IN THE COURT OF APPEALS 2/25/97

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01026 COA

GROVER INGRAM

APPELLANT

v.

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

CHARLES THOMAS JONES JR.

GERALD HUGH GIBSON

ATTORNEY FOR APPELLEE:

GEORGE H. RITTER

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY VERDICT FOR EMPLOYER

BEFORE THOMAS, P.J., PAYNE AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Grover Ingram was denied relief on a personal injury claim against Illinois Central Railroad Company. Feeling aggrieved, Ingram appeals assigning four issues as error. Finding no error, we affirm.

FACTS

This action arises under the Federal Employers' Liability Act (FELA). On the morning of April 17, 1989, Ingram, a welder and maintenance worker for Illinois Central, hurt his back while attempting to repair a damaged wing on a ballast regulator. A ballast regulator is a self-propelled track machine used to smooth out ballast or crushed rock dumped on the railroad track. Each wing consists of three sections weighing approximately 300 to 500 pounds. Ingram, along with Willie Chism and Dale May, lifted the wing until it rested on a railing block. It then became necessary to use a track jack to have the wing jacked up a few inches so that the hinges on the wing could become aligned, allowing a pin to be inserted. After Ingram reached across his body to pick up the track jack, he felt a "sting" in his back. The track jack weighed 47 pounds.

Ingram continued to work the rest of the day without any complaint of injury or pain. Ingram testified that he felt worse that night. The next day, he filled out an accident report and was taken to see the railroad's physician. He was later diagnosed with a ruptured disc and eventually had back surgery to remove the disc.

ANALYSIS

I.

DID THE TRIAL COURT ERR IN DENYING INGRAM'S INSTRUCTION ON THE ISSUE OF ASSUMPTION OF THE RISK?

At the close of evidence, Ingram proposed an instruction which would have allowed the jury to find that Ingram did not assume the risk of his injury. The proposed instruction stated:

> Jury Instruction No. P-13--Section 4 of the Federal Employers' Liability Act [45 U.S.C.A. § 54] provides in part that:
>
> > "In any action brought against any common carrier . . . to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier."
>
> If the Plaintiff's injury is caused or contributed to by the negligent act or omission of a fellow employee, acting in the course of his employment, then the defendant employer

> would be responsible for the act or omission of the fellow employee.

The trial judge excluded any mention of assumption of the risk in a pre-trial motion in limine; therefore, the court refused the instruction.

We must first point out that our efforts to completely review this matter were hampered because we were not provided the complete record of the instructions granted and refused by the trial judge. We were only provided with the one instruction that this Court is now asked to review. Putting this aside, Ingram asserts that Illinois Central introduced the issue of assumption of the risk through its cross-examination of Ingram, himself, and Dale May and Willie Chism, the other workers present when Ingram was injured. Therefore, Ingram contends the jury should have decided whether he assumed the risk. However, Ingram did not object to any of the testimony which he now contends led to the injection of assumption of the risk evidence. Ingram also failed to raise this error in his motion for a new trial. Our Supreme Court has stated that, "[w]here a party neither provides the specific grounds for an objection at trial nor asserts the issue on motion for new trial, this Court need not consider any alleged error on appeal." *Materials Transp. Co. v. Newman*, 656 So. 2d 1199, 1203 (Miss. 1995); *Anderson v. Jaeger*, 317 So. 2d 902, 906-07 (Miss. 1975).

Procedural bar aside, we find no cause for reversal. "At common law an employees' voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties constitutes assumption of risk." *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d, 1309, 1316 (9th Cir. 1986). However, FELA abolished the common law doctrine of assumption of the risk. 45 U.S.C. §54. To have given the jury an instruction dealing with assumption of the risk would have likely only caused confusion among the jury. *Texas & Pacific Ry. Co. v. Buckles*, 232 F.2d 257, 262 (5th Cir. 1956), *cert. denied*, 76 S.Ct. 1052 (1956). Further, assumption of the risk was not defined in the proposed instruction. The proposed instruction was vague as to the law and would likely be confusing to the average juror. "It is well settled that jury instructions which are mere abstract principles of law and which are not applied to the specific facts of the case should not be given." *Estate of Lawler v. Weston*, 451 So. 2d 739, 741 (Miss. 1984).

As noted earlier, Ingram asserts that Illinois Central injected assumption of the risk into the trial by its cross-examination of Dale May and Willie Chism. However, the questions asked on cross-examination by counsel for Illinois Central were designed to show, first, that Illinois Central was not negligent, and, second, if Ingram were injured, his own negligence was the cause of the injury. The answers to these questions show that the workplace provided by Illinois Central was safe, the work method was proper and safe, and it was Ingram, himself, who was the cause of his injury by picking up the track jack in an awkward manner. By posing these questions, Illinois Central was defending itself against any allegation of wrong doing and shifting the blame to Ingram. Since Illinois Central did not inject assumption of the risk into this case, it would have been error to instruct the jury on issues that were not supported by the facts. *Peoples Bank and Trust Co. v. Cermack*, 658 So. 2d 1352, 1366 (Miss. 1995).

Finally, Ingram asserts that he was acting under a direct order from his foreman when he was injured, and relies on *Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206 (9th Cir. 1994), to further argue that the instruction on assumption of the risk should have been granted. The *Jenkins* court held that:

> when an employee carries out his supervisor's general order in an unsafe manner, he is

> responsible under FELA for his own contributory negligence. But when an employee carries out a direct order, even if he has reason to know the order exposes him to danger, he is not contributorily negligent; rather his conduct falls under the abolished doctrine of assumption of risk.

Id. at 211.

Jenkins points out that where an order has been given, if the person has a choice open to him as to the manner in which to carry out the order, this will be construed as a general order. *Id.* (quoting *Atchison T. & S.F. Ry. Co. V. Seamas*, 201 F.2d 140, 144 (9th Cir. 1952)). From the testimony presented at trial, it is clear that Ingram was acting under a general order when he injured himself. The method of moving the track jack was a choice open to Ingram alone. No one ordered Ingram to pick up the track jack in the manner which led to his injury. Ingram testified that no one told him to move the track jack in that manner, and that he was solely responsible for determining how to move the track jack. From these facts, the trial court correctly found there was no basis for granting the instruction on assumption of the risk.

II.

DID THE TRIAL COURT ERR IN BARRING INGRAM'S EXPERT WITNESS FROM TESTIFYING AS TO NEGLIGENCE ON THE PART OF ILLINOIS CENTRAL?

Ingram contends the trial judge erred by not allowing Dee Quicksall to testify as an expert. Quicksall had forty-one years of experience as a laborer, foreman and bridge inspector in the railroad industry. However, Quicksall had no formal training or experience in the repair of a ballast regulator. Quicksall was to testify as to the proper and safe methods of performing the work which Ingram was doing at the time he was injured. In disqualifying Quicksall, the trial judge stated there is no relevance to the testimony which Quicksall plans to give an opinion as to his expertise.

Although the Supreme Court has held that formal education is not the only means of becoming an expert in a particular field, *City of Mound Bayou v. Roy Collins Construction Co.*, 499 So. 2d 1354, 1360 (Miss. 1986), the witness must still adhere to the standards set forth in Mississippi Rule of Evidence 702. The rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Miss. R. Evid. 702.

"A witness may qualify to give an expert opinion through his experience." *City of Mound Bayou* at

1360 (quoting *Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1050 (Miss. 1984)). However, "[i]t is within the sound discretion of the trial court to determine whether a proffered expert is qualified to testify and that decision will be reversed on appeal only where there has been an abuse of discretion." *West v. Sanders Clinic for Women*, 661 So. 2d 714, 720 (Miss. 1995).

This case is similar to *Anderson v. National R.R. Passenger Corp.*, 866 F. Supp. 937 (E.D. Va. 1994), *aff'd*, 74 F. 3d 1230 (4th Cir. 1996). *Anderson* dealt with the disqualification of two proposed expert witnesses who were not familiar with the railroad dispatch system. In *Anderson*, the court stated:

> The testimony of Messrs. Holl and Pugh respecting the role of CSX's dispatch system, the duties of dispatchers, and the failure of the dispatcher to satisfy those obligations is insufficient to create a jury issue because neither witness is qualified by training, knowledge, or experience as an expert in the field of dispatching. Both, of course, are eminently qualified in a number of railroad related areas, but their qualifications reflect a notable, and fatally defective, absence of experience, training, or base of knowledge on the role and operation of railroad dispatch systems. Hence, they fail to satisfy the threshold requirement of expertise of Federal Rule of Evidence 702.

Id. at 948.

In the case at hand, there exists no doubt that Quicksall was experienced in the railroad industry. Quicksall was more than qualified to testify as to the maintenance and repairs of bridges along the railway. However, this is not a case about bridge maintenance. This case involves the proper care in fixing a ballast regulator wing. Quicksall testified he never supervised the repair of a ballast regulator nor himself ever repaired a ballast regulator. He possessed no knowledge as to the proper maintenance of a ballast regulator. Quicksall further testified he had never been accepted by any court of law as an expert witness testifying as to the repair of heavy equipment and was not responsible at his job for repairing heavy equipment. Quicksall was never qualified as a welder, and was not qualified to operate welding equipment. These facts hardly give Quicksall the experience, training or knowledge necessary to give expert testimony dealing with a ballast regulator. Therefore, the trial judge did not abuse his discretion is disqualifying Quicksall as an expert in this case.

III.

DID THE TRIAL COURT ERR IN PERMITTING INGRAM'S CO-WORKERS TO GIVE LAY OPINION TESTIMONY PURSUANT TO M.R.E. 701?

Ingram asserts the trial court erred in allowing Dale May and Willie Chism, Ingram's co-workers on the day of the accident, to testify as to the safe operation at the job site. Ingram contends that allowing May and Chism to testify was error because neither was identified as experts by Illinois Central in response to interrogatories as required by Rule 26(b)(4) of the Mississippi Rules of Civil Procedure. The trial judge allowed the witnesses to testify under Mississippi Rule of Evidence 701,

opinion testimony by lay witnesses.

Rule 701 of the Mississippi Rules of Evidence states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue.
>
> Miss. R. Evid. 701.

May was a welder with Illinois Central who had experience in repairing ballast regulators. May testified that in his opinion it was not necessary to use a boom or hoist to repair the ballast regulator. May stated the track jack was all that was needed to complete the repair work. This does not present evidence of scientific, technical, or specialized knowledge as required by M.R.E. 702. This is evidence of May's perception of the event when determining that the ballast regulator could be fixed where it was found, and the track jack was the only tool necessary to assist in the job.

Chism was a foreman with thirty-one years experience working for Illinois Central. Chism had repaired ballast regulators with similar type damage on previous occasions. The only issue to which Ingram objected to at trial dealing with Chism's testimony is that Chism testified when Ingram picked up the track jack in an awkward manner, he was in violation of Illinois Central safety rules. Chism stated the proper way to pick up a track jack is to bend your knees, keep your back straight and lift with your knees. All employees of Illinois Central were advised of these rules. Chism's testimony is not expert testimony because no scientific, technical, or specialized knowledge exists to assist the trier of fact. Chism simply testified as to the safety rules that had previously been admitted into evidence.

The testimony of May and Chism was not expert testimony and Illinois Central was not in error when it did not identify May and Chism as expert witnesses in response to interrogatories by Chism. This issue is without merit.

IV.

WAS THE JURY VERDICT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Ingram contends he was required to pick up the ballast regulator wing, and then ordered to pick up the track jack. Further, Ingram argues there were other sites where the ballast regulator could have been moved in order for it to be fixed. Ingram asserts these facts indicate the jury verdict was contrary to the weight of the evidence.

Federal law controls when determining whether a railroad has breached its duty. *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988). Under the FELA, an employer is liable for negligence which causes injury to an employee while the employee is acting in the course and scope of his employment. 45 U.S.C. § 51. The standard of proof in a FELA action requires the plaintiff to prove "simply whether the fruits 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." *Rogers*

v. Missouri Pac. Ry. Co., 352 U.S. 500, 506 (1957). The plaintiff must prove negligence in order to recover under the FELA. *Illinois Central Gulf R.R. Co. v. Boardman*, 431 So. 2d 1126, 1130 (Miss. 1983) (quoting *Morrison v. Illinois Central Gulf R.R. Co.*, 387 So. 2d 754, 755 (Miss. 1980)). Even though the plaintiff's burden of establishing causation under the FELA is relaxed, the plaintiff is still held to the common law standard of negligence.

To conclude that Ingram was entitled to a new trial, we must hold that the overwhelming weight of the evidence presented at trial is contrary to the jury's verdict and in favor of Ingram. The evidence presented at trial, taken in light most favorable to Illinois Central, shows there is substantial evidence to support the jury's verdict in favor of Illinois Central. The evidence shows that (1) Ingram was a qualified welder who performed track maintenance and labor work for Illinois Central; (2) the workplace chosen to fix the ballast regulator was safe and suitable; (3) Ingram was not acting under a direct order from his supervisor or foreman when his injury occurred; (4) Ingram caused his own injury by reaching across his body and picking up the track jack in an awkward manner; (5) Ingram was in direct violation of Illinois Central's safety rules when he picked up the track jack; (6) Ingram completed work that day and did not complain about his injury or go to a doctor until the following day; and finally, (7) a videotape was presented into evidence at trial showing Ingram bending over, squatting, twisting, charging his car battery and raking his yard.

Even under the relaxed standard of care in FELA actions, based upon these facts, it was reasonable for the jury to conclude that Illinois Central did not breach its duty of care to Ingram and that Ingram was negligent in picking up the track jack. Also, it was reasonable for the jury to believe the workplace provided by Illinois Central was safe. Further, it was reasonable for the jury to conclude that Ingram was not even injured. Therefore, we cannot find that the jury verdict must be reversed. We will not set aside a jury verdict unless the verdict is contrary to the overwhelming weight of the evidence and credible testimony. *Bobby Kitchens v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 131 (Miss. 1989). "The jury is the judge of the weight of the evidence and the credibility of the witnesses." *Id.*

The jury could have concluded that Illinois Central breached its duty of care, which resulted in Ingram's injury. The fact that the jury did not reach this conclusion will not render their decision void where evidence exists to support their verdict.

THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, C.J., MCMILLIN, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.

HERRING, J., NOT PARTICIPATING.