

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 11 - 0385<sub>J</sub>

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VICKIE L. AKERS, Plaintiff Below,

Petitioner,

vs.

CSX TRANSPORTATION, INC., Defendant Below,

Respondent.

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Appeal from the Circuit Court of Cabell County  
The Honorable David M. Pancake Judge  
Civil Action No.: 08-C-0656

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**BRIEF OF PETITIONER**

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### **Assignment of Error**

The Trial Court erred in not permitting Ms. Akers to introduce evidence of a 1994 Safety Assessment of the Huntington Division of CSXT during the cross-examination of CSXT's ergonomics expert, Todd Brown, Ph.D. which would have impeached his credibility and rebutted the defense's case.

## Statement of the Case

Plaintiff, Vickie Akers, filed suit against CSX Transportation, Inc. (referred to hereinafter as “CSXT”) on or around November 7, 2008. Ms. Akers alleged that she sustained cumulative trauma injuries as a result of the negligence of her railroad employer, CSXT, and sought recovery under the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. §51, *et seq.* See Ms. Akers’ Complaint, Appendix Vol. 1, A006 – A012. In particular, Ms. Akers contended that workplace stressors present in her job at the Huntington West Virginia Locomotive Shop caused her significant upper extremity injuries resulting in her disability from employment. The Defendant, CSXT, answered Ms. Akers’ Complaint on or around December 18, 2008. See Defendant’s Answer, Appendix Vol. 1, A013 – A022.

The case was tried before a jury beginning on September 20, 2010 and ending on September 23, 2010. A true and correct copy of the complete trial transcript can be found at Appendix Vol. 2. The verdict was in favor of the Defendant, CSXT. See Verdict Form, Appendix Vol. 1, A023 – A027. A Final Judgment Order was entered by the Court, signed by the Honorable David M. Pancake, on October 13, 2010. See Final Judgment Order, Appendix Vol. 1, A028 – A030. Ms. Akers timely filed her Motion for a New Trial and Brief in Support with the Court on October 21, 2010.

In the Motion for a New Trial, Ms. Akers requested a new trial based on the Court’s evidentiary exclusion of a 1994 Safety Assessment of the Huntington Division of CSXT, the location where Ms. Akers primarily worked. See 1994 Huntington Division Safety Assessment, Appendix Vol. 1, A039 – A109. Ms. Akers attempted to enter this evidence during the cross-

examination of CSXT's ergonomics expert, Todd Brown, Ph.D., to impeach his credibility and rebut one of CSXT's overarching defenses: that the company had an efficient and adequate safety program. See Trial Transcript, Appendix Vol. 2, p. 603. The evidence in question was a safety assessment conducted by CSXT employees, at the request of CSXT, which resulted in a number of very negative findings about safety at CSXT, specifically in Huntington. The Court sustained CSXT's objection to the entry of this document on the grounds that the empirical data in the report "is contrary to the commentary in all but one, and this is inflammatory language that is not consistent with the evidence and testimony in this case." See Trial Transcript, Appendix Vol. 2, p. 608; 1-4. This ruling prompted Ms. Akers to file her Post Trial Motion.

The Court issued an Order on January 31, 2011 denying Ms. Akers' Motion for a New Trial. See Order Denying Plaintiff's Motion for a New Trial, Appendix Vol. 1, A031 – A035. Ms. Akers timely filed her Notice of Appeal with this Honorable Court on March 1, 2011.

### Summary of Argument

One of the primary disputed liability issues in the trial of this matter was whether CSXT had a sufficient ergonomics program in place to protect its employees, like Ms. Akers, from occupational cumulative trauma injuries. Ms. Akers alleged that no such program existed. CSXT countered by arguing that such a program existed under the ambit of a comprehensive and effective safety program. From its opening statement, through its cross and direct examinations, and concluding with its closing argument, CSXT argued consistently that a safety program was in place and that a safety committee at the Huntington Locomotive Shop was established to address any issues the employees may have with workplace safety and injuries. Through its witnesses, CSXT criticized Ms. Akers for failing to follow this safety program and for failing to report her safety concerns to a safety employee representative.

The Trial Court committed reversible error in precluding Ms. Akers from entering the 1994 Huntington Division Safety Assessment into evidence during the cross-examination of CSXT's ergonomics expert, Todd Brown, Ph.D. This evidence would have directly contradicted and rebutted CSXT's contentions with regard to its safety program. Throughout the entire trial, CSXT, as well as Dr. Brown, extolled the virtues of CSXT's system wide safety program, and more specifically the Huntington Locomotive Shop's safety program, training, meetings, reporting system and safety committee. Ms. Akers attempted to counter this evidence with the evidence in question, the 1994 Safety Assessment of the Huntington Division of CSXT, which was conducted by CSXT employees at the request of CSXT, and which contained very negative findings regarding safety and the safety committee in Huntington. Ms. Akers attempted to enter

this evidence during the cross-examination of Dr. Brown after he denied ever seeing any information or evidence that the Safety Committee at the Huntington Locomotive Shop was ineffective. The evidence in question counters both Dr. Brown's statements and the overarching defense of CSXT. This 1994 Safety Assessment shows, *inter alia*, that CSXT's employees at the Huntington location found the safety committee to be nonexistent, the safety process to be dysfunctional, found that there was a lack of attention to workplace conditions, and found that the employees did not feel empowered to make decisions affecting their own safety. This evidence is clearly germane to the ultimate issue in this case, and serves to rebut the CSXT's case and impeach the credibility of Dr. Brown, CSXT's liability expert.

CSXT objected to this evidence on grounds of relevance, arguing that 1) the date of the assessment was six (6) years before Ms. Akers started at Huntington, and 2) the report was prepared for the Transportation Department, and Ms. Akers was not a transportation employee. However, the Court's exclusion of this evidence was not based on either of the arguments made by CSXT; rather the exclusion was based on its independent determination that the survey data included in the 1994 Safety Assessment was not supported by the responses contained in the actual survey itself. This conclusion was simply inaccurate as a matter of fact, but even if it was factually accurate, it speaks to the weight of the evidence and not its admissibility.<sup>1</sup> While the Court is the gatekeeper for the admission or exclusion of evidence, determinations about the credibility and consistency of evidence entered by either the Plaintiff or Defendant is an issue decided by the trier of fact.

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<sup>1</sup> For that matter, the arguments made by CSXT go to the weight of the evidence, and not its admissibility.

The Court's decision to exclude the Safety Assessment is further undermined by the fact that during the direct examination of Dr. Brown, CSXT introduced, over Ms. Akers' objection, statistical job studies which supposedly depicted Ms. Akers' job activities. Ms. Akers' objection to the admission of this evidence was based on the fact that such evidence was from a different time period than when she was employed by CSXT, and that the statistical job studies were conducted at locations other than where she worked. Nevertheless, the Court allowed CSXT to introduce these surveys as evidence that Ms. Akers' job was not as difficult as she alleged.

After the examination of Dr. Brown, CSXT went on to offer the testimony of two fact witnesses, both of who were Ms. Akers' supervisors at the Huntington Locomotive Shop, and who both praised the safety committee at Huntington and stressed the importance of job safety at that location. The evidence in question could have been further utilized by Ms. Akers to impeach the credibility of these witnesses, and would have provided her with evidence to use in her closing argument to rebut CSXT's defense; that it provided a reasonably safe place for Ms. Akers to work.

In sum, it was an abuse of discretion and reversible error to preclude Ms. Akers from offering the 1994 Safety Assessment into evidence, which would rebut the key defense of CSXT and impeach the credibility of its expert witness and fact witnesses.

**Statement Regarding Oral Argument and Decision**

Oral argument on this issue is necessary pursuant to WV R.A.P. 19(a)(1) and (2). The issue on appeal involves the Court's exclusion of evidence offered by Ms. Akers to impeach the credibility of CSXT's expert witness and offered to rebut the defendant's case. The exclusion of this evidence by the Court, and its reasoning for such exclusion, involves both "assignments of error in the application of settled law" and "unsustainable exercise of discretion where the law governing that discretion is settled." WV R.A.P. 19(a)(1) and (2).

In light of the foregoing, Petitioner requests oral argument before this Honorable Court on this issue.

### **Standard of Review**

“A trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.” State v. Robinson, Syl. Pt. 4, 204 W.Va. 58, 511 S.E.2d 469 (W.Va. 1998).

## **Argument**

### **A. CSXT's Central Defense was that it Employed an Effective and Comprehensive Safety Program**

Throughout the entirety of trial, CSXT defended against Ms. Akers' allegations that she sustained cumulative trauma injuries through her work by stressing the theme that her job was reasonably safe because CSXT had an effective and comprehensive safety program in place. It was this theme which resonated throughout the entire trial, beginning with CSXT's opening statement and ending with its closing argument.

In her opening statement, counsel for CSXT stressed that throughout the trial CSXT would provide evidence that employees like Ms. Akers were "[t]rained with videotapes. She was trained with safety rules. There were Safe Job Procedures from everything from climbing up on an engine to walking across the floor safely." See Trial Transcript, Appendix Vol. 2, p. 109; 21-23. This training was given to "Mrs. Akers, and all the employees of CSX." See Trial Transcript, Appendix Vol. 2, p. 110; 4-5. "CSX did everything in their power to make it reasonably safe" and accomplished this by providing employees with the "CSX Safe Way book... [and] the Safe Job Procedures which had specific warnings about possible problems that you can incur." See Trial Transcript, Appendix Vol. 2, p. 111; 12-13 and 8-9.

CSXT continued to stress its theme of an effective and comprehensive safety program during the cross examination of Ms. Akers. She was asked questions about the various manuals and mandatory safety training she received during her employment with CSXT. Specifically, Ms. Akers was asked "Can you tell the jury what the CSX Safe Way is? The book, the CSX Safe Way, are you familiar with it?" and "You had, everyday when you came to your shift, what is

called either a safety meeting or something like a safety meeting?” See Trial Transcript, Appendix Vol. 2, p. 204; 21-22 and p. 205; 12-14. CSXT also asked Ms. Akers about the training she received from the “Back in Motion and Body in Motion videos at CSX.” See Trial Transcript, Appendix Vol. 2, p. 209; 24. These questions were all designed to establish the fact that CSXT emphasized its safety program and training program where Ms. Akers worked, and that this safety program was both comprehensive and effective.

CSXT further attempted to stress the effectiveness of safety manuals and training Ms. Akers received as part of her job at the Huntington Locomotive Shop during cross examination of her ergonomics expert, Dr. Robert Andres. Specifically, Dr. Andres was asked if employees such as Ms. Akers “have access to things like Safe Job Procedures or Safe Mechanical Procedure of the CSX Safe Way, that they’re required to keep in their grip, in their locker or on their person.” See Trial Transcript, Appendix Vol. 2 at 341; 13-16. Additionally, CSXT argued through its questioning that safety was a priority, and that it has “an absolute requirement that their employees report to them any pains or strains or injuries what they receive on-the-job.” See Trial Transcript, Appendix Vol. 2, p. 341, 18-20

The theme of an effective and comprehensive safety program continued during CSXT’s case in chief with the testimony provided by both its expert and fact witnesses. The first witness CSXT offered was Todd Brown, Ph.D. Dr. Brown was offered by CSXT and accepted by the Trial Court as an expert in ergonomics. Dr. Brown extolled the virtues of CSXT’s safety policies and procedures. Specifically, he discussed the various policies and procedures CSXT had in place at the Huntington Locomotive Shop designed to educate the employees and prevent workers, such as Ms. Akers, from suffering the injuries she did. See generally Trial Transcript,

Appendix Vol. 2 at 529-530, 533, 537, 542-543, 545, 549, and 550-552. Dr. Brown praised CSXT's ergonomics program, the safety committee at the Huntington Shop, and went as far as to say that CSXT stressed safety in the workplace and frequently reviewed and updated its safety policies by having CSXT employees from outside Huntington "come from other locomotive shops on the system and evaluate Huntington in terms of how it was, you know, measuring up to CSX published safety criteria." See Trial Transcript, Appendix Vol. 2, p. 530; 3-6. Dr. Brown discussed the daily safety meetings at the Huntington location and discussed the safety committee and the Huntington Locomotive Shop's safety reporting procedure as one of the ways that CSXT provided a reasonably safe place for Ms. Akers to work. Mr. Brown went as far to say that "there is an open forum at the end [of the safety meetings]" where employees were encouraged to voice "any questions or concerns or complaints." See Trial Transcript, Appendix Vol. 2, p. 536; 17-19.

CSXT next offered the testimony of Roger O. Simmons, one of Ms. Akers' supervisors at the Huntington Locomotive Shop, whose testimony echoed CSXT's defense that it had an effective and comprehensive safety program in place. Mr. Simmons stated that the "safety committee's a pretty strong force in the Huntington shop." See Trial Transcript, Appendix Vol. 2, at 640; 1-2. One example he offered to attempt to prove the safety committee's effectiveness and importance at the Huntington Shop was the fact that an employee could report any injuries or safety concerns to the committee, which has "quite a bit of power and authority to get things changed." See Trial Transcript, Appendix Vol. 2, p. 639; 20-21.

CSXT's other fact witness, Jim Fischer, another supervisor at Huntington, further added to CSXT's position on safety by stating that in his 30 years of working for the company, he knew

CSXT to take workplace injuries, work place conditions and safety “very serious.” See Trial Transcript, Appendix Vol. 2, p. 667; 12-19. He stressed that there were members of the safety committee that worked during Ms. Akers’ shift in Huntington to which she could have reported any injuries or problems. The job responsibility of this safety committee was “well, there – if you had an unsafe condition or even an unsafe act, it was their job to try and correct the situation.” See Trial Transcript, Appendix Vol. 2, p. 669; 11-18.

In concluding its case, CSXT reiterated its fundamental argument that it had a comprehensive and effective safety program in place which was designed to prevent the injuries Ms. Akers sustained. CSXT admitted it didn’t have an ergonomics program in place, but rather stated “[o]ur ergonomics program is our safety program. It was there then and it’s there now.” See Trial Transcript, Appendix Vol. 2, p. 941; 5-7. The closing stressed that CSXT had a Safe Job Procedures manual that “told you what you needed to know about the job...and it also warned you of hazards you might incur in that job, and those hazards include ergonomic factors.” See Trial Transcript, Appendix Vol. 2, p. 947-948; 22-24, 1. This program has been a “part of our training, as part of our education of our employees for years and year and years.” See Trial Transcript, Appendix Vol. 2, p. 948; 3-4. Lastly, CSXT again urged “there was constant, constant warnings, constant education and constant training of our employees” about safety rules and procedures designed to prevent the injuries Ms. Akers sustained. See Trial Transcript, Appendix Vol. 2, p. 948; 8-9.

The foregoing evidence, testimony and statements offered by CSXT throughout this trial clearly establish its overarching defense that Ms. Akers’ job was reasonably safe based on an effective and comprehensive safety program nationally and at the Huntington Locomotive Shop,

where Ms. Akers worked. In her counter to this defense, Ms. Akers attempted to offer the 1994 Huntington Division Safety Assessment, which serves to directly rebut CSXT's defense and impeach both its liability expert and fact witnesses. This evidence was, however, erroneously excluded by the Trial Court, the reasoning for which forms the basis of this appeal.

**B. The 1994 Huntington Division Safety Assessment Directly Rebuts CSXT's Central Defense that it had an Effective and Comprehensive Safety Program in Place, and the Trial Court Erred in Excluding this Evidence**

CSXT's overarching theme that it had an effective and comprehensive safety program in place is directly contradicted by the 1994 Huntington Division Safety Assessment. This survey directly counters CSXT's argument and overall theme presented throughout the trial that it possessed a sufficient safety program, both in general and at Huntington particularly, that would have protected Ms. Akers from occupational cumulative trauma and injury.

The 1994 Huntington Division Safety Assessment is a survey that explored safety at the Huntington Division of CSXT. This survey assessment was conducted by CSXT employees at the request of CSXT itself. See 1994 Huntington Division Safety Assessment, Appendix Vol. 1, A040. This assessment, the relevant portions of which occurred right in Huntington, West Virginia, concluded, *inter alia*, that the "safety process is dysfunctional [*sic*] at Huntington" and that no safety committee existed. See Huntington Division Safety Assessment, Appendix Vol. 1, A054. These findings serve to impeach the testimony provided by CSXT's fact witnesses, who stated that the "safety committee's a pretty strong force in the Huntington shop." See Trial Transcript, Appendix Vol. 2, p. 640; 1-2. The Safety Assessment also states: "safety committee activity is nonexistent. Safety committee representatives resigned according to employee reports.

Their resignations were prompted by lack of attention to reported unsafe conditions.” See Huntington Division Safety Assessment, Appendix Vol. 1, A054. Additionally, the study determined that “an atmosphere of intimidation exists at this location to the extent employees were reluctant to complete survey forms for fear of reprisal from management.” Id.

Additionally, the findings of this Safety Assessment serve to impeach the credibility of CSXT’s ergonomics expert, Todd Brown. Ms. Akers attempted to enter this evidence on cross examination of Dr. Brown after he was asked whether he had “ever seen any information or evidence that...the safety committees were ineffective at the Huntington locomotive shops?” See Trial Transcript, Appendix Vol. 2, p. 603; 16-18. After answering, “No, sir.”, Ms. Akers’ counsel attempted to enter the evidence in question. See Trial Transcript, Appendix Vol. 2, p. 603; 19.

CSXT objected to the entry of this evidence on the grounds of relevance. It first argued that the survey was taken before Ms. Akers began working in Huntington (“She wasn’t even on the property in 1994.”) See Trial Transcript, Appendix Vol. 2, p. 605; 5-6. CSXT further argued that the survey encompassed only a “division of the transportation department. She is not in the transportation shop in Huntington...which is entirely and completely separate.” See Trial Transcript, Appendix Vol. 2, p. 606-607; 7-9, 25, 1. Ms. Akers responded to these objections by pointing out the fact that the survey “is evidence that the safety department exists at the location at Huntington,” and the findings contained therein “doesn’t limit it to the transportation department.” See Trial Transcript, Appendix Vol. 2, p. 607, 2-5. CSXT’s objection to this evidence and the Trial Court’s ruling is further undermined by the fact that CSXT offered evidence of a statistical job study of workers in Waycross, Georgia and Raceland, Kentucky, two locations where Ms. Akers did not work, in an attempt to prove that Ms. Akers’ job was not as

difficult as she alleged. Counsel objected to the admission of this evidence on the grounds of relevance, in that the evidence was not relevant to the time period or location of Ms. Akers work. See Trial Transcript, Appendix Vol. 2, p. 564-565. The Court held that the evidence was admissible and stated that counsel's objection was "proper cross-examination. It goes to the weight and credibility. They will be admitted." See Trial Transcript, Appendix Vol. 2, p. 565; 8-9. Ms. Akers' counsel asked the Court to use this same logic in ruling on the admissibility of the evidence in question. "I objected to the admission of the Waycross, the Russell, Kentucky, because she was never in Waycross, she was never in Russell...I should certainly be entitled to cross-examine him on this...it's the Huntington division." See Trial Transcript, Appendix Vol. 2, p. 606; 1-5, 23. Despite the Trial Court's prior ruling and counsel's objection, the Trial Court excluded this evidence, a clear abuse of its discretion.

**1. The Court Improperly Invaded the Province of the Jury by Making an incorrect Factual Determination that Underpinned its Ruling Excluding the Safety Assessment**

In spite of CSXT's stated reasons for its objection and Ms. Akers' response, the Court came to the independent conclusion that the Safety Assessment should be excluded because:

The Court finds that the conclusions set forth under the commentary that you wish to use are not supported by the responses to the survey itself...the empirical data is contrary to the commentary in all but one, and *this is inflammatory language that is not consistent with the evidence and the testimony in this case*, even by Mrs. Akers. Therefore, I'm going to sustain the objection.

See Trial Transcript, Appendix Vol. 2, p. 607; 9-11 and 608; 1-5. (emphasis added). At no point during sidebar did CSXT object to the admission of the Safety Assessment based on the grounds the Court used in coming to its conclusions. Rather, the Court made this incorrect factual

determination on its own. This factual determination, however, is inaccurate and is contrary to established law in West Virginia.

It is clear that in the state of West Virginia juries are given the task of interpreting evidence, weighing witnesses' credibility, and deciding on the weight to give a particular piece of evidence. The Supreme Court of West Virginia has held, "the jury is the trier of the facts and in performing that duty, it is the sole judge as to the weight of the evidence and the credibility of the witnesses." State v. Bailey, Syl, Pt.2, 151 W.Va. 796, 155 S.E.2d 850 (W.Va. 1967). "It is the peculiar and exclusive province of the jury to weigh the evidence and *to resolve questions of fact when the testimony is conflicting.*" Smith v. Cross, Syl. Pt. 7, 223, W.Va. 422 675 S.E.2d 898 (W. Va. 2009) (emphasis added) *citing* Long v. City of Weirton, Syl. Pt. 3, 158 W.Va. 741, 214 S.E.2d 832 (W.Va. 1975); Bourne v. Mooney, Syl. Pt. 2, 163 W.Va. 144, 254 S.E.2d 819 (W.Va. 1979); and Toler v. Hager, Syl. Pt. 2, 205 W.Va. 468, 519 S.E.2d 166 (W.Va. 1999).<sup>2</sup>

Therefore, regardless of the fact that this Safety Assessment may have possessed conflicting information, it was still the task of the jury to decide whether those inconsistencies were noteworthy and how they may have impacted the jury's factfinding. In making factual determinations with respect to this Safety Assessment, the Trial Court invaded the province of the jury. The Safety Assessment directly countered CSXT's argument that it possessed a sufficient general safety program that would have protected Ms. Akers from occupational cumulative trauma. CSXT's repeated defense to Ms. Akers' claims was that it had sufficient

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<sup>2</sup> Importantly, the Court did not hold that the Safety Assessment was irrelevant or unreliable; to the contrary, it clearly recognized the Assessment's relevance when it analyzed the survey results. This Honorable Court has held that when entering evidence against CSX, the fact that the report was prepared by CSX and "was adverse to its originator unquestionably provides significant indicia of reliability." Lacy v. CSX Transp. Inc., 520 S.E.2d 418, 438 (W.Va. 1999).

safety programs in place that would have perhaps prevented or mitigated her injuries had she followed them. The 1994 Safety Assessment directly refutes this, finding that the “safety process is dysfunctional [*sic*] at Huntington” and that no safety committee existed. See Huntington Division Safety Assessment, Appendix Vol. 1, A054. The jury should have been permitted to evaluate the evidence on its own. In so doing, CSXT could have then raised any issues surrounding the Safety Assessment on cross-examination. In failing to let the jury hear the evidence surrounding the Safety Assessment, Ms. Akers was unable to refute the basic essence of CSXT’s defense that it had an effective and comprehensive safety program in place.

While Ms. Akers maintains that the conclusions of the 1994 Safety Assessment and/or its internal inconsistencies are irrelevant relative to its admissibility, she nevertheless feels compelled to call attention to some of the substantive points made in the Safety Assessment. First, sixty-three percent (63%) of the Huntington employees surveyed indicated that they “felt empowered to make decisions and take reasonable actions to prevent personal injuries.” See Huntington Division Safety Assessment, Appendix Vol. 1, A055. Viewed another way, this means that thirty-seven percent (37%) of those surveyed answered the question in the negative, *i.e.*, they did not feel empowered to take reasonable actions to prevent personal injuries.<sup>3</sup> Taken as a whole, thirty-seven percent can be construed as high number of employees who did not feel capable of ensuring protection against injuries. It bears repeating that CSXT continually contended that it possessed a sufficient safety program. In allowing the jury to hear that thirty-seven percent of employees did not feel like they could take actions to prevent injuries, Ms. Akers would have been able to present evidence to show that the safety program was not as

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<sup>3</sup> This was the specific question identified by the Court as being inconsistent with the Assessment’s conclusions.

laudable as CSXT portrayed. At the very least, assessing the viability of thirty-seven percent of employees' opinions about safety in Huntington should have been a question for the jury. It should also be noted that most CSXT locations surveyed about safety considerations yielded much higher "empowerment" data, with some locations of CSXT revealing that employees felt one hundred percent (100%) empowered to make safety actions to prevent injury. See generally Huntington Division Safety Assessment, Appendix Vol. 1, A044 and A082.

Also, only thirteen percent (13%) of those surveyed testified that safety was always given the same priority as production; and only thirteen percent (13%) felt that when they made a safety suggestion their supervisors listened and took remedial action. See Huntington Division Safety Assessment, Appendix Vol. 1, A056. It is very important to note that only eight (8) individuals completed the survey. See Huntington Division Safety Assessment, Appendix Vol. 1, A055. Thirteen percent of eight individuals equates to one single person. Only one person was able to answer these two questions in the affirmative. This conclusion gives rise to perhaps the most important caveat associated with the 1994 Safety Assessment – only eight employees were even willing to complete the survey. In looking at all of the surveyed locations of CSXT, this is the lowest participation of employees by far. The lack of participation led the surveyors to comment, "it should be noted an atmosphere of intimidation exists at this location to the extent employees were reluctant to complete survey forms for fear of reprisal of management." See Huntington Division Safety Assessment, Appendix Vol. 1, A054. Ms. Akers was not simply making conclusions about the lack of participation and the reasons for it, nor was an outside agency like OSHA, rather CSXT's own surveyors noted the pervasive intimidation at the Huntington location. This conclusion weighs heavily in favor of the Safety Assessment's

credibility. Such credibility should have been determined by the jury, sitting as factfinder, and not by the Court. Had this Assessment been admitted into evidence, and had the jury been able to hear testimony surrounding these inconsistencies in the Safety Assessment, CSXT would have had ample opportunity to cross-examine on those points, or even rehabilitate its own witnesses. The failure to admit such evidence operates as an abuse of the Court's discretion, and substantial justice requires that a new trial must be granted.

Furthermore, this Honorable Court has held that it will not "disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bounds of permissible choices in the circumstances." Hensley v. West Virginia Dep't of Health and Human Res., 203 W.Va. 456, 461, 508 S.E.2d 616, 621 (W.Va. 1998) quoting Gribben v. Kirk, 195 W.Va. 488, 500, 466 S.E.2d 147, 159 (W.Va. 1995). As outlined above, the Trial Court clearly made an error of judgment in coming to the independent conclusion that the evidence presented was inaccurate or inconsistent. This error is further compounded by the fact that CSXT did not even object the entry of this evidence on that ground.

For these reasons alone, the ruling of the Trial Court on the admissibility of the Huntington Division Safety Assessment must be reversed, and Ms. Akers must be granted a new trial.

## **2. The Arguments Made by CSXT with Regard to the Admission of the Safety Assessment go to the Weight of the Evidence and Not its Admissibility**

*Assuming arguendo* this Honorable Court wishes to entertain the merits of CSXT's actual objections to the Safety Assessment made at trial, the evidence in question is clearly both

relevant and admissible. The Safety Assessment is relevant as both impeachment evidence speaking to the credibility of CSXT's witnesses, and rebuttal evidence to CSXT's defense.

Dr. Brown testified as CSXT's ergonomics expert liability witness. His testimony was offered by CSXT to prove that it had an effective safety policy in place that addressed the ergonomic injuries Ms. Akers sustained in her job. On cross-examination, Dr. Brown testified that he had never seen any evidence indicating that the safety committees were ineffective at the Huntington locomotive shops. See Trial Transcript, Appendix Vol. 2, 603; 16-18. His testimony is, however, contradicted by the Huntington Division Safety Assessment, which explicitly states (among other things) that at Huntington, "drastic measures must be taken to ensure safety becomes the number one priority." See Huntington Division Safety Assessment, Appendix Vol. 1, A054. Although this assessment was conducted before Ms. Akers began working at Huntington, and the survey was taken at the Transportation Department, it tends to disprove CSXT's defense and Dr. Brown's testimony about its effective safety program. Ironically, Dr. Brown, who was hired by CSXT in 1995 to work on improving its safety program, never read or reviewed this study. See generally Trial Transcript, Appendix Vol. 2, p. 526-527. The fact that an individual who was brought on to improve safety at CSXT never reviewed this study before developing a new safety program could also indicate to the jury that CSXT did not disclose this study to the employees responsible for designing safety programs and training. The fact that this evidence was excluded prevented Ms. Akers from being able to inquire as to any reasons why Dr. Brown had not seen this study before, and whether the findings made in the study were ever investigated or changes implemented by CSXT in Huntington. The conclusions of the Safety Division indicate that "Unsafe conditions must be handled with a sense of urgency to

demonstrate management commitment to safety...People on the Huntington Division are screaming for leadership in safety.” See Huntington Safety Division Assessment, Appendix Vol. 1, A094 – A095. Cross examining Dr. Brown regarding whether this actually occurred could have impeached his credibility and created doubt as to the effective and comprehensive safety program CSXT argued it had in place.

Further, the Safety Assessment serves to impeach CSXT’s fact witnesses who were offered after Dr. Brown. Specifically, Roger O. Simmons, a fact witness offered by CSXT in support of its defense, stated that the “safety committee’s a pretty strong force in the Huntington shop.” See Trial Transcript, Appendix Vol. 2, p. 640; 1-2. Another example he offered to prove the effectiveness and importance of the safety committee at the Huntington Shop was the fact that an employee could report any injuries or safety concerns to the committee, which has “quite a bit of power and authority to get things changed.” See Trial Transcript, Appendix Vol. 2, p. 639; 20-21. This testimony is directly contradicted by findings contained in the Safety Assessment, which states: “safety committee activity is nonexistent. Safety committee representatives resigned according to employee reports. Their resignations were prompted by lack of attention to reported unsafe conditions.” See Huntington Division Safety Assessment, Appendix Vol. 1, A054. Additionally, the study determined that “an atmosphere of intimidation exists at this location to the extent employees were reluctant to complete survey forms for fear of reprisal from management.” See Huntington Division Safety Assessment, Appendix Vol. 1, p. A054. This evidence could also have been used as impeachment material during cross-examination of Jim Fischer, another supervisor at Huntington, who further added to CSXT’s position on safety by stating that in his 30 years of working for the company, he knew CSXT to

take workplace injuries, work place conditions and safety “very serious.” See Trial Transcript, Appendix Vol. 2, p. 667; 12-19.

The law in West Virginia clearly establishes that “upon inquiry as to the admissibility of evidence, its weight or probative value is not the criterion test. If it tends even slightly to prove a fact relevant to any issue in the case and material or forceful in the determination thereof, it is admissible.” State v. Bail, Syl. Pt. 7, 140 W.Va. 680, 88 S.E.2d 634 (W.Va. 1955) *citing* State v. McKinney, Syl. Pt. 3, 106 S.E. 894 (W.Va. 1921). In this case, a material issue was whether CSXT had a sufficient ergonomics program in place which was designed to prevent the injuries Ms. Akers’ sustained. CSXT admitted that it did not have an ergonomics program in place, but rather stated “[o]ur ergonomics program is our safety program. It was there then and it’s there now.” This program has been a “part of our training, as part of our education of our employees for years and year and years.” See Trial Transcript, Appendix Vol. 2, p. 948; 3-4. Based on this argument, it was reversible error for the Trial Court to exclude this evidence.

This Honorable Court has held that:

Whether evidence offered is too remote ... is for the trial court to decide in the exercise of sound discretion; its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears such action amounts to an abuse of discretion.

McCormick v. Hamilton Business Systems, Inc., Syl. Pt. 2, 175 W.Va. 222, 332 S.E.2d 234 (W.Va. 1985) *quoting* Yuncke v. Welker, Syl. Pt. 5, 128 W.Va. 299, 36 S.E.2d 410 (W. Va. 1945). Obviously, CSXT’s position throughout this entire trial was that the safety program, which was in place for years (years before Ms. Akers began working for CSXT), addressed the problems and injuries Ms. Akers sustained in her job. The evidence in question undoubtedly

encompasses a time period close to when Ms. Akers began working at CSXT and is not so remote from the time in question that it is irrelevant to a material issue in this case. If Ms. Akers were permitted to enter the Safety Assessment into evidence, she could have explored the issue of the safety program's effectiveness over the years at CSXT, with specific references to the Safety Assessment, with all CSXT's witnesses and created a sense of doubt about the effectiveness and existence of the safety program in Huntington. This in turn likely would have swayed the jury into finding in her favor. As such, it was a reversible error and abuse of discretion for the Trial Court to exclude this evidence.

The ruling of the Trial Court on the admissibility of this evidence must be reversed and Ms. Akers must be granted a new trial.

### **3. The Court Admitted, Over Objection, Similar Evidence During CSXT's Case in Chief.**

As a rebuttal to Ms. Akers' allegations that her job was difficult, demanding and caused the injuries she complained of, CSXT, through Dr. Brown, offered evidence of job analysis conducted by CSXT that analyzed job performance of laborers in Waycross, Georgia and Raceland, Kentucky in the mid 1990s and early 2000s (1995, 1996, 1997 and 2002). See Trial Transcript, Appendix Vol. 2, p. 564; 11-12 and p. 578; 18-23. Noticeably absent from this report is any empirical or statistical evidence related to the Huntington Locomotive Shop, the site where Ms. Akers worked and suffered her cumulative trauma injuries. Despite her objection to the entry of this evidence, the Trial Court allowed this study to be entered into the record, and

allowed CSXT's ergonomic liability expert Dr. Brown to testify about the findings contained therein. See Trial Transcript, Appendix Vol. 2, p. 564.

During Ms. Akers' counsel's exchange at sidebar with the Court regarding the admissibility of this evidence, the Court stated that Ms. Akers' argument for its exclusion went to the "weight and credibility" of the evidence. See Trial Transcript, Appendix Vol. 2, p. 565; 9. The Trial Court stated "it's proper cross-examination...they will be admitted." Id.; 8-9. Ms. Akers' counsel asked the Court to use this same logic in ruling on the admissibility of the Safety Assessment, stating, "I objected to the admission of the Waycross, the Russell, Kentucky, because she was never in Waycross, she was never in Russell...I should certainly be entitled to cross-examine him on this...it's the Huntington division." See Trial Transcript, Appendix Vol. 2, p. 606; 1-5, 23. Despite the Trial Court's prior ruling and counsel's objection, the Trial Court excluded the Safety Assessment, a clear abuse of its discretion, and a contradiction to its earlier ruling.

In making its objection to the admission of the Safety Assessment, CSXT argued that it was not relevant because the study was not conducted during the time when Ms. Akers worked for CSXT and the survey was done for the Transportation Department, not the locomotive shop where Ms. Akers worked. See generally Trial Transcript, Appendix Vol. 2, p. 604-607. Essentially, CSXT's argument is that the evidence in question is not admissible because it is for the wrong time and wrong job (Ms. Akers was not an employee at CSXT's Huntington location in 1994 and did not work in the Transportation Department).

Ms. Akers' counsel made an identical objection earlier during the direct examination of Dr. Brown when CSXT entered the job analysis study for the workers in Waycross, GA and

Russell, KY. Ms. Akers' counsel argued that the evidence was not admissible because it is for the wrong time, wrong job and wrong location (Ms. Akers never worked at Waycross, Georgia or Russell Kentucky, and was not a laborer in Huntington). See generally, Trial Transcript, Appendix Vol. 2, p. 564-565. The Trial Court overruled Ms. Akers' objection and instructed counsel to handle these time, place and location issues on cross examination. See, Trial Transcript, Appendix Vol. 2, p. 565.

The Trial Court's reasoning in admitting CSXT's statistical information should also have been logically used by Trial Court when ruling on CSXT's objection to the admission of the Huntington Division Safety Assessment. Ms. Akers requested the Trial Court grant her the same deference it showed CSXT, which could have addressed its issues surrounding the Safety Assessment on redirect of Dr. Brown and during closing argument.

There is simply no explanation as to why the Court did not use the same reasoning when Ms. Akers attempted to admit the Safety Assessment, which actually discusses the location where Ms. Akers worked as opposed to areas remote from Huntington, West Virginia. This evidence, even if it is "different job" – "different time" evidence, is no different from Dr. Brown's statistical surveys which also consist of "different job" – "different time" (and different location for that matter) evidence.

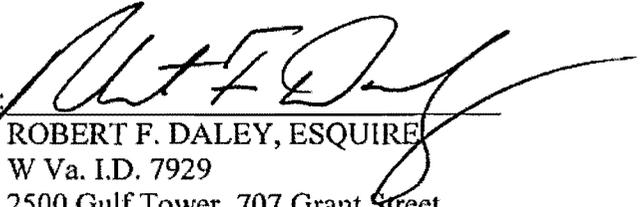
Based on the actions of the Trial Court in allowing the statistical job study to be entered into evidence over Ms. Akers' objection, she should be granted a new trial.

**Conclusion**

In light of the foregoing, Ms. Akers respectfully requests this Honorable Court reverse the evidentiary ruling of the Trial Court with regard to the 1994 Huntington Division Safety Assessment, and remand this case for a new trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

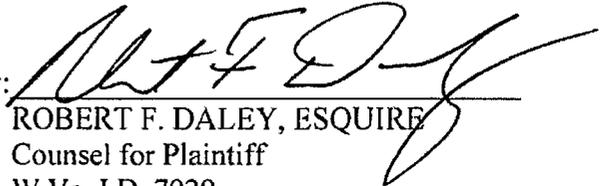
I, Robert F. Daley, hereby certify that a true and correct copy of the foregoing Brief was served this 7<sup>th</sup> day of June, 2011, by first class United States mail, postage prepaid, upon counsel for the Respondent, addressed as follows:

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