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**Date:** 3/11/2005

**Case Style:** Douglas McKown v. Burlington Northern Santa Fe Railroad

**Case Number:** DV-02-1125

**Judge:** Russell C. Fagg

**Court:** District Court, Yellowstone County, Montana

**Plaintiff's Attorney:**

Fredric A. Bremseth, Bremseth Law Firm, P.C., Wayzata, Minnesota

**Defendant's Attorney:**

Jeff Hedger and Jim Robertson, Hedger Moyers, L.L.P., Billings, Montana

**Description:**

Douglas McKown sued Burlington Northern Santa Fe Railroad on a Federal Employers' Liability Act (FELA) claim for injuries he sustained as a result of a collision between two coal trains in the Powder River Basin in 2002.

On May 11, 2002, 49 year-old Plaintiff Douglas P. McKown, a BNSF Locomotive Engineer, and his conductor departed the North Rochelle coal mine in southern Wyoming with a fully-loaded coal train and entered BNSF's Main Line No. 1 at MP 49 in an east-bound direction traveling down grade into a valley. A UPRR train was traveling in the same direction on Main Line No. 2 several miles behind Plaintiff's train. Plaintiff was properly operating the train at restricted speed due to a yellow signal aspect, and properly brought the train to a halt at MP 52 when a signal displaying a red aspect came into view. Plaintiff and his conductor observed an empty west-bound BNSF coal train several miles ahead. Plaintiff and his conductor could not determine the track on which the approaching coal train was traveling, but they did observe that the approaching train was slowing as it approached a signal post at MP 52.2. While BNSF's dispatcher did not

contact any of the train crews, Plaintiff and his conductor assumed the approaching BNSF coal train would stop at the signal, and the UPRR train following them would be allowed to proceed past the two BNSF coal trains.

Plaintiff went to the rear of the locomotive cab to make coffee while his conductor completed some paper work and prepared to disembark from the locomotive to roll-by the UPRR train approaching from the rear on Main Line No. 2. Just as Plaintiff returned to his seat, his conductor suddenly yelled "Look out!" and Plaintiff saw to his horror that approaching coal train was on their track just a few car lengths away. Plaintiff barely had enough time to brace himself in his seat before the head-on collision occurred. The empty BNSF coal train struck Plaintiff's train at 29 MPH.

During BNSF's investigation as well as throughout their respective FELA cases, the Engineer and Conductor of the oncoming BNSF coal train consistently testified that they approached the signal at MP 52.2 at restricted speed and were prepared to stop until they each saw and called out a green aspect at MP 52.2. The engineer therefore increased the throttle and the train accelerated to 36 MPH before the train cleared a curve and the crew could see that they were on the same track as the idling and fully-loaded BNSF coal train.

BNSF blamed the crew of the empty coal train for missing the signal. BNSF's signal experts reviewed all downloaded data for the signal and concluded that the system was working as designed and could not have displayed a green aspect. BNSF's investigation did reveal, however, that a signal light bulb burned out the night before. BNSF contended this would have resulted in a dark aspect, requiring the crew to stop the empty coal train in any event. Whether crew error or system failure caused the collision was irrelevant for purposes of this trial because BNSF was liable to Plaintiff under either scenario.

In addition to sustaining minor injuries to his right knee and leg, right forearm and left jaw, all of which resolved completely, Plaintiff developed chronic headaches for which he sought medical care from a variety of specialists. Ultimately, his treating neurosurgeon diagnosed occipital neuralgia as the probable cause of his headaches. In addition, Plaintiff was variously diagnosed as having developed a mood disorder, an anxiety disorder or Post-Traumatic Stress Disorder as the direct result of the collision. Plaintiff never returned to work as a Locomotive Engineer. Plaintiff's conductor did continue working.

Plaintiff earned \$69,000 during 2001, the last full year he worked before the collision. Plaintiff's co-workers testified that BNSF Locomotive Engineers with comparable seniority earned up to \$85,000 in 2004.

Although finally admitting liability just before trial, BNSF refused to concede the issue of medical causation. BNSF also alleged that Plaintiff failed to mitigate his damages. All of the medical, psychological, and psychiatric experts from both parties agreed that Plaintiff could not return to

work as a Locomotive but the parties' experts disagreed over the nature and extent of the injuries. BNSF challenged the seriousness of Plaintiff's injuries and the railroad's experts testified that his headaches and anxiety were fully treatable and that Plaintiff was fully capable of substantial gainful employment on a full-time basis. Evidence at trial showed that Plaintiff earned about \$200 per month over the last year performing small engineer repair out of his home. The Court granted a directed verdict on medical causation after a five-day trial, and the jury returned a \$1 million verdict for the 52 year-old Plaintiff after deliberating for about 1.5 hours.

**Outcome:** Plaintiff's verdict for \$1 million.

**Plaintiff's Experts:** Gary B. Becker, M.D., Gillette, WY (treating primary care); Mary Joswiak, M.D., Billings, MT (treating pain management); John Oakley, M.D. (treating neurosurgeon); Craig G. Mills, M.D., Rapid City, S.D. (physical medicine and rehabilitation); Ray Leugers, Ph.D., Sheridan, WY (treating psychologist); Anup Sidhu, M.D., Sheridan, WY (treating psychiatrist); Donna M. Veraldi, Ph.D., Billings, MT (forensic neuropsychologist); James M. Fortune, C.R.C., Billings, MT (forensic vocational rehabilitation); Dennis J. O'Donnell, Ph.D. (forensic economist).

**Defendant's Experts:** Mark Scanlan, M.D., Scottsbluff, NE (one-time psychiatric evaluation); Joseph K. McElhinny, Ph.D., Billings, MT (IME neuropsychologist); Bill S. Rosen, M.D., Billings, MT (IME physical medicine and rehabilitation); Kathy Kleinkopf, C.R.C., Missoula, MT (forensic vocational rehabilitation); Bernard Rose, Ph.D. (forensic economist).

**Comments:** None

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