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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2218**

Thomas F. Willie,
Appellant,

vs.

Duluth, Winnipeg & Pacific Railway Co., et al.,
Respondents.

**Filed June 25, 2012
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-CV-10-3214

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Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Willis,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the decision awarding summary judgment to his former employer on the ground that appellant's personal-injury claims were barred by the statute of limitations. Because we see no error in the district court's construction and application of the statute of limitations, we affirm.

FACTS

Appellant Thomas Willie began to work for respondents Duluth, Winnipeg & Pacific Railway Co. and Canadian National Railway Co. in 1976. In 1980, he became a locomotive engineer; he worked in that job for 28 years.

According to appellant, the engines he rode in were "rough riding, rocking . . . the worst ride there is"; their defects included "the vibration and the rocking and rolling and the poor seating conditions"; the "ride quality issues" continued throughout his employment; one part of his job, namely switching, involved going from three miles an hour "and bam, you're whipped, your head snaps back and you're back up to eight to ten miles an hour, and . . . you're doing that constantly, all day long"; and "[e]very day you switch, [an] engineer experiences a whiplash-type stop."

Appellant's medical records show that, in 2002, he first experienced pain on the right side of his neck; in 2006 he reported pain in his right arm and right shoulder; in April 2007 he complained of ten days of aching pain in his right shoulder and saw a chiropractor; and in December 2007 he began treatment with a neurologist to whom he

complained of “deep” pain in his right shoulder and bicep region. In February 2008, in accord with the neurologist’s recommendation, appellant retired from his job.

In February 2009, appellant’s counsel wrote to the neurologist asking for her medical opinion on appellant’s injuries and the extent to which his injuries could be attributed to his work. His attorney’s letter said appellant’s injuries were the “result of traumatic and compressive mechanical forces he was subjected to over the course of his employment as a locomotive engineer” and that appellant “began to experience pain and problems with his right shoulder and neck with pain going down his arm in April 2007.” The neurologist replied in a letter saying that appellant’s pain and problems with his right shoulder, neck, and arm very probably resulted from his work.

In September 2010, appellant brought this action. At his deposition in June 2011, he testified that he was claiming “damage to [his] neck” with symptoms of pain that went from the neck “down [his] right shoulder and arm” and “pain that radiate[d] from [his] neck up into [his] head on both sides.” He also testified that the pain had been constant rather than intermittent for two months, i.e., since April 2011.

Appellant brought his action under the Federal Employers’ Liability Act (FELA), 45 U.S.C. §§ 51-60 (2006), and the Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703 (2006). Respondents moved for summary judgment, alleging that the FELA three-year statute of limitations barred appellant’s claims. Their motion was granted, and appellant’s claims were dismissed. He challenges the grant of summary judgment.

DECISION¹

On an appeal from a summary judgment, this court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). “The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo.” *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). “No action shall be maintained under [FELA] unless commenced within three years from the day the cause of action accrued.” 45 U.S.C. § 56. The cause of action accrues and “the [FELA] three-year statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury that is the basis of the claim.” *Lecy v. Burlington N. & Santa Fe Ry.*, 663 N.W.2d 589, 592 (Minn. App. 2003).

Appellant brought this action in September 2010. Therefore, the relevant questions are if, before September 2007, he knew of the existence of his injury and knew or had reason to know that his employment was a potential cause of the injury.

¹ We note that, at oral argument, appellant appeared to abandon an argument advanced in his brief, namely that claims brought under FELA should not be resolved by summary judgment because FELA gives claimants a right to a jury trial. In any event, the argument is unavailing because the construction and application of a statute of limitations is a legal issue for the court, not a factual issue for the jury. *See MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008) (construction and application of a statute of limitations is a question of law).

I. Existence of the injury

Three of appellant's 2007 medical records, dated April 14, 17, and 18, as well as a letter from appellant's attorney to his neurologist, support the finding that appellant knew of his injury before September 2007.

The report of a doctor who saw appellant on April 14, 2006, noted that "[appellant] does complain of pain in his right arm. He also complains of right shoulder pain when he is awake." The report of appellant's family doctor, who saw him on April 17, 2007, said he was seen for "right shoulder pain" and noted that appellant "[had] been having aching pain in right shoulder for approx. 10 days"; that during the "[p]ast couple days the pain has started to radiate from shoulder to the back," that "[p]ain seems to be deep in the deltoid area – dull ache. Muscle spasms in the base of the neck down into the right shoulder." The doctor also noted that appellant might "want to consider [a] chiropractor for adjustment."

The questionnaire appellant filled out at a chiropractic clinic on April 18, 2007, said that his symptom was a dull ache that was getting worse, that nothing made the symptoms either better or worse, that he had had similar symptoms in the past, for which he had visited another chiropractor, that he had fallen on his right side at work about three and one-half weeks earlier, and that he was a full-time locomotive engineer. Appellant also put check marks on a form indicating that he had neck pain, upper back pain, and elbow/upper arm pain.

On February 4, 2009, appellant's attorney wrote to the neurologist who had been treating him since December 2007. His attorney said that appellant was making a claim

“for cumulative and repetitive injuries to his spine, neck, shoulder and arm” and that he “began to experience pain and problems with his right shoulder and neck with pain going down his arm in April 2007.” At his deposition, appellant said he had seen this letter, did not take exception to anything in it, and thought it was accurate.

Appellant argues he did not actually know of his pain while it was intermittent, from April 2007 to April 2011. But he brought this action in September 2010, claiming he suffered “severe and permanent injuries to his spine and body,” “permanent and progressive [musculoskeletal dysfunction and impairment] MSD,” and “permanent injury and disability.” Thus, appellant knew of his injury well before his pain became continuous, which, according to his testimony, was not until April 2011.

The medical records, the letter of appellant’s attorney, and appellant’s own testimony all support the finding that appellant knew of his injury before September 2007.

II. Cause of the injury

For an action to accrue under FELA, “it is sufficient if the plaintiff knows that . . . the injury is work related.” *Id.*; *see also Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1095-96 (7th Cir. 1990) (an employee need only be aware that the employment was a potential cause of the injury; “[a]ctual knowledge by the plaintiff of causation is not necessary to a finding that a cause of action has accrued”). The district court concluded that “[appellant] reasonably should have known that his employment had something to do with his chronic injury by April of 2007” and that “[t]he medical records supplied by the

parties, as well as [appellant's] own deposition testimony, support [respondents'] assertion that no substantial dispute of fact exists on this issue.”

Two documents in the record, as well as appellant's testimony, support these conclusions. First, the neurologist's report of appellant's first visit to her in December 2007 said that appellant

went to a chiropractor [in April 2007] . . . and was told that he had what appeared to be [a] whiplash like injury. [Appellant] does not recall having a whiplash [injury] but he works as a locomotive engineer and is bounced around a fair amount. This has been going on for many years. He has a lot of neck jolting as he describes it.

If, in December 2007, the work condition to which appellant attributed his injury had been going on for many years, he must have known of it before September 2007, when the statute of limitations on the claims in his September 2010 complaint began to run.

Appellant also testified about the neurologist's report of his December 2007 visit. When asked if he remembered any whiplash-like injury, he said, “No. Just being bounced around in the locomotive.” When asked if, around April 2007, he remembered any incident where there was any type of whiplash-like symptom, he said, “Every day you switch, [an] engineer experiences a whiplash-type stop.” When asked if he could think of anything other than his work that could have caused the right shoulder and right neck symptoms, appellant answered, “No.”²

² Appellant was also asked if he could think of anything other than “maybe the surgeries or medical conditions” that would have caused his right neck and shoulder problems. He answered, “No” and later testified that his cardiologist had told him his heart condition had no relationship to those problems.

Second, appellant's attorney said in his February 2009 letter to the neurologist that appellant's injuries were the "result of traumatic and compressive mechanical forces he was subjected to over the course of his employment as a locomotive engineer" and that he began to experience symptoms of the injuries in April 2007. The letter went on to state that appellant worked "at least 6 days per week and averaging 10 to 12 hours per work shift while operating rough riding locomotive engines seated in poorly designed cab seats. From the 1970s to the 1980s he rode in . . . [seats that] were hard and most were not adjustable" and that appellant later "began to ride in locomotive engines that rode very roughly with a lot of side to side and up and down jarring, bouncing and vibration." Appellant testified that he had seen his attorney's letter and thought it was accurate. Thus, appellant agreed with his attorney's statement that the conditions to which appellant attributed his injury had existed for decades. The district court did not err in concluding that appellant knew these conditions were related to his injury by April 2007.

Appellant argues that, because no doctor identified his work as the cause of his injury until the neurologist did so in December 2007, his cause of action did not accrue until then. This argument has two flaws. First, the neurologist's report demonstrates that appellant himself saw his work as at least a possible cause of his injuries and had done so for some time. "[Appellant] was told that he had what appeared to be whiplash like injury. [Appellant] . . . works as a locomotive engineer and is bounced around a fair amount. This has been going on for many years." Second, appellant cites no legal support for the view that a physician must first make the causal connection between an employer's acts and an employee's injury, and there appears to be none. *See Lecy*, 663

N.W.2d at 592 (holding that, for an action to accrue, it is sufficient if the plaintiff knows of the injury and that the injury is work-related).

Appellant relies on two cases from other jurisdictions, *Green v. CSX Transp., Inc.*, 414 F.3d 758, 760 (7th Cir. 2005) (vacating summary judgment granted to railroad on the ground that the statute of limitations precluded an employee's FELA claim and remanding for trial) and *Nichols v. Burlington N. & Santa Fe Ry.*, 56 P.3d 106, 109-10 (Colo. App. 2002) (concluding that summary judgment granted to railroad on the ground that the statute of limitations precluded an employee's FELA claim was "inappropriate," reversing the judgment, and remanding for further proceedings). His reliance is misplaced because both cases are distinguishable on their facts and concern a different statute-of-limitations issue.

Green concerned an injury that resulted from a specific incident in January 2000 when a railway employee strained her shoulder by pulling a hose with one hand while holding on to a ladder with the other hand. 414 F.3d at 761-62. She brought her action in October 2002, within three years after the incident. *Id.* at 762. The issue in *Green* was whether the fact that the employee's shoulder problems were treated before the January 2000 injury made that injury "merely an aggravation" of a prior condition, or whether the January 2000 injury was "a new and distinct injury" that triggered the statute of limitations. *Id.* at 765. *Nichols* concerned a railway employee who brought an action in June 2000 for cumulative injury within three years after reporting an occupational injury in July 1997. 56 P.3d at 108. As in *Green*, the employee had been treated for similar injuries some years earlier, and the issue was whether the triggering occupational injury

was distinct from the earlier injuries. *Id.* at 110. Here, there was no specific incident causing an injury, and the issue was whether the occupational injury existed for more than three years before appellant brought his complaint.

The documents in the record and appellant's deposition testimony demonstrate that he knew of his injury and should have known, if he did not know, that his work was one possible cause of the injury in April 2007, more than three years before bringing his complaint.

Affirmed.