FEAR OF CANCER DAMAGES IN AN FELA OCCUPATIONAL DISEASE TRIAL: INSTRUCTIONS AND SUFFICIENCY OF EVIDENCE

Introduction

Occupational disease litigation under the Federal Employers Liability Act (FELA) often concerns non-malignant illnesses caused by exposure to substances known also to cause cancer. Exposures to asbestos, diesel exhaust, silica, creosote, environmental tobacco smoke, and possibly solvents and welding fumes are or have been common in the railroad working environment. These substances can cause both non-malignant and malignant illnesses.

In an FELA occupational disease action seeking damages for a non-malignant illness, counsel for the plaintiff should give strong consideration to the assertion and proof of a claim for damages for the fear of cancer. The fear of cancer is undoubtedly part of the plaintiff's loss because the connections between asbestos, diesel exhaust, and environmental tobacco smoke and cancer are generally well known.

Railroads have consistently sought to limit the recovery for fear of cancer damages by arguing at trial that these damages may only be recovered in very limited circumstances which are rarely present in a non-malignant occupational disease action. Railroad defendants seek to limit the recovery by offering instructions that would impose a heavy burden of proof for fear of cancer damages.

Until recently, there was an absence of law on how trial courts should limit, if at all, the recovery for the fear of cancer. A series of actions by the Supreme Court of the United States since its seminal 2003 decision of *Norfolk & Western Ry. Co. v. Ayers*[1] has provided some clarification of what instructions and evidence on the fear of cancer are

required. The plaintiff's counsel must be familiar with the *Ayers* decision and the subsequent development of the law governing fear of cancer damages.

Norfolk & Western v. Ayers

In the *Ayers* decision, the Supreme Court, in a 5-4 decision, resolved the issue of whether an FELA plaintiff, who has been diagnosed with asbestosis, but not cancer, may recover damages for the fear of future cancer without physical manifestation of the claimed emotional distress. The divided Court stated, "Our answer is yes, with one important reservation. We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages. It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious."[2] Justice Kennedy dissented from this part of the decision and Justices Rehnquist, CJ, O'Connor, and Breyer joined in the dissent.

Justice Breyer filed a separate dissent and it is his dissent upon which the railroads have based subsequent attempts to drastically limit when fear of cancer damages may be recovered. Justice Breyer's separate dissent seems to be based on the premise that restriction of damages for fear of cancer to those claims in which the fear is genuine and serious will not separate the "valid, important emotional distress claims from less important, trivial, or invalid claims."[3] Justice Breyer reasoned that it is impossible to determine the incremental increase of a person's fear of cancer that results because of exposure to asbestos from what concern the person would have had about developing cancer in the ordinary course of life.

Justice Breyer also reiterated the argument from Justice Kennedy's dissent that allowing FELA asbestosis plaintiffs to recover for fear of cancer will consume the

resources available to compensate those plaintiffs who actually develop asbestos-related cancers. Both Justices Kennedy and Breyer noted that asbestos litigation in the United States has depleted the resources available to manufacturers who are called on to compensate asbestos-cancer victims. From this, Justice Breyer advocated in his dissent a limiting rule that would preserve the resources of railroads to compensate those who actually develop cancer.

With this background stated, Justice Breyer wrote in his dissent that he would accept the majority's limitations on recovery (i.e., the requirement that the fear be genuine and serious) if additional restrictions were added that would rule out recovery if 1) actual development of the disease can neither be expected nor ruled out for many years; 2) the fear of the disease is separately compensable if the disease occurs; and 3) fear of the disease is based upon risks not significantly different in kind from the background risks that all individuals face.[4] Justice Breyer concluded his dissent by writing that he would permit a recovery for fear of cancer "where the fear of cancer is unusually severe-where it significantly and detrimentally affects the plaintiff's ability to carry on everyday life and work."[5]

Having lost on the issue of whether fear of cancer damages may be recovered by an asbestosis victim, but recognizing the significant split on the subject among the Supreme Court Justices, American railroads have sought to limit the recovery of the fear of cancer damages to those instances that would fit within Justice Breyer's restrictions. A series of court decisions has followed as a result of the railroads' efforts to narrowly restrict the availability of this element of damages.

Hensley v. CSX

The Supreme Court decision in *Hensley v. CSX Trans., Inc.* [6] is the most recent in the series of fear of cancer decisions following *Ayers*. The *Hensley* decision, however, provides only limited guidance to counsel on the issues of what instructions and evidence may be required when seeking fear of cancer damages.

The trial court in *Hensley* did not instruct the jury that the plaintiff's fear of cancer damages must by "genuine and serious." In *Hensley*, a former employee of CSX Transportation, Inc. claimed that he developed asbestosis and toxic encephalopathy as a result of exposure to asbestos and chemicals during his employment with CSX and its predecessors. The trial resulted in a substantial jury verdict for the plaintiff. On appeal to the Tennessee Court of Appeals, CSX argued that the trial court erred by failing to instruct the jury that a plaintiff's fear of cancer must be "genuine and serious" and by failing to declare, as a matter of law, that the plaintiff's evidence did not satisfy that standard. The Tennessee Court of Appeals affirmed the judgment on the jury's verdict.

At trial, the *Hensley* plaintiff testified that he had "some concern" over getting cancer "in the back of my mind," like "a little cloud" hanging over his head. The court of appeals described this testimony as "vague", but noted that the *Hensley* plaintiff also testified that he experiences anxiety and that he takes Xanax for his anxiety, in part because of his fear of cancer. The plaintiff testified:

Q: For your anxiety, why did [Dr. Perry] give [Xanax] to you? What kind of anxiety do you have that you have to take medicine for?

A: Well, I just feel like, you know, my chest-I get tightness in my chest and can't-I smother and I sit and worry. I think about-you know, this asbestos in my lungs, it's apt to cause-I don't say I've got it, but it's apt to cause cancer of the lungs.

The Tennessee Court of Appeals ruled that this was enough evidence to justify the instruction to the jury that it could award fear of cancer damages.

The Tennessee Court of Appeals also ruled that the *Ayers* decision does not require instructions explaining damages based on a fear of developing cancer. The opinion states, "Rather, it is for the courts to serve as gatekeepers in this regard, to ensure that fear of cancer claims, do not *go* to the jury unless there is credible evidence of a 'genuine and serious' fear."[7]

CSX offered two fear of cancer instructions at trial that were refused by the trial court. One stated, "Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate ... that the ... fear is genuine and serious." The other refused instruction stated:

> In determining whether the Plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious.... In making this determination, you may take into account whether or not the Plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

CSX sought review of the fear of cancer issues by the Supreme Court of the United States. In a *per curiam* decision on June 1, 2009, with Justices Stevens and Ginsburg dissenting, the Court granted the Petition for Writ of Certiorari and reversed the

ruling of the Tennessee Court of Appeals without further briefing or argument. The Supreme Court remanded the case to the Tennessee Court of Appeals for further proceedings. In doing so, the Court arguably transformed the *Ayers* decision holding that pain and suffering damages may include damages for fear of cancer when fear of cancer accompanies a physical injury, to a ruling that it is reversible error not to give some type of limiting and qualifying instruction on fear of cancer damages when a railroad defendant requests the instruction.

The *per curiam* opinion states that although plaintiffs may seek fear of cancer damages in some FELA cases, they must "satisfy a high standard in order to obtain them."[8] The opinion also states that when a railroad defendant requests instructions stating the proper standard for fear of cancer damages, the instructions must be given.

The *Hensley per curiam* opinion does not describe, however, what an instruction which states the "proper standard" will include. The *per curiam* opinion also does not address whether one or both of CSX's tendered instructions stated the proper standard. Finally, the *per curiam* opinion does not address whether the *Hensley* plaintiff's evidence of fear of cancer was sufficient to instruct the jury on the fear of cancer.

Justice Stevens' dissent from the *per curiam* decision sates that he believes the *Ayers* fear of cancer majority decision (in which he joined) is limited to holding that pain and suffering damages may include damages for fear of cancer when fear of cancer accompanies a physical injury (in that case, asbestosis). Justice Stevens persuasively argued that the *Hensley per curiam* decision took a footnote from *Ayers* that states trial courts have several verdict control devices available to them including a "charge that each plaintiff must prove any alleged fear to be genuine and serious …" and transformed

it into a federal common law rule that a failure to give some type of limiting instruction is reversible error. Justice Stevens also pointed out in his dissent that the *Hensley* decision "is bound to invite further questions. … The risk that the Court's opinion will generate more confusion than clarity is inherent in a summary decisional process …."

Justice Ginsburg, in her dissent, wrote, "The Court's opinion in … *Ayers*… would support this plain and simple instruction: 'It is incumbent upon [the plaintiff] to prove that his alleged fear [of cancer] is genuine and serious.'"

The Tennessee Court of Appeals, on remand, ruled that the failure to give the requested fear of cancer instructions at trial was not harmless error and ordered a new trial on damages only.[9] In doing, so the Court of Appeals stated, "We believe that the evidence on the fear of cancer claim, while legally sufficient to sustain the verdict, was close."

Jones v. CSX

Consideration of the facts and procedural histories of other fear of cancer cases after *Ayers* but before *Hensley* gives some further guidance to what may be required in seeking fear of cancer damages. The first reported decision following the *Ayers* decision is *Jones v. CSX Transportation, Inc.*[10] from the United States Court of Appeals for the Eleventh Circuit. In *Jones*, the circuit court of appeals vacated that part of its prior decision wherein it affirmed the district court's summary judgment ruling that the FELA asbestosis plaintiffs could not recover damages for emotional distress over the fear of contracting cancer unless the plaintiffs produced evidence of objective manifestations of their emotional distress. The Eleventh Circuit noted that the Supreme Court in *Ayers* had ruled that damages for genuine and serious distress may be recovered and modified its

prior ruling. In doing so, the court of appeals stated in its opinion, "Our prior conclusion that a plaintiff must produce evidence of objective manifestations of purported emotional distress is, we conclude, inconsistent with *Ayers*."[11] It is clear from *Ayers* and *Jones* that a plaintiff need not manifest objective symptoms of anxiety (e.g. weight loss or physical disability) as a result of his anxiety in order to recover damages for fear of future cancer.

Hedgecorth v. Union Pacific

In 2006, the Missouri Court of Appeals addressed the issue of how an FELA asbestos jury should be instructed on the fear of cancer.[12] In *Hedgecorth v. Union Pacific R.R. Co.*, the plaintiff introduced evidence at trial that he had "a very mild case of asbestosis."[13] The *Hedgecorth* opinion does not describe the evidence introduced by the plaintiff to prove his fear of cancer.

Union Pacific offered two instructions at trial concerning the fear of cancer, asserting that the instructions reflected the *Ayers* ruling. The offered instructions were:

> Instruction No. A
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> In determining whether plaintiff has suffered emotional distress resulting from any reasonable fear of developing cancer as a result of his diagnosis of asbestosis, you must determine whether he has demonstrated that his fear is genuine and serious. In order to award damages to plaintiff for any emotional distress, you must be persuaded, by a preponderance of the evidence, that his emotional distress is an actual injury.
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> In making this determination, you may take into account whether or not plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.
>
> Unless you determine that their fear is genuine and serious, and he has suffered actual emotional injury as a result of this fear, you cannot find for the Plaintiffs.

Instruction No. B

In order to find in favor of plaintiff for emotional distress resulting from any reasonable fear of developing cancer as a result of asbestosis, you must believe:
First, plaintiff suffers actual emotional injury as a result of his fear of cancer relating to asbestosis; and

Second, plaintiff has taken actions indicating more than a general concern about his future health or has demonstrated physical symptoms as a result of his fear of cancer.[14]

The trial court refused the instructions. Following a verdict in favor of the plaintiff, Union Pacific appealed and asserted that the court erred in refusing the instructions. It argued that the *Ayers* decision required an explanatory instruction on the fear of cancer.

The Missouri Court of Appeals held that *Ayers* does not require instructions in addition to a state's pattern instructions to explain fear of cancer damages.[15] The opinion states, "[T]he Court in *Ayers* did not discuss or authorize jury instructions on this issue, but merely ruled on substantive law. Since the form of the instructions is a matter of Missouri law, the *Ayers* holding does not require a change to the form MAI[16] instructions."[17] The plaintiff's verdict was affirmed.

Union Pacific then filed a Petition for a Writ of Certiorari in the Supreme Court of the United States. Initially, the Supreme Court stayed enforcement of the judgment on the verdict, but later denied the Petition for Writ of Certiorari. The later *Hensley* decision negates the precedential value of the decision of the Missouri Court of Appeals in *Hedgecorth*.

Blackburn v. Illinois Central

The fear of cancer issue was presented to the Supreme Court again in 2008 in the case of *Blackburn v. Illinois Central Railroad Company*.[18] In *Blackburn*, three former employees filed suit against Illinois Central under the FELA alleging that they developed

asbestosis as a result of their exposure to asbestos during their with the railroad. The jury awarded each plaintiff damages for the fear of cancer. The verdicts were affirmed on appeal and the Illinois Supreme Court rejected Illinois Central's Petition For Leave to Appeal. Illinois Central then filed a Petition for a Writ of Certiorari with the Supreme Court of the United States.[19]

One *Blackburn* plaintiff testified that he was concerned about his lungs and the prospects of cancer as a result of his asbestosis and that he had consulted with his personal physician about his concern. He had periodic appointments with the physician for monitoring his condition. The plaintiff testified that he had learned of the various diseases associated with asbestos by reading about the subject following an examination by a pulmonary physician before trial. The plaintiff testified, "I'm concerned about it. I'm even worried about it. … I do think about it a lot."

The second *Blackburn* plaintiff testified that an examining pulmonary physician advised him to keep track of the plaintiff's diagnosed asbestosis and, as a result, he had routinely visited his doctors since the pulmonary examination. The plaintiff testified that he provided the pulmonary examiner's report to his personal physicians. He testified that he is concerned about his future as a result of his asbestosis and the prospect of cancer and that he is also concerned about the security of his family.

The third *Blackburn* plaintiff testified that after his pulmonary examination, the examining physician talked to him about asbestos and cancer and told the plaintiff that he "should get checked." The plaintiff testified that he discussed the issue of future cancer with his personal physician and was told that he should get an annual chest x-ray and that they would "keep a handle on it." The plaintiff also testified that getting cancer had been

on his mind all of the time. For example, he explained that when he developed chest symptoms in 2006 his first thought was that it was cancer until the symptoms were later diagnosed by his physician as resulting from pneumonia.

The *Blackburn* plaintiffs presented the testimony of a pathologist who testified in detail as to what cancers are caused by asbestos exposure. An examining pulmonary physician gave similar testimony. The pathologist further testified that it would be medically reasonable for each plaintiff to be concerned about his prospects of developing an asbestos-related cancer in the future.

Both the pathologist and the examining pulmonary physician testified about the type of future medical care that would be required to monitor the plaintiffs' asbestosis and increased risks of cancer. Specifically, they testified that each plaintiff would require periodic x-rays, medical examinations and periodic colonoscopies. The Illinois Appellate Court found this evidence sufficient to support the circuit court's decision to instruct the jury that it could award each plaintiff damages for the genuine and serious fear of cancer.

The trial court, using modified Illinois Pattern Jury Instructions, instructed the jury separately regarding each plaintiff as follows:

"If you decide for the plaintiff … on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted, in whole or in part, from the negligence of the defendant, taking into consideration the nature, extent[,] and duration of the injury:

…

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future."

Relying on Justice Breyer's *Ayers* dissent, Illinois Central argued in the Illinois Appellate Court that that the trial court erred in refusing an instruction that would have narrowly defined "genuine and serious." Illinois Central's proposed instruction, refused by the trial court, stated: "In order to recover for fear of cancer, a plaintiff must demonstrate that his fear is genuine and serious. This means fear that significantly and detrimentally affects the ability to carry on everyday life and work."

The Illinois Appellate Court held that the fear of cancer instruction given by the trial court was consistent with *Ayers* because it included the qualifying term, "genuine and serious." The appellate court further ruled that *Ayers* does not require instructions that further define the term.

In its Petition for a Writ of Certiorari, Illinois Central contended that the circuit court erred in refusing the limiting instruction it offered at trial. Illinois Central argued that prior decisions[20] of the Court have held that "damages for emotional distress are recoverable only where the emotional injury complained of is serious and supported by more than a complainant's subjective testimony."[21] Illinois Central also employed the argument that if recovery for fear of cancer damages is not narrowly limited as suggested by Justice Breyer in his *Ayers* dissent, the American railroad industry will be faced with limitless liability that will destroy the industry's ability to compensate those employees who actually develop cancer because of exposure to asbestos during their railroad employment. Finally, Illinois Central argued that there was insufficient evidence to warrant an instruction on fear of cancer damages.

The Supreme Court denied Illinois Central's Petition for a Writ of Certiorari on November 3, 2008.

Conclusions

The *Ayers* decision made it clear that fear of cancer damages may be recovered when there is a physical injury and the fear is genuine and serious. *Ayers* also made it clear that genuine and serious does not mean physical manifestations of the fear. The *Hensley* and *Blackburn* decisions made it clear that a damages instruction for fear of future cancer must have state that the fear must be genuine and serious. Counsel for the plaintiff seeking fear of cancer damages should not resist an instruction that includes this term as it will be inviting an appellate ruling finding reversible error.

What remains unanswered, however, is whether trial courts are required to give further instructions which would define genuine and serious as strictly as what was outlined by Justice Breyer in his *Ayers* dissent. While the Supreme Court's *Hensley* decision did not go that far, its lack of guidance for a newly created rule will, as predicted by Justice Stevens, result in continued efforts by the railroad industry to obtain further restrictive definitions of the genuine and serious fear of cancer. Counsel for the plaintiff should rely on Justice Ginsburg's statement in her *Hensley* dissent and the procedural history from *Blackburn* and argue that nothing more is required than the fear be genuine and serious.

The above decisions also provide some insight as to what evidence will be sufficient to support a fear of cancer instruction. First, medical testimony establishing the increased risk of cancer because of the exposures and underlying injury should be presented. Second, courts appear to be suspicious and less convinced by vague statements

such as “I worry about getting cancer” etc. Evidence that a plaintiff has consulted his personal physician about his prospects of future cancer, has undergone medical monitoring for the cancer, has sought counseling, and/or has been prescribed medication for the anxiety will be much more persuasive.

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[1] 123 S. Ct. 1210, 1223 (2003).

[2] *Ayers*, 123. S. Ct. at 1223.

[3] *Ayers*, 123. S. Ct. at 1237.

[4] *Ayers*, 123. S. Ct. at 1239.

[5] *Id*.

[6] 278 S.W.3d. 282 (Tn. Ct. App. 2008), *appeal denied*, (Tn. 2008), c*ert. granted*, *rev'd*, 129 S. Ct. 2139 (2009), *rev'd*, and new trial on damages only ordered, 2009 WL 2615849 (Tenn. Ct. App. 2009).

[7]*Hensley*, 278 S.W.3d. at 300.

[8]*Hensley*, 129. S. Ct. at 2141.

[9] *Hensley v. CSX Transp*., 2009 WL 2615849

[10] 337 F.3d. 1316 (11th Cir. 2003).

[11] *Jones*, 337. F.3d. at 1317.

[12] 210 S.W.3d. 220 (Mo. Ct. App., E. D. 2006).

[13] *Hedgecorth*, 210 S.W.3d. at 224.

[14]*Hedgecorth*, 210 S.W.3d. at 227.

[15]*Hedgecorth*, 210 S.W.3d. at 228.

[16] Missouri Approved (pattern) Instructions.

[17] *Hedgecorth*, 210 S.W.3d. at 229.

[18]*Blackburn v. Illinois C. R.R., Co.*, 882 N.E.2d 189 (5th Dist. 2008), *appeal denied*, 889 N.E.2d 1114 (Ill. 2008), *cert. denied*, 129 S. Ct. 497 (2008).

[19] The Association of American Railroads filed a brief as Amicus Curiae in support of Illinois Central's petition.

[20] *Metro-North Commuter R.R. Co. v. Buckley*, 117 S. Ct. 2113 (1997); *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2113 (1994); and *Atchison T. & S.F. Ry. Co. v Buell*, 114 S. Ct. 2396 (1987).

[21] Petition for a Writ of Certiorari at 11.