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JANUARY 14, 2009
(FILE NO. 2007-SC-0548-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001494-MR

CSX TRANSPORTATION, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 02-CI-005094

TROY MOODY — APPELLEE

OPINION AFFIRMING IN PART
AND
VACATING IN PART

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: This is an appeal from a judgment following a jury verdict finding CSX Transportation liable under the Federal Employer's Liability Act, 45 U.S.C.A.§ 51-60, (FELA), for a permanent psychiatric neurological injury sustained by

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Troy Moody as a result of his exposure to solvents during the course of his employment with CSX. The jury returned a verdict for Moody awarding him damages as follows: future medical expenses, $200,000; impairment of his earning capacity, $540,000; past pain and suffering, $1,000,000; and future pain and suffering, $1,000,000.

CSX alleges that: (1) the evidence was insufficient to submit the issue of foreseeability to the jury; (2) the trial court should have given a specific foreseeability instruction; (3) the evidence was insufficient to prove causation; (4) it was error to allow Moody to introduce evidence of other dissimilar claims filed by workers against CSX; (5) the evidence was insufficient to support the jury's award for future medical expenses and lost wages; (6) the trial court erroneously failed to instruct the jury that lost wages and future medicals are non-taxable; and (7) the trial court should have instructed the jury to discount the award to present value.

In August 1978, at the age of 27, Moody began working as a service attendant for CSX's predecessor, Louisville & Nashville Railroad Company, at its South Louisville shop and subsequently held the positions of machinist helper and machinist apprentice. His job duties included cleaning pits, ramps, and anything else on the premises that required cleaning and he was often in enclosed areas. To clean, he used brown soap, mineral spirits and a solvent the workers referred to as "DowClene."[2] Although he was customarily equipped with a rubber apron, a hard hat, safety goggles and a face shield, he was not given a respirator.

[2] "Dow Clean" and "DowClene" are used interchangeably by the parties. According to CSX records, OSHA inspection records, and the Jefferson County Pollution Control inspection records, the chemical used was a pure 1,1,1 trichloroethane. "DowClene" is a cleanser made by Dow Chemical and contains a mix of trichloroethane and perchloroehtylene.

Moody testified that he used the chemicals on a daily basis and would often become lightheaded, dizzy, and nauseated. When this occurred, he would go outside for a "fresh air break." Once his symptoms subsided, he would return to work. During the time he used the solvents, Moody did not report to a company nurse or other physician that he was dizzy, had a headache, or was nauseated.

On December 12, 1982, Moody was furloughed from his work at L&N and was not recalled until July 28, 1983. At that time, he certified that he had no illnesses or injuries. Upon his return, Moody again worked at the South Louisville shop and remained there until 1984. He used mineral spirits and brown soap but did not use DowClene.

In 1984, Moody was transferred to a rail gang and worked as a mechanized mechanic repairing machinery until 2002, when he developed carpal tunnel syndrome. At the time of his trial, Moody had not returned to work.

Moody filed the present action pursuant to FELA alleging that his exposure to DowClene caused him to suffer from toxic encephalopathy, a condition resulting in permanent, irreversible brain damage, and that CSX knew, or should have known, that he could suffer such damage.

POST-TRIAL MOTIONS

Immediately after the jury returned its verdict, CSX orally made a motion for a judgment notwithstanding the verdict. The trial judge then requested that the parties brief two issues: (1) Moody's entitlement to future medical expenses and (2) Moody's entitlement to future lost wages. In compliance, CSX submitted a brief addressing those two issues and Moody responded. On November 21, 2002, the court denied CSX's oral

motion for "JNOV" addressing only the two issues as to medical expenses and future lost wages.

Following entry of judgment, CSX filed a timely motion for a new trial and requested JNOV on issues other than future medical expenses and lost wages. Prior to ruling on CSX's pending motions, the trial judge retired and a successor judge heard oral argument on CSX's pending motion. On the eve of the successor leaving the bench, he denied CSX's motion for JNOV but did not address CSX's motion for a new trial. That motion was not decided until June 8, 2005, when, yet another judge, denied the motion. Within thirty days, CSX filed its notice of appeal.

Moody filed a motion to dismiss CSX's appeal in which he contended that Kentucky and federal law prohibit the filing of successive post-trial motions; the appeal, he contended, should have been filed by January 14, 2004, thirty days from the entry of the judgment. Initially, a three-judge panel of this court agreed with Moody and dismissed the appeal; on CSX's motion for reconsideration, however, this court reinstated the appeal. In that order, this court stated:

> The record shows that the trial court's order of November 21, 2003, denied appellant's motion for judgment notwithstanding the verdict but did not dispose of appellant's motion for new trial. Thus it did not adjudicate "all the rights of all the parties." CR 54.01 We also believe that the final judgment entered on December 18, 2003, did not impliedly deny the motion for new trial and that the motion was not disposed of until June 21, 2005, thereby making the notice filed timely on July 14, 2005.

Having previously ruled that the appeal was timely filed, we find no reason to revisit that order. A party cannot file "successive identical" motions raising the same issue and thereby defer the time for appeal. *See Mollett v. Trustmark Insurance Co*., 134

S.W.3d 621 (Ky.App. 2003). The motion for JNOV and those raised in CSX's oral motion and the two addressed pursuant to the court's order were not identical, thus, we re-affirm our prior decision that the appeal was timely filed.

FELA

Before discussing the merits of CSX's appeal, we briefly explain the nature of a FELA action. FELA is a federal act which provides that "[e]very common carrier by railroad...shall be liable in damages to any person suffering injury while he is employed by such carrier...for the 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.A § 51. It is a remedial and humanitarian act intended as a response to the special needs of railroad workers exposed to the inherent dangers of their work of which they may know nothing about and are helpless to defend against. *Booth v. CSX Transportation, Inc*., 211 S.W.3d 81, 83 (Ky.App. 2006).

In FELA cases, state law applies to procedural issues but federal substantive law applies. *Id*. at 83. A successful plaintiff must prove the traditional elements of negligence: duty, foreseeability, and causation. The standard of proof required, however, is lower than in the ordinary negligence case. *Id*. at 84. The test as to whether the plaintiff has made a case for the jury's consideration is "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id*. at 84, (quoting *Rogers v. Missouri Pacific Railroad Co*., 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957)).

The more subtle differences between a FELA action and a common law negligence action are more apparent in our discussion of the specific issues raised by CSX.

FORSEEABILITY

CSX asserts that Moody failed to establish all the necessary elements of a negligence claim, including that his permanent irreversible brain damage was a foreseeable result of Moody's exposure to solvents.

A railroad has a duty to provide employees with a reasonably safe place in which to work and are considered to have breached that duty if it knew or should have known of a potential hazard in the workplace but failed to exercise reasonable care to inform and protect its employees. *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996). Foreseeability is an essential element of a FELA claim. *Gallick v. Baltimore and Ohio R. Co.*, 372 U.S. 108, 117, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). The issue of foreseeability turns upon whether the carrier knew or should have known of a potential hazard; the employer, however, does not have to foresee a particular injury but only that an injury was foreseeable. *Id*.

CSX contends that until 1985, when the World Health Organization first published a report concerning the effect of long-term exposure to solvents, there were no scientific studies linking solvents to human health problems. At the time Moody was exposed to DowClene, its use had not been linked specifically to toxic encephalopathy by the scientific community.

There was evidence, however, that CSX and its predecessors were aware, as early as the 1950's, that exposure to solvents, including 1,1,1 TCA, may be toxic and

that respirators should be used when the solvent is used in confined spaces. Internal documents completed by CSX's predecessors stressed the need for safety equipment when the solvent was in use and, a 1981 internal CSX memorandum, advised that 1,1,1 trichloroethane and other solvents should not be used in confined areas and could cause permanent health damage.

Therefore, there was ample evidence from which the jury could reasonably conclude that CSX knew or should have known that Moody's use of solvents in enclosed areas, without proper precautions, could cause permanent injury.

FORESEEABILITY INSTRUCTION

CSX tendered a foreseeability instruction to the court; the court's instruction, however, failed to include a foreseeability instruction. Instead, the court gave a general negligence instruction as follows:

> Negligence is simply the failure to use the same degree of care which a person of ordinary prudence would use in the circumstances of a given situation. It can be the doing of something which a reasonably prudent person would not have done, or failing to do something a reasonably prudent person would have done under the circumstances. This definition of negligence applies both to the defendant, CSX Transportation, Inc., and to the Plaintiff, Troy Moody.

CSX, relies on *Union Pacific R. Co. v. Williams*, 85 S.W.3d 162 (Tex. 2002),[3] also a FELA case, wherein the Supreme Court of Texas stated that when the evidence regarding foreseeability is in dispute, the trial court should instruct the jury regarding whether the railroad knew, or should have known about, the danger posed to the plaintiff. *Id*. at 169.

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[3] In *Union Pacific R. Co*., the Texas court overruled its prior decision that a foreseeability instruction was not proper in a FELA action. *Mitchell v. Missouri-Kansas-Texas R. Co*., 786 S.W.2d 659 (Tex. 1990).

The way in which the substantive law in a FELA case is presented to the jury is a procedural matter and, therefore, a matter of state law. *See Pryor v. National R.R. Passenger Corp.*, 301 Ill.App.3d 628, 633, 703 N.E.2d 997, 1000-1001 (1998). In the context of a FELA case, in *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272, 275 (Ky.App. 2006), this court stated:

> Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review. Instructions must be based upon the evidence and they must properly and intelligently state the law. The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instruction are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury. (internal quotations and citations omitted).

Although the trial court in this case did not specifically use the term "foreseeability," it gave a general negligence instruction which defined negligence as the "failure to use the same degree of care which a person of ordinary prudence would use in the circumstance of a given situation." Kentucky continues to adhere to the "bare bones" approach to jury instructions in civil cases and disfavors the practice of instructing the jury at length regarding every nuance of the relevant law. The content of jury instructions on negligence should be couched in terms of duty and should leave for counsel the job to flesh out, during closing argument, the legal nuances that are not included in the instructions. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 228-230 (Ky. 2005).

We can find no logic in requiring a foreseeability instruction in FELA cases and, therefore, decline to follow the Texas court's most recent view on the need for a separate foreseeability instruction. Our view is consistent with that in *Merando v. Atchison, Topeka and Santa Fe Ry. Co*., 232 Kan. 404, 656 P.2d 154 (1982), wherein the

court stated that negligence does not need to be defined with the specific use of the word "foreseeability" when the element is contained in the instructions. Thus, we find no error in the instruction submitted.

CAUSATION AND THE APPLICATION OF DAUBERT

Having determined that there was sufficient evidence from which a reasonable person could conclude that CSX breached its duty of care owed to Moody when it exposed him to the solvents in the work-place, we inquire as to whether Moody was damaged as a result of that breach. Again, we stress that the level of proof in a FELA claim is less than in an ordinary negligence claim and differs from the common law in that it does not require that the injury be the proximate result of the railroad's negligence.

> A key difference between a statutory FELA action and a common law negligence action is that in order to satisfy the causation element in a FELA action, a plaintiff need only show that that the employer "in whole or in part" caused his or her injury. (Citation omitted).

Hamilton, 208 S.W.3d at 275.

Moody presented medical testimony that he suffered from chronic toxic encephalopathy which was caused by his repeated exposure to DowClene, brown soap, and mineral spirits. Dr. Douglas Linz, a physician specializing in internal occupational and environmental medicine, testified that Moody's chronic toxic encephalopathy was caused by this repeated exposure to DowClene, brown soap, and mineral spirits. He testified that in 1985, the World Health Organization first published criteria concerning long-term exposure to solvents in the workplace and the potential effects of such exposure. However, he admitted that until at least 1992, there was debate in the scientific

community as to the dose, duration, and level of exposure necessary before there would be any permanent effect. His diagnosis of Moody was based on several factors including: Moody's symptoms; results of neuropsychological tests; and Moody's exposure to solvents from 1978 until 1982, which he stated was a sufficient length of exposure to cause Moody's condition. Additionally, Dr. Martine Robards and Dr. Lisa Morrow, testified that Moody's neuropsychological tests were consistent with toxic encephalopathy. They further eliminated other possible causes.

CSX presented medical testimony that contradicted that presented by Moody. Dr. Robert Granacher, Dr. Barry Gordon and Dr. Geoffrey Kelafant, however, did not dispute Dr. Linz's opinion that three years of exposure to solvents is sufficient to cause toxic encephalopathy.

Although the evidence was contradictory, Moody's evidence was more than sufficient to present a factual question as to causation. CSX, however, makes a *Daubert* challenge to the evidence presented to support Moody's claim.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court redefined the standard for admission of expert testimony which Kentucky adopted in *Mitchell v. Commonwealth,* 908 S.W.2d 100 (Ky. 1995), overruled on other grounds by *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999). Under *Daubert*, the trial court is the "gatekeeper" charged with the duty to keep out unreliable, pseudoscientific evidence. A preliminary determination must be made as to whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. "This entails a preliminary assessment of whether the reasoning or methodology underlying the

testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Miller v. Eldridge*, 146 S.W.3d 909, 913-14 (Ky. 2004).

The court in *Daubert* set forth four factors to be considered by the trial court when evaluating the reliability of an expert's testimony, including but not limited to: (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community. *Id*. at 914. In addition to being reliable, the proposed testimony must "assist the trier of fact to understand or to determine a fact in issue." *Id.*

The relationship between *Daubert* and the relaxed standard of causation under FELA was the subject of thorough discussion in *Savage v. Union Pacific Railroad Co*. 67 F.Supp.2d 1021 (E.D. Ark. 1999). Recognizing that the standard for causation under FELA and the *Daubert* standard for admission of expert testimony are somewhat at odds with each other, that court concluded:

> To recapitulate, then, as long as plaintiff's expert presents scientifically reliable evidence that the toxic exposure could have played some role, however small, in causing plaintiff's injuries, the testimony should be admitted . . . . On the other hand, *Daubert's* standard of admissibility extends to each step in an expert's analysis all the way through the step that connects the work of the expert to the particular case. Thus, if the expert's conclusion-or inferential link that undergrids it-fails under *Daubert* to provide any evidence of causation, it must be excluded . . . . (Internal quotations and citations omitted).

Id. at 1028.

Applying the *Daubert* analysis, the court found that the challenged testimony in *Savage* was not scientifically valid because the experts had no knowledge of the level of creosote to which the plaintiff was exposed which, he alleged, caused his basal cell carcinoma. In that case, the experts had no knowledge of the plaintiff's exposure and did not know the amount of chemicals present on the property. Furthermore, there was no scientific data demonstrating the level of exposure necessary to cause the basal cell carcinoma in human beings. Thus, the court held, the expert opinions offered were based on nothing more than "educated guesses." *Id*.

> At a minimum, the expert should include a description of the method used to arrive at the level of exposure and scientific data supporting the determination. The expert's assurance that the methodology and supporting data is reliable will not suffice. Scientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case.

Id. at 1034-35.

We agree with the court in *Savage* that the *Daubert* analysis is applicable to the admission of expert testimony in FELA cases. However, in this case, we can find no error in the admission of the expert testimony.

We disagree with CSX that in order to validate the testimony of the medical experts, Moody was required to prove the precise dosage of solvents to which he was exposed and the precise level required to have a harmful effect on human beings. In *Savage*, citing *Wright v. Willamette Indus., Inc*., 91 F.3d 1105, 1106 (8th Cir. 1996), the court held that the plaintiff in a toxic tort case must show both the level of exposure that is deemed hazardous as well as the actual level of exposure. However, the court

emphasized that the evidence does not have to be mathematically precise. Such a requirement would render most toxic tort cases impossible to prove since, in most cases, if the evidence is to exist, only the defendant would have the means to formulate such information.

We believe that Moody presented sufficient evidence both as to his level of exposure and that necessary to cause his toxic encephalopathy. He presented testimony concerning how often he used the offending solvents and the duration of his exposure. He further explained the physical symptoms that he suffered while working with the solvents. While not quantitatively specific, the expert testimony supports the conclusion that Moody's exposure, under the circumstances described, and his length of the exposure, are sufficient to cause his toxic encephalopathy.

Although argued in terms of a *Daubert* challenge, the crux of CSX's argument goes to the issue of the sufficiency of the evidence as to causation rather than the admissibility of Moody's experts. Under the lenient standard for causation applicable in FELA cases, the evidence was sufficient so that a reasonable person could conclude that his exposure probably caused his injuries. *Boren v. Burlington Northern & Santa Fe Ry. Co.*, 10 Neb. App. 766, 637 N.W.2d 910 (2002).

ADMISSION OF PRIOR CLAIMS

CSX alleges that the trial court committed reversible error by admitting evidence of dissimilar claims regarding other CSX employees. Specifically, CSX alleges that the trial court erred by allowing into evidence the following: (1) the 1978 accident report regarding John Newell's claim that he had suffered health problems after being exposed to solvents; (2) the 1980 deposition of Tyrone Green regarding Newell's 1978

claim; (3) Larry Elmore's testimony regarding Newell's 1978 claim; and (4) Dr. Martine Robards' testimony regarding her study of other CSX employees.

As a general rule, we review a trial court's evidentiary rulings for abuse of discretion. *Hamilton*, 208 S.W.3d 279, 280, (citing *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577 (Ky. 2000)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In March of 1978, John Newell was working as a service attendant at the South Louisville shop and, after returning home from work, developed abdominal pain, began vomiting, and became dehydrated. Newell reported this incident to CSX and further informed it that the hospital had related his exposure to "DowClene." Over CSX's objection, the trial court permitted Moody to introduce, through Elmore, the notice of accident report given to CSX, Newell's deposition in the prior claim, as well as testimony from Green, a co-worker, that he had seen Newell become dizzy and light-headed while working in the South Louisville shop. CSX argues that any evidence concerning Newell's claim should not have been admitted because it was not substantially similar to Moody's claim.

Evidence of a prior incident is not admissible unless the incident occurred under substantially similar circumstances as that of the plaintiff. *Hartel v. Long Island R. Co.,* 476 F.2d 462 (2nd Cir. 1973). CSX contends that Newell's claim was not substantially similar to Moody's and makes the following compare and contrast of the facts:

> Newell became sick while at home, not at work. Newell developed abdominal pain, Moody did not. Newell

> experienced vomiting, Moody did not. Newell purportedly became dehydrated, Moody did not. Newell did not claim that he suffered any memory loss, much less permanent, irreversible brain damage.

We believe CSX has applied the "substantially similar requirement" much too narrowly.

The evidence of Newell's claim went to the issue of CSX's knowledge that exposure to DowClene had caused harm to a worker prior to that suffered by Moody. It was relevant to the jury's assessment of foreseeability because Newell and Moody worked in the same location at approximately the same time and both were exposed to DowClene. Although their physical symptoms differed, it remains that the circumstances under which both men became ill were substantially similar so that a reasonable jury could believe that, as early as 1978, CSX knew of the harmful effects of DowClene.

CSX challenges Dr. Robards' testimony that she evaluated former and current CSX workers who were exposed to solvents and that 61 workers claimed to have had problems with depression and memory loss. It contends that her testimony brought into evidence unrelated dissimilar claims.

A review of Dr. Robards' testimony reveals that she testified at length as to the basis of her study without objection as to the relevance of her testimony. If, as CSX suggests, her study had no relevance based on dissimilarities in the identity, work duties, work environment or their exposure to solvents, CSX was free to cross-examine her on the issues. Its present objection goes to the weight to be given to her testimony rather than its admissibility.

FUTURE MEDICAL WAGES

CSX complains that despite the jury's award of $200,000 for future medical expenses, that there was absolutely no evidence introduced by Moody as to the amount of

future medical costs he will reasonably incur. Thus, it maintains, the trial court erred when it failed to grant its motion for a directed verdict.

It is not the function of an appellate court to weigh the evidence or judge the witnesses' credibility. We will reverse a denial of a directed verdict only if the verdict was flagrantly against the evidence so that it indicates that the jury reached the verdict as a result of passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

Moody presented evidence from various medical experts that his neurological condition is a permanent condition and there is sufficient evidence from which a reasonable juror could conclude that Moody will require future medical treatment. Dr. Douglas Linz, a physician specializing in internal, occupational, and environmental medicine, explained the long-term effects of occupational exposure to DowClene and, based on the history given to him by Moody, concluded that as as result of his exposure to solvents, Moody has suffered permanent irreversible brain damage. Moody's treating physician testified that from 1995 through 2001, he treated Moody for ringing in the ears, dizziness, fatigue, high blood pressure, flank pain, headaches, and repeated sore throats. In June 2002, Moody complained of memory loss and, in September of that same year, of depression. He testified that he would need to perform follow-up evaluations of Moody's condition. The physicians' testimony introduced by Moody and by CSX all offered testimony that toxic encephalopathy, is a permanent condition and that future treatment is required.

We have no difficulty in concluding that there is ample evidence that, within a reasonable medical certainty, Moody will require future medical treatment; there

is, however, no evidence upon which the jury could determine that the reasonable cost of that treatment will be $200,000.

> A FELA plaintiff, upon proof of employer liability, may recover damages for loss of earnings, medical expenses and pain and suffering. The burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought.

Williams v. Missouri Pacific Railroad Company, 11 F.3d 132, 135 (10th Cir. 1993) (citations omitted).

Although Moody makes citations to the record where there is evidence to support his claim that his condition is permanent, there is no reference to any testimony or other evidence which would permit a reasonable jury to measure an appropriate award for future medical expenses. The record is completely lacking as to cost of future medications, frequency or duration of medications and treatment, or of past medical expenses from which future medical expenses could be determined. Based on the state of the evidence, the amount awarded for future medicals was based only on supposition and speculation by the jury; it was, therefore, improper to present the question for its consideration. *Kentucky & Indiana Terminal Railroad Co. v. Mann*, 312 S.W.2d 451, 454 (Ky. 1958).

Even when the evidence is viewed most favorable to Moody, we conclude that the trial court erred when it did not grant CSX's motion for a directed verdict on the issue of future medical expenses.

FUTURE LOST WAGES

At the time of trial, Moody was 51 years, nine months old. He testified that his monthly paycheck was $4,500 and that he intended to retire from CSX at the age of

sixty (60). There was no evidence presented concerning his net wages nor was a life expectancy table submitted as evidence. Thus, the only evidence the jury had to consider on the issue of lost wages was his monthly gross income and his intended age of retirement. CSX contends that the maximum the jury could have awarded based on the figures of $4,500 multiplied by eight years, three months, was $445,000.

The courts have consistently recognized that the jury's determination of the amount to be awarded for future lost wages is subject to a degree of speculation. As noted by the court in *Wiles v. New York, Chicago & St. Louis Railroad Co*., 283 F.2d 328 (3rd Cir. 1960) *cert. denied*, 364 U.S. 900, 81 S.Ct. 232, 5 L.Ed.2d 193 (1960), in evaluating a FELA claim for impairment of future earnings:

> [W]e cannot say that there was a significantly larger element of speculation in arriving at an estimate of Wiles' loss of future earnings than there would be in any ordinary instance requiring an estimate of damages by a jury. Since none of us is capable of foreseeing the future with any substantial degree of certainty every estimate of damages must contain elements of speculation.

Id. at 332.

Because of the many factors that can affect future earning capacity, such as discharge from employment, increase or decrease in wages, fringe benefits, and possible post-retirement employment, the resolution of these factors should be left for the jury to "consider and weigh all the relevant facts and determine what price to place on a narrowing of a plaintiff's economic horizons." *Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 484, (3rd Cir. 1989).

Moody testified that at age sixty (60), he intended to retire from CSX; we do not believe, however, that his statement of future intent precluded the jury from

awarding an amount reflecting employment beyond that time. The average juror is aware that people often work after retirement and, given Moody's projected retirement age of sixty (60), it is not unreasonable for the jury to conclude that he may work after leaving CSX. Moreover, the jury's award could reasonably have included fringe benefits that Moody would have earned over the course of his employment. Such speculation is not only permissible but is an inherent part of the jury process when awarding future lost wages. *Wiles*, 283 F.2d 331, n.3. Thus, the jury was not limited to awarding future wages until Moody reached age sixty (60).

FAILURE TO INSTRUCT THE JURY THAT LOST WAGES ARE NOT TAXABLE

CSX tendered an instruction instructing the jury that any award made for future lost wages and future medical expenses is non-taxable. Since we are vacating the award for future medical expenses, our discussion is limited to the tendered instruction as it relates to future lost wages. Additionally, CSX tendered an instruction requiring that the jury calculate its award for future lost wages on an after-tax basis. CSX alleges as error the trial court's refusal to give the instructions. Although CSX separates these two arguments for our consideration, we find them to be interrelated and that clarity demands we consider them as one.

Questions relating to the measure of damages in a FELA case are federal in character and, therefore, we must apply federal law. *See CSX Transp., Inc. v. Williams*, 230 Ga.App. 573, 497 S.E.2d 66 (1998). In *Norfolk Western Railway v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), the Supreme Court held that in FELA cases,

the defendant is entitled to an instruction that damages are not subject to federal income taxation. As the Supreme Court observed, the award in that case was improperly inflated and it was not beyond reason to suppose that the jury believed that the award would be subject to income taxes. The purpose of such an instruction, it explained, is to eliminate from the jury's deliberations "an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." *Id*. 444 U.S. at 498, 100 S.Ct. At 759-760.[4]

We agree with CSX that *Liepelt* requires that, under the facts in that case, the trial court erred when it refused the requested non-taxable instruction. However, the question remains whether an instruction is required even though the defendant fails to place before the jury any evidence concerning the plaintiff's net wages.

Both CSX and Moody cite cases which they argue support their position: CSX argues that regardless of the evidence, a requested non-taxable instruction is always required when the issue of future lost wages is submitted to the jury, and Moody claims it is required only if the defendant submits evidence from which the jury could determine the amount or rate of tax that would be owed on the plaintiff's income. Both arguments, we find, are tenable depending on the instruction requested and the evidence presented.

The court's holding in *Liepelt* was that the court was required to give a general non-taxable instruction as embodied in that tendered by the defendant which informed the jury that:

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[4] Kentucky rejected the reasoning of *Liepelt* in *Paducah Area Library v. Terry*, 655 S.W.2d 19 (Ky. App. 1983), stating that the tax consequences are irrelevant to the jury's award. An argument that the resulting verdict is excessive is a matter to be dealt with by the trial judge by post-judgment motion. However, in this case we are controlled by the court's holding in *Liepelt*.

> your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award.

Id. at 444 U.S. 490, 492, 100 S.Ct. 755, 757.

The instruction, approved by the court, is simply stated and does not instruct the jury to make complex calculations as to specific tax consequences as to a particular plaintiff.

The second type of instruction pertaining to the tax implications of a future lost wages award is the after-tax instruction which, unlike the general instruction submitted in *Liepelt,* requires that the jury calculate the plaintiff's net pay and make a corresponding deduction from an award for future lost wages. The difference is highlighted by the court's opinion in *CSX Transp., Inc. v. Williams,* 230 Ga.App. at 574, 497 S.E.2d at 68:

> CSX failed to present any evidence as to the amount or rate at which Williams' past and future lost wages would be taxed. It thereby waived any right to ask for a jury instruction that the jury should reduce the income portion of its award by the appropriate tax. Unlike the general charge that the award is not taxed and that the jury should not inflate its award to make up for any potential taxes, a charge directing the jury to reduce that portion of its verdict representing lost income so as to calculate an after-tax figure requires that the jury have facts as to what tax rate to apply. Instructing a jury not to do something does not require evidence, whereas instructing it affirmatively to calculate numbers requires that the jury have the tools to perform that calculation. It cannot simply guess, or fashion an arbitrary formula.

We believe the reasoning in *Williams* to be sound. A jury might well erroneously assume that damages for pecuniary loss are taxable, thus, a general instruction of the law is appropriate. If, however, the defendant tenders an instruction that the jury must reduce its award, there must be evidence from which the jury can determine the amount to be reduced. A defendant benefiting from the application of a

particular economic formula has the burden to prove that formula. *See CSX Transp. Inc. v. Casale*, 247 Va. 180, 441 S.E.2d 212 (1994). Because CSX totally failed to present any evidence upon which the jury could deduct from its award a specific amount for taxes paid by Moody from his earnings, we find no error in the trial court's refusal to give the instruction.

Although it is our conclusion that because CSX failed to offer evidence concerning Moody's after-tax income, it was not entitled to an after-tax instruction, it was, nevertheless, entitled to the general instruction approved of in *Liepelt*. In *Gulf Shore Co. v. Mobil Oil Corp*., 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), the Supreme Court briefly addressed in a footnote the argument that a *Liepelt* instruction is proper only if evidence is introduced regarding the effect of taxation. In rejecting the argument the court stated:

> We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaedecke's future earnings. No evidentiary predicate is required to instruct a jury *not* to consider taxes. (Emphasis original).

Id. at 453 U.S. at 485 n. 15, 101 S.Ct. 2879 n. 15.

Our inquiry, however, has not ended.

An improper failure to give an instruction or an erroneous instruction does not require reversal unless the error adversely affects the substantial rights of the complaining party. *See Louisville Bear Safety Service, Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438 (Ky. App. 1978). We adopt the logic expressed in *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880 (8th Cir. 1980), wherein the court held, that the FELA defendant was not prejudiced by the failure to give a non-taxable instruction.

Quoting from *McWeeney v. New York, New Haven & Hartford Railroad*, 282 F.2d 34, 39 (2d Cir. 1960), the court stated that:

> Before an appellate court should hold that failure to give such a cautionary instruction was reversible error, there ought to be evidence either that juries in general increase recoveries on this account or that the particular jury did so.

The only evidence the jury had in this case was Moody's monthly gross wage and his age. Although arguably the award for future lost wages could have been less, it certainly was not out of proportion to the proof presented. We can find no evidence in the record to support CSX's hypothesis that the jury inflated the award based on a misconceived notion about the award being taxable. Again, we reiterate that the jury is permitted to consider a myriad of variables in making its award.

In conclusion, while we find that the failure to give a general non-taxable instruction was error, we find that, in this case, it was harmless.

REDUCTION OF THE JURY'S AWARD TO PRESENT VALUE

CSX maintains that the trial court also erred when it refused its tendered instruction directing that any award of damages must be reduced to present value. However, again, CSX failed to present any evidence concerning the amount by which the award should have been discounted.

There can be no dispute that federal law controls and that an award under FELA should be based on the present value. In *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303 (1985), the court affirmatively stated:

> Not only is it a federal question, but it is also one to which existing law provides a clear answer. Nearly 70 years ago, this Court held that a defendant in a FELA case is entitled to

> have the jury instructed that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.

The reason for the rule is that a given sum of money in hand is worth more than the like sum of money payable in the future. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916). The instruction tendered and approved of by the court in *St. Louis Ry. Co.,* stated:

> If you find in favor of Plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that Plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Id. at 470 U.S. 410, 10 S.Ct. at 1348.

Again, we are confronted with conflicting authority from the federal courts as to whether the defendant must lay an evidentiary foundation before the requested instruction is given. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) the Court indicated such proof is unnecessary for the giving of a present value instruction. However, there is authority to the contrary, including that established in *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982), wherein the court held that where neither party provides competent evidence of the inflation rate or the discount rate, a lump sum award need not be adjusted for either factor.[5]

Despite the divergence of opinion among the courts, we conclude that a general instruction that the jury must discount the award to its present value is required

[5] *Alma* and *Jones and Laughlin Steel Corp.* are Jones Act cases; their holdings nevertheless have applicability to the present case.

under federal law. However, absent some evidence upon which the trial court can give a specific discount figure, a specific instruction is not required.

Having stated our interpretation of the federal law, we find no reversible error in the failure to give a discount instruction in the present case. There is nothing from which we can conclude that CSX was prejudiced by the failure of the trial court to give the instruction. Again, we emphasize that without evidence for this court to consider, we are without any factual basis to decide whether the jury failed to discount the award. In fact, it is just as logical to assume that the jury did discount the award to present value based on its common sense that money is worth more in a present lump sum than future payment.

CONCLUSION

We have concluded that there was no evidence upon which to support the jury's award for $200,000 in future medical expenses and, therefore, vacate the award for future medical expenses. As to all other issues raised, we affirm.

ALL CONCUR.

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