

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 351 EDA 2008

James V. Gautieri,

Plaintiff-Appellee,

v.

CSX Transportation, Inc.,

Defendant-Appellant.

BRIEF OF APPELLANT CSX TRANSPORTATION, INC.

*Appeal from the Judgment of the Court of Common Pleas of Philadelphia County
July Term 2006, No. 003847, Entered on March 7, 2008*

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STATEMENT OF JURISDICTION

This appeal is from an order of the Court of Common Pleas of Philadelphia County entered on March 7, 2008, in which the court entered judgment against defendant CSX Transportation, Inc. (“CSXT”) on a \$1,425,000.00 jury verdict in favor of plaintiff James V. Gautieri (“Gautieri”) on Gautieri’s claim under the Federal Employers Liability Act (“FELA”). This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S. § 742 and Pennsylvania Rule of Appellate Procedure 341(a).

ORDER IN QUESTION

The final order from which CSXT appeals is memorialized in a March 7, 2008 docket entry, which states:

Defendant’s praecipe to enter judgment pursuant to Pa. RCP 227.4 against the Defendant, CSX Transportation in the amount of \$1,425,000. In accordance with this Court’s order dated 12-3-07, denying the Defendant’s motion for post-trial relief, and letting stand the jury verdict entered in favor of Plaintiff. Notice given under Pa. RCP 237. Notice given under Pa. RCP 236. Judgment is hereby entered.

A copy of this docket entry appears at R.18a.¹ On March 4, 2008, the trial court issued an opinion, docketed on March 10, 2008 and appended hereto, in which it set forth its reasons for denying CSXT’s post-trial motions.²

¹ The March 7, 2008 order is not reprinted or appended because CSXT never received a copy, and—according to information received in response to CSXT’s inquires—neither the Court of Common Pleas nor this Court possess a copy. It is unclear whether the lower court ever produced a written order of judgment.

² Also pending before this panel is CSXT’s fully briefed motion to correct the record on appeal, which was referred to the merits panel in a January 26, 2009 order of the Court. Because consideration of CSXT’s motion was deferred to the merits panel, the scope of the record on appeal has yet to be authoritatively determined. Lest there be any confusion, CSXT has separated the trial record into two sets of materials: The first, the “Reproduced Record” (whose pages are numbered 1a, 2a, 3a, etc.), contains the materials that have in fact been transmitted to this Court by the trial court as well as those materials (*i.e.*, Dr. Bernstein’s deposition transcript)

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Although all of the issues CSXT urges on appeal were presented to the trial court in CSXT's motion for post-trial relief, the trial court's opinion explaining its reasons for summarily denying CSXT's motion directly addresses only one of the bases for a new trial that CSXT urges on appeal (namely, the court's failure to give an apportionment instruction). *See* R.1923a-1924a (*Gautieri v. CSX Transp. Inc.*, July Term 2006 No. 3847 (Mar. 4, 2008)); *cf.* R.1836a-1863a (Def. Mot. Post-Trial Relief). Accordingly, "[w]here, as here, the trial court does not set forth its reasons for denying a motion for a new trial," this Court "must apply a broad scope of review." *Donouge v. Lincoln Elec. Co.*, 936 A.2d 52, 68, 2007 Pa. Super. 309, ¶ 31 (Pa. Super. Ct. 2007) (internal quotation marks and alteration omitted).

When conducting that broad review, this Court must give plenary consideration to questions of law. *See Rossa v. Workers' Comp. Appeal Bd.*, 839 A.2d 256, 259, 576 Pa. 349, 354-55 (Pa. 2003). Thus, when considering questions of law, the "standard of review is *de novo*" and this Court is "not constrained by the determination of the trial court." *Jones v. Rivera*, 866 A.2d 1148, 1150, 2005 Pa. Super. 17, ¶ 4 (Pa. Super. Ct. 2005). When reviewing a determination that is entrusted to the trial court's discretion—for example, the trial court's failure to give a jury instruction, exclusion of certain evidence, or denial of a motion to compel discovery—this Court will reverse if "the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case" and the appellant was thereby prejudiced. *Schmidt v. Boardman Co.*, 958 A.2d 498, 514, 2008 Pa. Super. 203, ¶ 34 (Pa. Super. Ct. 2008).

that the trial court found should have been transmitted to this Court; the second, the "Reproduced Record: Items in Dispute Subject to Pending Motion to Correct" (whose pages are numbered 1d, 2d, 3d, etc.), contains the materials improperly excluded from the record on appeal.

STATEMENT OF THE QUESTIONS INVOLVED

1. Whether the trial court erred in refusing to instruct the jury on its obligation to apportion any damages between those attributable to plaintiff's pre-existing injuries and those allegedly attributable to the incident giving rise to the present action.

Answer below: No.

2. Whether the trial court erred in excluding evidence that part or all of plaintiff's current condition was caused by pre-existing injuries for which CSXT is not liable under FELA.

Answer below: No.

3. Whether the trial court erred in preventing CSXT from cross-examining plaintiff's damages expert on a key assumption underlying his calculations.

Answer below: No.

4. Whether the trial court erred in excluding evidence that plaintiff failed to mitigate his damages.

Answer below: No

5. Whether the trial court erred in excluding evidence offered to rebut plaintiff's assertion that CSXT valued profits over safety.

Answer below: No

6. Whether the trial court erred in failing to compel plaintiff to be deposed and to undergo an independent medical examination.

Answer below: No

STATEMENT OF THE CASE

Procedural History

Gautieri initiated this FELA action in the Court of Common Pleas of Philadelphia County in July 2006, alleging that CSXT, a freight railroad, was liable for injuries he supposedly suffered while working as a CSXT employee. At the end of a five-day trial held in August 2007, a jury returned a verdict in favor of Gautieri, awarding him \$1,425,000 in damages. *See* R.1365a-1367a. CSXT timely moved for post-trial relief. *See* R.16a. The trial court denied CSXT's post-trial motion in a December 3, 2007 order, the grounds for which it subsequently set forth in a March 4, 2008 opinion. *See* R.1902a (Order, *Gautieri v. CSX Transp. Inc.*, January Term 2006 No. 4735 (Dec. 3, 2007)); R.1915a–1926a (*Gautieri v. CSX Transp., Inc.*, 2008 WL 2090885 (Pa. Ct. Common Pleas Mar. 4, 2008)). On December 31, 2007, CSXT filed a notice of appeal. *See* R.17a; R.1903a-1914a. On March 7, 2008, in response to a praecipe filed by CSXT at this Court's direction, the trial court entered judgment against CSXT. *See* R.18a; *cf.* n.1 *supra*. Pursuant to Pa. R. App. P. 905(a)(5), CSXT's previously filed notice of appeal is deemed "filed after" but "on the day" of the order entering judgment against CSXT.

Statement of Facts

A. The Complaint.

Asserting a single count under FELA, Gautieri alleges that he was injured when he fell after "trip[ping] on debris" in a 2005 workplace incident. R.26a (Compl. ¶ 7). In his complaint, Gautieri identified his alleged injuries as "disc herniations at L2–3, L3–4, L5–S1, and radiculopathy." R.26a–27a (Compl. ¶ 9).³

³ At trial, Gautieri introduced no evidence of disc herniations, notwithstanding the allegation in his complaint.

B. The September 2005 Incident.

At the time of trial, Gautieri was a 49-year old CSXT locomotive engineer. R.937a-938a. On September 26, 2005, the day of the incident giving rise to this action, Gautieri was working in CSXT's Woodburne Yard in Langhorne, Pennsylvania. R.711a. Before beginning his shift, Gautieri attended a daily safety briefing which, coincidentally, on that particular day focused on the procedures that CSXT employees are required to follow to protect themselves against trips and falls. R.773a. The daily briefing emphasized CSXT Safety Rule 2006, which requires that employees, when walking, look in the direction they are going, stop walking if they must turn their vision elsewhere, avoid taking steps if they do not have a clear view of where their feet will go, and use a flashlight to illuminate their path if walking in the dark. R.768a-772a, 774a; R.990a, 992a, 1000a.

That night, Gautieri tripped and fell while checking locomotives in the rail yard. At approximately 11:30 p.m., Gautieri was inspecting the fuel levels on the engines. R.951a. Gautieri was, by his own admission, "in the process" of taking a step when—in violation of Safety Rule 2006—he lifted his flashlight from the ground and "pointed it towards the fuel tank" of the engine he was inspecting. R.965a (quoting R.457d); R.995a; *see also* R.989a-990a (plaintiff's admission that he "lift[ed] the flashlight up" while "walking along").⁴ According to Gautieri, he then fell as his left leg became enwrapped by a metal band on the ground and his right foot came into contact with a knuckle (a device used to couple railcars). R.989a-990a.

⁴ The next day, Gautieri conceded in a written statement that he had lifted his flashlight from the ground and "pointed it towards the fuel tank." R.457d. Because Gautieri's conduct was in apparent violation of Safety Rule 2006, CSXT initiated, as a prelude to a possible disciplinary action, a formal investigation of his evident failure to avoid placing his feet in a place that would cause him to fall. *See* R.999a-1000a, 1025a.

Gautieri's co-worker, Rick Heater, found him sitting on the step of the engine and called for medical assistance after Gautieri claimed to have hurt himself. *See* R.725a, 960a. Gautieri was treated at the scene by emergency medical technicians, who then transported him to St. Mary's Medical Center, from which he was released just a few hours later. *See* R.961a, 996a.

In the months following the incident, Gautieri sought medical care from Dr. Ronald Abraham. Dr. Abraham diagnosed Gautieri with certain lower back conditions, including lumbar strain and sprain, several bulging vertebral discs (in particular, the L2–L3, L3–L4, L4–L5, and L5–S1 discs), and degeneration in and between the discs in the lumbosacral area. *See* R.1408a; R.227d–229d, 233d–238d (records of 10/06/05, 11/08/05, 01/03/06). He prescribed pain medication and muscle relaxants, along with a course of physical therapy. *See* R.1409a; R.970a–972a. Eventually, in a reevaluation conducted specifically for trial, Dr. Abraham concluded that Gautieri was “disabled permanently.” R.72d–73d (record of 7/17/07); R.1428a.⁵ Gautieri has not returned to work since the incident.

C. Plaintiff's Prior Injuries.

It is undisputed that Gautieri had injured his back on no fewer than *seven* occasions prior to the incident giving rise to this action. *See* R.1002a–1004a. Between 1980 and 2001, Gautieri was, by his own account, involved in three automobile accidents and four workplace accidents, each of which, he concedes, resulted in injuries to his lower back. *See id.*; *see also* R.1004a–1007a; R.1493a. Gautieri's prior injuries were significant and permanent. On December 21, 2000, for example, Gautieri sustained what Dr. Abraham, his treating physician, described as “acute injuries” in a “serious motor vehicle accident.” R.102d–103d (record of 6/12/01);

⁵ CSXT requested, but was denied, the opportunity to conduct an independent medical examination of Gautieri. *See infra* at 10-11; *see also* R.1d-12d; R.248a–265a.

R.1578a.⁶ As a result of those “acute injuries,” Gautieri suffered “permanent deficits from the motor vehicle accident.” *Id.*; *see also* R.1551a–1552a. According to Dr. Abraham, those “permanent deficits” include “lumbar pain, lumbar strain and sprain,” several bulging discs (specifically, the L2–L3, L3–L4, and L4–L5 discs), and “degenerative changes” to the lumbar region (in particular, to the L5–S1 disc). R.102d–103d; R.1551a–1552a. Notably, Dr. Abraham’s diagnosis following plaintiff’s December 2000 auto accident was almost identical to the diagnosis he gave after the September 2005 incident giving rise to this action; in both instances he found that plaintiff had “lumbar pain,” “lumbar strain and sprain,” “degenerative changes,” and problems with four vertebral discs in the lower back. *Compare* R.102d–103d (record of 6/12/01) *with* R.199d–201d (record of 1/23/07); *see also* R.1568a–1576a.

D. Plaintiff’s Abuse of the Discovery Process.

Plaintiff impeded the discovery process from the start. As would be expected in a personal injury case, CSXT requested that plaintiff produce copies of all medical records relating to any injury he had ever suffered, including but not limited to the injury he allegedly suffered as a result of the 2005 incident. R.436a. Plaintiff did not object to the request or seek a protective order. *Cf.* R.447a–448a. Instead, he simply failed to comply. Plaintiff never produced *any* records relating to his prior injuries, and produced only select and incomplete records pertaining to the September 2005 incident. R.447a; R.14d, R.16d. As a consequence, CSXT was forced to obtain the pre-September 2005 records itself, even though Dr. Abraham, who treated Gautieri after both incidents, was in possession of those records.

⁶ The pain from the injuries Gautieri sustained in the December 2000 car accident was so severe that Dr. Abraham was still prescribing him Vicodin ES, a narcotic painkiller, more than a year later. *See, e.g.*, R.154d (2/5/02 prescription); *see also* R.1457a.

Similarly, although CSXT asked plaintiff (via interrogatory) to provide a detailed description of all injuries or conditions he had sustained or suffered in the ten years prior to the 2005 incident and to identify every accident in which he had been involved in the fifteen years prior to the incident, plaintiff identified neither the December 2000 auto accident nor the “permanent deficits” in his lumbar region that he suffered as a result. *Compare* R.419a, 442a (Interrogatories Nos. 20 & 24) *with* R.431a (Responses to Interrogatories Nos. 20 & 24); *cf.* R.102d–103d (6/12/01 evaluation); R.1551a–1552a, R.1578a.⁷ In response to CSXT’s request that Gautieri identify the physicians he saw, the treatments he received, and the problems that necessitated such treatments (R.419a–420a (Interrogatory No. 21)), Gautieri failed to disclose that after his 2000 auto accident he had been treated by Dr. Abraham, had been prescribed months of physical therapy and years of painkillers, and had been diagnosed with lower back pain, lumbral disc injuries, and degenerative changes resulting from the auto accident. Rather than disclose any of this material information, plaintiff instead falsely stated that the answers to CSXT’s interrogatory were “unknown at this time.” R.431a (Response to Interrogatory No. 21).

The usually routine procedure of deposing the plaintiff was anything but routine in this case. Indeed, as a result of plaintiff’s obstructionist conduct, CSXT was deprived of the opportunity to take plaintiff’s deposition. Gautieri’s persistent failure to produce documents and answer interrogatories forced CSXT to schedule Gautieri’s deposition late in the discovery period in the hope that CSXT would finally obtain those materials prior to taking his deposition. Although still without many of the materials Gautieri was obligated to produce, CSXT ultimately noticed Gautieri’s deposition for March 29, 2007, or four days before the April 2, 2007 discovery

⁷ Inasmuch as plaintiff did identify a 2002 auto accident in response to the interrogatory (as well as a 1996 shoulder injury), plaintiff clearly recognized that auto accidents, such as the one he suffered in December 2000, were responsive to the interrogatory. *Cf.* R.431a (Dec. 27, 2006).

deadline. R.18d–21d (Ex. C, Mot. Compel). But, *at plaintiff's request*, CSXT agreed to move the deposition date, first to April 27, 2007, and then to May 7, 2007. R.4d (¶¶ 11–12); R.29d–32d; R.34d; R.59d (¶ 7); R.503a (¶¶ 8–11).⁸ Then, due to a mutual scheduling conflict (namely, a status conference set by the Court for May 7), the parties agreed that plaintiff's deposition would be rescheduled for a later date. In the weeks that followed, counsel for CSXT made numerous attempts to contact plaintiff's counsel for purposes of rescheduling plaintiff's deposition. For more than two weeks, however, plaintiff's counsel refused to accept and failed to return CSXT's counsel's repeated calls. R.4d (¶ 13). On May 25, when counsel for CSXT was finally able to speak with plaintiff's counsel, plaintiff's counsel stated that he had previously arranged vacation plans and that plaintiff's deposition therefore would have to be taken during the week of July 9. Plaintiff's counsel promised to contact counsel for CSXT to set a specific date during that week after he had had an opportunity to consult his calendar. R.57d (¶ 8); R.504a (¶ 16).

Unfortunately, plaintiff's counsel did not keep his word. Having heard nothing from plaintiff's counsel, counsel for CSXT called plaintiff's counsel on June 6, and then again on June 7, to schedule plaintiff's deposition. But plaintiff's counsel again refused to accept and failed to return the calls. Plaintiff's counsel likewise failed to respond to a June 7 fax sent by counsel for CSXT requesting that plaintiff's counsel advise CSXT of a date on which plaintiff's deposition could be taken. *Cf.* R.36d–37d. Persisting in his dilatory tactics, plaintiff's counsel simply

⁸ Also at plaintiff's request, CSXT agreed to make several CSXT employees—Dave Dinges, Jack Darrah, Rick Heater, and someone familiar with CSXT's vocational rehabilitation program—available for deposition on May 8, 2007 and then again during the week of July 9, 2007, notwithstanding the fact that the discovery period had nominally ended. *See* R.503a (¶ 11); R.519a–523a; R.532a (¶ 8); R.534a–536a. Plaintiff ultimately chose not to take those depositions.

ignored CSXT's repeated requests to set a date for plaintiff's deposition. *Cf.* R.504a–505a (¶¶ 18–20). Finally, on June 13, still having heard nothing from plaintiff's counsel and with the August trial date rapidly approaching, CSXT unilaterally re-noticed plaintiff's deposition for July 6, 2007. *See* R.39d–43d. On July 3, at the conclusion of a pre-trial status conference, a representative of plaintiff's counsel, having evidently been instructed that plaintiff would not be made available for his deposition on July 6, advised counsel for CSXT to submit a list of alternative dates. *See* R.531a–532a; R.534a–536a. Accordingly, that same day counsel for CSXT provided plaintiff's counsel with a list of eight dates between July 11 and July 25 on which counsel for CSXT could take plaintiff's deposition. *See id.* Plaintiff's counsel, however, did not respond. *Cf.* R.49d–52d. On July 6, counsel for CSXT called plaintiff's counsel and was informed that none of the eight dates that CSXT had proposed were acceptable. Later that day, counsel for CSXT sent plaintiff's counsel a letter identifying six additional dates over a two-week period on which CSXT could take plaintiff's deposition. *See* R.49d–52d; R.54d–55d. On July 9, after receiving no response from plaintiff's counsel, counsel for CSXT called plaintiff's counsel, who, without offering any alternative dates, informed CSXT that plaintiff would not be made available for deposition on any of the dates suggested by CSXT. *See* R.541a–542a.

In addition to refusing to make himself available for his deposition, Gautieri also refused to make himself available for an independent medical examination (“IME”). On July 3, CSXT informed counsel for plaintiff that CSXT wanted to schedule the IME “for a date convenient for our physician and the plaintiff.” R.45d–47d. On July 5, having heard nothing from plaintiff's counsel, CSXT informed plaintiff's counsel that CSXT's physician could perform the IME on July 16 and asked that plaintiff's counsel confirm Gautieri's availability on that date. The next day, plaintiff's counsel told CSXT that plaintiff would not be made available for the IME on July

16, but gave no reason and offered no alternative dates on which Gautieri would be made available. R.54d–55d.

Confronted by plaintiff’s steadfast refusal to make himself available for his deposition and IME, and facing a fast approaching trial date, CSXT filed a motion to compel on July 9, 2007. *See* R.1d–12d. Although trial was scheduled to start less than a month later, the trial court, acting through a motions judge, denied the motion to compel plaintiff’s deposition and IME on the ground that plaintiff’s failure to make himself available was “not an emergency.” R.161a, R.165a. In support of the motion, CSXT had presented the court with, *inter alia*, copies of the March 1 notice pursuant to which plaintiff’s deposition would have been taken on March 29, and the superseding March 29 notice—issued after plaintiff requested an adjournment of the original deposition date—pursuant to which plaintiff’s deposition would have been taken on April 27. *See* R.18d–21d; R.29d–32d; *see also* R.161a (reminding court that CSXT had noticed plaintiff’s deposition prior to discovery deadline). Nevertheless, in denying the motion, the motions judge told counsel for CSXT that “if you had noticed it prior to April the 2nd, I would have compelled this.” R.161a. Despite denying CSXT’s motion, the court—acknowledging CSXT’s effort to accommodate plaintiff’s repeated requests for delay—recognized that “what [counsel for CSXT] tried to do is be decent, and what ended up happening is it slapped her right in the face.” R.165a–166a. Moreover, although it refused to order plaintiff’s deposition and IME, the court nonetheless urged plaintiff’s counsel to make the plaintiff available, warning that any verdict in plaintiff’s favor would be vulnerable to being “overturned [on appeal] because [CSXT] went into trial without discovery.” R.164a. But plaintiff’s counsel did not heed the court’s advice: CSXT was forced to go to trial without having had the opportunity to depose plaintiff, and without the benefit of an independent medical examination.

E. The Trial and Verdict.

During four days of testimony, the jury heard from several witnesses, including Gautieri, Rick Heater (Gautieri's co-worker, who was present the night of the fall), Rosalyn Pierce (plaintiff's vocational rehabilitation expert, who testified about Gautieri's prospects for future employment), and Andrew Verzilli (plaintiff's valuation expert, who estimated Gautieri's alleged damages). The jury also heard videotaped deposition testimony from three physicians: Dr. Abraham (Gautieri's treating physician for both the 2000 car accident and the 2005 fall); Dr. Burt Blackstone (the emergency room doctor who saw Gautieri the night of the fall); and Dr. Joseph Bernstein (a defense expert whom plaintiff presented as part of his case-in-chief). The parties also offered numerous exhibits, including medical records, photographs, and contemporaneous written statements.

Five evidentiary aspects of the trial are particularly significant to the issues presented on appeal. *First*, throughout trial, plaintiff argued to the jury that CSXT sacrificed safety for profit. In his opening statement, for example, plaintiff's counsel asserted that "the evidence will show to you that CSX made a simple decision over finances versus safety." R.687a. Later, in purported support of that assertion, plaintiff introduced evidence that CSXT had not installed certain lighting at Woodburne Yard, allegedly because it would have cost "too much money." R.945a–946a. CSXT sought to rebut plaintiff's theory that CSXT sacrificed safety for profit by introducing evidence of the substantial sums CSXT allocated to safety measures in the district where Gautieri worked. The court, however, excluded that evidence, thereby preventing CSXT from refuting plaintiff's inflammatory allegations. *See* R.984a–985a, R.1151a–1152a.⁹

⁹ A local safety committee determined how the money CSXT had allocated for safety measures was spent in a given location. Gautieri sat on the committee that directed expenditures for the Woodburne Yard. *See* R.980a–984a. The trial court excluded evidence of what CSXT

Second, the trial court also prevented CSXT from introducing evidence that plaintiff failed to mitigate his damages despite his obligation to do so under FELA. As CSXT attempted to prove at trial, CSXT operates a vocational rehabilitation program designed to assist injured employees in regaining their full employment capacity, but Gautieri refused to participate in the program. *See* R.895a–898a, R.1063a–1064a. CSXT tried to cross-examine plaintiff and his vocational expert, Roslyn Pierce, on the subject, and wanted to question its own witness about the program and plaintiff’s refusal to participate, but the court precluded all such questioning. *See* R.897a, R.1014a, R.1062a–1069a.¹⁰

Third, despite Gautieri’s various discovery violations (*see supra* at 7–11) and the court’s erroneous exclusion of relevant evidence (*see infra* at 15), CSXT still managed to present evidence of the numerous lower back injuries plaintiff sustained before the September 2005 incident giving rise to this action. For example, as noted above (*see supra* at 6), Gautieri admitted on cross-examination that he had injured his lower back on seven previous occasions.

spent on safety measures on the ground that CSXT’s duty to provide a safe workplace is non-delegable. *See* R.984a–985a. Although it is not entirely clear why the court excluded the evidence on that basis, it seems that the court mistakenly believed that CSXT was attempting to prove that because Gautieri had a say in how the safety expenditures were spent he was contributorily negligent to the extent inadequate safety measures were taken. But, as CSXT explained to the court, CSXT sought to introduce evidence of how much it spent on safety measures merely to rebut Gautieri’s insinuation that “CSX never did anything about safety, never spent any money.” R.984a.

¹⁰ Plaintiff objected to the questioning of Pierce and Gautieri on relevance grounds. *See* R.895a–897a, R.1013a–1014a. After initially permitting a question to Pierce on the existence of CSXT’s vocational rehabilitation program, the court, without further explanation, sustained plaintiff’s objections. *See id.* When CSXT announced that it planned to question Beverly Jackson, who helps run the program, on Gautieri’s failure to participate, Gautieri objected to the anticipated questioning on the grounds that requiring his participation in the program “during the course of litigation” would be “improper.” R.1065a. The court found that the proposed testimony was “questionably relevant,” but sustained the objection because participation in the program would, purportedly, “put[] the plaintiff in a position of being required to give information to the defendant that [he] wouldn’t necessarily be required to do.” R.1067a.

See R.1002a–1007a. Moreover, Dr. Abraham’s testimony and medical records confirmed that at least one of those prior incidents, the “serious motor vehicle accident” which injured plaintiff in December 2000, had left Gautieri with “permanent deficits”—including “lumbar pain, lumbar strain and sprain,” several bulging discs, and “degenerative changes” to the lumbar region—that are similar if not identical to the conditions diagnosed by Dr. Abraham after the incident giving rise to the current action. R.102d–103d (6/12/01 evaluation); R.199d–201d (1/23/07 evaluation); R.1493a, R.1551a–1552a, R.1568a–1576a, R.1578a. Furthermore, consistent with both Dr. Abraham’s testimony that an MRI taken in 2001 revealed bulging discs and degenerative changes “throughout the lumbar spine” and Dr. Blackstone’s testimony that the degenerative changes seen on an MRI taken immediately after plaintiff’s 2005 fall were “pre-traumatic” (*i.e.*, had occurred prior to the fall), Dr. Bernstein testified that MRIs taken of plaintiff after his 2000 car accident and the 2005 fall are “grossly similar.” R.1562a–1563a (Abraham); R.706d (Blackstone); R.1795a (Bernstein).¹¹ Dr. Abraham conceded that the pre-existing degenerative changes observed in 2001 “might have” developed into the problems about which plaintiff now complains “[e]ven without any additional trauma.” R.1650a-1651a.

¹¹ The trial court initially excluded this portion of Dr. Bernstein’s testimony on the ground that it was “outside the scope” of Dr. Bernstein’s expert report. See R.1129a; see also Feb. 10, 2009 Supp. Opinion ¶ 2(a). But immediately thereafter, the court recognized that if there were “items counsel have agreed on themselves they can put them on” (R.1129a–1130a), and counsel for plaintiff then specifically informed the court that the parties had agreed that “Page 23 is in” (R.1130a). Moreover, contrary to the trial court’s preliminary ruling (and its February 10, 2009 Supplemental Opinion recapitulating that ruling), Dr. Bernstein’s testimony was not “outside the scope of the report.” R.1129a. In fact, Dr. Bernstein’s report specifically compares the 2001 and 2005 MRIs and concludes that the “films are grossly similar.” R.1813a-1817a. A colloquy during the charge conference makes clear that Dr. Bernstein’s testimony regarding the similarity of the two MRIs was indeed read to the jury notwithstanding the court’s initial exclusion of that testimony. Cf. R.1167a (uncontradicted statement by counsel for CSXT that the jury “heard from Dr. Bernstein, . . . who said that the subsequent MRI is the same as the prior MRI”).

Fourth, although CSXT was able to introduce some evidence of plaintiff’s prior injuries, other evidence of those injuries and their effects was excluded over CSXT’s objection. For example, the trial court—on the ground that he was offering an expert opinion without having submitted an expert report (*see* R.648a–668a)—prevented CSXT from presenting the testimony of Dr. Mitchell Schnall, a radiologist who treated Gautieri after his 2000 auto accident and would have testified, in rebuttal to Dr. Abraham, that the MRIs taken after plaintiff’s 2005 fall were “identical” to those taken after his 2000 car accident. R.806d–807d; *cf.* R.1636a (Abraham denying that the MRIs taken in 2001 and 2005 are the same). The court also excluded—on the ground that it was beyond the scope of his report (*see* R.1129a)—certain portions of Dr. Bernstein’s testimony, including, for example, his testimony that plaintiff’s “disability could’ve been caused by the degenerative changes . . . alone.” R.1803a. In addition, the trial court excluded, and precluded cross-examination about, documents prepared by plaintiff’s physician in 1993 after plaintiff suffered an injury to his lower back that, according to his physician’s sworn statement, left plaintiff unable to work for an “indefinite” period of time. R.583d–584d (May 5, 1993 Supp. Doctor’s Statement); *see* R.1023a–1025a, R.1028a–1031a.

Finally, the damages estimate presented to the jury by plaintiff’s expert, Andrew Verzilli, was, by Verzilli’s admission, based on the assumption that plaintiff would have worked until age 67. *See* R.1085a, 1069a, 1110a. Verzilli readily acknowledged that his estimate of plaintiff’s purported damages would have been lower had he instead assumed that plaintiff would have retired earlier. *See* R.1097a. Verzilli’s assumption that Gautieri would not retire until age 67 was made at the request of plaintiff’s counsel. *See* R.1098a (Verzilli describing the assumption as the “prerogative” of plaintiff’s counsel); R.63d (letter from Verzilli to plaintiff’s counsel noting that the assumption that plaintiff would work until age 67 was made “[a]t your request”).

Verzilli justified the assumption as “reasonable” on the ground that age 67 was “normal retirement under social security” and on “the fact that once a person gets to the point that they can get full social security benefits, they’re going to retire.” R.1079a, 1085a, 1099a; R.63d (citing “changes to the ages individuals can collect full social security benefits” as justification for retirement-age assumption). On cross-examination, however, Verzilli acknowledged that railroad employees, such as plaintiff, receive retirement benefits that are administered by the Railroad Retirement Board (“RRB”) rather than those administered by the Social Security Administration. R.1099a. Then, to expose the falsity of Verzilli’s retirement-age assumption (and the corresponding inflation of his damages estimate), CSXT sought to elicit the fact that—in contrast to full social security benefits, which are not available until age 67—full RRB retirement benefits are available to railroad employees such as plaintiff at the age of 60. But, implicitly invoking the collateral source rule, the court precluded CSXT from eliciting that fact, and thus prevented the jury from learning of the error upon which plaintiff’s exaggerated damages estimate rested. *See* R.1100a–1110a.

At the close of trial, despite the governing law and the evidence introduced at trial, the court denied CSXT’s request that the jury be instructed to apportion plaintiff’s damages, if any, between those caused by the incident in question and those caused by plaintiff’s pre-existing lower back injuries. *See* R.1165a–1171a; *cf.* R.138a–140a. Indeed, the court not only refused to instruct the jury to apportion plaintiff’s (alleged) damages, but affirmatively instructed the jury that “[i]f you do not separate the pain or disability caused by the past injury from that caused by the injury of September 26th, 2005, then defendant is liable for all of plaintiff’s injuries.” R.1312a.

The jury returned a verdict in favor of plaintiff. It found that he had suffered total damages of \$1.5 million, 95% of which the jury attributed to CSXT's negligence and 5% of which it attributed to Gautieri's contributory negligence. *See* R.1365a–1366a. Accordingly, after denying CSXT's post-trial motion, the court entered judgment in favor of plaintiff in the amount of \$1,425,000. *See* R.1902a.¹²

¹² Each issue CSXT raises on appeal was preserved below: 1) CSXT submitted proposed apportionment instructions, requested that they be given, and objected when they were not given (*see* R.138a–140a; R.1164a–1171a, R.1191a–1194a, R.1198a–1199a, R.1321a–1322a); 2) With respect to the exclusion of evidence that would have supported an apportionment instruction, CSXT (a) offered the complete depositions of Drs. Abraham and Bernstein and objected when the court excluded certain portions of their testimony (*see* R.1127a, 1131a, 1133a), (b) offered the complete deposition of Dr. Schnall, explained its relevance, and objected when it was excluded in its entirety by the court (*see* R.649a, 668a, 1200a), and (c) attempted to cross-examine plaintiff on, and introduce medical records documenting, the effects of his 1993 injury, and made an offer of proof when it was precluded from doing so (*see* R.1023a–1025a, R.1028a–1031a); 3) CSXT attempted to cross-examine plaintiff's damages expert, Andrew Verzilli, on the reasonableness of his assumption that plaintiff would not have retired until age 67 because that is the age at which full retirement benefits are available under the Social Security Act, and made clear to the court that it would have elicited testimony that plaintiff was actually eligible to retire with full retirement benefits at age 60 under the Railroad Retirement Act had it been allowed to pursue its cross-examination (*see* R.1100a–1110a); 4) As for plaintiff's failure to mitigate his damages, CSXT attempted to cross-examine plaintiff and his vocational expert on plaintiff's failure to participate in CSXT's vocational rehabilitation program, and sought to examine a CSXT employee responsible for running that program on that same topic, but was precluded from doing so, despite explaining the relevance of the precluded testimony to the court (*see* R.895a–898a, R.1014a, R.1062a–1069a); 5) CSXT attempted to rebut plaintiff's contention that CSXT placed profits over safety through cross-examination of plaintiff, and fully apprised the court of the testimony it would have elicited had it been allowed to do so (*see* R.984a–985a, R.1151a–1152a); and 6) CSXT requested an order to compel plaintiff's deposition and independent medical examination, but CSXT's motion was denied, as was its motion for reconsideration (*see* R.1d–12d, R.159a–166a, R.171a–179a; R.632a). The trial court did not issue an order under Pa. R. App. P. 1925 requiring submission of a Concise Statement of Matters Complained of on Appeal.

SUMMARY OF ARGUMENT

The proceedings in this case were infected with error from beginning to end. The errors began when the motions judge allowed plaintiff to shirk his most basic discovery obligations. The errors continued at trial, with a series of one-sided evidentiary rulings that consistently enabled plaintiff to present a distorted picture of reality and that had the practical effect of significantly increasing the amount of damages awarded by the jury. And the *coup de grace* was delivered at the conclusion of trial, when the court refused to instruct the jury on its obligation to apportion plaintiff's damages between those caused by the incident at issue and those caused by his prior accidents and degenerative conditions, none of which were attributable to CSXT. Because each of those errors prejudiced CSXT, CSXT is entitled to a new trial.

1. Because a FELA defendant is liable only for those damages that are attributable to its negligence, it is entitled to an instruction directing the jury to apportion damages between those attributable to the defendant's negligence and those attributable to the plaintiff's pre-existing condition whenever there is evidence that the plaintiff's damages are attributable in whole or part to that pre-existing condition. Here, there was substantial evidence that plaintiff's damages were attributable, at least in part, to plaintiff's prior injuries and degenerative condition. CSXT was, therefore, entitled to an apportionment instruction, which the trial court erroneously denied.

2. Although CSXT was able to introduce sufficient evidence of plaintiff's prior injuries and degenerative condition to warrant an apportionment instruction, the trial court erroneously excluded yet other evidence of plaintiff's prior injuries and degenerative condition. Had that evidence been admitted, the jury might well have awarded a materially lower amount of damages even without CSXT's proposed instruction on apportionment.

3. The trial court also erroneously precluded CSXT from cross-examining plaintiff's damages expert on a critical assumption underlying his calculations. Although the expert based

his damages estimate on the assumption that plaintiff would not have retired until age 67, and defended that assumption on the ground that age 67 is when people become eligible for full retirement benefits under social security, the trial court—implicitly invoking the collateral source rule—erroneously precluded CSXT from eliciting the fact that railroad employees such as plaintiff are in fact eligible for full retirement benefits at age 60. That ruling, which is contrary to well-established law, prevented the jury from learning that plaintiff’s inflated damages estimate rested on a false premise.

4. The trial court compounded this error by preventing CSXT from introducing evidence that plaintiff failed to mitigate his damages. Although plaintiff’s duty to mitigate his damages is beyond dispute, and although plaintiff undoubtedly placed his medical condition at issue when claiming permanent disability, the trial court—on relevance and privilege grounds—erroneously prevented CSXT from introducing evidence that plaintiff refused to participate in a vocational rehabilitation program designed to reestablish his working capacity.

5. Plaintiff argued to the jury that CSXT placed profits over safety and was allowed to introduce evidence that supposedly supported that assertion. CSXT sought to rebut plaintiff’s assertion with evidence of its safety expenditures, but the court erroneously excluded that evidence, leaving the jury with the false impression that CSXT is a greedy and uncaring corporation.

6. Finally, plaintiff blatantly failed to fulfill his most basic discovery obligations. Although he refused to appear at his duly noticed deposition and independent medical examination, the motions judge denied CSXT’s motion to compel. As a result, CSXT was forced to defend itself without the benefit of full discovery.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO APPORTION PLAINTIFF'S DAMAGES CONSTITUTES REVERSIBLE ERROR.

The trial court committed reversible error when it failed to instruct the jury on the apportionment of damages. It is well established that “[w]here a defendant requests a jury instruction on a defense, the trial court may not refuse to instruct the jury regarding the defense if it is supported by evidence in the record.” *Commonwealth v. DeMarco*, 809 A.2d 256, 261, 570 Pa. 263, 271 (Pa. 2002); *see also Rizzo v. Michener*, 584 A.2d 973, 976, 401 Pa. Super. 47, 54 (Pa. Super. Ct. 1990) (“[t]he charge of the trial court should not exclude any theory or defense that has support in the evidence”). It is also undisputed that a FELA defendant is liable only for those damages that are attributable to its negligence. Here, there was ample evidence that plaintiff’s damages are, at least in part, attributable to his prior injuries and pre-existing conditions rather than CSXT’s negligence. Accordingly, as this Court held in *Meyer v. Union Railroad*, 865 A.2d 857, 2004 Pa. Super. 407 (Pa. Super. Ct. 2004), the trial court was required to instruct the jury on its obligation to apportion plaintiff’s damages between those, if any, attributable to the 2005 incident giving rise to this action and those attributable to his prior injuries and pre-existing conditions. The court’s failure to do so constitutes reversible error entitling CSXT to a new trial.

A. A FELA Defendant Is Not Liable For Damages Attributable To A Pre-Existing Condition.

The law is clear and undisputed: A FELA defendant is liable only for those damages that are attributable to its own negligence. A necessary corollary of that black-letter principle is equally clear and also undisputed: “[W]hen a defendant’s negligence aggravates a plaintiff’s pre-existing health condition, the defendant is liable only for the additional increment caused by the negligence and not for the pain and impairment that the plaintiff would have suffered even if

the accident had never occurred.” *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594, 601 (1st Cir. 1996).¹³ See also *Richardson v. Mo. Pac. R.R.*, 186 F.3d 1273, 1278 (10th Cir. 1999) (“Plaintiff is entitled to recover damages for any aggravation of the pre-existing condition, but those damages are limited to the additional increment caused by the aggravation.”); *Edsall v. CSX Transp., Inc.*, 2008 WL 244344, at *2 (N.D. Ind. Jan. 28, 2008) (“a plaintiff’s damages under FELA may be reduced to the extent that his current condition is the result of a pre-existing condition, rather than the railroad’s negligence”); *Rust v. Burlington N. & Santa Fe Ry.*, 308 F. Supp. 2d 1230, 1231 (D. Colo. 2003) (“as a general matter, when a plaintiff’s preexisting medical condition is aggravated by defendant’s negligence, the defendant is liable only for the additional increment caused by the negligence”); cf. *Evans v. United Arab Shipping Co.*, 790 F. Supp. 516, 519 (D.N.J. 1992) (holding under Jones Act that “[i]n cases like this one, in which an employer’s negligence aggravated a preexisting condition, courts have held that the defendant must compensate plaintiff only for the aggravation itself and not for the preexisting condition”), *aff’d*, 4 F.3d 207 (3d Cir. 1993).¹⁴ Accordingly, this state’s supreme court has held that when a FELA plaintiff “has been injured partially by the employer’s negligence and partially by other causes” that “relate to a pre-existing condition,” the defendant employer “must pay damages **only for those injuries attributable to its negligence.**” *Dale v. Baltimore & Ohio R.R.*, 552 A.2d 1037, 1041–42, 520 Pa. 96, 106 (Pa. 1989) (emphasis added).

¹³ Cf. R.1166a (acknowledgment by plaintiff’s counsel that CSXT is “only liable for that portion of the plaintiff’s current condition which was a result of an aggravation or exacerbation of a pre-existing condition”).

¹⁴ Because the Jones Act incorporates FELA (*see* 46 U.S.C. § 30104), it is well established that Jones Act precedents are persuasive in FELA cases, and vice versa. See, e.g., *Gallose v. Long Island R.R.*, 878 F.2d 80, 83 (2d Cir. 1989).

B. A FELA Defendant Is Entitled To An Apportionment Instruction Whenever There Is Evidence That The Plaintiff's Damages Are Attributable In Part To A Pre-Existing Condition.

Recognizing that “apportionment clearly is within the ambit of FELA,” this Court has squarely held that it is reversible error to refuse an apportionment instruction when there is “sufficient evidence to support [the] requested instruction.” *Meyer*, 865 A.2d at 864, 868, 2004 Pa. Super. 407, ¶¶ 18, 34. This Court’s recognition that FELA defendants are entitled to an apportionment instruction when there is evidence that the plaintiff suffered from a pre-existing condition accurately reflects federal law, which governs this case. *See St. Louis Sw. Ry. v. Dickerson*, 470 U.S. 409, 411 (1985) (per curiam) (“[T]he propriety of jury instructions concerning the measure of damages in an FELA action is an issue of ‘substance’ determined by federal law.”). Courts applying FELA recognize that “[a]lthough apportionment may be difficult, like comparative negligence it is a question for which juries are well suited.” *Sauer v. Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996). Thus, “in FELA cases, if sufficient evidence exists to indicate that an injury may have resulted from the aggravation of a preexisting condition, the jury should be instructed that if it finds for the plaintiff on the issue of liability, it should award damages only for the aggravation of the plaintiff’s preexisting condition.” *Schultz v. Northwest Ill. Reg’l Commuter R.R.*, 775 N.E.2d 964, 974 (Ill. 2002). Indeed, because the “[a]pportionment of damages is best determined by the jury,” it “is properly addressed . . . through . . . instructions to the jury.” *Rust*, 308 F. Supp. 2d at 1231; *see also Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 823 (7th Cir. 1985) (“It is desirable in such cases to direct the jury’s attention to the issue by a specific instruction.”). Accordingly, the Seventh Circuit, sitting *en banc* in a FELA case brought by a plaintiff with a pre-existing condition, unanimously approved an instruction that “in short, . . . told the jury to apportion.” *Varhol v. Nat’l R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990) (*en banc*) (per curiam) (approving jury

instruction—and corresponding special interrogatory—that directed the jury to “determine what portion of plaintiff’s present condition resulted from the aggravation and make allowance in your verdict only for the aggravation”) (internal quotation marks omitted)

The jury in this case was not told of its obligation to apportion plaintiff’s damages. To the contrary, the trial court informed the jury that if it found that CSXT “negligently caused further injury or aggravation to plaintiff’s past injury, plaintiff is entitled to compensation for *all* of plaintiff’s damages caused by the incident” and that CSXT was “liable for *all of* plaintiff’s injuries” if “you do not separate the pain or disability caused by the past injury from that caused by the injury of September 26th, 2005.” R.1312a (emphasis added). Thus, while the instruction given in this case may have allowed the jury to apportion plaintiff’s damages if it so chose, the instruction erroneously failed to inform the jury of its legal obligation to apportion those damages if apportionment was supported by the evidence. Under the instruction given in this case, the jury could well have believed, albeit mistakenly, that apportionment was entirely discretionary and that it therefore had no obligation to apportion notwithstanding the evidence that plaintiff’s damages were, at least in part, attributable to his pre-existing conditions. Similar to the instruction that this Court held was erroneously denied in *Meyer*,¹⁵ the instruction requested by CSXT would have told the jury that “[i]f you find that the plaintiff’s injury was due in part to a pre-existing condition and in part to defendant’s aggravation of the pre-existing

¹⁵ The instruction requested in *Meyer* stated:

If you find that the plaintiff had a pre-existing condition or disability at the time of the accident and that there was a likelihood that he would have sustained the injury about which he complains even if the accident had not occurred, you are to reduce the amount of damages which you award plaintiff by the degree of that likelihood.

865 A.2d at 860, 2004 Pa. Super. 407, ¶ 3.

condition, you must determine how much of the plaintiff's injury is due to his pre-existing condition and how much of his present injury is a result of the defendant's aggravation of his pre-existing condition." R.141a.

As this Court recognized in *Meyer*, although the defendant bears the burden of producing sufficient evidence to warrant an apportionment charge, that burden is minimal. The defendant need only "produc[e] *some evidence* to support its proposed apportionment instruction." *Meyer*, 865 A.2d at 866, 2004 Pa. Super. 407, ¶ 27 (emphasis added); *see also id.* at 868, 2004 Pa. Super. 407, ¶ 32 (defendant seeking an apportionment charge faces only a "relaxed burden of producing factual evidence to support a jury instruction"). Accordingly, because "[t]he charge of the trial court should not exclude any theory or defense that has support in the evidence," "a trial court should charge" the jury on apportionment whenever "there is some factual support in the record for the charge." *Id.* at 866, 2004 Pa. Super. 407, ¶ 26 (quoting *Rizzo*, 584 A.2d at 976, 401 Pa. Super. at 54, and citing *Levey v. DeNardo*, 725 A.2d 733, 555 Pa. 514 (Pa. 1999)). It is, therefore, well established that a FELA defendant seeking an apportionment charge based on a pre-existing degenerative condition is "not required to demonstrate an exact percentage representing the likelihood that the degenerative condition caused" the plaintiff's injury. *Id.* at 867, 2004 Pa. Super. 407, ¶ 27; *see also id.* at 868, 2004 Pa. Super. 407, ¶ 32 (recognizing that under federal law a FELA defendant does not have to "adduce sufficient evidence to substantiate a mathematical proportion" before being entitled to an apportionment instruction). Indeed, in FELA cases, courts have consistently "reject[ed] [the] argument that there must be expert testimony precisely apportioning the injury on a percentage basis between preexisting conditions and prior accidents." *Sauer*, 106 F.3d at 1494. Because "[t]he extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical

precision or great exactitude,” the evidence adduced “need only be sufficient to permit a rough practical apportionment.” *Id.*¹⁶

Courts repeatedly have held apportionment instructions to be warranted in FELA cases presenting factual circumstances similar to those presented here. For example, in *Meyer*, in which the plaintiff claimed to have suffered a herniated disc as the result of a workplace accident, this Court held that the failure to give an apportionment instruction constituted reversible error because the defendant had adduced evidence that the plaintiff’s “pre-existing degenerative disc condition could have caused” the plaintiff’s injury. 865 A.2d at 867, 2004 Pa. Super. 407, ¶ 28. That holding reflects the well-established rule that the jury should be instructed “to reduce the damages by the likelihood that [the plaintiff] would eventually have suffered the injury even if the accident had not occurred.” *Sauer*, 106 F.3d at 1495; *see also Lancaster*, 773 F.2d at 822-23 (when the plaintiff suffers from a pre-existing condition that rendered him particularly vulnerable to injury, the jury should be instructed to discount his

¹⁶ Federal law with respect to FELA differs from Pennsylvania law in this regard. *Compare Sauer*, 106 F.3d at 1494 (“When there is evidence that defendant’s negligence aggravated a preexisting condition but expert testimony does not precisely apportion the injury, apportionment is an issue for the jury.”), and *Zarow-Smith v. New Jersey Transit Rail Operations, Inc.*, 953 F. Supp. 581, 589 (D.N.J. 1997) (“it is preferable in the interest of fairness to permit some rough apportionment of damages rather than to hold the defendant entirely liable for a harm that was inflicted by several causes”), with *Martin v. Owens-Corning Fiberglass Corp.*, 528 A.2d 947, 950, 515 Pa. 377, 384-85 (Pa. 1987) (holding “[r]ough approximation” to be impermissible basis for apportionment under Pennsylvania law and therefore disallowing apportionment because “common sense and common experience possessed by a jury do not serve as substitutes for expert guidance”). At trial, plaintiff’s counsel invoked Pennsylvania law when arguing that CSXT was not entitled to an apportionment instruction. *See* R.1168a, 1171a (argument of plaintiff’s counsel that “in Pennsylvania” defendant bears the burden of “tell[ing] the jury what that apportionment should be” through “competent medical evidence”). But of course it is federal law, not Pennsylvania law, that governs. *See Meyer*, 865 A.2d at 862, 2004 Pa. Super. 407, ¶ 14 (recognizing that “[t]he propriety of jury instructions concerning the measure of damages in an FELA action is an issue of “substance” determined by federal law”) (quoting *Dickerson*, 470 U.S. at 411).

damages “to reflect the likelihood that he would have been injured anyway, from a nonliable cause, even if the defendant had not injured him”). Similarly, because a FELA defendant “is liable only for the additional increment [of pain and impairment] caused by [the defendant’s] negligence” (*Stevens*, 97 F.3d at 601), courts have also held an apportionment instruction to be appropriate if there is evidence that the defendant’s negligence merely aggravated a pre-existing condition. In *Edsall*, for example, the court held that apportionment was “the responsibility of the jury” where there was evidence that “the incident at issue aggravated pre-existing back and neck problems.” 2008 WL 244344, at *3. The fact that the symptoms of the pre-existing condition may be indistinguishable from those of the alleged aggravation does not excuse the failure to give an apportionment instruction. Thus, this Court held in *Meyer* that an apportionment instruction was necessary despite evidence that the plaintiff’s pre-existing condition and the injury allegedly caused by his workplace accident could “present identical symptoms.” 865 A.2d at 868, 2004 Pa. Super. 407, ¶ 30.¹⁷

¹⁷ Requiring an apportionment instruction even when it is difficult to distinguish the effects of the workplace injury from those of the pre-existing condition reflects the law of comparative negligence in FELA cases. *See, e.g., Paul v. Mo. Pac. R.R.*, 963 F.2d 1058, 1061–62 (8th Cir. 1992) (affirming comparative negligence instruction that placed “the opportunity to apportion” “in the jury’s hands” notwithstanding that “[a]ny hearing loss caused by one of these negligent exposures would be indistinguishable from, and perhaps subsumed by, a loss from the other”); *Kaspis v. Port Auth. Trans-Hudson Corp.*, 712 A.2d 1250, 1257 (N.J. Super. A.D. 1998) (affirming comparative negligence instruction, and ensuing apportionment, notwithstanding recognition that it was “impossible to determine what the relative contribution of each” cause was to the plaintiff’s damages). As the Tenth Circuit stated in *Sauer* (an opinion upon which this Court relied heavily in *Meyer*), “apportionment may be difficult,” but “like comparative negligence it is a question for which juries are well suited.” *Sauer*, 106 F.3d at 1494.

C. CSXT Was Entitled To An Apportionment Instruction Because It Adduced Ample Evidence That Gautieri's Damages Are Attributable, At Least In Part, To A Pre-Existing Condition.

The evidence adduced in this case was more than sufficient to require an apportionment instruction. There is ample evidence in the record that plaintiff suffered from a pre-existing degenerative condition that was, at most, aggravated by the 2005 incident giving rise to this action and that would have, or at least might have, grown worse over time even if that incident had not occurred. To the extent plaintiff's pre-existing condition was in fact aggravated by the 2005 incident, there is evidence that, if credited, distinguishes that aggravation from the pre-existing condition. Finally, there is substantial evidence that the symptoms plaintiff ascribes to the 2005 incident are actually attributable to plaintiff's previous lower back injuries, including those he suffered in his December 2000 automobile accident. On these facts, described in greater detail below, CSXT was entitled to an apportionment instruction.

It is undisputed that plaintiff suffers from degenerative back conditions that pre-date the 2005 incident giving rise to this action. *See, e.g.*, R.1166a (acknowledgment by plaintiff's counsel of plaintiff's pre-existing degenerative conditions); R.1231a (concession by plaintiff's counsel that plaintiff "had a degenerative problem in his back"); *see also, e.g.*, R.1476a (acknowledgement by plaintiff's physician, Dr. Abraham, that plaintiff had "preexisting degenerative changes" that "had already been evident . . . prior to whatever happened to him on September 26th, 2005"); R.102d–117d (records of 6/12/01, 5/8/01, 3/30/01, 3/27/01, 3/1/01, 1/30/01, 1/16/01, 12/28/00). Plaintiff's degenerative conditions include bulging discs, osteophytes (*i.e.*, arthritic spurs), and foraminal narrowing (*i.e.*, reduced spaces between the vertebrae). *See* R.1562a, R.1565a, R.1567a (bulging discs); R.1557a, R.1563a, R.1567a (foraminal narrowing); R.1557a, R.1559a (osteophytes); *see also, e.g.*, R.102d–105d (records of 6/12/01 and 5/8/01).

At trial, there was evidence that each pre-existing degenerative change from which plaintiff suffers would or could have worsened over time even if the 2005 incident giving rise to this action had not occurred. For example, Dr. Abraham testified that plaintiff has “osteophytes which are growing over time” and acknowledged that “even without trauma, if they grow to a certain point, they can cause problems with respect to the nerves coming out of the spine.” R.1559a–1560a. Dr. Abraham also testified that “as part of the aging—the degenerative process with arthritis, the osteophytes can grow large enough to affect the foramina.” R.1561a. Moreover, Dr. Abraham specifically acknowledged that “if osteophytes grow into that foraminal space, that can also cause a problem with the nerve root” either “[w]ith or without trauma.” *Id.* Dr. Abraham further acknowledged that foraminal narrowing can possibly “cause a person to have radiculopathy,” a symptom that plaintiff attributes to the 2005 incident. R.1563a; *cf.* R.1408a; R.199d–204d (reports of 10/24/06 and 1/23/07). With respect to plaintiff’s bulging discs, one of which plaintiff claims became a “protrusion” as a result of the 2005 incident, Dr. Abraham conceded that “over time” a bulge could eventually “have progressed to the point of being a protrusion” simply “due to the degenerative process” and that it “[p]robably” “could have happened to [plaintiff] without the accident in any event.” R.1651a–1652a. In sum, Dr. Abraham acknowledged that plaintiff’s pre-existing degenerative changes “may have” “progress[ed] in time” “even without any additional trauma.” R.1650a–1651a.¹⁸ Indeed, upon reviewing plaintiff’s CAT scan, Dr. Blackstone—the doctor who saw plaintiff on the night of the 2005 incident—noted plaintiff’s “significant degenerative changes” and stated that he “d[id]n’t

¹⁸ Moreover, Dr. Abraham also testified that *prior* accidents—such as plaintiff’s seven previous car and workplace accidents (*see supra* at 6–7)—can contribute to the degenerative process. *See* R.1477a (acknowledging that “[o]ne of the things . . . that can contribute to the degenerative process is whether they’ve had prior accidents”).

think there's anything . . . there that was made worse by the trauma." R.708d. Thus, CSXT adduced evidence that the plaintiff's "pre-existing degenerative disc condition could have caused" the plaintiff's injury (*Meyer*, 865 A.2d at 867, 2004 Pa. Super. 407, ¶ 28) and that plaintiff "would eventually have suffered the injury even if the accident had not occurred" (*Sauer*, 106 F.3d at 1495).¹⁹ That alone was sufficient evidence to require that an apportionment instruction be given.

But there was more. Plaintiff claimed that his pre-existing degenerative conditions were aggravated by the 2005 incident. *See, e.g.*, R.1231a (argument by plaintiff's counsel during summation that "a degenerative condition can be aggravated by trauma"). In support of that assertion, plaintiff offered the testimony and medical records of Dr. Abraham. Consistent with his contemporaneous notes, Dr. Abraham testified repeatedly that the 2005 incident caused "an aggravation of preexisting degenerative changes." R.1476a; *see also* R.1405a, 1408a, 1421a; R.199d–201d, R.236d–238d (reports of 1/23/07 and 10/06/05).²⁰ Dr. Abraham identified five distinct ways—three of which are nominally objective, and two of which are avowedly

¹⁹ In addition to the evidence that was admitted at trial, further evidence that plaintiff's injuries are attributable to the degenerative process rather than any trauma suffered in 2005 was proffered by CSXT but excluded by the trial court. *See, e.g.*, R.807d (Schnall stating that MRIs taken after plaintiff's September 2005 incident "showed the exact same degenerative changes . . . already seen in March of 2001"); R.1796a–1797a (Bernstein testifying that degenerative changes could "worsen over time," that "[e]verything you see in '05 can be explained [by] what was there already in '01," and that "there isn't" "any objective evidence on the November 2005 MRI of any traumatically induced condition"); R.1803a–1804a (Bernstein testifying that plaintiff's "disability could've been . . . caused by the degenerative changes shown on the MRIs alone" and that it is "fair to say [that] degenerative changes that progress to a certain extent on their own without trauma can also cause a disability").

²⁰ Although the other doctors who testified, Drs. Bernstein and Blackstone, doubted that the 2005 incident had in fact aggravated plaintiff's pre-existing condition, both acknowledged that trauma could in principle aggravate degenerative changes. *See* R.712d (Blackstone stating that "a fall or some other accident . . . could aggravate" a pre-existing degenerative condition); R.1801a–1802a (Bernstein acknowledging that "a degenerative condition can be aggravated by trauma").

subjective—in which the 2005 incident allegedly aggravated plaintiff’s pre-existing condition. In particular, Dr. Abraham testified that the 2005 incident aggravated plaintiff’s pre-existing degenerative condition by causing one disc to protrude²¹ and another disc to bulge²² and by initiating an inflammatory process resulting in radiculopathy,²³ all of which purportedly left plaintiff with greater pain²⁴ and reduced functionality.²⁵ Thus, there was evidence that, if

²¹ See R.1418a (“This new injury that occurred on September 26th, 2005 with direct trauma to the back caused . . . protrusion at the L4-5 level”); R.1421a (opining that 2005 incident caused “onset of . . . L4-5 protrusion”); R.1630a (“The new findings showed disc protrusion, which were not present previously at the L4-5 level”); R.1633a (“He now has at the L4-5 level a disc protrusion, which was not present previously.”); R.1641a (contrasting plaintiff’s condition in 2005 with that in 2001 and opining that “there’s evidence of disc protrusion at the L4-5 level which was not noted four years earlier”); R.1651a (testify that what had previously been a bulge at the L4-L5 level “became a protrusion”); *see also* R.199d–232d (reports of 1/23/07, 10/24/06, 8/29/06, 6/27/06, 5/23/06, 4/25/06, 3/28/06, 2/28/06, 1/31/06, 1/3/06, 12/06/05).

²² See R.1418a (“This new injury that occurred on September 26th, 2005 with direct trauma to the back caused onset of disc bulge at the L5-S1 level”); R.1421a (ascribing “onset of . . . bulging L5-S1” to 2005 incident); R.1431a (“The disc problems became more severe with further bulging and protrusion.”); *see also* R.199d–232d (reports of 1/23/07, 10/24/06, 8/29/06, 6/27/06, 5/23/06, 4/25/06, 3/28/06, 2/28/06, 1/31/06, 1/3/06, 12/06/05).

²³ See R.1418a (“This new injury that occurred on September 26th, 2005 with direct trauma to the back caused onset of . . . an inflammatory process that developed with evidence of radiculopathy.”); R.1432a (“There was objective evidence of nerve root irritation radiculopathy.”); R.1476a (testifying to “[a]n onset of inflammatory process” as a result of the 2005 incident); R.1580a (testifying that, in contrast to what he allegedly found in 2005, there was no evidence of radiculopathy in 2001); R.1630a (testifying that “[t]he new findings showed . . . a positive EMG with nerve root radiculopathy”); R.1633a (“He [now] has radiculopathy documented on electrodiagnostic testing.”); *id.* (testifying that “involvement with the fifth lumbar and first sacral nerve roots” was “a new problem”); R.1641a (contrasting plaintiff’s condition in 2005 with that in 2001 and opining that “there’s also evidence of . . . nerve root involvement which were not noted earlier, which means there is more of a process of inflammation”); R.1649a (stating that there was “no clinical indication of [radiculopathy] then” (*i.e.*, in 2002)).

²⁴ See R.1630a (“The new findings showed . . . increasing ongoing subjective complaints.”); R.1633a (testifying that aggravation of pre-existing degenerative condition was “evidenced by the clinical complaints of pain”).

²⁵ See R.1642a (comparing a list of plaintiff’s functional deficits after the 2005 incident with a list of plaintiff’s functional deficits after his 2000 car accident and concluding that

credited, would have allowed the jury reasonably to conclude that the 2005 incident aggravated plaintiff's pre-existing condition in ways that could be distinguished from the effects of the pre-existing condition itself. Therefore, because a FELA defendant "is liable only for the additional increment" of harm caused by its negligence (*Stevens*, 97 F.3d at 601), apportionment was "the responsibility of the jury" (*Edsall*, 2008 WL 244344, at *3), which should have been instructed accordingly.

Here, as in *Meyer*, there also was evidence that plaintiff's injury "could have been unrelated to the accident" giving rise to this action. 865 A.2d at 867, 2004 Pa. Super. 407, ¶ 29. In December 2000, plaintiff—who admitted having injured his back at least seven times prior to the incident giving rise to this action (*see* R.1002a–1004a)—sustained "acute injuries" in a "serious motor vehicle accident." R.102d–103d (6/12/01 evaluation); R.1551a–1552a, R.1578a. According to Dr. Abraham's testimony and medical records, those "acute injuries" caused plaintiff to suffer "continuing pain, which became chronic" and left plaintiff with "permanent deficits"—including several bulging discs and "degenerative changes" to the lumbar region—that would cause him "difficulty with certain activities in the future." R.102d–R.105d (5/8/01 evaluation; 6/12/01 evaluation); R.1551a–1552a, R.1562a. Given that plaintiff's "medical records clearly suggest a long history of pre-existing back . . . conditions" that would allow the jury to infer "a sufficient causal connection between the pre-existing conditions . . . and [plaintiff's] post-incident condition" (*Edsall*, 2008 WL 244344, at *3), and given that plaintiff's injury "could have been unrelated to the accident" giving rise to this action (*Meyer*, 865 A.2d at

"there's more involvement in . . . the injury . . . from September 26th, 2005" because "there's either four or five additional areas checked off"); R.1643a ("the complaints of 10/6/05 indicate more problems than in 2000").

867, 2004 Pa. Super. 407, ¶ 29), “the trial court erred in refusing to charge the jury relating to the apportionment principle” (*id.* at 868, 2004 Pa. Super. 407, ¶ 34).

* * *

“When an appellate court reviews a challenge to the trial court’s refusal to give a specific jury instruction, the court’s role is to determine whether the record supports that decision.” *Meyer*, 865 A.2d at 866, 2004 Pa. Super. 407, ¶ 26. Here, it is clear that the record does *not* support the trial court’s refusal to give an apportionment instruction. Because the court’s actual instructions omitted “basic and fundamental material” by failing to inform the jury of its obligation to attempt an apportionment of plaintiff’s damages (*see supra* at 23-24), this Court is “constrained to vacate the judgment entered on the verdict and remand for a new trial.” *Meyer*, 865 A.2d at 869, 2004 Pa. Super. 407, ¶ 34 (citing *Lockhart v. List*, 665 A.2d 1176, 542 Pa. 141 (Pa. 1995)).

II. THE TRIAL COURT ERRONEOUSLY EXCLUDED ADDITIONAL EVIDENCE THAT SUPPORTED AN APPORTIONMENT OF DAMAGES.

In a series of erroneous rulings, the trial court improperly excluded evidence that would have supported an apportionment of damages. In particular, the trial court erroneously excluded portions of Dr. Bernstein’s testimony, all of Dr. Mitchell Schnall’s testimony, and certain documents evidencing the extent of plaintiff’s prior injuries. Had this erroneously excluded evidence been admitted, it is probable that a properly instructed jury would have apportioned plaintiff’s damages, particularly when the excluded evidence is considered in conjunction with the evidence that was admitted at trial. Indeed, this additional evidence could well have caused the jury to apportion damages even under the inadequate instruction given by the trial court. Finally, even if, contrary to our arguments above, the evidence introduced at trial were not sufficient by itself to warrant an apportionment instruction, that evidence and the erroneously

excluded evidence were, in conjunction, more than sufficient to warrant such an instruction. Accordingly, the trial court's improper exclusion of the evidence, which is described in more detail below, constitutes reversible error that warrants a new trial.

Citing various grounds that do not withstand scrutiny, the trial court excluded several portions of Dr. Bernstein's testimony, each of which tended to show that plaintiff's injuries were caused by—or were, at most, an incremental aggravation of—plaintiff's pre-existing degenerative condition. For example, on the ground that it purportedly was “outside the scope of [Dr. Bernstein's] report” (R.1129a), the trial court excluded Dr. Bernstein's testimony that degenerative changes could “worsen over time” (R.1796a); that “the worsening that you see in '05 can be explained simply on the basis of the condition that was there in 2000 or 2001 having gotten worse” (*id.*); that “there isn't” “any objective evidence on the November 2005 MRI of any traumatically induced condition” (*id.*); that “[e]verything you see in '05 can be explained [by] what was there already in '01” (R.1797a); that plaintiff's “disability could've been . . . caused by the degenerative changes . . . alone” (R.1803a); and that “degenerative changes that progress to a certain extent on their own without trauma can also cause a disability” (R.1803a-1804a). But contrary to the trial court's ruling, each portion of this excluded testimony *was* fairly encompassed by Dr. Bernstein's report, which expressly stated that “there is no independent, objective evidence of an injury,” that “it is difficult to countenance a diagnosis of serious aggravation of the underlying condition” and that “[d]ifferences on [the] MRI films can be explained on the basis of progression of the underlying condition, and do not in and of themselves speak to the occurrence of trauma.” R.1816a (¶¶ 3(a), (b), (d)). Accordingly, the exclusion of this testimony was erroneous. *Cf.* Pa. R. Civ. P. 4003.5(c); *Expressway 95 Bus. Ctr., LP v. Bucks County Bd. of Assessment*, 921 A.2d 70, 79 (Pa. Commw. Ct. 2007); *Daddona*

v. Thind, 891 A.2d 786, 805–06 (Pa. Commw. Ct. 2006) (“An expert’s trial testimony that constitutes a reasonable explanation or even an enlargement of the expert’s written words may be deemed to fall within the coverage of ‘fair scope.’”) (citing *Hickman v. Fruehauf Corp.*, 563 A.2d 155, 386 Pa. Super. 455 (Pa. Super. Ct. 1989); *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 502 A.2d 210, 348 Pa. Super. 285 (Pa. Super. Ct. 1985)).

The trial court’s exclusion of other portions of Dr. Bernstein’s testimony also was erroneous. The court precluded Dr. Bernstein from testifying that any diagnosis that the 2005 incident had aggravated plaintiff’s pre-existing conditions would rest on “what Mr. Gautieri has to describe rather than what the films say independently” and that such a diagnosis therefore “would be made independent to the films.” R.1800a. The trial court excluded this testimony on the ground that it made “no sense to the Court” and the court had “[n]o idea what they’re saying here.” R.1129a. It is of course true that the trial court may exclude relevant evidence if “its probative value is outweighed by the danger of . . . confusion of the issues[] or misleading the jury” (Pa. R. Evid. 403), but there was no such danger here. Dr. Bernstein’s testimony is perfectly clear: He was saying that plaintiff’s condition may have been aggravated by the 2005 incident, as plaintiff alleges, but that the MRIs taken at the time do not provide objective proof of plaintiff’s allegation and that therefore one must accept plaintiff’s subjective account (of his pain and its onset) if one is to conclude that the 2005 incident did in fact aggravate his pre-existing condition.

Were there any doubt as to what Dr. Bernstein was saying, its meaning was explained moments later when (in other testimony excluded by the trial court) Dr. Bernstein stated that the diagnosis of an aggravation to plaintiff’s pre-existing condition depended “on Mr. Gautieri’s credib[ility]” so that “if the jury accepts what Mr. Gautieri says as a fact, then he has a diagnosis

of an aggravation” that is “independent to”—*i.e.*, does not rely on—“the films.” R.1802a. The trial court excluded this latter testimony on the ground that Bernstein “appear[ed] to make a ruling . . . on the plaintiff’s credibility . . . , which would not be appropriate” because such determinations are for the jury. R.1129a. But that ruling mischaracterizes Dr. Bernstein’s testimony and misstates the law. First, Dr. Bernstein was *not* passing judgment on plaintiff’s credibility; he was merely explaining that one would have to accept plaintiff’s subjective account of his symptoms as a factual predicate in order to conclude that the 2005 incident had in fact aggravated plaintiff’s pre-existing condition. Second, even if Dr. Bernstein had opined on plaintiff’s credibility based on the medical evidence he reviewed, that would not be grounds for excluding his testimony. *See* Pa. R. Evid. 704 (expert testimony “is not objectionable because it embraces an ultimate issue to be decided by the trier of fact”); *Bey v. Sacks*, 789 A.2d 232, 239, 2001 Pa. Super. 357, ¶ 19 (Pa. Super. Ct. 2001) (“Rule 704 of our Pennsylvania Rules of Evidence . . . specifically permits expert testimony as to the ultimate issue in a case”). The exclusion of Dr. Bernstein’s testimony was, therefore, erroneous.²⁶

The trial court also improperly excluded the testimony of Dr. Mitchell Schnall, a radiologist who had treated plaintiff after his 2000 car accident. Schnall would have testified that the MRIs taken of plaintiff’s back after the 2005 incident giving rise to this action “looked

²⁶ Dr. Bernstein’s testimony regarding the necessarily subjective basis for concluding that an aggravation had occurred is similar in substance to testimony that this Court found to support an apportionment instruction in *Meyer*—namely, a doctor’s testimony, based on an MRI, that the plaintiff’s injury was work-related “*assuming* the accuracy of [plaintiff’s] claim that he first experienced the symptoms within a day of the incident.” *Meyer*, 865 A.2d at 867, 2004 Pa. Super. 407, ¶ 29 (emphasis added). Notably, this Court’s conclusion that an apportionment instruction was necessary rested not only on that testimony, but also on the same doctor’s further testimony as to “why he did not believe [plaintiff’s] assertion was valid.” *Id.* Thus, the very sort of evidence that the trial court purported to be excluding in this case is precisely the sort of evidence that this Court has held requires an apportionment instruction.

identical” to the set taken after plaintiff’s 2000 car accident and that those taken in 2005 “showed the exact same degenerative changes that [Schnall] had already seen back in March of 2001.”

R.807d. CSXT offered Schnall’s testimony, which supported CSXT’s contention that plaintiff’s injuries were attributable to his degenerative condition, in rebuttal to Dr. Abraham’s unexpected testimony that the two sets of MRIs were not the same. *Cf.* R.1641a.²⁷ The trial court excluded Dr. Schnall’s testimony on the ground that he was, in the court’s view, being offered as an expert but had not produced an expert report prior to his testimony. *See* R.660a, 667a. That ruling was incorrect, both because Dr. Schnall had actually treated the plaintiff in 2001 (and thus was testifying, at least in part, based on his personal observations as a treating physician), and because he was not required to have produced a report even if he was being offered as an expert with respect to plaintiff’s condition in 2005. It is black-letter law that “an expert’s opinion offered in response to other testimony presented at trial need not be addressed in the expert’s report.” *Daddona*, 891 A.2d at 806; *see also Allegheny Ludlum Corp. v. Mun. Auth. of Westmoreland County*, 659 A.2d 20, 28 (Pa. Commw. Ct. 1995); Pa. R. Civ. P. 4020(d) (“At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.”). Thus, the exclusion of Dr. Schnall’s testimony was erroneous.

Finally, the trial court erred when it excluded—and precluded cross-examination about—certain documents that evidenced the severity of one of plaintiff’s prior lower-back injuries. In 1992 or 1993, while working for another railroad, plaintiff was injured when the locomotive in

²⁷ Because plaintiff offered Dr. Abraham as a treating physician rather than as an expert (*see* R.663a), Dr. Abraham did not produce a report prior to his testimony, which was recorded on July 27, 2007, less than three weeks before trial began. Thus, CSXT had no notice that Dr. Abraham would compare the MRIs and conclude that they were different.

which he was riding was rear-ended by another locomotive. *See* R.1004a, 1711a. As a result of the injuries he sustained in that accident, plaintiff applied to the Railroad Retirement Board for disability benefits under the Railroad Retirement Act and/or sickness benefits under the Railroad Unemployment Insurance Act. *See* R.609d (July 9, 2007 letter from Railroad Retirement Board). In support of his application for continuing benefits, plaintiff submitted periodic status reports from his treating physician. On each so-called “Supplemental Doctor’s Statement,” plaintiff’s physician was asked to provide plaintiff’s current diagnosis and whether plaintiff was “able to work without restriction,” and, if not, to “explain how the medical evidence shows the patient is still disabled” and to estimate when plaintiff would be able to return to work. In May 1993, plaintiff’s treating physician stated, under penalty of perjury, that plaintiff had sustained a “lumbar sprain and strain,” that plaintiff was not able to work without restriction, that plaintiff was “still disabled” because of the resulting “moderate-severe . . . lumbar tenderness & spasm” and “significant pain on movement,” and that plaintiff’s consequent inability to work was of “indefinite” duration. R.584d (May 5, 1993 Supp. Doctor’s Statement). Almost four months later, plaintiff’s physician stated, again under penalty of perjury, that plaintiff was still suffering a “subacute lumber s[prain]/s[train]” and was still unable to work without restriction. R.586d (Aug. 31, 1993 Supp. Doctor’s Statement).

Although these documents—which show that plaintiff had previously suffered a debilitating injury to precisely the same area as he allegedly injured in the 2005 incident giving rise to this action—were clearly relevant, the trial court prevented CSXT from cross-examining plaintiff about them and from introducing the documents into evidence, on the ground that CSXT’s proposed questioning was purportedly beyond the scope of plaintiff’s direct examination. *See* R.1023a–1026a, R.1029a–1031a. In particular, the court held that CSXT’s

proposed cross-examination about plaintiff's "indefinite" disability was beyond the scope of the direct examination, and thus purportedly inadmissible, because on direct examination plaintiff had, purportedly, been asked only about any prior medical assessment of a "permanent"—as opposed to "indefinite"—disability. *See* R.1030a–1031a. But the proposed cross-examination was not beyond the scope of plaintiff's direct examination. On direct examination, plaintiff's counsel asked plaintiff about the "litany of 30 years worth of problems and claims that [he had] made or had" (R.1017a) and whether plaintiff had ever, as a result of that history, "been physically disqualified from . . . performing [his job] functions" (R.1019a). Those questions address a subject matter that undoubtedly encompasses the statements submitted on plaintiff's behalf by plaintiff's physician that in 1993 plaintiff was "indefinite[ly]" disabled as a result of a lower back injury.

Moreover, even if the trial court's unduly cribbed characterization of plaintiff's direct examination were fully accurate, that still would not be grounds for precluding CSXT from inquiring about, and introducing, the documents at issue. Although Rule 611(b) of the Pennsylvania Rules of Evidence limits the cross-examination of "a witness *other than a party in a civil case*" to the subject matter of the direct examination, it expressly provides that "[a] party witness in a civil case may be cross-examined by an adverse party on *any matter relevant to any issue in the case.*" Pa. R. Evid. 611(b) (emphasis added). As the Pennsylvania Supreme Court has stated:

The distinction between cross-examination of witnesses and cross-examination of parties must always be kept in mind. It is true that the trial judge should restrict cross-examination of witnesses to the subject matter covered by his testimony on direct examination but no such rule applies to parties. A party to litigation who offers himself as a witness does so generally as to all relevant matters.

Agate v. Dunleavy, 156 A.2d 530, 532, 398 Pa. 26, 30 (Pa. 1959). See also *McManamon v. Washko*, 906 A.2d 1259, 1277, 2006 Pa. Super. 245, ¶ 35 (Pa. Super. Ct. 2006) (“Under Pa. R.E. 611(b), a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility.”) (quoting Pa. R. Evid. 611 cmt.). Accordingly, it was erroneous for the trial court to have prevented CSXT from inquiring about, and introducing, the documents at issue.²⁸

* * *

In sum, the trial court improperly excluded powerful evidence of plaintiff’s previous injuries and pre-existing degenerative condition that, if admitted, would have supported both an apportionment instruction and an actual apportionment of plaintiff’s damages. Because the erroneous exclusion of the evidence was a “misapplication of law” and thus an “abuse of discretion” (*Rogers v. Johnson & Johnson Prods., Inc.*, 585 A.2d 1004, 1007, 401 Pa. Super. 430, 436 (Pa. Super. Ct. 1990)), and because the evidence’s improper exclusion may have affected the jury’s verdict (*cf. Wilkes-Barre Iron & Wire Works, Inc.*, 502 A.2d at 215, 348 Pa. Super. at 294 (affirming grant of new trial where verdict “*may have been* based on improperly admitted evidence”), CSXT is entitled to a new trial. See *Hutchinson v. Penske Truck Leasing Co.*, 876 A.2d 978, 984, 2005 Pa. Super. 179, ¶ 13 (Pa. Super. Ct. 2005), *aff’d per curiam*, 922 A.2d 890, 592 Pa. 38 (Pa. 2007).

²⁸ A trial court may limit cross-examination of a civil litigant to the scope of direct examination, but only when it finds that such limitation is required by “the interests of justice.” Pa. R. Evid. 611(b). Here, the trial court made no such finding, and the facts of the case would not support such a finding had it been made.

III. THE TRIAL COURT ERRONEOUSLY PRECLUDED CSXT FROM CROSS-EXAMINING PLAINTIFF’S DAMAGES EXPERT ON A CRITICAL ASSUMPTION UNDERLYING HIS TESTIMONY.

To substantiate his alleged damages, plaintiff presented the testimony of Andrew Verzilli, an economist who estimated plaintiff’s lost wages. At plaintiff’s request, Verzilli based his estimate on the assumption that, but for his alleged injury, plaintiff would not have retired until age 67. *See* R.1085a, 1096a, 1098a; R.63d. Verzilli admitted that his estimate of plaintiff’s alleged damages was higher than it would have been had he instead assumed a lower retirement age. *See* R.1097a. On direct examination, Verzilli testified that “the assumption” that plaintiff would not retire until age 67 was “reasonable” because that is “normal retirement [age] under social security.” R.1085a.²⁹ Later, during cross-examination, Verzilli repeated that justification, testifying that his retirement age assumption was based on “the fact that once a person gets to the point that they can get full social security benefits, they’re going to retire.” R.1099a.

Because it was the basis for his damages estimate, CSXT attempted to cross-examine Verzilli on the appropriateness of his retirement-age assumption. In particular, CSXT sought to elicit the fact that plaintiff, as a railroad employee subject to the Railroad Retirement Act (“RRA”) rather than the Social Security Act (“SSA”), was eligible for full retirement benefits at the age of 60, and thus would not have had to have waited until age 67 as Verzilli had expressly assumed. The trial court, however, precluded CSXT from eliciting that fact, and thus prevented the jury from learning that plaintiff’s damages estimate rested on a false premise. *See* R.1100a–1110a. Moreover, the trial court subsequently compounded the prejudice when, at plaintiff’s

²⁹ *See also* R.1079a (Verzilli testifying that when estimating lost wages “we normally use normal retirement under social security”). Verzilli’s testimony was consistent with his expert report, in which he cited “changes to the ages individuals can collect full social security benefits” as justification for his retirement-age assumption. R.63d. Verzilli’s report was offered into evidence and shown, at least in part, to the jury. *See* R.1088a.

request, it informed the jury that railroad retirement benefits “are irrelevant and you are not to consider such in any shape or form while you deliberate [in] this matter.” R.1219a; *cf.* R.1108a–1109a (plaintiff’s request for instruction).

In precluding CSXT’s attempted cross-examination, the trial court accepted plaintiff’s contention that testimony about RRA benefits was barred by the collateral source rule. *See* R.1100–1109a, R.1291a. But CSXT’s attempted cross-examination did not contravene the collateral source rule, and the court’s highly prejudicial ruling accordingly constitutes reversible error.

As this Court recognizes, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.” *Plowman v. Plowman*, 597 A.2d 701, 705, 409 Pa. Super. 143, 151 (Pa. Super. Ct. 1991) (quoting *Hall v. Luick*, 461 A.2d 248, 250, 314 Pa. Super. 460, 463 (Pa. Super. Ct. 1983)); *see also Ganster v. W. Pa. Water Co.*, 504 A.2d 186, 92, 349 Pa. Super. 561, 573 (Pa. Super. Ct. 1985) (cross examination “is a vital and fundamental part of a fair trial”) (internal quotation marks omitted). Furthermore, “[a]lthough cross-examination is generally said to be confined to matters testified to by the witness on direct examination, this is broadly defined to include inferences, deductions, or conclusions which may be drawn therefrom, which explain or destroy the effect of the direct testimony.” *McGowan v. Devonshire Hall Apartments*, 420 A.2d 514, 522, 278 Pa. Super. 229, 244 (Pa. Super. Ct. 1980) (citations omitted). Accordingly, it is well-established that “the right of cross-examination extends beyond the subjects testified to in direct testimony and includes the right to examine the witness on any facts tending to refute inferences or deductions arising from matters the witness testified to on direct examination.” *Kemp v. Qualls*, 473 A.2d 1369, 1371, 326 Pa. Super. 319, 324 (Pa. Super. Ct. 1984). Thus, “[e]very

circumstance relating to the direct testimony of an adverse witness or relating to anything within his or her knowledge is a proper subject for cross-examination, including any matter which might qualify or diminish the impact of direct examination.” *Id.*; see also *Conley v. Mervis*, 188 A. 350, 353, 324 Pa. 577, 582 (Pa. 1936).

The fact that plaintiff was eligible to retire with full benefits at the age of 60 is clearly a “fact[] tending to refute inferences or deductions” that the jury may have drawn from Verzilli’s testimony on direct examination. Given Verzilli’s testimony—in which he justified his assumption that plaintiff would not have retired until age 67 on the ground that it is the “normal retirement [age] under social security” (R.1085a)—the jury, which is presumed to possess common knowledge, could have reasonably concluded (i) that age 67 is the normal retirement age under social security specifically because it is the age at which individuals become eligible for full retirement benefits;³⁰ (ii) that plaintiff would likely have continued working until he was eligible to receive full retirement benefits; (iii) that plaintiff would not have been eligible for full retirement benefits until age 67; and (iv) that a proper measure of plaintiff’s damages therefore includes the wages that he would have earned through age 67. If, however, CSXT had been allowed to elicit the fact that plaintiff was actually eligible for full retirement benefits at age 60, “the impact of [Verzilli’s] direct examination” might have been “qualif[ied] or diminish[ed].” *Kemp*, 473 A.2d at 1371, 326 Pa. Super. at 324. Accordingly, under this Court’s long-standing precedent, that fact was “a proper subject for cross-examination.” *Id.*³¹

³⁰ Indeed, Verzilli’s subsequent testimony—that his retirement-age assumption was based on “the fact that once a person gets to the point that they can get full social security benefits, they’re going to retire” (R.1099a)—underscores just how reasonable this inference was.

³¹ Verzilli acknowledged that railroad employees, such as plaintiff, receive retirement benefits that are administered by the Railroad Retirement Board rather than those administered by the Social Security Administration. R.1099a. Thus, in addition to being a “matter which

Contrary to the trial court’s belief, the collateral source rule does not require a different result. Even assuming *arguendo* that the collateral source rule would otherwise have prevented CSXT from introducing evidence of plaintiff’s eligibility for RRA retirement benefits during CSXT’s case-in-chief, Verzilli’s testimony on direct examination opened the door for cross-examination about those benefits.³² It is well-established that testimony elicited by an adverse party will, if it creates a false impression, “open[] the door to . . . evidence[] which was not otherwise admissible.” *Duchess v. Langston Corp.*, 709 A.2d 410, 412 (Pa. Super. Ct. 1998), *aff’d*, 769 A.2d 1131, 564 Pa. 529 (Pa. 2001). This principle applies fully to evidence that might otherwise have been barred by the collateral source rule. As the Third Circuit has stated, “the collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence . . . and then seek immunity from cross-examination regarding it.” *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 484 (3d Cir. 1967). *See also Bartosch v. Lewison*, 413 N.W.2d 530, 533 (Minn. Ct. App. 1987) (“the collateral sources rule should not be used as a shield” against cross-examination). Thus, once the door has been opened by testimony on direct examination, “the usual rules on cross-examination apply,” even if evidence regarding collateral benefits will be elicited, given “the necessity to protect the full range of inquiry allowed by cross-examination, a fundamental part of the adversary system.” *Hannah v. Haskins*, 612 F.2d 373, 375–76 (8th Cir. 1980).

might qualify or diminish the impact of [Verzilli’s] direct examination,” the fact that plaintiff could retire with full benefits at age 60 was also a proper topic of cross-examination as a “circumstance . . . relat[ed] to” matters “within [Verzilli’s] knowledge.” *Kemp*, 473 A.2d at 1371, 326 Pa. Super. at 324.

³² In fact, retirement benefits—whether received under the RRA or the SSA—are not collateral benefits because they are not paid on account of injury but are instead received as a matter of course upon attaining a certain age. Accordingly, even if plaintiff had not opened the door, the collateral source rule would not have barred CSXT from introducing evidence of plaintiff’s eligibility for RRA retirement benefits.

In answer to a question propounded by plaintiff on direct examination, Verzilli testified that his assumption that plaintiff would have worked until age 67 was “reasonable” because that is “normal retirement [age] under social security.” R.1085a. CSXT “was not required to leave this testimony unchallenged.” *Gladden*, 385 F.2d at 483. On the contrary, CSXT was entitled to “test[] the credibility of [Verzilli’s] assertion” (*Bartosch*, 413 N.W.2d at 533) and show through cross-examination that Verzilli’s assumption was in fact **unreasonable** given plaintiff’s eligibility for full RRA retirement benefits at age 60. *See also Ganster*, 504 A.2d at 193, 349 Pa. Super. at 574 (remanding for new trial where expert opinion was “totally insulated from any challenge regarding its veracity and reliability”) (internal quotation marks omitted).

It was plaintiff who, through Verzilli’s testimony regarding social security benefits, injected the issue of plaintiff’s eligibility for retirement benefits into the case. Moreover, when Verzilli told the jury that it was “reasonable” to assume that plaintiff would have worked until age 67 because that is the “normal retirement [age] under social security,” Verzilli clearly implied that plaintiff would not have been eligible to receive full retirement benefits until that point. Having elicited testimony from his own expert that falsely suggested that he was not entitled to full retirement benefits before age 67, plaintiff opened the door to cross-examination “to refute the impression” he had created. *Benson v. Am. Export Isbrandtsen Lines, Inc.*, 478 F.2d 152, 154–55 (3d Cir. 1973).

The principle that a plaintiff may not present evidence, especially evidence that creates a false implication, “and then seek immunity from cross-examination regarding it” (*Gladden*, 385 F.2d at 484) is not only fully applicable in FELA cases generally, but—as illustrated, for example, by *Lange v. Missouri Pacific Railroad*, 703 F.2d 322 (8th Cir. 1983) (per curiam)—remains fully applicable even when the ensuing cross-examination introduces evidence of

collateral benefits. Affirming a verdict in favor of the defendant railroad, *Lange* rejected the contention that it was error to have allowed cross-examination regarding the plaintiff's receipt of workers' compensation benefits. Reiterating that cross-examination is "a fundamental part of the adversary system" and that "the usual rules on cross-examination apply" even when collateral benefits are involved, the Eighth Circuit held that collateral "payments become relevant when the plaintiff's direct testimony misleads the jury on some issue in the case and cross-examination of the plaintiff on evidence of collateral source payments is necessary to rebut the testimony." *Id.* at 324. Thus, even in FELA cases such as this, if "plaintiff's case itself has made the existence of collateral sources of probative value," proof of those collateral benefits is allowed. *Moses v. Union Pac. R.R.*, 64 F.3d 413, 416 (8th Cir. 1995). Indeed, notwithstanding the general inadmissibility of collateral benefits evidence, courts have held, "for obvious reasons, that once a plaintiff asserts that he does not have coverage, then the defense may show that he does." *Id.* See also, e.g., *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir. 1996) (recognizing that although "evidence of payments made to plaintiff from collateral sources is not admissible" in FELA cases, "such evidence may be admissible if the plaintiff puts his financial status at issue").

Neither of the two cases upon which plaintiff relied at trial—*Hileman v. Pittsburgh & Lake Erie R.R.*, 685 A.2d 994, 546 Pa. 433 (Pa. 1996), and *Greisser v. Amtrak*, 761 A.2d 606, 2000 Pa. Super. 313 (Pa. Super. Ct. 2000)—support the trial court's ruling. Indeed, if anything, *Hileman* strongly suggests that it was error for the trial court to have precluded cross-examination about RRA retirement benefits. In *Hileman*, the Pennsylvania Supreme Court held that it was reversible error to inform the jury that a FELA plaintiff is ineligible for workers' compensation because "[i]nformation about the lack of workers' compensation can serve only to

create sympathy for the plaintiff and potential prejudice against the defendant.” 685 A.2d at 998, 546 Pa. at 441. Here, although Verzilli did not expressly state that plaintiff was ineligible for retirement benefits until age 67, he clearly implied as much—and that false implication, which formed the foundation for his inflated estimate of plaintiff’s damages, was no less prejudicial to CSXT than was the information provided to the jury in *Hileman*. It was, therefore, erroneous for the trial court to have prevented CSXT from “refut[ing] the impression created by the plaintiff.” *Benson*, 478 F.2d at 154–55.

Greisser is of no help to plaintiff either. In *Greisser*, this Court held that the trial court erred when it allowed the defendant to introduce evidence that the plaintiff could retire with full pension benefits at age 60. But in *Greisser*, unlike here, the plaintiff’s expert never mentioned social security benefits at all, and certainly never invoked the “normal retirement [age] under social security” to defend the reasonableness of his damages calculation. Thus, in sharp contrast to this case, the damages expert in *Greisser* never opened the door to the sort of cross-examination that CSXT attempted here.³³ As the Third Circuit has explained, the fact that the plaintiff *did* open the door “is what distinguishes the present case from *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963),” and therefore from *Greisser*, which relied on *Eichel*. *Gladden*, 385 F.2d at 483; *cf. Greisser*, 761 A.2d at 609, 2000 Pa. Super. 313, ¶ 11.³⁴

³³ *Greisser* is also distinguishable because there, unlike here, the defendant, rather than limiting itself to cross-examination of the plaintiff’s expert, introduced affirmative evidence of the plaintiff’s eligibility for full retirement benefits through its own expert during its case-in-chief. *See* 761 A.2d at 613, 2000 Pa. Super. 313, ¶ 26.

³⁴ If this Court nonetheless believes that *Greisser* is applicable to this case, CSXT respectfully requests that the Court revisit its holding in *Greisser*, which rests on a misreading of both *Hileman* and, by extension, *Eichel*. In *Greisser*, this Court erroneously concluded that *Hileman* had held that *Eichel* establishes federal substantive law with respect to the admission of collateral source evidence in FELA cases and that this Court is therefore bound to apply *Eichel* as purportedly construed in *Hileman*. *See Greisser*, 761 A.2d at 613, 2000 Pa. Super. 313, ¶ 28

Once plaintiff opened the door by affirmatively “conveying the impression” that he was not eligible for full retirement benefits until age 67, the trial court should not have allowed plaintiff to use the collateral source rule “as a shield” to prevent CSXT from cross-examining Verzilli on the accuracy of that false impression. *Bartosch*, 413 N.W.2d at 533. By precluding CSXT’s questioning, the trial court erroneously “conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination.” *Gladden*, 385 F.2d at 483. That error mandates reversal.

IV. THE TRIAL COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT PLAINTIFF FAILED TO MITIGATE HIS DAMAGES.

A new trial is also necessary because the trial court erroneously excluded evidence that plaintiff failed to mitigate his damages. As CSXT attempted to prove at trial through cross-examination of plaintiff and his vocational expert (Rosalyn Pierce), and through examination of

(rejecting contention that trial court could admit collateral source evidence in its discretion under Pa. R. Evid. 403 given how *Hileman* construed *Eichel*). But, in fact, *Hileman* expressly found that notwithstanding *Eichel* “it is not clear that federal substantive law requires” the exclusion of collateral source evidence under all circumstances. *Hileman*, 685 A.2d at 997, 546 Pa. at 440. Thus, contrary to *Greisser*, fidelity to *Hileman* does **not** require the *per se* exclusion of all collateral benefits evidence as a matter of federal substantive law under all circumstances in all FELA cases. Moreover, *Eichel* itself imposes no such rule. As an initial matter, *Eichel* addressed a defendant’s effort to introduce collateral benefits evidence during its case-in-chief; it did not consider whether such evidence could be introduced on cross-examination after the plaintiff has opened the door. Second, the defendant in *Eichel* sought to introduce the collateral benefits evidence to prove that the plaintiff was malingering. The Court reasoned that as to **that** issue “there will generally be other evidence having more probative value and involving less likelihood of prejudice.” *Eichel*, 375 U.S. at 255. While that might be true with respect to evidence of malingering, it is not true with respect to evidence of plaintiff’s eligibility for full retirement benefits at age 60; the **only** evidence of plaintiff’s eligibility to retire with full benefits at age 60 is evidence of the RRA retirement age. Finally, as the First Circuit has recognized, even with respect to collateral benefits evidence offered to prove malingering, *Eichel* did “not . . . establish[] a bright-line ruling barring the admission” of such evidence; the admissibility of such evidence must instead be determined on a case-by case basis by weighing its probative value against its potentially prejudicial impact. *McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998).

its own witness (Beverly Jackson³⁵), plaintiff refused to participate in the vocational rehabilitation program that CSXT operates to assist injured employees in regaining their full employment capacity. The trial court, however, precluded all questioning on the rehabilitation program and plaintiff's refusal to participate in it. *See* R.895a–898a, R.1014a, R.1062a. Plaintiff objected to the questioning of himself and Pierce on relevance grounds, and to the questioning of Jackson, who helps run the rehabilitation program, on the ground that requiring plaintiff's participation in the program “during the course of litigation” would be “improper.” R.1065a; *see also* R.895a–897a, R.1013a–1014a. The trial court sustained plaintiff's objections, in part without explanation and in part because plaintiff's participation in the program would, purportedly, have “put[] the plaintiff in a position of being required to give information to the defendant that [he] wouldn't necessarily be required to do.” R.1067a; *see also* R.897a, 1014a. But, contrary to the trial court's rulings, evidence of CSXT's rehabilitation program and plaintiff's refusal to participate in it was both relevant and admissible.

It is beyond dispute that “[u]nder the FELA . . . ‘an injured plaintiff has a duty to mitigate his damages.’” *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1288 (3d Cir. 1995) (quoting *Jones v. Consol. Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986)). *See also, e.g., Russell v. Amtrak*, 189 F.3d 590, 596 (7th Cir. 1999); *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 136 (2d Cir. 1993). As has been recognized in other contexts as well, that duty includes the “duty to mitigate damages by seeking vocational rehabilitation.” *Thompson v. Port Auth.*, 728 N.Y.S.2d 15, 16 (N.Y. App. Div. 2001). *Cf. Wieczorek v. S. Pac. Transp. Co.*, 149 F.3d 1192, 1998 WL 314365, at *1–*3 (10th Cir. 1998) (unpublished) (approving a failure-to-mitigate instruction in FELA case given evidence that the plaintiff “did not take advantage of the

³⁵ Ms. Jackson is incorrectly referred to as “Beth” Jackson in the trial transcript.

vocational counseling offered to him by [the defendant railroad]”); *Duren v. Union Pac. R.R.*, 980 S.W.2d 77, 80 (Mo. Ct. App. 1998) (defendant railroad was entitled to a failure-to-mitigate instruction in FELA case in which “Plaintiff failed to participate in vocational rehabilitation” offered by the railroad).

Accordingly, courts have repeatedly held that “evidence of a FELA plaintiff’s failure to take part in railroad vocational rehabilitation programs is admissible to show that a plaintiff has failed to mitigate his damages” (*Edsall, Inc.*, 2008 WL 244344, at *4), and that exclusion of such evidence constitutes reversible error. For example, in *Yauch v. Southern Pacific Transportation Co.*, 10 P.3d 1181 (Ariz. Ct. App. 2000), as in this case, the defendant railroad sought to introduce evidence that the plaintiff had refused to participate in a vocational rehabilitation program offered by the railroad. *See id.* at 1185. The trial court excluded the evidence, but the court of appeals reversed and remanded for a new trial, holding the “proffered evidence relevant to [the railroad’s] defense that [plaintiff] failed to reasonably mitigate his damages.” *Id.* at 1188. Similarly, in *Mikus v. Norfolk & W. Ry.*, 726 N.E.2d 95 (Ill. App. Ct. 2000), the appellate court ordered a new trial after the trial court excluded evidence of the defendant railroad’s “offer to enter plaintiff in a rehabilitation program.” *Id.* at 110. Because “[s]uch evidence is relevant to the issue of whether the plaintiff mitigated [his] damages,” the trial court’s “exclusion of evidence of defendant’s offers of rehabilitative services . . . was an abuse of discretion.” *Id.*

Contrary to what the trial court implicitly held in this case (*cf.* R.1065a, 1067a), the fact that an injured employee has sued the railroad in connection with his or her alleged injuries does not excuse the employee’s failure to mitigate his or her damages through participation in the railroad’s rehabilitation program, and does not render evidence of that failure inadmissible. Indeed, squarely rejecting the contention that such evidence was “inadmissible because litigation

had begun between the parties,” the *Mikus* court held that “the fact that the defendant in this case offered rehabilitation services . . . after litigation had begun does not render evidence of defendant’s offers inadmissible.” 726 N.E.2d at 110. As that court observed, if pending litigation rendered evidence of such offers inadmissible, it could have “a chilling effect on the motivation of employers to offer injured employees rehabilitation services.” *Id.* Policy considerations aside, it is well-established—under both federal and Pennsylvania law—that the doctor-patient “privilege is waived when,” as here, “the patient places his or her medical condition at issue in a personal injury lawsuit.” *Kraus v. Taylor*, 1997 WL 1133644, at *6 (Pa. Ct. Common Pleas June 9, 1997), *aff’d*, 710 A.2d 1142 (Pa. Super. Ct. 1998); *see also Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000); *Bayne v. Provost*, 359 F. Supp. 2d 234, 238 (N.D.N.Y. 2005); *Dennie v. Univ. of Pittsburgh Sch. of Med.*, 638 F. Supp. 1005, 1008 (W.D. Pa. 1986). Accordingly, there is no merit either to plaintiff’s assertion that requiring his participation in CSXT’s rehabilitation program “during the course of litigation” would have been “improper” (R.1065a), or to the trial court’s finding that it would have “put[] the plaintiff in a position of being required to give information to the defendant that [he] wouldn’t necessarily be required to do” (R.1067a).

Evidence of CSXT’s rehabilitation program and plaintiff’s refusal to participate in it was relevant and admissible. The exclusion of that evidence prejudiced CSXT by depriving it of the opportunity to prove that plaintiff failed to mitigate his damages. Its exclusion thus constitutes reversible error that entitles CSXT to a new trial.

V. HAVING ALLOWED PLAINTIFF TO ARGUE THAT CSXT PLACED PROFITS OVER SAFETY, THE TRIAL COURT IMPROPERLY EXCLUDED CSXT’S EVIDENCE OF THE MONEY IT ALLOCATED FOR SAFETY MEASURES.

From the very beginning of trial, plaintiff argued to the jury that CSXT sacrificed safety for profit. In his opening statement, for example, plaintiff’s counsel told the jury that “the

evidence will show to you that CSX made a simple decision over finances versus safety.” R.687a. Consistent with that theme, plaintiff subsequently testified, over objection, that he had, as a member of a CSXT safety committee, obtained bids for the installation of certain lighting at the railyard where he worked but was told that the lighting cost “too much money.” R.946a. Plaintiff was also allowed, again over objection, to identify three exhibits documenting the bids he obtained. *See* R.946a–947a.³⁶ To rebut plaintiff’s testimony and his assertion that CSXT sacrificed safety for profit, CSXT, during its cross-examination of plaintiff, sought to introduce evidence of the substantial sum it allocated to safety measures in the district where plaintiff worked. The trial court, however, excluded that evidence, thereby depriving CSXT of the opportunity to rebut plaintiff’s testimony. *See* R.984a–985a, R.1151a.

The trial court prevented CSXT from introducing evidence of its substantial safety expenditures on the ground that CSXT’s duty to provide a safe workplace was non-delegable. Although it did not explain its reasoning, the trial court apparently believed that CSXT wanted to use the excluded evidence to suggest that plaintiff, as a member of the local safety committee that determined how allocated funds would be spent, shared responsibility for the failure to install the lighting at issue. *See* R.984a–985a. But, as CSXT told the court, CSXT sought to introduce the evidence of how much it spent on safety measures solely to rebut plaintiff’s contention that CSXT sacrificed safety for profit. *See* R.984a. The excluded evidence was clearly relevant to that point. It was, moreover, plainly admissible through cross-examination of plaintiff because it “tend[ed] to refute inferences or deductions arising from matters the witness testified to on direct examination” and thus “might qualify or diminish the impact of direct

³⁶ Although plaintiff implied that the lack of lighting contributed to his fall, he did not introduce any evidence that the particular lighting for which he obtained bids would in fact have illuminated the particular spot where he fell.

examination.” *Kemp*, 473 A.2d at 1371, 326 Pa. Super. at 324; *see also Conley*, 188 A. at 353, 324 Pa. at 582.

If the trial court believed that the jury might have used the evidence for an improper purpose, the court should have admitted the evidence and given a limiting instruction. *Cf. Duchess v. Langston Corp.*, 769 A.2d 1131, 1147, 564 Pa. 529, 556 (Pa. 2001) (noting that a “limiting instruction is appropriate” where otherwise inadmissible evidence is admitted after door has been opened). Excluding the evidence entirely, while simultaneously allowing the plaintiff to argue that CSXT placed profits over safety, was prejudicial error. As a result of the trial court’s ruling, the jury was left with plaintiff’s distorted portrayal of CSXT as an uncaring, greedy corporation. Because CSXT was improperly denied the opportunity to rebut that characterization and the evidence plaintiff offered in support of it, CSXT is entitled to a new trial.

VI. PLAINTIFF’S BLATANT VIOLATIONS OF HIS DISCOVERY OBLIGATIONS NECESSITATE A NEW TRIAL.

CSXT also is entitled to a new trial because of plaintiff’s blatant failure to abide by his discovery obligations. As detailed above (*see supra* 7–11), plaintiff repeatedly impeded the discovery process. Plaintiff provided incomplete and untruthful responses to CSXT’s interrogatories and document requests, and then refused to appear for his deposition and independent medical examination. When it became clear that plaintiff had no intention of appearing for his duly noticed deposition and independent medical examination, CSXT sought the assistance of the court. The motions judge refused to intercede, erroneously denying CSXT’s motion to compel because plaintiff’s failure to make himself available was, in the court’s view, “not an emergency” and because CSXT had, purportedly, failed to notice plaintiff’s deposition prior to the discovery deadline. R.161a. But, contrary to the lower court’s ruling, CSXT *had*

noticed plaintiff's deposition prior to the discovery deadline, and plaintiff's failure to appear *was* an emergency given the fast approaching trial date. Plaintiff's willful evasion of his most basic discovery obligations prejudiced CSXT, which was forced to go to trial without having deposed plaintiff and without having conducted an independent medical examination. Accordingly, CSXT is entitled to a new trial.

Notwithstanding the motion judge's plainly erroneous finding to the contrary, CSXT did notice plaintiff's deposition prior to the discovery deadline. *See* R.18d–21d. CSXT agreed to postpone the duly noticed deposition twice, but *at plaintiff's request*. R.4d (¶¶ 11–12); R.29d–32d; R.34d; R.59d (¶ 7); R.503a (¶¶ 8–11). Having twice postponed the deposition at plaintiff's request, CSXT diligently sought to reschedule the deposition for more than two months, but plaintiff—who at no point sought relief under Rule 4012 of the Pennsylvania Rules of Civil Procedure—repeatedly refused to make himself available. *See supra* 9–10. Having specifically requested that the duly noticed deposition be postponed, and having then engaged in a lengthy series of dilatory tactics, plaintiff should not be allowed to evade his obligation to appear at his deposition on the ground that the discovery deadline had passed.

Indeed, plaintiff is equitably estopped from invoking expiration of the discovery deadline as an excuse for failing to appear at his deposition. The doctrine of “equitable estoppel recognizes that an informal promise implied by one's words, deeds or representations[,] which leads another to rely justifiably thereon to his own injury or detriment, may be enforced in equity.” *Novelty Knitting Mills, Inc. v. Siskind*, 457 A.2d 502, 503, 500 Pa. 432, 435 (Pa. 1983). Equitable estoppel has two essential elements, “inducement and justifiable reliance on that inducement” (*id.* at 503, 500 Pa. at 436), both of which are present here. Through his repeated assurances that he would make himself available at a later date, plaintiff induced CSXT to

postpone his deposition until after the discovery deadline had passed (and then to delay the filing of its motion to compel). CSXT was justified in relying on plaintiff's assurances: because they were made by plaintiff's counsel, who is under an ethical obligation to act in good faith; because the postponement of a deposition to accommodate scheduling conflicts is a matter of routine, not an obvious indication of subterfuge; because Rule 4002 of the Pennsylvania Rules of Civil Procedure, which is intended to "enlarge the rights of the parties by permitting them to agree to modify the procedures for discovery," expressly states that "[t]he parties may by agreement . . . provide that depositions may be taken . . . at any time" (Pa. R. Civ. P. 4002 & cmt.); and because plaintiff requested the opportunity to depose several CSXT employees after expiration of the discovery deadline (*see n.8 supra*), thereby clearly indicating that he did not consider expiration of that deadline to be preclusive of further discovery. Accordingly, plaintiff cannot rely on the expiration of the discovery deadline to excuse his failure to appear at his deposition. *See Blofsen v. Cutaiar*, 333 A.2d 841, 843, 460 Pa. 411, 417 (Pa. 1975) (equitable estoppel "prevent[s] a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken").

It is beyond dispute that CSXT had the right to depose plaintiff prior to trial. *See* Pa. R. Civ. P. 4001(c), 4007.1(a). Although perhaps too obvious to merit discussion, it should be remembered that "[d]epositions are the factual battleground where the vast majority of litigation actually takes place" (*Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)) and that "depositions of the parties are an exceedingly important aspect of the discovery process" (*Adams v. Teck Cominco Alaska, Inc.*, 2005 WL 846202, at *2 (D. Alaska Apr. 7, 2005)). Among other things, depositions enable a party, such as CSXT, to uncover evidence for use at trial, to learn the extent of the deponent's knowledge, to evaluate the deponent's demeanor, and to commit the

deponent to certain testimony. *See* 7 MOORE’S FEDERAL PRACTICE § 30.41 n.1 (3d ed. 2009). The rules granting litigants the right to discovery, including the right to take the opposing party’s deposition, “are designed to encourage a fair trial on the merits, and to discourage unfair surprise” (*Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1189, 2005 Pa. Super. 141, ¶ 33 (Pa. Super. Ct. 2005)) and “are essential in order to insure the orderly and equal administration of justice” (*Paden v. Baker Concrete Constr., Inc.*, 658 A.2d 341, 344, 540 Pa. 409, 414 (Pa. 1995)). A litigant who is deprived of the opportunity to depose the opposing party before trial is at a significant disadvantage. Indeed, because of the important role depositions play in ensuring a fair trial, a party’s failure to appear at a properly noticed deposition is sanctionable. *See* Pa. R. Civ. P. 4019(a)(1)(iv).

No less important in a personal injury case, such as this one, is the defendant’s right to obtain an independent medical examination of the plaintiff. Accordingly, “[w]hen the . . . physical condition of a party . . . is in controversy,” that party may be required “to submit to a physical . . . examination.” Pa. R. Civ. P. 4010(a)(2). In this instance, there can be no dispute that plaintiff, who claims to have suffered a permanent disability as a result of a workplace accident, placed his physical condition “in controversy.” CSXT was therefore entitled to an order requiring that plaintiff submit to a physical examination.

The motion judge’s failure to compel plaintiff’s deposition and independent medical examination—the two most important forms of discovery from the defendant’s perspective—severely prejudiced CSXT. It was forced to defend itself against plaintiff’s claim without any opportunity to test plaintiff’s knowledge and credibility or to obtain independent information about the nature and extent of plaintiff’s alleged injuries prior to the trial. Indeed, because of the inherent prejudice such conduct causes, appellate courts applying discovery rules such as those

applicable here have upheld severe sanctions, including outright dismissal, for conduct similar to plaintiff's conduct in this case. *See, e.g., Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 765 (2d Cir. 1990) (affirming dismissal of action as a sanction for plaintiff's refusal to attend her own deposition); *see also, e.g., Lockhart v. Sullivan*, 925 F.2d 214, 218 (7th Cir. 1991) (noting that a "plaintiff's failure to attend his own deposition" may justify "the harsh sanction of dismissal").³⁷ Although the motions judge refused to order plaintiff's deposition and IME, it warned plaintiff that any verdict in his favor would be vulnerable to being "overturned [on appeal] because [CSXT] went into trial without the discovery." R.164a. This Court should make good on that warning, and order a new trial.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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³⁷ With respect to depositions, the Pennsylvania Rules of Civil Procedure are substantively similar to the Federal Rules of Civil Procedure. *Compare* Pa. R. Civ. P. 4001(c), 4007.1(a) *with* Fed. R. Civ. P. 30(a)(1).

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two (2) copies of the foregoing Brief of Appellant CSX Transportation, Inc., upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.App. P. 121:

Service by first-class mail, postage prepaid, addressed as follows:

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Andrew Tauber, Esq.

Dated: May 14, 2009

ADDENDUM

**TRIAL COURT OPINION,
MARCH 4, 2008**

**STATEMENT OF MATTERS
COMPLAINED OF ON APPEAL**

The Trial Court did not issue an order directing Appellant to file and serve a Concise Statement of Matters Complained of on Appeal, pursuant to Pa. R. App. P. 1925. Accordingly, no such Statement was filed or served.