

and Urology of Indiana. The court entered a defense judgment.

**FELA - Plaintiff worked more than 20 years for a railroad; five years after becoming disabled in a car wreck, plaintiff filed suit against his former employer and claimed to have suffered cumulative work-related trauma to his knees**

*Elliott v. Consolidated Rail Corp.*,  
20C01-0408-CT-47

Plaintiff: John P. Nichols, *Anderson & Nichols*, Terre Haute

Defense: Barry L. Loftus, *Stuart & Branigin, LLP.*, Lafayette; and Daniel J. Hampton, *Burns White, LLC.*, Pittsburgh, PA

Verdict: Defense verdict on liability  
County: Elkhart, Circuit

Court: J. Shewmaker, 10-30-12

Max Elliott began working in April of 1976 for the Consolidated Rail Corporation and eventually worked his way up to the position of engineer. On 5-28-93 Elliott was injured in a car wreck, and on 12-23-95 he was injured in a slip and fall incident. Finally, Elliott became permanently disabled when he was involved in yet another car wreck on 8-9-96.

Elliott never worked again after the 1996 car wreck. Some five years later, however, in 2001, he filed a lawsuit in St. Clair County, IL against the Consolidated Rail Corporation and claimed to be suffering from injuries that he attributed to his more than 20-year employment with the company.

Thus began a lengthy history of litigation that would ultimately span four separate lawsuits and multiple venues. First, defendant's attorney at the time, Thomas W. Avery, Jr. of the Belleville, IL firm of Thompson, Coburn, LLP., persuaded Elliott that Illinois was not the best place for the

litigation.

Avery suggested that Elliott dismiss his Illinois case and refile in Indiana. In exchange, Avery promised he would not contest Indiana's jurisdiction and would waive the statute of limitation defenses. Elliott agreed to this plan, dismissed his Illinois case on 5-29-01, and refiled in Vigo County on 7-16-01.

That, however, would not be the end of the matter. The Vigo County case was soon transferred to Clay County. Shortly thereafter Clay County refused to maintain jurisdiction, and the case was transferred again, this time to Elkhart County.

With the jurisdictional and venue issues finally resolved, the litigation could get underway in earnest. Along the way, however, the substance of Elliott's claims seems to have evolved. Although he declared in a deposition taken in the original Illinois case that his claim was for specific injuries rather than for cumulative trauma, by the time the case came to rest in Elkhart County his claim had become one *only* for cumulative trauma.

According to Elliott, his many years of walking on large, uneven ballast and of climbing on and off moving equipment as part of his job for Consolidated Rail caused him to suffer trauma to his knees. As a result, Elliott had to undergo two knee surgeries, and he suffered further knee problems at home after he became disabled in 1996. He thought those further problems were a follow-on consequence of his work-related trauma.

Consolidated Rail defended the case on several fronts. First, the company disputed the scope and extent of any waiver of its statute of

limitations defenses. According to Consolidated Rail, the promise made by its former attorney to waive those defenses applied only to some, rather than all, of Elliott's claims.

Second, Consolidated Rail disputed that any of Elliott's post-1996 knee problems could be attributed to his work for the company. Instead, Consolidated Rail thought those problems were more likely caused by his 1996 car wreck. On 6-18-08, the court granted Consolidated Rail a partial summary judgment on the issue of Elliott's post-1996 knee problems.

Finally, Consolidated Rail pled a failure to mitigate defense, implicated Elliott's own contributory negligence, and argued that none of Elliott's injuries were in fact work-related. On this last point, Consolidated Rail noted that during the term of his employment Elliott never made any complaints about his knees and was not now making any claim for missed work or lost income. Instead, Consolidated Rail sought to link any injuries Elliott might have to his accidents in 1993, 1995, and 1996.

The case was tried for two days in Goshen. The jury deliberated for only 23 minutes before returning a verdict for Consolidated Rail, and Elliott took nothing. The court entered a defense judgment.