

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )  
THOR WILLIAMS, )  
Petitioner, )  
vs. )  
NORFOLK SOUTHERN CORPORATION, )  
Respondent. )

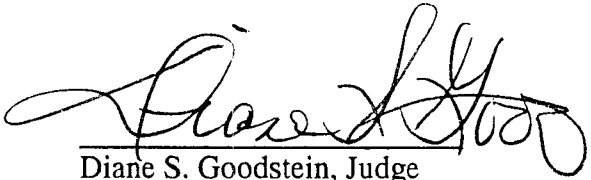
CERTIFIED COPY  
2014 OCT -1 ) AM 9:28  
Clerk  
CLERK OF COURT  
DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
Case No.: 2012-CP-18-1681

**ORDER DENYING PETITIONER'S  
MOTION FOR RECONSIDERATION**

This matter came before this Court by way of Petitioner's Motion for Reconsideration.  
Because the Petitioner's Motion does not raise any new issues for the Court's consideration, the  
Petitioner's Motion for Reconsideration is denied.

**AND IT IS SO ORDERED.**

  
Diane S. Goodstein, Judge  
First Judicial Circuit

This 22 day of Sept, 2014

**RECEIVED**  
NOV 03 2014  
**SC Court of Appeals**

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF DORCHESTER  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012CP1801681

Thor Williams

2014 OCT -1 AM 9:26  
 Norfolk Southern Corporation

*Cheryl*  
 CLERK OF COURT  
 DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

**RECEIVED**

NOV 03 2014

**SC Court of Appeals**

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Diane S. Goodstein  
 Circuit Court Judge

2112  
 Judge Code

10/1/2014  
 Date

**For Clerk of Court Office Use Only**

This judgment was entered on **10/1/2014**, and a copy mailed first class or placed in the appropriate attorney's box on **10/1/2014**, to attorneys of record or to parties (when appearing pro se) as follows:

**Gordon Hughes Garrett** 1075 E. Montague Ave.  
Charleston, SC 29405

**Gregory Payne Sloan** PO Box 10589 Greenville, SC 29603  
**Breon C. M. Walker** PO Box 7368 Columbia, SC 29202  
**Robert Thomas Green** 55 Beattie Place Suite 1200  
Greenville, SC 29601

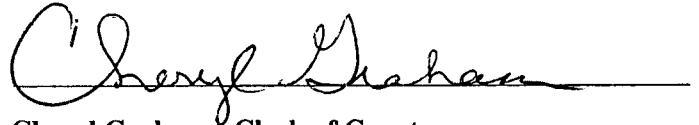
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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

  
**Cheryl Graham - Clerk of Court**

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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inferences therefrom in the light most favorable to the party opposing summary judgment, in cases applying federal law, “the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.” *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, 803 (SC 2009). In a FELA action, “before the case may be properly left to the jury there must be more than a scintilla of evidence establishing the defendant’s liability.” *Rogers v. Norfolk S. Corp.*, 588 S.E.2d 87, 90 (S.C. 2003) (citing *Brady v. S. Ry.*, 320 U.S. 476, 479 (1943)).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Plaintiff was employed as an engineer with Norfolk Southern from 1997 to August 2009. Plaintiff filed a complaint on July 6, 2012, alleging violations of the Federal Employers Liability Act (FELA) (45 U.S.C. 51, et. seq), the Locomotive Inspection Act (LIA) (49 U.S.C. 20701), 49 C.F.R. 229.45, and the Rail Safety Improvement Act of 2008 (49 U.S.C. 21103). Plaintiff claims he developed carpal tunnel syndrome in his right wrist and right elbow epicondylitis as a result of repetitive motions necessary to operate locomotives. In addition, Plaintiff claims he developed a sleep disorder as a result of his work schedule with Norfolk Southern. Lastly, Plaintiff claims Norfolk Southern was negligent in employing him as an engineer.

The basis of liability under the FELA is negligence, not that an injury occurred. *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947). Just as in any other general negligence action, a FELA plaintiff has the burden of proving all the traditional elements of negligence: (1) a particular duty of care owed; (2) a breach of duty; (3) foreseeability; and (4) causation. *Williams v. National RR Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir. 1998); *Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir. 1990). Moreover, although there is a relaxed

standard of causation in FELA actions, there is no relaxed standard with respect to the Plaintiff's duty to prove the other elements of negligence. *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 28 (S.C. 2008); *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6<sup>th</sup> Cir. 2007).

Plaintiff has failed to present any evidence creating a genuine issue of material fact that his carpal tunnel syndrome and elbow epicondylitis were due to the failure of Norfolk Southern to provide him with a reasonably safe work environment. Plaintiff claims he developed cumulative trauma due to the fact his job required him to frequently move locomotive control levers and brakes. However, Plaintiff acknowledged in his deposition that he was not claiming Norfolk Southern was negligent in failing to provide him with a reasonably safe place to work. Furthermore, Plaintiff testified he is not claiming the control levers and brakes were unsafe or dangerous. Rather, the basis of the claim is the simple fact that his job as an engineer required him to frequently move locomotive control levers and brakes as part of his normal job duties.

Plaintiff has also failed to present any medical testimony supporting his carpal tunnel syndrome and elbow epicondylitis claims. Many courts in recent years have addressed the issue of when expert testimony on specific causation is required in FELA cases. In a comprehensive review of the pertinent federal appellate authority, the Seventh Circuit summarized the general rule as follows:

Expert testimony is unnecessary in cases where a layperson can understand the injury. So, for example, when a plaintiff suffers from a broken leg or a gash when hit by a vehicle, he doesn't need to produce expert testimony. But when there is no obvious origin to an injury and it has multiple etiologies, expert testimony is necessary to establish causation.

*Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 643 (7<sup>th</sup> Cir. 2010).

Consistent with the rule as described in *Myers*, federal appellate courts in FELA cases have held that many types of injuries require medical causation testimony. *See, e.g., Huffman v.*

*Union Pac. R.R.*, 675 F.3d 412, 26 (5<sup>th</sup> Cir. 2012) (reversing trial court's denial of JNOV to railroad on basis that employee failed to present sufficient causation evidence as to osteoarthritis in his knees and holding that, as a result, "[the path from workers injury to employer liability was too broken in this record to allow juror common sense to travel it.]); *Myers*, 629 F.2d at 643 (affirming summary judgment to railroad, in part, because the origin or plaintiff's cumulative trauma injuries to his knee, elbow, back and neck "would not have been obvious to a layman" but rather involves potential causes that are neither "obvious or certain," and holding that plaintiff needed expert testimony "to tie them to his working conditions at the Railroad."); *Goewey v. U.S., Fluor Daniel Corp., FD Services, Inc.*, 886 F. Supp. 1268, 1279 (D.S.C. 1995) (citing *Ellis v. United States*, 484 F. Supp. 4 (D.S.C. 1978)); (*McCann v. Ill. Cent. R.R.*, 711 F.Supp.2d 861, 872 (C.D.Ill. 2010) (requiring expert testimony to prove causation of carpal tunnel syndrome and degenerative disc injury).

Plaintiff's treating orthopedist, Dr. David Fulton, was unable to state to a reasonable degree of medical certainty whether Plaintiff's right side carpal tunnel syndrome or his right elbow epicondylitis was caused by his work with the railroad. Instead, Dr. Fulton testified he had no opinion as to the cause of Plaintiff's carpal tunnel syndrome and elbow epicondylitis. Importantly, Plaintiff offered no other medical testimony to support his claim.

Lastly, even if Plaintiff could create some genuine issue of material fact regarding Norfolk Southern's alleged negligence, his carpal tunnel syndrome claim is barred by the FELA three year statute of limitations. The FELA provides that "no action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." (45 U.S.C. § 56). The cause of action accrues when the plaintiff knew or, in the exercise of reasonable diligence, should have known of the injury and its cause. *United States v. Kubrick*,

444 U.S. 111, 122–123 (1979); *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1028–1029 (5th Cir.1984). A plaintiff knows or should know he has suffered an injury when the symptoms have manifested themselves to the point that the plaintiff reasonably should have discovered the injury, although he may not experience all of the symptoms of the injury. *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990). Furthermore, a plaintiff has an affirmative to investigate his symptoms. *Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir.1986). The discovery rule does not provide an escape for a plaintiff that is aware that some type of injury exists and chooses to ignore it by failing to seek diagnosis and investigate the cause. *Id.* (citing *Kubrick*, 444 U.S. at 120-21 n. 7). Additionally, the fact that an injury “has not reached its maximum severity ... but continues to progress” does not relieve the plaintiff of the duty to use reasonable diligence to discover the original injury and its cause. *Fries*, 909 F.2d 1092, 1096 (7th Cir.1990).

It appears from the record that Plaintiff was aware of his carpal tunnel syndrome, as well as its alleged cause, no later than 2008. In October 2006, Plaintiff complained of pain and numbness in his right hand and wrist to his family doctor. In addition, Plaintiff reported that his job at Norfolk Southern required him to make repetitive hand motions. Plaintiff was diagnosed with carpal tunnel syndrome at that time. Plaintiff also testified in his deposition that in 2008, he believed that the pain and numbness he was experiencing in his right hand and wrist was the result of his work at Norfolk Southern. Because Plaintiff knew both about the condition and the cause by 2008, and suit wasn't filed until July 2012, his claim is barred by the three year statute of limitations.

For these reasons, Norfolk Southern's motion for summary judgment regarding Plaintiff's carpal tunnel syndrome and elbow epicondylitis claims is granted.

Plaintiff has also failed to present any evidence creating a genuine issue of material fact that the development of a sleep disorder was caused by Norfolk Southern's alleged negligence.

Plaintiff alleges Norfolk Southern violated the Rail Safety Improvement Act of 2008 (RSIA). The RSIA provides that train crew members may not remain on duty for more than 12 hours a day and may not go on duty unless they have had at least 10 consecutive hours off duty during the past 24 hours. 49 U.S.C.A. § 21103. Plaintiff alleges he routinely worked straight periods of up to 21 hours as an engineer. Furthermore, Plaintiff provided the Court with specific instances wherein Norfolk Southern violated the RSIA. Those included:

- June 26, 2004, when Plaintiff allegedly worked 20.20 hours in a 24-hour period;
- June 11, 2004, when Plaintiff was allegedly allowed to work 21.09 hours in a 24-hour period;
- July 2, 2004, when Plaintiff allegedly worked 20.20 hours in a 24-hour period; and
- August 4, 2005 through August 12, 2005.

However, it appears from the record that the RSIA did not go into effect until July 16, 2009 – 13 days before Plaintiff stopped working at Norfolk Southern. Plaintiff has not alleged violations of the RSIA on or after July 16, 2009; therefore, there is no evidence supporting Plaintiff's claim that Norfolk Southern violated the RSIA. Furthermore, Plaintiff admitted in his responses to requests for admission that Norfolk Southern did not violate any hours of service regulation in effect at the time Plaintiff claims he developed a sleep disorder.

Lastly, Plaintiff has failed to present sufficient medical testimony supporting his sleep disorder claim. Dr. William McLain, Plaintiff's sleep medicine doctor, testified in his deposition that his "best guess" as to the cause of Plaintiff's sleep disorder was shift work, a head injury Plaintiff suffered prior to being hired by Norfolk Southern, and Plaintiff's personality traits. At the hearing, Plaintiff submitted an unnotarized letter, not an affidavit provided under oath, from Dr. McLain clarifying his prior testimony. In the

letter, Dr. McLain states he believes Plaintiff's prior head injury, combined with shift work, led to his persistent complaints of insomnia. However, Dr. McLain also states that he did not think Norfolk Southern "could or should have known [Plaintiff] would be predisposed to develop these problems from working shifts any more than any other train engineer." The Court finds Dr. McLain's opinions are insufficient to tie Plaintiff's sleep disorder to his working conditions at Norfolk Southern. Again, Plaintiff offered no other medical evidence to support his claim.

Lastly, even if Plaintiff could create some genuine issue of material fact regarding Norfolk Southern's alleged negligence, his sleep disorder claim is barred by the applicable statute of limitations.

It appears from the record that Plaintiff was aware of his sleep problem, as well as its alleged cause, no later than 2006. From 1997 to 2002 Plaintiff worked for periods of time on the "extraboard." The extraboard is a category of railroad employees who do not have a permanent duty assignment. Those employees are paid a higher wage rate because they are on a standby list to fill assignments, as needed, at irregular times. Plaintiff testified that he volunteered for the extraboard because he wanted to make more money and an assignment in a regular job would have required him to commute to a location that was an hour and a half from his home.

Plaintiff testified he began suffering from sleep problems in 2002. Plaintiff further testified that when his sleep problems began, he immediately knew they were caused by his extraboard work schedule. As a result, Plaintiff removed himself from the extraboard and transferred to a position with stable work schedules. Lastly, Dr. McLain testified he diagnosed Plaintiff with possible "shift work [sleep] disorder" in March 2006. Because Plaintiff knew both

about the condition and the cause by 2006, and suit wasn't filed until July 2012, his claim is barred by the three year statute of limitations.

Lastly, Plaintiff claims Norfolk Southern was negligent in employing him as an engineer due to his pre-existing head injury. A railroad has no general duty to ascertain whether an employee is physically fit to perform his job. *Fulk v. Illinois Cent. R. Co.*, 22 F.3d 120, 125 (7th Cir. 1994); *Voytko v. Consol. Rail Corp.*, 94 F.3d 645, 645 (6th Cir. 1996). A railroad only has duty to use reasonable care in assigning employees. *Fletcher v. Union Pac. R. Co.*, 621 F.2d 902, 909 (8th Cir. 1980). To prove a negligent assignment claim, the employee must show that the railroad knew or should have known that its assignment exposed the employee to an unreasonable risk of harm. *Fletcher*, 621 F.2d at 909.

Plaintiff testified he doesn't know the basis of the claim that Norfolk Southern was negligent in hiring and assigning him to an engineer position. In addition, prior to being hired, Plaintiff underwent a physical examination and was found to be qualified. Furthermore, Plaintiff testified he suffered no residual effects from his prior head injury and was fully capable of working as a railroad engineer. Lastly, Plaintiff's own medical expert, Dr. McLain testified that it was not unreasonable to assign Plaintiff to work irregular shifts as an engineer simply because he had a prior head injury. Again, Plaintiff offered no other medical evidence to support his claim.

Plaintiff has produced no evidence to support his claim that Norfolk Southern was negligent in hiring him and assigning him to an engineer position. Therefore, Norfolk Southern's motion for summary judgment regarding Plaintiff's claim of negligent hiring and assignment is granted.

CONCLUSION

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Norfolk Southern's motion for summary judgment is GRANTED.

IT IS SO ORDERED.



Diane Schafer Goodstein  
Circuit Judge for First Judicial Circuit

21 day of April, 2014

Dorchester, South Carolina

STATE OF SOUTH CAROLINA )

IN THE  COURT OF COMMON PLEAS )

COUNTY OF DORCHESTER )

FAMILY COURT )

Thor A. Williams, )

2014 MAY -2 AM 9:57 )

CASE NO. 2012-CP-18-1681 )

Plaintiff )

*Cheryl Berkman*  
CLERK OF COURT  
DORCHESTER COUNTY )

v. )

Norfolk Southern Corporation )

**MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET**

Defendants )

**Check box above indicating submitting party**

<u>Name and address of plaintiff's attorney</u> Gordon H. Garrett 1075 E. Montague Avenue Charleston, SC 29405	<u>Name and address of defendant's attorney</u> Gregory P. Sloan Robert T. Green Gallivan, White & Boyd, P.A. P.O. Box 10589 Greenville, SC 29603 Phone: (864) 271-9580
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- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion:

Estimated Time Needed:

Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

*[Signature]* April 28, 2014  
Signature of Attorney for  Plaintiff/  Defendant Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$25.00

EXEMPT:

Rule to Show Cause in Child or Spousal Support

(check reason)

Domestic Abuse or Abuse and Neglect

Indigent Status  State Agency v. Indigent Party

Sexually Violent Predator Act  Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication  Motion for Execution (Rule 69, SCRCP)

Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

Other:

**RECEIVED**

NOV 03 2014

**SC Court of Appeals**

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.

Other:

\_\_\_\_\_  
JUDGE

CODE: \_\_\_\_\_ DATE: \_\_\_\_\_

**CLERK'S VERIFICATION**

DATE FILED

Collected by: \_\_\_\_\_  
(print name)

MOTION FEE COLLECTED: \_\_\_\_\_

CONTESTED - AMOUNT DUE: \_\_\_\_\_