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Railroad failed to provide safe work place

Patrick Hagerty

By Geri L. Dreiling

When does walking go from a healthy habit to a health hazard? That was the question a trial judge posed while taking away a $100,000 jury verdict awarded to a railroad electrician.

The electrician, Dan Cuslidge, filed a claim under the Federal Employers Liability Act against Union Pacific alleging that excessive walking in the workplace contributed to a painful inflammatory condition in his feet that ultimately required surgery.

St. Louis Circuit Judge Julian Bush granted the railroad's motion for judgment notwithstanding a verdict stating that the worker should have presented evidence as to when the amount of walking becomes unreasonably safe.

But on July 18, the Missouri Court of Appeals Eastern District, ruled that the inquiry wasn't necessary under the "liberal" or worker-friendly standards of FELA.

"The trial court set an evidentiary burden that Cuslidge was not required to meet, namely, to identify a 'tipping point at which the health risks attendant to walking exceed the health benefits attendant to walking," wrote Judge Mary Kay Hoff for the court in Cuslidge v. Union Pacific Railroad Company (MLW No. 54409) (8 pages).

Union Pacific declined to comment on the opinion. However, Patrick J. Hagerty, the St. Louis lawyer with the firm of Gray, Ritter & Graham, who represented the worker with the counter-intuitive claim, asserted: "This is so much more than just a case about walking. It was about needless and excessive walking."

It can be difficult to convince jurors to rule in plaintiff's favor on cumulative trauma cases, Hagerty conceded.

"If it is a guy who falls off an engine and breaks his neck, the jury can latch onto that. But if you argued something happened over time, that is sometimes the hard part and juries expect railroad work to be hard work," he said.

While the jury ultimately came down in his client's favor, the trial judge did not. "Because it involved walking, the judge thought the law required some proof that walking in and of itself was dangerous," Hagerty noted.

Cuslidge had been with Union Pacific or one of its predecessor companies for three decades. He became an electrician in 1998, replacing locomotive parts on the "C-line" an area the size of two football fields and covered mostly with concrete flooring.

Less than five percent of the parts he needed to do his job were stored near his work area, which meant that Cuslidge spent at least an hour-and-a-half each day roaming the C-line in steel-toe boots and lugging around parts and tools weighing more than 20 pounds.

Cuslidge never had problems with his feet before working on the C-line but by December 1999, his right foot started to hurt. In March 2000, he was diagnosed with plantar fascitis, a painful inflammatory condition of the tissue stretching underneath the sole that attaches to the heel. After a conservative course of treatment of stretching exercises and cortisone failed to ease his pain, surgery was performed.

In May 2000, Cuslidge filed a Report of Personal Injury with Union Pacific stating that "walking on concrete all day produced stress on feet causing fascitis." After filing the report and returning to work following the surgery, there were no changes to his work conditions.

Cuslidge then experienced pain in his left foot, again was diagnosed with plantar fascitis and eventually underwent surgery. In August 2001, he filed a second Report of Personal Injury stating that his condition was caused by too "much walking on hard uneven surfaces."

Cuslidge filed a petition in the City of St. Louis Circuit Court for personal injuries under the Federal Employers' Liability Act (FELA).

His orthopedic surgeon testified that standing and walking repetitively contributed to Cuslidge's injuries. An ergonomics expert testified that plantar fascitis is a cumulative trauma disorder that can develop from excessive walking, kneeling or stooping. He estimated that Cuslidge walked 3.8 miles per shift, that Union Pacific didn't provide a reasonably safe work environment because it failed to perform a work and hazard analysis. He also indicated that the amount of walking that is deemed too much depends on the walking surface, the shoe, the job details, and how much weight the person carries.

A jury concluded that the workplace walking contributed to his injuries and awarded Cuslidge $100,000.

In granting the railroad's motion for judgment notwithstanding the verdict Bush acknowledged that "it may well be that there is a tipping point at which the health risks attendant to walking exceed the health benefits attendant to walking, and, depending on the context, an employment that required an employee to walk past that point (mail carrier, nurse, museum docent) might not be reasonably safe."

However, the worker failed to "present evidence that would permit a reasonable person to conclude that the amount of walking" Union Pacific "required of him was not reasonably safe," Bush wrote.

In addition, Bush stated that if the amount of walking should have been reduced, "there was no evidence as to how much it should have been diminished."

But the appellate court disagreed with the added evidentiary hurdles.

Hoff indicated that in order to make a submissible case under FELA's "liberal" standards, the worker had to show: (1) the employer had a duty to provide a reasonably safe work place; (2) the employer's lack of care played some part, however slight, in producing the injury; and (3) the injury was reasonably foreseeable."

Under the first element of the test, a reasonably safe workplace is one where an employer is required to get rid of dangers that "can be removed by the exercise of reasonable care."

The expert's testimony regarding the average time Cuslidge spent each day walking, Union Pacific's failure to perform a work analysis, and its failure to provide equipment which could have reduced the amount of walking required satisfied the second element.

The final element, foreseeability, was satisfied by showing that the employer had actual or constructive notice of the defect and, at the very least, Cuslidge's first Report of Personal Injury put the company on notice of the problem.

Once the three-part test was met, a submissible case was made and there was no need to impose the extra requirements of introducing "tipping point" evidence. Therefore, the trial court erred in granting the judgment notwithstanding verdict and the jury verdict was reinstated.

Click here for the full text of the decision.