

Case Name: James L. Varner v. BNSF Railway Co.
Date Decided: March 4th, 2011
Originally Filed in: South Dakota (federal)
Decided by: South Dakota District Court (Federal)
Court: United States District Court for the District of South Dakota
Judge: Judge Viken
Citation: 2011 WL 835887

Background:

This action arose out of injuries allegedly sustained by James L. Varner ("Varner") while attempting to move a deer carcass off [railroad](#) tracks located near Edgemont, [South Dakota](#). Varner brought a negligence action against his employer BNSF Railway Co. ("BNSF") under the [Federal Employers' Liability Act](#) ("FELA"), 45 U.S.C. Â§ 51 seeking damages for past and future economic and non-economic losses. Following discovery, BNSF filed a motion to exclude the testimony of Dr. Michael D. Shinnick ("Dr. Shinnick"), an expert in the field of ergonomic safety in the workplace. The Court ordered a *Daubert* hearing to resolve BNSF's motion and the parties agreed to schedule the hearing for December 30, 2010. Dr. Shinnick was unavailable to attend the scheduled *Daubert* hearing. Varner's counsel, G. Michael O'Neal ("O'Neal"), explained that Dr. Shinnick informed him one week before the hearing that he would not be able to attend, and that he did not inform the Court because he thought the time could be used to conduct a "status conference." O'Neal also requested the Court go forward with the hearing on the basis of briefs and depositions. The Court denied his request stating that the purpose of the *Daubert* hearing was frustrated by Dr. Shinnick's absence. As a result, the Court was forced to reschedule the hearing for March 16, 2011. BNSF then filed a motion for costs, expenses and attorney fees reasonably incurred as a result of the multiplication of the *Daubert* hearing. Varner failed to file a timely response.

Issue:

Whether and to what extent can the Court award fees and costs for the multiplication of the *Daubert* hearing?

Overall Issues Discussed or Touched Upon in this Case:

- *Expert Witness- Daubert Issues*
- *Procedural Issues - Federal*

Held:

28 U.S.C. Â§ 1927 provides a court with the authority to require counsel to satisfy *personally* attorney fees reasonably incurred by an opposing party when counsel's conduct multiplies the proceedings in any case unreasonably and vexatiously. Here, the Court held O'Neal's conduct was both unreasonable and vexatious. It reasoned that O'Neal offered no reasonable excuse

for his failure to immediately notify the court of Dr. Shinnick's impending absence. It noted that O'Neal's concern with conducting a status conference was not a reasonable excuse because the parties had multiple discussions concerning the dates for trial and pretrial. The Court concluded that O'Neal had carelessly wasted BNSF's and the Court's time and went on to consider the amount of fees and costs that should be awarded. The Court explained it may impose only the excess attorney fees and costs "reasonably incurred by Mr. O'Neal's improper conduct." Consequently, the Court awarded BNSF's counsel travel and lodging expenses connected to the failed *Daubert* hearing in the amount of \$1,014. It also awarded BNSF \$3,570 in attorney fees: 11.5 billable travel hours paid to attend the failed hearing; and 7.5 billable hours paid to prepare for the future *Daubert* hearing. Consequently, the Court GRANTED BNSF's motion for expenses and fees in the amount of \$4,584 to be paid by personally by O'Neal within 60 days of the order.

Comments: