IN THE DISTRICT COURT OF BOX BUTTE COUNTY, NEBRASKA

JESS E. MULLANIX,	)	Case No. CI 09-89
	)	
Plaintiff,	)	
	)	
Vs.	)	**ORDER**
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	

This matter is before the Court on various motions. Plaintiff appeared through counsel David N. Damick and James R. Welsh. Defendant appeared through its attorneys Nichole S. Bogen and Katherine Q. Martz. The Honorable Travis P. O'Gorman presided. Evidence was offered and received and a briefing schedule was established.

The Court has reviewed the entirety of the evidence and the briefs of the parties. The Court rules as follows:

I. Defendant's *Daubert/Schafersman* Motion to Exclude the Testimony of Tyler Kress

The Defendant has moved to exclude the testimony of Plaintiff's designated expert Tyler Kress. Defendant contends that "Kress's opinions are not founded upon substantial data, do not rest on a rational and reliable foundation, are not based on valid methodology or reasoning, do not 'fit' the facts of this case, and would not assist the trier of fact as required by Neb. Evid. R. 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215 (2001) and its progeny."

Background and Kress's Opinions

This action was originally initiated in 2009. Mullanix claims in Count 1, that his many years of operating locomotives as an engineer for BNSF caused him to develop bilateral carpal and cubital tunnel syndrome ("CTS") and injuries to his nerves and related soft tissues in his hands, wrists, arms, elbows and shoulders. Mullanix originally

premised his CTS claims on the Federal Employers' Liability Act ("FELA") and the Locomotive Inspection Act ("LIA"). The FELA claim alleged BNSF was negligent, and generally failed to provide Mullanix with a reasonably safe place to work. In his LIA claim, Mullanix alleged that BNSF was strictly liable because its locomotives were not in proper condition and were defective. In 2010, BNSF moved for summary judgment on the LIA claim. Plaintiff's counsel conceded that summary judgment was appropriate and the LIA claim was dismissed with prejudiced.

On December 30, 2013, Mullanix sought leave to file an amended petition. Mullanix was denied leave to amend Count II of the petition which was previously dismissed with prejudice. Specifically, this Court ruled that Mullanix was granted leave to amend his petition to add a count with the exception of "those paragraphs that relate to Plaintiff's theories of negligence under the LIA related to his carpal tunnel syndrome. . . . [T]hat claim has already been dismissed with prejudice."

The operative petition now alleges the CTS claim under FELA, Count I, and a hernia claim related to a locomotive fire under both the FELA and LIA. Tyler Kress's opinions are offered in support of Plaintiff's claim under Count 1.

Kress was disclosed in February of 2010. He has not been identified as an expert in support of Plaintiff's fire claim. Kress has not prepared a written report. Kress is expected to testify about "ergonomic risk factors present in Plaintiff's employment." Kress is a board certified industrial hygienist. Plaintiff disclosed Kress's opinions as follows:

> 1. There are ergonomic risk factors present in the engineer craft for BNSF Railroad that could lead to the development of cumulative trauma disorders to the upper extremities. Plaintiff's injuries are consistent with these ergonomic risk factors and similar injuries developed system wide and industry wide among engineer employees.
>
> 2. The Defendant failed to give proper training concerning recognition and exposure to the potentially injurious conditions of Plaintiff's job. This is inconsistent with OSHA Safety and Health Standards for the

Construction Industry. Note that OSHA has cited railroads for violation of its construction industry standards in the past.

3. There are available means to reduce the ergonomic risk factors to which employees in Plaintiff's craft are exposed.

At his deposition, Kress summarized his opinions as follows:

1. Mr. Mullanix's work at the railroad involves exposure to ergonomic risk factors consistent with his injuries to his upper extremities.

2. BN failed to design Mr. Mullanix's job properly in order to minimize recognized hazards associated with developing his injuries.

3. BN failed to implement an ergonomics program to help reduce upper extremity CTDs.

4. BN failed to provide proper awareness training or job training involving the risks associated with the development of upper extremity CTDs. *See* Kress Deposition, 10:22-12:19. To prepare his opinions, Kress did not conduct any inspection, testing or analysis of Mullanix's workplace, job duties, or the locomotives he worked on. *See* Kress Depo. 47:14-19, 68:2-14.

Applicable Law

Rule 27-702 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 opinion or otherwise.

Rule 702 follows Federal Evidence Rule 702. In *Schafersman v. Agland Coop*, 262 Neb. 215 (2001), the Nebraska Supreme Court adopted the standards set forth by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to determine whether expert testimony is admissible under Rule 702.

Under *Daubert/Schaferman*, "the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."

McNeel v. Union Pac. R. Co., 276 Neb. 143, 152-53, 753 N.W.2d 321, 330-31 (2008). "This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* This analysis entails two parts. First, the analysis "establishes a standard of evidentiary reliability." *Id.* Second, the "fit" analysis "assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine a fact in issue by providing 'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" *Id.* "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.'" *Id.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id.* "It is not enough for the trial court to determine that an expert's methodology is valid in the abstract. The trial court must also determine if the witness applied the methodology in a reliable manner." *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004). "The objective of the trial court's gatekeeping responsibility is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

As BNSF points out, numerous Courts have applied a *Daubert* analysis to similar opinions offered by Kress. In *Myers v. Illinois Cent. R. Co.* 679 F.Supp.2d 903 (C.D. Ill. 2010), the trial court excluded Kress's opinions finding that "his conclusions are based simply on his own speculation as to the details of plaintiff's work, which is insufficient to establish that his views are supported by a scientifically reliable method." Kress had offered opinions that the work duties of conductors presented "ergonomic risk factors" that put workers "in an unreasonably hazardous environment." *Id.* at 909. Kress did not inspect the plaintiff's workplace. He failed to take any measurements or perform any testing. *Id.* He relied solely on the discovery materials in the case, pleadings, medical records and literature. *Id.* Kress attempted to explain his failure to perform any testing by relying on inspections he had performed at other sites and interviews with

conductors in other matters. These inspections of unrelated work sites and interviews with other conductors in the industry lead him to the conclusion that "the employment tasks of railroad brakemen/conductors are the same for all Class I railroads so it is not necessary to conduct a case specific site inspection as analysis of these employment tasks in one case are equally applicable to the case at hand." *Id.* at 910.

The *Meyers* court found Kress's opinions unreliable. The Court stated:

> There was no independent investigation into Plaintiff's work tasks, as Kress's opinion was based on the Plaintiff's own description of his work. (Citation omitted.) Kress had no evidence of the amount of pressure or repetition necessary to cause the injuries. (Citation omitted). Kress did not quantitatively measure the Plaintiff's exposure to the relevant risk factors in performing his job duties. (Citation omitted). Further, Kress did not apply the facts of the Plaintiff's case to existing studies so that the opinion could be tested or peer-reviewed.
>
> Kress developed opinions without citing or taking measurements of the forces imposed on Plaintiff when Plaintiff was performing the tasks at issue and has altogether failed to provide evidence of the actual force levels at work in Plaintiff's work environment. His conclusions are based simply on his own speculation as of the details of Plaintiff's work, which is insufficient to establish that his views are supported by a scientifically reliable method.

Myers at 915-16.

Similarly, in *Smart v. BNSF Railway Company*, 369 P.3d 966 (Kan. App. Ct. 2016), the Kansas Court of Appeals affirmed the exclusion of Kress's opinions on the issue of cumulative trauma. In excluding Kress's opinions, the district court found Kress had no specific information regarding the plaintiff's case and his "testimony is so generic that it could apply to almost any worker, in any position, anywhere dealing with a railroad." *Id.* at 488. Kress never visited the shop where the plaintiff worked. He was unable to testify to the tools used by the Plaintiff. Kress never gave specific examples

of what BNSF did wrong or could have done better. Like in *Myers*, he performed no testing. The Court observed:

> Dr. Kress did not purport to have conducted any study, in accordance with the literature he referenced, to determine the magnitude, duration, or frequency of the risk factors that allegedly contributed to Smart's CTD. But such literature demonstrates that causation of CTDs and the degree of various risks specific workstations might possess can be measured, tested and analyzed. To achieve reliability, the analysis should include a method for measuring a worker's exposure to the relevant risk factors such as force, posture, repetition, and vibration. The scientist should then compare the exposure to known human capabilities to arrive at a probability conclusion. (citations omitted). Kress did no such thing.

Id. at 498-99.

Most recently, the exclusion of Kress's opinions was upheld by the Kansas Court of Appeals in *Farley v. BNSF Railway Company*, 367 P.3d 1284 (Kan. App. 2016.) There, Kress planned to testify that BNSF had failed to provide a reasonably safe place to work and was negligent by failing to have adequate ergonomic tools and work practices to prevent injuries like those the Plaintiff experienced. In excluding his testimony, the district court found:

> Kress's opinions in this case are based on the same *post hoc ergo propter hoc* logic that our Supreme Court found deficient in *Kuxhausen v. Tillman Partners*, 291 Kan. 314, 241 P.3d 75 (2010), and . . . Kress fails to show a methodology for his opinions that would allow this court to find that he should be able to testify as an expert . . .

Id.

In affirming the district court's exclusion of Kress, the Kansas Court of Appeals pointed out that Kress had never done a site visit to the location at issue. Rather, like the other cases cited above, he relied on the site visits he conducted in the past at different locations. Furthermore, Kress did not meet the Plaintiff. Rather, he based his

testimony on a phone conversation that lasted 45 minutes to 1 hour. During that conversation, the plaintiff told Kress about the tools he worked with, the awkward positions he worked in and the fact that he worked on his knees. While Kress claimed the tools were not ergonomically designed, he could not identify the makes and models of those tools. The appellate court concluded:

> Because nothing in the record provides the necessary connection between Dr. Kress' experience and his conclusions, we find that Dr. Kress' "opinion evidence was connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157. After independently reviewing Dr. Kress' deposition, report, supplemental report, and other matters in the record, we find the district court did not abuse its discretion by granting BNSF's motion to strike Dr. Kress' expert testimony.

Id.

Application to Kress's Mullanix Testimony

Kress's proposed testimony suffers from the same deficiencies in this case. Like in the cases cited above, Kress has failed to inspect or analyze the working environment that Mullanix actually worked in. When asked whether a site inspection was done in this case, Kress testified as follows:

> I have not done a specific inspection in this matter.

(Kress Depo. 47:14-19.) The evidence shows that Mullanix spent the majority of his career riding locomotives between Alliance and Ravenna, Nebraska. Kress could not recall visiting either location. (Kress Depo 15:24-16:24.) Although Kress has been on "a couple" runs with BNSF engineers in Texas in the late 90's, he has never ridden on a locomotive between Ravenna and Alliance. (Kress Depo. 17:10-24; 17:4-7.) Kress attempts to rely solely on his general past experience.

Kress opines that the ergonomic risk factors for CTS include "primarily force and repetition and posture, and some vibration too." (Kress Depo. 27:16-23.) However, Kress did not take a single measurement in the locomotives Mullanix actually operated. He also failed to even recall seeing or reviewing the specific Job Task Analysis for an

engineer in the Alliance to Ravenna pool. Kress speculates that there are "three/four main controls, a variety of controls" the engineer must manipulate while operating the locomotive, but he did not provide any measurement, duration, force or frequency of repetition for use of those controls. Like the cases cited above, Kress did nothing but rely upon what he had seen in other unknown cases, and assumed the circumstances were "substantially similar" to those presented to Mullanix in his runs from Alliance to Ravenna. Like his testimony in *Smart, supra*, his "testimony is so generic that it could apply to almost any worker, in any position, anywhere dealing with a railroad."

Kress even failed in this case to provide definitive testimony as to what exactly posed an "ergonomic risk" in Mullanix's working environment. When asked which controls posed an ergonomic risk from a repetitive standpoint, Kress opined:

> I didn't take the time to sit here and get specific on a particular number

(Kress Depo. 44:15-45:10.) Although Kress was willing to admit that the basis of his opinions required the employee to be engaged in "repetitive tasks," he refused to provide a definition of what he would consider to be a repetitive task.

> So there is no magic value that says this means it's repetitive.

(Kress Depo. 45:17-46:1.) When asked for the basis of his opinion, he stated:

> Well, I communicate specifically what it is. And Mr. Mullanix, you can get some reasonable numbers by saying, for example, as I was doing earlier, that on a one-way he is at least hitting the whistle approximately 400 times . . .

(Kress Depo. 46:7-20.) Kress did not opine that the whistle was a dangerous activity but that;

> You consider all things here to make a reasonable judgment here. And he not only had to manipulate the horn, he had to manipulate the throttle and the bell and the brake and do these other things. And he had to - you don't just look at repetition, you look at the postures . . . The posture is relevant too.

(Kress Depo. 47:2-13.)

Kress failed to actually perform ANY analysis and could not provide ANY specifics or documentation of ergonomic risk factors associated with the work environment that Mullanix worked in. He relies solely on his "experience investigating risk factors for CTD's in other locomotive engineer litigation, and from [his] familiarity with, inspection and testing of locomotives similar to those used by [BN]."

Based on the foregoing, this Court finds that Kress's testimony does not meet the standard for admissibility, is not reliable and would not be helpful to the jury. The law requires this Court to ensure that proffered expert testimony is based on sufficient facts or data and is the product of reliable principles and methods. In addition, the Court must ensure that the witness has reliably applied those principles and methods to the facts of the particular case. Kress's proposed testimony falls well short of this. An expert cannot be permitted to substitute generic experience for relevant, case specific data. The Defendant's Motion to Exclude the Testimony of Tyler Kress should be and is hereby GRANTED.

II. Defendant's Motion for Summary Judgment as to Count 1, CTS Claim.

BNSF has moved for summary judgment on Count 1 on the ground that Mullanix has no liability evidence that BNSF failed to meet its standard of care in providing Mullanix with a reasonably safe place to work. Given this Court's exclusion of the testimony of Tyler Kress, the Court agrees.

Facts

Mullanix began working for BNSF as an engineer in 1977. (Mullanix Oct. 29, 2009 Depo. 9:7-9.) For the majority of his career, Mullanix worked the same route operating locomotives between Alliance and Ravenna, Nebraska. *Id.* 11:16-12:24. Mullanix believes that throwing switches before 1977 and when he was a brakeman, operating throttles and levers and general "repetitive movement" caused his CTS and nerve-related injuries. *Id.* at 25:2-29:1.

Mullanix believes he was adequately trained for his job as an engineer. *Id.* at 34:12-15. He believes he had adequate help in his job as an engineer. *Id.* at 34:16-18. He was provided a reasonably safe place to work. *Id.* at 82:13-15; 85:15-16. He

testified that the locomotives he operated were reasonably safe and the equipment he used was properly maintained. *Id.* at 82:16-20; July 5, 2012 depo at 43:12-13.

Summary Judgment Standard

"Summary Judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue of material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014). "Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute." *Id.* "Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination." *Fraternal Order of Police, Lodge No. 2 v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

Discussion

Under the FELA, Mullanix must prove the traditional common law elements of negligence including duty, breach, foreseeability, and causation. *Davis v. Burlington Northern, Inc.,* 541 F.2d 182 (8th Cir. 1976). With regard to the first component of negligence, Mullanix must prove that BNSF failed to meet the applicable standard of care. *Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832 (8th Cir. 1992). Mullanix has the burden to show that BNSF knew, or should have known, that the manner in which he had to perform his job created an unreasonable risk of harm. *Tootle v. CSX Transp.*, 746 F. Supp2d 1333 (S.D. Ga. 2011).

Without the testimony of Tyler Kress, Mullanix cannot prove that his job was unreasonably safe or that the railroad required him to perform his job in an unreasonably safe manner. Mullanix's description of his job tasks fail to prove his job was not reasonably safe. This case is very similar to *Ensign v. BNSF Railway Company*, 2014 WL 211368, where this Court's grant of a directed verdict was affirmed on the basis that a description of job duties without more is insufficient to show the workplace was unreasonably safe. Courts from other jurisdictions have come to the

same conclusion. *See e.g. Lewis v. CSX Transp., Inc.*, 778 F. Supp.2d 821 (S.D. Ohio 2011)(summary judgment for railroad proper as plaintiff's testimony describing the physical demands of his work is not evidence that his job was unreasonably safe); *Tootle v. CSX Transp.* 746 F. Supp.2d 1333 (S.D. Ga. 2011)(same).

Without the testimony of Tyler Kress, Mullanix cannot show that BNSF breached a legal duty owed to him. For this reason, BNSF's Motion for Summary Judgment on Count 1, Mullanix's CTS claim is GRANTED and his cause of action is dismissed with prejudice.

III. Defendant's Objection to Plaintiff's Supplemental Response and Affidavit of Jeffrey A. Holloway, M.D.

Following the hearing on the motions at issue, Plaintiff produced an affidavit of Dr. Jeffrey A. Holloway, M.D. In that affidavit, Dr. Holloway provides an opinion as to the cause of plaintiff's hernia and alleged future pain and discomfort. This causation opinion was not disclosed in advance of the Court's deadline for Plaintiff to disclose expert witnesses who would be providing opinion testimony, which was February 15, 2016.

Defendant's objection is sustained. Dr. Holloway's causation opinion was not timely disclosed. His affidavit will not be considered with respect to the pending motion for summary judgment.

Furthermore, Dr. Holloway will not be permitted to offer his causation opinion at the trial of this matter.

To the extent Defendant seeks to exclude Dr. Holloway from testifying in all respects, the motion is denied. Defendant has had Dr. Holloway's medical records for some time. There is no prejudice with respect to the treatment he provided and the contents of the medical records. Dr. Holloway will be permitted to testify to the treatment he provided Mr. Mullanix.

IV. Defendant's Motion to Exclude the Testimony of Charles Culver

Defendant seeks to exclude the testimony of Charles Culver on similar grounds that it sought exclusion of Tyler Kress. Culver's claimed expertise is in "railroad

operations." He has worked in the railroad industry primarily as an engineer. He resigned in 1995 and has worked as a consultant since.

Culver is not offering the type of scientific evidence that necessitates a *Daubert/Schaffersman* analysis. He is testifying as an expert in the field based on his numerous years working the industry. He has reviewed the evidence in this case as it relates to the locomotive fire incident Mullanix was involved in. With proper foundation, he will be allowed to give expert opinion testimony. BNSF's motion to exclude Charles Culver is denied.

With respect to the cause of the locomotive fire or any locomotive defect, Culver admits he does not have that expertise. He will not be permitted to opine as to the cause of the fire or any specific defect he believes existed.

VI. Motion for Summary Judgment - Locomotive Fire Claims

BNSF argues it is entitled to Summary Judgment on the locomotive fire claims under FELA and LIA if Dr. Holloway's causation opinion is excluded. Although this Court does exclude Holloway from giving a causation opinion, summary judgment is not proper. There is evidence that Mr. Mullanix was diagnosed with a hernia shortly after his fall. Given the relaxed causation standard under FELA, the Court believes there is sufficient evidence to submit the issue of causation to the jury. BNSF's Motion for Summary Judgment as it relates to the locomotive fire claims is DENIED.

IT IS SO ORDERED.

BY THE COURT:

District Court Judge

Cc: David M. Damick
James R. Welsh
Nichole S. Bogen
Katherine Q. Martz

CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 14, 2017 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Nichole S Bogen
nsb@sattlerbogen.com

David N Damick
dnd@damicklaw.com

Christopher P Welsh
laurie@welsh-law.com

Date: February 14, 2017 BY THE COURT: Kevin P. Klein

CLERK