

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-212062

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-40-5460

Trumaine V. Moorer,

Respondent

v.

Norfolk Southern Railway Company,

Appellant

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. **UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT NORFOLK SOUTHERN HAD A DUTY TO PROVIDE SUFFICIENT MANPOWER AND TO ASSIGN RESPONDENT TO WORK FOR WHICH HE WAS REASONABLY SUITED GIVEN HIS KNOWN WEAKENED CONDITION.**
- II. **RESPONDENT INTRODUCED MORE THAN A SCINTILLA OF EVIDENCE THAT APPELLANT WAS ON NOTICE THAT THERE WAS AN EMERGENCY AND THAT MOORER COULD NOT HELP HIMSELF.**
- III. **RESPONDENT INTRODUCED MORE THAN A SCINTILLA OF EVIDENCE THAT RESPONDENT SUFFERED INJURY DURING THE DELAY IN MEDICAL TREATMENT.**
- IV. **DR. LINA'S DISQUALIFICATION LETTER OF AUGUST 2, 2007 WAS PROPERLY ADMITTED AND PROVIDES THE BASIS FOR THE LOST FUTURE WAGE CLAIM.**
- V. **MISCELLANEOUS JURY CHARGES.**
- VI. **RESPONDENT'S HANDICAPPED SON.**

STATEMENT OF THE CASE

The parties tried this Federal Employers Liability Act case two times, with the first trial ending in a hung jury. Following the second trial, the jury awarded Plaintiff \$1,100,000 in actual damages, and found Plaintiff 40% at fault; the Court reduced the gross verdict and entered judgment in the amount of \$660,000. The testimony from Respondent's expert economist at trial showed that Plaintiff's net economic losses reduced to present value were \$1,086,755, meaning that the award simply compensated Respondent for his lost net wages and benefits reduced to present value with a *de minimus* award for general damages in the form of pain and suffering.

Reduced to its essence, Appellant argues that the trial court erred in denying the railroad's motion for a directed verdict – and later denying its motion for JNOV on several issues because Plaintiff failed to introduce more than a scintilla of evidence to allow the case to go to the jury. As will be set forth below, the trial record clearly indicates that Respondent introduced extensive evidence to support Judge Benjamin's decision to submit the case to the jury and to deny the motion for JNOV. The trial court applied the correct legal standards, and nothing in Appellant's Brief demonstrates that Judge Benjamin committed error. The court should affirm the award and finally end this case.¹

¹ Appellant does not argue that the verdict is excessive, against the weight of the evidence, or is out of proportion to the evidence. It also makes no argument that the verdict has any impermissible punitive component.

STATEMENT OF FACTS

A. Given The Temperature, The Demands Of The job, And Moorers' Medical Vulnerability To A Second Heat Injury, NSRC Negligently Assigned Respondent To Work Job P28 On May 31, 2007.

Trumaine Moorer (Respondent) sustained two very serious work-related heat injuries while working as a conductor as part of a two-man² crew for Norfolk Southern Railway Company (Appellant) on May 9, and again on May 31, 2007 on job P28, a local job that originates in Columbia, SC and works industries along the main line track to Orangeburg, SC. (R. pp. 98-99). Following the first heat injury, Respondent returned to work on May 30, 2007 on the same job, but on his second day back at work, he suffered a second work-related heat injury that resulted in his medical disqualification from working as a conductor for Appellant. Both injuries occurred at or near the end of the shift at Doane Pet Products (milepost 76) in Orangeburg, which is 50 miles from Andrews Yard (milepost 126.5) in Columbia where the train stopped on May 31, 2007, and EMS finally provided medical treatment. (R. pp. 115, 166-167, 162-172, and 777). Both injuries were the direct result of dehydration caused by the working environment at the railroad, and both required emergency care and several days of hospitalization. (R. pp. 503-504). Following the second injury, Appellant medically disqualified Respondent from working as a conductor. (R. p. 1311).

Initially, Respondent filed a three count complaint: Count I alleged negligent assignment on May 9, 2007; Count II alleged negligent assignment on May 31, 2007; and Count III alleged failure to provide emergency medical care on May 31, 2007. After conducting discovery Respondent dismissed Count I and tried the remaining two counts:

² A two-man crew has an engineer and a conductor only. A three-man crew adds a brakeman who helps the conductor by sharing the manual work and reducing walking.

the new Count I (formerly Count II) alleged negligent assignment on May 31, 2007; the new Count II (formerly Count III) alleged failure to provide emergency medical care on May 31, 2007.

Respondent admitted evidence at trial about the May 9, 2007 event and its aftermath to provide context for the negligent assignment and career-ending event on May 31. He alleged that the May 9, 2007 event put the railroad on notice that the P28 job was unsafe for him to work as part of a two-man crew because he was not experienced, especially when the temperature was very hot and when he was medically susceptible to a second heat injury. Specifically, Respondent alleged that the work on May 31, 2007 was too much and too hot *for him*, given all of the facts.

1. The temperature on May 31, 2007 was significantly higher than on May 9, 2007 when the first heat injury occurred.

The high temperature on May 9, 2007 was 78 degrees with 60% humidity. Despite the comparatively mild temperatures, Respondent, who worked in a rubber rain suit, collapsed at the end of the shift. (R. p. 1806). On May 31, 2007, the temperature was hotter. At 2:53 p.m. the high temperature on May 31, 2007 was 88 degrees with 42% humidity. (R. p. 1348). Indisputably, Appellant knew that Respondent had collapsed on May 9, 2007 and that on May 31, 2007 the temperature was ten degrees hotter. Despite that knowledge, it made no modifications to the job or the equipment. It assigned Respondent to work with an engineer only, even though it had the ability to add a brakeman to the job.

2. The P28 job was extremely demanding for inexperienced conductors like Respondent, regardless of the temperature.

Appellant had the ability to control the work environment and the physical demands of the P28 job by assigning a brakeman, but it chose not to. (R. pp. 667, 698). Historically, NSRC staffed P28 job with a three-man crew before May, 2007. (R. pp. 654-655, R. p. 1593). NSRC admitted at trial that staffing the P28 with a brakeman and conductor would have allowed the crew to play “pitch and catch” with the rail cars as the crew dropped or spotted cars at the industries and thus greatly reduced the amount of walking and exertion. (R. pp. 111-112).

According to experienced Conductor Billy Chavis, a three-man crew cuts the walking in half on this job. (R. p. 111). Conductor Jeff Norwood -- who is also a Captain in the South Carolina National Guard – worked the P28 job during training as part of a three-man crew, and he replaced Moorner as part of a two-man crew on P28 on June 1, 2007, the day after the injury.³ (R. p. 285). He described the job as hot, tough, hard, and very mental. (R. pp. 283, 285). Specifically, he described having to get the engines from one end of the yard to the other end, having to line switches, and having to do the work of two men by himself. Norwood testified that with a two man-crew that he could not play “pitch and catch” with the cars, meaning that he would need to walk the length of the train with each move, throw the switch, then walk to the lead end of the

³ Norwood worked the P28 for four months and still felt like a “rookie” based on the demands and complexity of the job. He defined a “rookie” on the P28 as one with less than one year of experience working that job. (R. p. 286). Respondent’s first day working P28 as part of a two-man crew was May 8, 2007. (R. p. 164). He worked the next day, May 9, 2007, and the first heat injury occurred on that day at the end of the shift. Then after a three-week period off work, he returned to the same job on May 30, 2007. Thus, May 31, 2007 was Respondent’s fourth day working P28 as part of a two-man crew.

movement. (R. p. 284). As to the benefit of having experience, Norwood testified, “[b]eing new, you don’t know the shortcuts, you are just not experienced in it. And it is a lot of pressure because it is on you.”⁴

Norwood testified that being experienced on P28 makes a noticeable difference in the amount of exertion required of the conductor who has to work the job alone. For this healthy, physically fit soldier, the P28 job was too hard because he lacked experience. Specifically, he “remember[ed] having objections to the railroad about certain things about the job and the temperature and the equipment and the work conditions on that job.” (R. p. 296). An experienced conductor Roger Davis testified that if the railroad assigns both a brakeman and a conductor to the job, there is less work because “the conductor don’t have to do all the work by himself [sic].” (R. p. 801). Conductor Billy Chavis testified that inexperienced employees on the P28 would have a “deer in the headlight look”, but over time with experience that same employee will learn “how to work that place as efficiently as possible.” (R. pp. 113-114). Experience allows an employee “to put themselves in proper position to where they are not going to walk themselves [sic] to death.” (R. p. 112).⁵

3. Respondent was medically vulnerable and more susceptible to a second heat injury after the first heat injury.

⁴ Norwood explained the importance of experience on P28 in a catchphrase: “if your mind does not catch it, your feet will, which means you are going to cause yourself more physical work unless, you know – I say smart, but it is really a job you learn through experience.” (R. p. 285).

⁵ The conductor job description at Norfolk Southern requires prolonged walking on uneven terrain (ballast) a maximum distance of 2-4 miles per day, and approximately 1-2 miles at any one time, climbing rail cars on average 25-40 times a day, frequent bending, stooping, squatting, climbing, pushing, pulling, working in all weather conditions, frequent throwing of ground to waist level switches, tying of handbrakes 25-30 times a day, usually while holding on the side of a freight car. (R. p. 1309).

Following the first heat incident on May 9, 2007, Respondent was medically vulnerable and more susceptible to a second heat injury according to Drs. Dantzler and Casa. Respondent's primary care physician, Dr. Dantzler explained that the first heat injury predisposed Respondent to a second heat injury because after a heat injury, the body attempts to conserve energy and is more susceptible to changes in temperature after the first incident. (R. p. 505). Douglas Casa Ph.D.,⁶ one of the leading heat exposure experts in the country, clarified even further. A second heat injury is "one-hundred percent preventable if proper heat acclimatization and phase-back-activity policy was followed." (R. pp. 413-414). He testified that one suffering a heat-related injury must go through a supervised five to ten day heat acclimatization process before returning to full duty under the same or similar work conditions. (R. pp. 399-404). The three-week absence⁷ from work, especially work in hot outdoor conditions, caused Respondent to lose "a great percentage" of his fitness level and "completely lose [his] heat acclimatization." (R. p. 405). He faulted Appellant for failing to return Respondent to work in a gradual manner and failing to determine whether Respondent was capable of handling the work before allowing him to return.⁸ (R. p. 403).

The railroad's expert industrial hygienist James Shea defined heat acclimatization as a "program that you can progressively increase your heat tolerance by progressively

⁶ Casa earned his Ph.D. in exercise physiology.

⁷ Respondent was off work from May 10, 2007 until May 30, 2007.

⁸ The Norfolk Southern Fee for Service Provider Manual sets out the procedures for returning employees to work after illness or injury. It provides for a field-testing process where the injured employee interacts with a qualified professional who can evaluate the employee's fitness for duty and devise an appropriate acclimatization strategy. (R. p. 409, R. p. 1330).

increasing your exposure to heat environments.” He acknowledged that it has been an accepted practice in the field of industrial hygiene for “years and years”. (R. p. 1102) Mr. Shea also agreed that one heat injury “predisposes an individual to additional injury.” (R. p. 1100). That means that the person is more susceptible to further injury due to heat and that he has a “somewhat lower or altered tolerance to be able to dissipate the heat in the body.” (R. p. 1101). The once-injured person has a reduced tolerance to the heat. (Id.). The concept that a prior heat injury predisposes a person to additional injury has been generally accepted in the field of industrial hygiene “for some time.” (Id.).

Therefore, the unrebutted expert testimony from the medical doctors, Respondent’s expert in exercise physiology, and Appellant’s expert industrial hygienist proved that the first heat injury made Respondent vulnerable and predisposed him to a second, more serious heat injury. In that context, the actions, or in this case inactions, of Appellant’s medical and transportation departments after the first incident were relevant to help the jury evaluate the reasonableness of the railroad’s conduct in assigning Respondent to work the same job but under hotter conditions on May 31, 2007.

B. Dr. Dantzer imposed permanent work restrictions after the first incident.

As to work restrictions, the Respondent’s primary care physician Dr. Dantzer imposed permanent work restrictions after the first heat injury, restrictions that he never modified or lifted. (R. pp. 506-507 and 509-510) Specifically, he opined that before the second incident Respondent needed “frequent breaks during the heat, increase fluid intake, no caffeine or ethanol.” (R. pp. 507, 509-510).

Nurse Vicky Carroll-White handled the medical review and made the return to work decision for the railroad after the first heat injury. Until this case, she had never

supervised a return to work case involving a heat injury. (R. p. 1192). Neither Dr. Paula Lina nor Dr. Ray Prible, the two full-time medical doctors in the Norfolk Southern medical department, was involved in the decision to return Respondent to work after the first incident. (R. pp. 1184, 1194). Nurse Carroll-White's job is "to make independent medical decisions and to review medical records of employees who are returning to work or attempting to return to work." (R. p. 1170). She routinely calls doctors' offices to get more or missing pages of records. (R. pp. 1173-1174).

Before releasing Respondent to return to work, Nurse Carroll-White did not obtain the office note dated May 17, 2007 from Dr. Dantzler in which he outlined Moorer's restrictions, and instead, she released him to return to work based on the hospital records. (R. pp. 1180-1181 and 1183). She mistakenly thought that he had no restrictions. (R. p. 1185). Later, on August 1, 2007 – well after the second incident – Nurse Carroll White received a fax from Dr. Dantzler's office, which contained his May 17, 2007 note. (R. p. 1186). Critically, in this note Dr. Dantzler placed permanent restrictions on Respondent before the second incident. (R. pp. 506-507). The note mandates that Moorer take "frequent breaks during heat, increase his fluid intake, no caffeine, no alcohol." (R. pp. 506-507, R. p. 1189).⁹

Nurse Carroll-White acknowledged that the NSRC Fee-for-Service Provider Manual sets forth policies and guidelines for doctors who conduct physical examinations for the railroad. (Id. at 1194; See also, R. p. 350). The relevant portion of the Guide

⁹ Nurse Carroll-White tried to explain away these work restrictions as simple "common sense," but Dr. Dantzler would have none of it. (R. p. 1190). In his opinion, these were permanent work restrictions, restrictions that the medical department failed to account for when making the return to work decision after the first event. (R. pp. 506-507, 509-510).

allows the Norfolk Southern Medical Department to get involved. Employees “with other functional limitations not clearly predicting adequate, safe performance **must** undergo a field performance test under actual job conditions to determine his/her ability to perform the job properly and safely.” (R. p. 1330). The final return-to-work decision will be made by the Norfolk Southern Medical Director after consultation with the employing department, in this case, the transportation department. (Id.)

Dr. Paula Lina first became involved in the return to work decision *after the second heat injury*, on July 9, 2007. (R. p. 992). Dr. Lina called Dr. Dantzler’s office on July 30, 2007 and confirmed Respondent’s restrictions with his office. (Id.) On August 2, 2007 NSRC Associate Medical Director Dr. Paula Lina medically disqualified Respondent from working as a conductor.¹⁰ She based her decision on a comprehensive review of the medical and hospital records and personal consultation with Respondent’s primary care physician, Dr. James Danzler and consultation with the NSRC Director of Medical Services, Ray Prible. (R. p. 1311; R. pp. 1002-1005; R. p. 1342). Dr. Lina never amended or modified her initial opinion that Respondent was disqualified from his job as a conductor. Dr. Lina’s disqualification forms the basis of the lost wage and lost benefit award.¹¹ Ultimately, the decision about whether Respondent was medically qualified to work rested with the Norfolk Southern medical department (R. p. 1311).

¹⁰ The disqualification letter states in relevant part, “Your persistent medical condition, recurrent, severe heat related illness does not permit safe performance of the essential functions of your position and is inconsistent with our medical guidelines.” (R. p. 1311).

¹¹ Moorer completely mitigated his damages by obtaining full time employment working as a police officer for the Town of St. George, making slightly less than \$30,000 / year. (R. pp. 154, 196, 204, and 530).

Thus, the issue before the jury was not whether the work on P28 was too much or too hot for a healthy, experienced conductor. It was whether it was too much or too hot *for Mr. Moorer* given his inexperience working the job, his increased susceptibility after the first injury, and Defendant's knowledge about his prior heat injury. Respondent introduced more than a scintilla of evidence to warrant submitting the case to the jury and to support the verdict.

C. Evidence of Failure to Provide Emergency Medical Care

According to the Norfolk Southern Director of Medical Services, Dr. Prible, Appellant had a medical policy to minimize the effects of heat related injuries at work: "when in doubt, get them [the heat injured co-worker] to an emergency facility . . . if there is no emergency services available, bring the medical facility to them." (R. pp. 347-348). Nurse Carroll-White agreed. (R. p. 1193) Terminal Superintendent David Stinson agreed. (R. p. 842).

At trial, Count II alleged that NSRC negligently failed to provide Respondent with emergency medical attention on May 31, 2007. While still at Doane Pet Products in Orangeburg, Respondent called Trainmaster Will DeShazor who was working in Charleston, and reported that he was not feeling well at 2:26 p.m. (R. p. 843; R. p. 1351). DeShazor then called his supervisor David Stinson in Columbia at 2:26 p.m., and Stinson took control of the situation. (R. pp. 843-844; R. p.1351).

After Respondent's call to DeShazor, Locomotive Engineer and co-worker Tommy Connelly placed the next call to DeShazor at 2:58 p.m. because Respondent could not place the call himself. (R. p. 174; R. p. 1351). In the period between 2:26 p.m. and 2:58 p.m., with the train moving towards Columbia, Respondent started breathing

heavily; his stomach cramped; both legs cramped; and both hands cramped. (R. pp. 172-173). Respondent stressed to Connelly that he was feeling worse, and Connelly made consistent phone calls to relay the message and report Respondent's worsening condition to Trainmaster DeShazor. (R. p. 173; R. p. 1351). Respondent did not place the calls himself because he "wasn't able to hold a phone because [his] hands were cramped shut." (Id.)

Debilitating cramping is a known and expected result of heat injuries. According to Dr. Prible, cramping associated with heat injuries gives the victim a feeling of "helplessness." When this type of cramping occurs, the only thing to do is "get very still and quiet and hope that they'll [cramps] relax." (R. p. 346). That is precisely what Moorer did. He was not physically able to call anyone as the train moved from Orangeburg towards Columbia, so Connelly called DeShazor three more times at 2:59 p.m., 3:00 p.m. and 3:07 p.m. (R. p. 173; R. p. 1351). In each call Connelly told DeShazor that Respondent was worse than the call before. (R. pp. 154, 738, 741, and 775).

The train continued towards Columbia with Respondent's condition worsening, and the calls from the Connelly shifted to DeShazor's boss, Terminal Superintendent David Stinson, who was working at Andrews yard in Columbia. At 3:21 p.m. and 3:22 p.m. Connelly called and told Stinson that Respondent's condition was worsening. (R. pp. 774-775; R. p. 1353). Stinson, who continued to talk to DeShazor on the phone in the interim, did not know that Connelly had previously told DeShazor that Respondent was worse four times between 2:58 p.m. and 3:07 p.m. (R. p. 846). Stinson testified that

DeShazor should have told him that Connelly reported that Respondent was getting worse during each call. (R. pp. 846-847).

During these calls, the train passed through the towns of St. Matthews and Fort Motte on the Columbia side of the Congaree Swamp where EMS was available. (R. p. 782). Once the train emerged from the swamp but before the train reached Andrews yard, there are at least eight road crossings where EMS could have accessed the train and provided emergency medical care. (R. p. 848). Stinson, who admitted that he was in control of the situation, never called the train or EMS. He talked to DeShazor about work-related matters, but they did not discuss the fact that Connelly reported that Respondent was getting worse in the hot engine.¹² (R. p. 846). If Stinson had known that Connelly had reported to DeShazor that Moorer was worse with each phone call, he might have intervened himself. (R. p. 851). Even the railroad's expert Shea was critical of DeShazor for failing to communicate Moorer's worsening condition to Stinson between 2:58 p.m. and 3:07 p.m. (R. p. 1105).

Appellant did not call EMS until after the engine arrived at the yard, travelled to its ultimate destination, stopped, and Stinson boarded the engine and evaluated the situation. (R. p. 785). Appellant called EMS 3:56 p.m.; EMS was dispatched at 3:57 p.m.; EMS arrived at the yard until 4:11 p.m.; EMS departed for the hospital at 4:32 p.m.; and EMS arrived at the hospital at 4:50 p.m. (R. p. 1349).

The Norfolk Southern Director of Medical Services admits that time is of the essence when treating a heat injury as the body needs to cool as soon as and as quickly as

¹² The trial court excluded evidence that Appellant had air conditioned engines in its fleet and chose not to provide one to Respondent's crew even though it knew of the first heat injury.

possible to avoid further heat injury. (R. pp. 344-345; R. p. 349). Thus, there was abundant direct and circumstantial evidence that Respondent was debilitated and unable to use his telephone from 2:58 p.m. (Connelly's first call after Respondent cramped) until the paramedics arrived at 4:11 p.m. In a 24-minute period (2:58 to 3:22) Defendant learned in six separate calls from Connelly that Respondent was worse, yet NSRC did not stop the train or call EMS when it was available. The supervisors did not discuss Respondent's condition or whether emergency medical care was needed and failed to call for EMS until 3:56 p.m., nearly one hour after Connelly first reported that Respondent was worse.

STANDARD OF REVIEW

Viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party and assuming the credibility of all evidence favoring the non-moving party, the Court must affirm the verdict if Respondent presented more than a scintilla¹³ of evidence such that a fair, impartial, and reasonable juror could find that employer negligence played any part, even the slightest in producing the injury for which damages are sought. Brady v. Southern Ry., 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943); Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957); Rogers v. Norfolk Southern Corp., 356 S.C. 85, 91-92, 588 S.E.2d 87 (2003). To make a jury case, an FELA plaintiff must present more than a scintilla of evidence, *but not much more*. Page v. National R.R. Passenger Corp., 200 Md.App. 463, 28 A.3d 60 (2011) (quoting Aparacio v. Norfolk & W.Ry Co., 84 F.3d 803, 810 (6th Cir. 1996).

¹³ A scintilla is defined as a "trace" of evidence. Blacks Law Dictionary 1347 (7th Ed. 1999).

ARGUMENT AND CITATION OF AUTHORITY

Under the Federal Employers' Liability Act (FELA), the railroad has a non-delegable duty to provide its employees with a safe place to work. Rogers v. Norfolk Southern Corp., 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003). Moreover, railroad carriers are liable to their employees for injuries resulting, in whole or in part, from the employer's negligence. 45 U.S.C. § 51. Congress has mandated that courts must construe the FELA liberally in favor of injured railroad workers. Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). However, under the FELA, plaintiffs must prove the traditional elements of negligence: duty, breach, foreseeability, and causation. Brown v. CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir.1994).

I. Under the Federal Employers' Liability Act Norfolk Southern Had A Duty To Provide Sufficient Manpower And To Assign Respondent To Work For Which He Was Reasonably Suited Given His Known Weakened Condition.

The parties agree that the railroad is negligent if it requires its employee to perform work beyond his physical capacity when the railroad has actual or constructive notice that the employee has diminished work capacity. Fogg v. Nat'l R.R. Passenger Corp., 585 A.2d 786, 789 (D.C. 1991) (Appellant Br., pp. 11-12). Similarly, a railroad has a duty to not aggravate a known weakened physical condition by assigning the employee to work which it knows or reasonably should know would aggravate or cause injury to such employee because of the known weakened physical condition. Ybarra v. Burlington Northern Inc., 689 F.2d 147, n.3 (8th Cir.1982). A railroad has a duty to assign employees to work for which they are reasonably suited and breaches that duty if it assigns an employee to perform work beyond his capacity. Fletcher v. Union Pac. R. Co., 621 F.2d 902, 909 (8th Cir.1980). Finally, under the FELA, the railroad has a

continuing duty to provide adequate manpower and equipment. Kalanick v. Burlington Northern R. Co., 242 Mont. 45, 788 P.2d 901 (1990). Whether the assignment is negligent is a question of fact for the jury. Dunn v. Conemaugh & Black Lick R.R., 267 F.2d 571, 576 (3rd Cir.1959).

A. Respondent was in a known weakened condition when he returned to work after the first heat injury.

The parties agree that Appellant's employees knew that Respondent had a heat-related medical emergency at work on May 9, 2007. On that date, Moorer collapsed along the side of the tracks at Doane Pet Products, and EMS responded with emergent care and transported him to Orangeburg hospital where he spent three days recovering. (R. p. 167). The un rebutted evidence shows that this first heat event predisposed Respondent to a second heat injury, meaning that when he returned to work on May 30, 2007 Respondent was in a known weakened condition. The question for the jury was whether, given this knowledge, NSRC negligently assigned Respondent to work the same job, staffed the same way, but in hotter conditions than at the time of the first heat injury.

The jury had more than a scintilla of evidence on this point. First, Appellant staffed the job on May 30 and May 31 with a two-man crew – engineer and conductor only, even though Appellant had the ability and the management prerogative to assign an additional worker to the P28 to share the work with Respondent once he returned to work. (R. pp. 667, 698). In the years before this incident, Appellant staffed the P28 with a three-man crew, and it retained that ability at the time of the incident. (R. pp. 654-655; R. p. 1593). Furthermore, the P28 job was both physically and mentally demanding, especially for “rookie” employees on that job. (R. pp. 283, 285). According to the co-workers who knew the job and worked it regularly both before and after the incident as

part of a two-man crew, experience – which Respondent lacked – allowed a conductor to work efficiently and not “walk himself to death.” (R. pp. 473, 474-475).

Next, the medical and expert witnesses testified that a first heat injury predisposes a worker to a second heat injury. The primary care physician, Dr. Dantzler, testified that the first heat injury decreased Moorer’s heat tolerance and increased the likelihood of a second, more serious heat injury. (R. p. 505).

The railroad industrial hygiene expert¹⁴ James Shea was probably the best witness on this point. Based on his training and experience, a prior heat injury lowers the body’s ability to dissipate and tolerate heat and predisposes an individual to additional injury (R. p. 1100). A heat-injured worker is more susceptible to further injury due to heat exposure because he has a “somewhat lower or altered tolerance to be able to dissipate the heat in the body.” (R. p. 1101). The notion that a prior heat injury will predispose a person to additional injury has been generally accepted in the field of industrial hygiene “for some time.” (*Id.*). Tellingly, Appellant fails to even mention Shea’s testimony in its brief. It completely ignores his expert testimony that establishes beyond any doubt that Respondent was in a weakened condition when he returned to work after the first incident.

Finally, Professor Douglas Casa, a Ph.D. in exercise physiology at the University of Connecticut, explained that the second heat injury was 100% preventable if Appellant had properly managed Respondent’s return to work after the first injury, given his known weakened condition. (R. pp. 413-414). Exercise physiology is the study of the human

¹⁴ Appellant has an industrial hygienist on staff, but rather than use an in-house expert, it retained Shea. He admitted on cross-examination that *before the travel and testimony for the second trial*, Appellant had already paid him \$39,375. (R. pp. 1096, 1102).

body and how it relates, adapts, changes during the act of exercise or labor in any kind of physical work. (R. p. 380). In addition to his responsibilities teaching, Dr. Casa frequently works on site managing heat injuries at extreme races like the Boston Marathon, New York City Marathon, and Marine Corps Marathon in Washington, D.C. (Id. at 381). Over the last 17 years, he has managed and treated more than 125 heat strokes “with zero deaths.” (Id.). He works regularly with high schools, colleges, professional teams, and the US Military to develop policies related to heat and hydration. (Id.). He has published on fluid replacement as the lead author for the National Athletic Trainers Association; he co-authored a position statement on exertional heat illness; he chaired the Inter-Association Task Force of 18 organizations including the NIH Centers for Disease Control to develop a policy statement on exertional heat illnesses; he co-authored the position statement of the American College of Sports Medicine on exertional heat illness; and in 2009 with Dr. Fran O’Connor, he co-chaired the US Military’s efforts to revamp the U.S. Army’s guidelines for return to duty for soldiers following exertional heat stroke.¹⁵ (Id.)

Applying his extensive education and training to the facts of this case, Dr. Casa opined that Appellant should have managed Respondent’s return to work after the first heat injury. Specifically, Respondent needed to undergo a supervised heat acclimatization process before returning to full duty under the same or similar work conditions because Respondent lost “a great percentage” of his fitness level and “completely lose [his] heat acclimatization.” (R. pp. 399-404, 405) He faulted Appellant for failing to follow a two-step process to return Respondent to work: evaluation

¹⁵ The surgeon general of the U.S. Army approved the new guidelines on June 22, 2009.

followed by heat acclimatization. (R. pp. 410-411). Specifically, Appellant failed to return Respondent to work in a gradual manner and failed to determine whether he was capable of handling the work before allowing him to return.¹⁶ (R. p. 407).

Appellant makes a weak attempt to discount Dr. Casa's testimony. Without question he is one of the leading heat exposure experts in the country, with a special focus on designing and implementing return-to-work and return-to-duty strategies for those who suffer a serious heat injury, then attempt to return to work. The strategies that he developed for the US Military and which the US Army adopted apply equally to workers like Respondent in a civilian setting. The trial court heard argument on this point and edited the deposition testimony to conform to Watson v. Ford Motor Co., 398 S.C. 434, 688 S.E.2d 169 (2010). (R. pp. 369-370).¹⁷

Appellant's logic fails in arguing against the trial court allowing Dr. Casa to apply his peer-reviewed and accepted return-to-work strategies to the railroad environment. According to him, in every case, one must consider the cause of the condition in the first place, the extent to which the employee has recovered, and the fitness deficit created after the first injury. (R. p. 404). In this case, Appellant "made a mistake [because] they made no effort to get [Respondent] back to duty in a gradual manner. They had no idea or way

¹⁶ The Norfolk Southern Fee for Service Provider Manual specifically allows for the type of supervised work evaluation suggested by Dr. Casa. It mandates field-testing process where the injured employee interacts with a professional who can evaluate the employee's fitness for duty and devise an appropriate acclimatization strategy. (R. p. 409).

¹⁷The trial court looked carefully at the testimony and distinguished Dr. Casa from the expert in Watson, who testified out of his area of expertise. "Dr. Casa does have experience and expertise with heat illness and acclimatization in a particular setting." (R. p. 374). The qualification of a witness as an expert is within the trial court's discretion and will be reversed absent abuse of discretion. Fields v. J. Haynes Waters Builders, Inc., 376 S.C 545, 555, 658 S.E.2d 80, 85 (2008).

of knowing if he could handle the activity when he went back.” (R. p. 407). After receiving the preliminary advice from Dr. Dantzer, it was ultimately the responsibility of the Appellant to decide if Respondent was medically qualified to work or not. (R. p. 408). Clearly, Dr. Casa published and implemented return to work strategies in the most extreme work settings (combat soldiers and elite athletes), then applied those strategies to this case to reach his opinions. Appellant fails to suggest why a strategy designed to return the soldiers to work and elite athletes to play under the most extreme conditions does not apply equally to a slightly less demanding work environment.

Somehow, Appellant fails to even mention that its own Fee For Service Provider Manual mandates that the railroad use the exact strategies suggested by Dr. Casa. It fails to mention that it had the ability and the duty to evaluate Respondent’s physical status, his conditioning, and his ability to work. It also fails to tell the Court that its own expert Shea agreed with the same strategies discussed by Dr. Casa.

Q: Acclimatization is an important consideration for people who are determining whether or not somebody is susceptible to a heat injury. That’s all I’m really asking, Mr. Shea.

A: It is important in certain circumstances, yes, of course.

(R. p. 1107)

Q: Existing medical conditions – that is an important consideration, susceptibility factor in figuring out whether somebody is predisposed to a heat stroke, or heat injury, right?

A: Absolutely.

(R. p. 1108).

Q: We have to look at Trumaine's situation in the context of Trumaine and his medical condition in looking at the job, don't we? Don't we?

A: Yes.

(R. p. 1108).

Finally, Appellant fails to tell this Court that the front line supervisor who was responsible for helping Respondent's attempt to return-to-work after the first heat injury had no training or experience in that area. Will DeShazor testified:

Q: Have you had any training of any kind whatsoever from Norfolk Southern on how to properly manage and counsel someone after they have had a heat injury?

A: The training is from the rule book, but no, not classroom or anything like that. No, I have not spoken to someone about that. I am just privy to that information.

Q: Well, do you know anything at all about how to properly manage and counsel somebody who is coming back from a heat injury?

A: Like I said, aside from the normal practices of hydration and work rest periods, no, sir.

Q: Because I have asked you that exact same question before, and your answer was, no, sir then; correct?

A: Right. Nothing specific as far as, you know, post – right.

(R. p. 723).

Applying the negligence principles outlined in Fogg v. Nat'l R.R. Passenger Corp., 585 A.2d 786 (D.C. 1991), the trial court properly submitted the case to the jury and denied the motion for JNOV. In Fogg, the plaintiff was a customer relations specialist who returned to work following back surgery. The Defendant knew that she

faced challenges upon her return to work and that her unmodified job could be beyond her physical abilities. The railroad, just like Appellant in this case, argued that it had no duty to provide accommodated work and that the trial court erred when it charged the jury on the railroad's duty with respect to the health and safety of its employees.¹⁸ In affirming the verdict for the Plaintiff, the Court of Appeals for the DC Circuit agreed that there was no duty to provide part-time work but explained that railroad officials could not simply ignore Plaintiff's physical condition. Allowing Plaintiff to work at an unmodified job despite actual or constructive knowledge that she had diminished work capacity could aggravate previous injuries, was sufficient to sustain the verdict. Id. at 789-790.

In this case, the facts are analogous, but even more compelling. In this case, Appellant did have the ability to modify the job within the terms of the union contract by adding a brakeman to the job, especially when the weather was significantly hotter than when the first event occurred. Even more fundamentally, Appellant knew or should have known that Respondent had a diminished ability to cope with and safely handle strenuous work in light of his diminished work capacity according to every expert witness in the case. Appellant was monitoring his medical condition by collecting records, and it had the records from the first hospitalization in Orangeburg starting on May 9, 2007. It also had the ability to call and speak to Respondent's physician, as evidenced by the fact that Dr. Lina called Dr. Dantzer's office after the second injury. Also, Appellant had the ability to evaluate Respondent's work capacity in its field-testing procedures, yet it chose

¹⁸ The charge stated: "A railroad company breaches that duty if it negligently requires its employees to perform work beyond her physical capacity, that is if the Defendant knew or should have known of the Plaintiff's diminished work capacity and in spite of that knowledge Defendant unreasonably continued to assign Plaintiff to tasks that Defendant knew or should reasonably have known would aggravate her physical condition." Fogg, 585 A.2d. at 789.

to skip that critical step. Just like Fogg, Appellant could not simply ignore the longstanding and accepted principle that one who suffers a heat injury is susceptible to another injury and assign him to work the same unmodified job under hotter conditions and thereby expose him to an unreasonable risk of harm, given his known weakened condition.¹⁹ The trial court properly applied the law to the facts of the case, and the verdict must be affirmed.

B. Dr. Dantzler imposed permanent work restrictions after the first heat incident, and the trial court did not impose a duty on Appellant to second-guess his opinions.

The allegations at trial were that given the totality of the circumstances, the railroad negligently assigned Moorer to work the P28 in late May, 2007. Respondent introduced into evidence many factors to support this allegation. These factors included (1.) the temperature and humidity on May 31, 2007, especially when compared to the cooler temperatures surrounding the first incident; (2.) the demands of the P28 job for inexperienced employees like Respondent; (3.) the railroad's admitted ability to staff the job with three men; (4.) the railroad's field-testing process to evaluate whether Respondent was physically ready to work and heat properly heat acclimatized; (5.) Respondent's physical condition and predisposition to sustain another heat injury given the totality of the working conditions; (6.) and, the work restrictions from Dr. Dantzler, the primary care physician.

¹⁹ Judge Benjamin correctly charged the jury as follows: "The Defendant Railroad has a duty to exercise reasonable care so as not to aggravate a known weakened physical condition or disability in an employee by assigning that employee work which the Defendant knows or in the exercise of reasonable care should know would aggravate or cause injury to such employee because of he known weakened physical condition or known disability." (R. pp. 1279-1280).

On item 6 above, Appellant represents to this Court that after the first heat injury that Dr. Dantzler returned Respondent to work without restrictions. (App. Br., p. 13). This assertion is wrong. It misrepresents the facts and ignores the testimony of Dr. Dantzler. Furthermore, Appellant asserts that during opening statement, Counsel admitted that Appellant “was not on notice of any work limitation generated by his private physician.” (App. Br., p. 13). This statement is grossly misleading and misrepresents what was said and what actually happened.

Consider the testimony of Dr. Dantzler:

Q: Would you go back through what those restrictions were after the first incident that you released Mr. Moorner to return to work with?

A: My exact words as far as written in the chart were: Frequent breaks during the heat, increase fluid intake, no caffeine or ethanol. The episode of dehydration had resolved, and return to regular duties.

(R. pp. 506-507)

* * *

Q: So I think that we now have an understanding that from the time you first saw Mr. Moorner after the first incident, up until today (December 2, 2009) the restrictions that you have articulated to us a moment ago have always been in place?

A: Yes, sir.

Q: Meaning that those restrictions are in place today and he should abide by those in the future?

A: Yes, sir.

Q: So what you are saying, is you would like him to return to work in some capacity, and therefore he is released; but at whatever job he works, at Norfolk Southern or otherwise, he needs to abide by your restrictions?

A: Yes, sir.

Q: And those are permanent?

A: Yes, sir.

Q: And that is expressed – is that opinion expressed to within a reasonable degree of medical certainty?

A: Yes, sir.

(R. pp. 509-510).

Somehow, Appellant reads this testimony to mean that Dantzler provided “unrestricted medical clearance.” (App. Br., pp. 1, 13).²⁰ This testimony demonstrates that Dr. Dantzler imposed restrictions on Respondent’s work and his consumption. Appellant incorrectly assumes that the return to work slip, which did not contain any restrictions, ends the discussion. Clearly it does not.

The railroad was actively managing the return to work status of Respondent, yet contrary to the assertions of Appellant, Respondent does not now and has never argued that the railroad had a duty to second-guess Dr. Dantzler. Instead, the allegation at trial was that the failure to obtain all the records, including the records that clearly set forth the restrictions, was but one small piece of evidence to explain the Appellant’s negligent

²⁰ In its Statement of Issues on Appeal, Appellant calls it an “unrestricted medical clearance.” In its brief, it is more careful and candid. The return to work slip contained no restrictions, but the notes from the office visit contained permanent restrictions. Ignoring Dantzler’s deposition testimony that clarifies and explains the entire situation does not change the facts.

assignment of Respondent to P28 on May 31, 2007. Even without the records or the restrictions, there is no dispute that Respondent was predisposed and vulnerable to a second injury. The failure to learn of the restrictions simply highlights the larger negligent decision to return Respondent to the P28, staffed with a two-man crew, in 88-degree weather, knowing that he had collapsed three weeks before and had never been through a medical field test to evaluate his fitness for duty. Appellants weak attempt to hide behind the return to work slip and ignore the overwhelming proof of the negligent assignment must fail.

Factually, Nurse Carroll-White did not have the notes wherein Dr. Dantzler imposed restrictions. Dr. Dantzler did release Respondent to work, but his notes clarified the work conditions. (R. pp. 509-510). Nurse Carroll-White obtained the hospital records with Respondent's help, and she simply assumed that there were no restrictions. She never spoke to the doctor, and she got the critical records only after the second heat injury. Once Dr. Lina got involved and called the doctor's office and finally understood the situation, she medically disqualified him from service as a conductor at Norfolk Southern.²¹

Respondent argued to the jury that given the totality of the circumstances, that on May 31, 2007 Appellant negligently assigned him work to the exact same job, staffed the exact same way, under conditions more than ten degrees hotter than the May 9, 2007. The weather and staffing evidence alone are sufficient to create a jury question and

²¹ In opening statement, Counsel told the jury that Dr. Dantzler completed a return-to-work slip, that he imposed restrictions in the May 17, 2007 office note, and that the Norfolk Southern medical department did not have the notes. The medical department was monitoring the situation and gathering relevant records, and it should have obtained the May 17, 2007 before releasing Respondent to work. Counsel did not say that Respondent was released without restriction. (R. p. 61).

provide more than a scintilla of evidence to support the verdict. However, the medical evidence makes it clear that Respondent, at the time he returned to work on May 30, 2007, was vulnerable and more susceptible to another heat injury than he would have been had he not suffered the first heat event. Given his known weakened condition, the railroad compounded the problem by not obtaining the medical records with the restrictions, not properly understanding the extent of his susceptibility, and not following its own field testing procedures. Finally, there was more than a scintilla of evidence that Will DeShazor had no training on how to assist Moorner in his return to work and that he took no steps to participate in the required field testing procedure, a process which would have prevented the second heat injury according to Dr. Casa.

II. Respondent Introduced More Than A Scintilla Of Evidence That Appellant Was On Notice That There Was An Emergency And That Moorner Could Not Help Himself.

What triggers a railroad's duty to render emergency aid is a showing that (1.) an emergency exists; (2.) the employee's condition is such that he is in "immediate danger of loss of life or great bodily harm"; and (3.) the railroad has actual or constructive knowledge of the emergency. Handy v. Union Pacific R. Co., 841 P.2d 1210 (Utah Ct. App.) (1992). In this case Respondent produced more than a scintilla of evidence to show the severity his condition and the railroad's knowledge of that condition triggered the duty to provide emergency medical attention.

Factually, David Stinson (in Columbia) and will DeShazor (in Charleston) knew that Moorner had a prior heat injury on May 9, 2007. Stinson, who took control of this situation at 2:26 p.m., admitted that he knew that heat injuries are very serious conditions that can be life threatening.

Q: And the reason for the training [by the railroad] that you perceive is because you learned that heat injuries are very, very serious and potentially life-threatening, right?

A: They can progress that way, yes, sir.

Q: I mean, you've been trained on that point by your employer?

A: Internally the heat-related illnesses can get worse.

Q: And if they progress to their logical conclusion they can be life threatening?

A: Yes.

Q: You knew at the time you were at work on the 31st of May, you knew all these concepts about the magnitude and potential of life-threatening harm for a heat injury, right?

A: Yes, sir.

(R. pp. 842-843).

The evidence is also un rebutted that Respondent could not use his telephone after he placed the first call at 2:26 p.m. to DeShazor because his hands cramped shut. (R. p. 710; R. p. 173).²² He told engineer Connelly that he needed EMS. (R. p. 173). In response, Tommy Connelly called DeShazor at 2:58 p.m., 2:59 p.m., 3:00 p.m., and 3:07 pm to relay that Respondent felt worse.²³ (R. pp. 154, 738 and 741). During these calls the train was on the Charleston side of the Congaree Swamp and the towns of St. Matthews and Fort Motte where EMS was available. (R. pp. 745, 782-783). Connelly continued to ask Respondent how he felt, and learned, "he felt like he was getting worse." (R. p. 773).

²² By the time the engine arrived at Columbia, Respondent looked flushed, had bags under his eyes, his forearms were visibly swollen tight, and he was hanging out the window of the engine. (R. p. 149).

²³ DeShazor never called Connelly between 2:26 p.m. and 2:58 p.m. (R. p. 738).

Once Connelly spoke to Stinson at 3:21 p.m. and 3:22 p.m., he told the boss that Respondent had informed him that he was feeling worse. (R. p. 775). Connelly admitted that he tried his best to relay what Respondent was telling him. “I was trying to keep Mr. Stinson and everybody apprised of what was being told to me if Mr. Moorer said he was feeling worse I would call and let them know that that is what he told me.” (R. p. 776). Based on what Respondent told Connelly, he “was getting worse the whole time.” (R. p. 786).

Critically, DeShazor never told Stinson that Respondent was getting worse. (R. p. 846). Stinson was critical of DeShazor on this point. When asked if DeShazor should have informed him that Connelly had relayed to him several times that Respondent was getting worse, Stinson candidly replied, “[i]f in fact Tommy told him that, yes, sir.” (R. p. 846). When on cross-examination Stinson was confronted with the failures of DeShazor, he admitted that Appellant breached its duty:

Q: If I tell you that Mr. Connelly called – Mr. Connelly and Mr. DeShazor spoke at 2:58, at 2:59 and at 3:00 o’clock and at 3:07 on [the Charleston] side of the swamp and in every one of those phone calls Mr. Connelly said that Trumaine was worse, do you think, Mr. Stinson, that at some point back here you, had you known that, would have said, why don’t you guys stop the train and let’s get an EMS vehicle to Trumaine?

A: Yes. The first phone call from Will was stating that Trumaine was ill. And we had a conversation. He is right there at Orangeburg at the hospital. And he said no, they are just going to head back to Columbia.

(R. p. 848).

Had he known what DeShazor knew, he might have intervened himself. (R. p. 851). The railroad expert also admitted that DeShazor should have relayed the messages from Connelly about Moorers' condition. (R. p. 1105).

Appellant's argument that counsel exculpated Norfolk Southern from liability by not blaming Tommy Connelly is ridiculous. Connelly was a conduit for information between the train and Appellant's supervisors after Respondent's hands cramped and he could not operate his telephone. Connelly has no medical training, and he made it clear that he simply relayed information to DeShazor and Stinson, while simultaneously operating the train at track speed. The evidence showed that both supervisors knew of the prior heat injury; both knew that Respondent was on his second day back to work after collapsing in the ballast, and spending time in the hospital. Both learned from Connelly that Moorers was bad and getting worse. Respondent told Connelly that he needed EMS, and Connelly was "trying to keep Mr. Stinson and everybody apprised of what was being told to me." If railroad supervision told Connelly to stop the train at St. Matthews or in Fort Motte, there was access to EMS, and they could have got EMS to Respondent. (R. p. 782).

Respondent did not receive any medical attention until 4:11 p.m. while he was still on the train. The evidence shows that there were 7 phone calls to supervision between 2:58 and 3:21 as the train moved from Orangeburg, to the Congaree Swamp, and to the outskirts of Columbia. There is more than a scintilla of evidence that Moorers faced a medical emergency, relayed his condition to Appellant's supervisors via Connelly, and that the railroad did nothing to provide emergency medical attention.

Appellant's reliance on Bell v. Norfolk Southern Railway Company, 222 Ga.App. 788 (1996) is misplaced. Factually, the plaintiff in Bell felt dizzy but was coherent when he told his supervisor that he was having "another of his spells." After supervision took him to an air-conditioned office, he told supervisors that he needed water, that he could work, that he could drive himself home, that he did not want them to call his wife, and that his doctors did not know what was causing recurrent dizzy episodes. 222 Ga.App. at 790. Nothing in the record showed that the plaintiff in Bell was unable to help and care for himself. (Id.) Logically, Bell's behavior was not a medical emergency, and the facts failed to establish that he could not help himself. The case has no application to this appeal.

III. Respondent Introduced More Than A Scintilla Of Evidence That Respondent Suffered Injury During The Delay In Medical Treatment.

As described above, there is unrebutted evidence that Respondent's condition worsened significantly between 2:58 p.m. when Connelly placed the first call to management and when EMS arrived at 4:11 p.m. The fire department arrived at the scene first and could not physically get Respondent off the train. They grabbed him under his arms and legs, but he started to cramp again, and Billy Chavis saw him "hanging out the window of the engine." (R. p. 126). Then, the paramedics used a special chair to try to get him down from the engine. (R. p. 127). It took four responders to remove Respondent from the engine. (Id.) There is no medical proof necessary for the trier of fact to assess pain and suffering damages by comparing the before and after condition. There was ample evidence for the jury to find for Respondent and award damages. Perhaps the best evidence relating to the need for prompt care in a heat injury case comes from the Director of Medical Services, Dr. Prible. He testified that that time

is of the essence when treating a heat injury as the body needs to cool as soon as and as quickly as possible to avoid further heat injury. (R. pp. 344-345, 349).

IV. Dr. Lina's Disqualification Letter Of August 2, 2007 Was Properly Admitted And Provides The Basis For The Lost Future Wage Claim.

Appellant stretches to make the argument that Respondent somehow failed to introduce evidence to support the verdict for future lost wages and benefits. There is no dispute that Respondent is and has been medically disqualified by Appellant since August 2, 2007. There is no dispute that Appellant, acting through its medical department, has the last and final word on whether medically qualifies to work. Irrefutably, if Appellant does not qualify Respondent to work, then he cannot work as a conductor for Appellant. Respondent proved his case relating to the negligence of Appellant, and the jury accepted that his career as a conductor at the railroad is over based on the opinions of the medical department. Regardless of what any other doctor says or thinks, Dr. Lina's disqualification is the only opinion that matters.

With respect to Dr. Lina's opinions and explanation for her decision to disqualify Respondent, the trial court carefully and painstakingly parsed the depositions and excluded only the parts of the testimony where Dr. Lina had no basis for her opinions. The Court admitted the opinion of Dr. Lina that she did not believe that Moorers' heat injuries were related to the work environment. It did not, however, allow Dr. Lina to speculate about possible other causes that might possibly explain the kidney failure. The trial court explained, "I think even under the relaxed standard under the FELA she has to do more than just guess what it is not, and then she just guesses²⁴ as to all the other things

²⁴ Appellant admits that the opinion testimony cannot be speculative. (App. Br., p. 37); See, Mayew v. Bell S.S. Co., 917 F.2d 964 (6th Cir. 1990).

it could possible be.” (R. p. 810). If anything, the Court leaned in favor of Defendant on this point of evidence because Dr. Lina admitted that she did not know what was the cause of Plaintiff’s “heat illness.” Logically, if she was not able to state what is the cause then she cannot state what is not the cause, but nevertheless, the Court admitted this “not the cause” opinion over objection. Defendant’s argument for reversal based on its own company doctor not being allowed to speculate about some unknown and unidentified genetic predisposition or a supplement possibly being the “cause” of the injury is completely meritless.

V. Miscellaneous Jury Charges.

At the end of Appellant’s brief it makes several weak arguments that are not supported by either the law or the facts. Respondent will address each in the order raised by Appellant.

A. Duty to monitor employee’s medical condition.

Appellants argues “Respondent’s entire theory for his negligent assignment claim depended on the law recognizing a duty for the railroad to proactively seek out, monitor, and intervene in an employee’s medical situation.” (App. Br., p. 41). Conveniently, Appellant ignores the staffing and manpower allegations, the hotter temperature, and Respondent’s vulnerability, all of which supported the negligent assignment claim. Appellant argues that its medical department was involved in the return to work decision, that it actively collected medical records, that it had access to the medical professionals both in writing and on the phone, and that it knew about the medical vulnerability caused by the first heat event, but that it could not have known that it was likely that Respondent would suffer a second heat injury. Respondent contends Appellant could not have

followed its own protocol and had him field-tested to evaluate his condition, and allowed for proper heat acclimatization before his final release to return to work.

Request to charge No. 6 was not tailored to the facts of the case. Appellant on its own accord monitored and followed Respondent's medical condition after the first heat event. It assigned a nurse to collect the records and make the return-to-work decision. It failed, however, to collect all of the records, including the critical records from May 17, 2007, which contained the work restrictions. In that context, the railroad in general, and the transportation department in particular made staffing and work decisions for Respondent. Will DeShazor did not know of the restrictions, and he had no training on how to properly advise an employee returning from a heat injury. The negligent assignment was made not only in the context of the incomplete information gathered by the medical department but also in the face of the unrebutted medical evidence that Respondent was medically vulnerable and susceptible to a second heat injury.

The trial court correctly declined to give Appellant's Request to Charge 29. The first paragraph is the same as Appellant's Request to Charge 6 above, and the second paragraph, although a correct statement of the law, is duplicative of the correct statement of the law as charged by the court. (R. pp. 1279-1280).

B. No negligence based on shortcomings of the vocational rehabilitation department.

Defendant's argument regarding the failure of the Court to charge regarding rehabilitation services is meritless. The railroad brought its Director of Vocational Rehabilitation as a witness at trial to bolster its mitigation defense. It argued that there are numerous jobs at NSRC paying more than Plaintiff is currently making as a police officer. NSRC put into evidence the credibility of the program and its effectiveness. All

Respondent did was undercut and discredit the program and the suggestion that the program was working well and effectively run by competent professionals. The issue at trial was mitigation: did Respondent act reasonably to lessen his damages? Appellant picked the mitigation fight, and it suffered the consequences. The mitigation charge was complete and accurate. (R. pp. 1280-1281). Appellant's Request to Charge 11 contains no case citation, and counsel is unaware of any state or federal court to have ever given this charge.

C. Failure to charge on alleged rule violation.

Appellant argues that the Court should have charged the jury regarding a safety rule violation for conduct that was not at issue at trial. The argument relates to Plaintiff's alleged failure to promptly report the first heat event in early May 2007 even though Respondent dismissed that count, and Appellant never charged Respondent with violating any rule. Respondent argued at trial and maintains that comparative fault was not an issue because Plaintiff's conduct for events unrelated to the events of May 31, 2007 is simply not relevant to any issue in the case. Over objection, the trial court charged on comparative fault, and the jury assigned 40% fault to Respondent. The issue was fully argued, charged, and the jury apportioned fault.

D. Charge that duty to provide safe workplace increases as risk of harm increases.

The medical evidence in the case was un rebutted that heat-related injuries like those suffered by Moorer can be life threatening. (R. p. 342). The Appellant admits that time is of the essence when treating a heat injury as the body needs to cool as soon as and as quickly as possible to avoid further heat injury. (R. pp. 344-345, 349). The charge

complained of is black letter law from the United States Supreme Court. Urie v. Thompson, 337 U.S. 163, 179-80, 69 S.Ct. 1018, 1029 (1949).

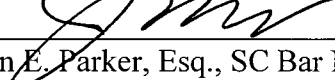
VI. Respondent's Handicapped Son.

The trial court properly allowed limited testimony regarding Respondent's handicapped son to explain to the jury why, in the context of mitigation, he chose not to take certain job opportunities. The court heard argument on this point, and counsel agreed to limit the testimony to the context of explaining Respondent's family circumstances and need for health insurance. Counsel told the court, "[w]e will not overplay our hand. We understand the parameters of fair play. We will stay on this side of the boundary." (R. p. 50). Accepting the representation of counsel, the trial court allowed limited testimony on this point. Appellant points to no evidence in the record to indicate that Respondent pandered to the jury or appealed to their sympathy. There is no suggestion that Counsel exceeded the limits of his promise to the court. The trial court properly instructed the jury that they "may not award damages based on sympathy, speculation or guesswork." (R. p. 1283).

CONCLUSION

Respondent introduced more than a scintilla of evidence to support the jury verdict, and the trial court committed no error. Respondent respectfully requests that this Court affirm the award and deny Appellants request for relief.

This 12 day of July, 2013.

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In The Court of Appeals
No. 2012-212062

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-40-5460

Trumaine V. Moorer,

Respondent

v.

Norfolk Southern Railway Company,

Appellant


CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b) SCACR.

July 12, 2013

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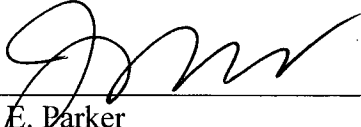
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of July 2013, he served the foregoing *Final Brief of Respondent* on counsel of record by forwarding a copy of the same via U.S. Mail postage prepaid, addressed as follows:

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