 887-89 (Minn. 2010).

I. The district court erred in granting JMOL to BNSF on Carlson’s damages for loss of earning capacity.

On appeal, Carlson argues that the district court erred in granting JMOL because it “failed to appreciate the fact that the burden Carlson bore in this FELA case was

significantly lighter than it would be in an ordinary negligence case.” Carlson points out that the district court “cited exactly zero FELA cases in support of its decision,” which is significant because of the “minimal showing” Carlson needed to submit damages to a jury under FELA. BNSF responds that the district court’s decision should be affirmed because “Minnesota law is no different” from the standard of proof required in FELA cases to recover damages for loss of earning capacity.

Under FELA, “[e]very common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he or she is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.” 45 U.S.C. § 51. FELA is “an avowed departure from the rules of the common law.” *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329, 78 S. Ct. 758, 762 (1958). Congress enacted FELA as “a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety.” *Id.* Given the “broad remedial nature of the FELA,” juries have “broad discretion” to make inferences on issues of causation and fault. *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) (providing examples of FELA cases submitted to the jury on “evidence scarcely more substantial than pigeon bone broth”). “[O]nly a scintilla of evidence” is needed “to avoid a directed verdict.” *Hauser v. Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 346 N.W.2d 650, 653 (Minn. 1984) (quotation omitted).

A “railroad employee may bring a FELA claim in either state or federal court.” *Kinworthy v. Soo Line R.R. Co.*, 860 N.W.2d 355, 357 (Minn. 2015) (citing 45 U.S.C.

§ 56). When a FELA claim is adjudicated in state court, state procedural rules apply, but “the substantive law governing [the claim] is federal.” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411, 105 S. Ct. 1347, 1348 (1985). “[O]nly if federal law controls can [FELA] be given that uniform application throughout the country essential to effectuate its purposes.” *Kinworthy v. Soo Line R.R. Co.*, 841 N.W.2d 363, 366 (Minn. App. 2013) (quoting *Dice v. Akron, Canton & Youngtown R.R. Co.*, 342 U.S. 359, 361, 72 S. Ct. 312, 314 (1952)), *aff’d*, 860 N.W.2d 355 (Minn. 2015). Questions concerning the measure of damages in FELA cases are issues of substance that are “federal in character.” *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S. Ct. 755, 757 (1980).

FELA allows a railroad worker to seek damages for impairment of earning capacity and other economic harms. *See, e.g., Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 160-61, 89 S. Ct. 331, 334 (1968). “Earning capacity” is “the potential for earning money in the future.” *Taenzler v. Burlington N.*, 608 F.2d 796, 798 (8th Cir. 1979). When determining loss of earning capacity under FELA, a jury may award damages if the plaintiff submits “competent evidence suggesting that his injuries have narrowed the range of economic opportunities available to him.” *Gorniak v. Nat’l R.R. Passenger Corp.*, 889 F.2d 481, 484 (3d Cir. 1989). In other words, a plaintiff must prove that his injury has “caused a diminution in his ability to earn a living,” which could include being discharged or voluntarily leaving an employer. *Id.* Whether such circumstances will actually come to pass is “to be weighed by the jury.” *Wiles v. N.Y.C, Chi., & St. Louis R.R. Co.*, 283 F.2d 328, 332 (3d Cir. 1960).

The district court granted JMOL on Carlson’s damages for loss of earning capacity for three reasons: (1) Carlson was still working full time at BNSF without medical restrictions, (2) Carlson’s physicians did not restrict his ability to work as a conductor, and (3) Carlson “failed to testify that any wage loss he may have experienced would continue into the future or for how long.” The district court concluded that the jury award was “unsupported by any reasonable theory of the evidence and purely speculative.”

Carlson is correct that the district court’s written analysis of this issue relied exclusively on Minnesota caselaw, even though federal law governs the measure of damages under FELA. We agree with BNSF, however, that the district court’s choice to cite Minnesota law is of no consequence because Minnesota caselaw is similar to federal caselaw on loss of earning capacity.¹ Whether we rely on federal or Minnesota caselaw, we conclude that the district court erred by requiring Carlson to prove loss of future wages. The district court also erred by relying on Carlson’s continued employment at BNSF without medical restrictions and the absence of evidence that “any wage loss . . . *would continue* into the *future* or for how long.” (Emphasis added.) The question is not whether Carlson will *actually lose* wages in the future, but whether he has lost earning capacity as the result of his injury. *See Taenzler*, 608 F.2d at 798; *Gorniak*, 889 F.2d at 484.

¹ Like the federal caselaw discussed above, Minnesota caselaw holds that a plaintiff may seek damages for loss of earning capacity and differentiates these damages from future lost wages. *See, e.g., Le May v. Minneapolis St. Ry. Co.*, 71 N.W.2d 826, 831 (Minn. 1955) (recognizing that a “plaintiff may recover for loss of earning capacity, even though presently she is performing only household duties and does not intend to resume gainful employment”). Loss of earning capacity is about “the loss of the *power* to earn in the future.” *Sylvester v. Gleason*, 371 N.W.2d 573, 575-76 (Minn. App. 1985) (discussing cases under Minnesota common law).

Carlson offered evidence that established his lost earning capacity, when the evidence is viewed in the light most favorable to the jury's verdict. For example, Dr. Pacheco testified that Carlson's RADS was the result of his injuries on November 11, 2015, his RADS was likely permanent, and he will likely need to continue using an inhaler and other asthma medication to manage his symptoms at work. Dr. Pacheco and Dr. Yehl recommended that Carlson avoid irritants while working and that he might need to change his work environment. Carlson's own testimony, when viewed favorably to the jury's verdict, established that his injuries led him to switch to the long-haul pool, which resulted in fewer locomotive trips and lowered his earning capacity.

We agree with the parties that federal law governs this issue. *See Norfolk*, 444 U.S. at 493. The parties disagree, however, on how to interpret relevant caselaw from the federal circuits. After reviewing each of the cases discussed by the parties, we find *Wiles* to be particularly instructive. *See Wiles*, 283 F.2d at 332. In *Wiles*, a railroad car worker sued his employer under FELA and submitted trial testimony that he experienced a back injury while at work and medical testimony that the injury had caused "a permanent, albeit minor, back deformity." *Id.* at 330-31. After his injury, the railroad gave the worker a different position with a "larger salary" than his previous position. *Id.* at 331-32. Expert testimony established that the worker would have difficulty getting hired outside the railroad because he would have to disclose his back injury. *Id.* The same expert also testified that he expected the worker to continue in his present job: "the fact that [he] has returned to his work and is working very comfortably, I don't see that the disability carries into his working field." *Id.* at 331 n.3. The jury awarded \$20,000 for lost earning capacity, but the

district court set aside those damages because the award was too speculative. *Id.* at 330, 332. The Third Circuit reversed and reinstated the damages, after concluding that the damages were supported by evidence that the railroad could discharge or lay off the plaintiff, and he might “have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer.” *Id.* at 332.

Carlson argues that his evidence is similar to the evidence submitted in *Wiles*. We agree and see four points of comparison. First, like the worker in *Wiles*, Carlson offered evidence that his injuries were likely permanent. *See Wiles*, 283 F.2d at 331. BNSF argues that it is significant that Carlson’s doctors approved his return to work without restrictions. But the injured worker in *Wiles* also returned to work, and “had no permanent physical restrictions precluding him from even heavy industrial employment.” *Gorniak*, 889 F.2d at 484 (discussing *Wiles*).

Second, the worker in *Wiles* offered evidence that his injuries limited his “economic horizons” in other employment because he would have to disclose his back injury to future employers. *Wiles*, 283 F.2d at 331-32. Similarly, Carlson offered evidence that his physicians recommended that his ongoing symptoms from his injuries would improve with a change in his work environment. Carlson also testified that he followed this advice in making his decision to switch to the long-haul pool, which limited his ability to earn wages. This evidence supports the inference that Carlson’s injury limited his “economic horizons” with BNSF. *See id.* at 332.

Third, the worker in *Wiles* had “not yet suffered economic loss” because he was making more money post-injury. *Id.* Carlson offered evidence that his ability to increase

his earnings had actually decreased post-injury and that he would continue to have lower earnings as a result of working in the long-haul pool. Thus, Carlson offered evidence of lost earning capacity based on his injuries and related change in work environment.

Fourth, like the worker in *Wiles*, Carlson's seniority at BNSF made it unlikely that he would leave the railroad. *See id.* *Wiles* noted this is a "significant factor to be weighed by the jury." *Id.* If, for some reason, Carlson lost his job at BNSF, he would also lose his seniority and might be unable to minimize his exposure to irritants in his next job with a different employer. As *Wiles* stated, a worker that is "chained to his present job in a kind of economic servitude" has experienced a loss of earning capacity. *Id.*

BNSF contends that two other federal circuit cases are similar to Carlson's and support JMOL, but we are not persuaded. In *DeChico v. Metro-N. Commuter R.R.*, a railroad shop superintendent sued his employer under FELA after a work injury. 758 F.2d 856, 858 (2d Cir. 1985). The worker appealed from the judgment and argued that the district court erred by not allowing the jury to consider his loss of earning capacity because he had offered evidence of a permanent injury. *Id.* at 861. The Second Circuit affirmed, reasoning that the worker returned to his pre-injury position and "eventually received a raise." *Id.* The Second Circuit distinguished *Wiles* because the worker in *DeChico* stated that he expected to keep his position as a shop superintendent and, if needed, exercise his seniority to obtain a new position. *Id.*

The facts in *DeChico* are substantially different from those present in Carlson's case. The worker in *DeChico* returned to his pre-injury position, expected to keep the position long-term, and received a raise. *Id.* Carlson testified that he switched to the

long-haul pool after his injury to avoid the “industrial environment” he often worked in and that, as a result, his earnings were lower.

BNSF also relies on *Fashauer v. N.J. Transit Rail Operations, Inc.*, a FELA case involving a railroad worker who offered medical testimony that his work injury was permanent and rendered him unable to do his job. 57 F.3d 1269, 1284-85 (3d Cir. 1995). After trial, the jury awarded no damages for future lost earning capacity. *Id.* at 1273. The worker appealed, and the Third Circuit affirmed, stating that no competent evidence supported the worker’s claim for loss of earning capacity. *See id.* at 1273, 1284-85.

Fashauer is distinguishable because the Third Circuit affirmed a jury verdict that awarded no damages for lost earning capacity. *See id.* at 1284-85. The Third Circuit did not decide, as did the district court in Carlson’s case, that *as a matter of law* the worker’s lost earning capacity should not have been submitted to the jury. *See id.* While the Third Circuit nevertheless stated that there was no competent evidence to support a damages award for lost earning capacity, this was because “[n]o witness even opined that [the worker’s] injury limited his economic potential.” *Id.* at 1285. In contrast, Carlson’s evidence established, when viewed favorably to the jury’s verdict, that he had lost the capacity to make additional earnings because he switched to the long-haul pool due to his injuries.

Finally, BNSF argues that “[t]he only possible basis for a reduction in [Carlson’s] earnings . . . is not backed up by any medical restrictions, expert testimony, or medical records, and thus, is not evidence that would support the jury’s award.” But BNSF does not cite any legal authority for this statement, and also conceded at oral argument that

federal caselaw has held that vocational expert testimony is not required to support damages for lost earning capacity. *See id.* at 1284 (stating that evidence of lost earning capacity does not need to come from a “vocational expert”).

We conclude that Carlson satisfied his burden under FELA to provide at least a “scintilla” of evidence in order “to avoid a directed verdict.” *Hauser*, 346 N.W.2d at 653 (quotation omitted). Because Carlson submitted sufficient evidence of lost earning capacity to support a jury determination of his damages, we reverse the district court’s decision to grant JMOL and remand with instructions to amend the judgment to include the jury’s award for Carlson’s damages for lost earning capacity.

Reversed and remanded.