



The Voice

And The Defense Wins

Published 9-25-13 by DRI

Timothy L. Fields and Nathan T. Nieman



DRI members [Timothy L. Fields](#) and [Nathan T. Nieman](#) of **Modrall Sperling** in Albuquerque, New Mexico, recently obtained a defense verdict in a personal injury/FELA railroad case involving substantial claimed personal injury damages. The case was tried before a 12-person jury in Santa Fe.

The plaintiff, a 58-year-old welder at the time of his alleged accident, contended that the railroad did not provide a safe workplace in that it required the plaintiff to work during the early morning hours “without sufficient lighting.” The plaintiff claimed that due to the insufficient lighting, he tripped, fell, and injured his back while working for the railroad. He supported his claim at trial by presenting testimony from a co-worker and a treating physician.

The plaintiff had surgery to his lower back after the incident and claimed approximately \$400,000 in lost wages, stating that he would not have retired until age 66. Also, the plaintiff claimed pain and suffering damages at trial.

BNSF Railroad defended by arguing that BNSF Railroad provided a safe work environment for the plaintiff by providing multiple lights, and that the plaintiff refused or failed to use the lights that were available to him. BNSF Railroad also argued that the plaintiff had the authority to wait to perform his job until after sunrise or take other steps to ensure he could perform his job safely. BNSF also used testimony from its expert, Dr. G. Theodore Davis, to demonstrate that there was no mechanism of injury that could have caused the back condition. BNSF also contested the damages, by claiming that the plaintiff had a long history of preexisting low back pain, and that any current complaints of low back pain were related to his preexisting and long-standing back condition. Additionally, BNSF argued that, based on multiple statements made to BNSF and a co-worker, the plaintiff intended to retire at age 60.

On the second day of deliberations, in a 10–2 decision, the jury ruled for the defense, determining that BNSF was not negligent. *Acosta v. BNSF Railway Company*, No. D-101-CV-2011-02741, Santa Fe, New Mexico

To learn more about DRI, an international membership organization of attorneys defending the interests of business and individuals in civil litigation, visit www.dri.org.