IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL B. CARRIGAN,
Appellant,
vs.
UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION,
Respondent.

No. 55924

FILED

APR 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Appellant has asserted a claim for negligence under the Federal Employers Liability Act (FELA) related to his 39-year employment as a switchman and brakeman for respondent. Appellant claims that respondent was negligent in its performance of duties owing to him, causing serious and continuing injuries to appellant's knees. Respondent filed a motion for summary judgment, arguing that appellant's claim is barred by the statute of limitations set forth in 45 U.S.C. § 56 (2006) because appellant was aware, or should have been aware, of the connection between his employment and his knee problems when he first sought medical treatment for knee pain in 2004. Appellant opposed the motion, and the district court granted summary judgment.

This court reviews summary judgments de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed

in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. Id.

No cause of action may be maintained under FELA "unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. A FELA claim based on a cumulative injury is calculated under the discovery rule, Fonseca v. Consolidated Rail Corp., 246 F.3d 585, 588-89 (6th Cir. 2001), under which a cumulative injury is considered to occur when the accumulated effects manifest themselves. Urie v. Thompson, 337 U.S. 163, 170 (1949). A claim for relief accrues when a reasonable person knows or should have known of both the injury and its governing cause. Nichols v. Burlington No. and Santa Fe Ry., 56 P.3d 106, 109 (Colo. App. 2002). "This rule requires an objective inquiry into when the plaintiff knew or, in the exercise of reasonable diligence, should have known the essential facts of the injury and its cause." Id.; Fries v. Chicago & Northwestern Transp. Co., 909 F.2d 1092, 1095 (7th Cir. 1990).

"Generally, de minimis aches and pains are not considered to be an injury for the purposes of the FELA statute of limitations." Granfield v. CSX Transp., Inc., 597 F.3d 474, 483 (1st Cir. 2010). "[T]here is a difference between an injury for which a claim of compensation can be filed and intermittent pain that is presumed to be temporary and is quickly resolved." Nichols, 56 P.3d at 109; see also Sabalka v. Burlington North, & Santa Fe Ry., 54 S.W.3d 605, 610 (Mo. Ct. App. 2001); Schaefer v. Union Pacific R.R., 10 F. Supp. 2d 1240, 1243-44 (D.Wyo. 1998). "The issue of when [appellant] knew or should have known of his injury and its cause is a question of fact for the jury." Hildebrandt v. Allied Corp., 839 F.2d 396, 398-99 (8th Cir. 1987) (citing Maughan v. SW Servicing, Inc.,

758 F.2d 1381, 1387-88 (10th Cir. 1985)); see also Rogers v. Illinois Cent. R. Co., 833 S.W.2d 426, 428 (Mo. Ct. App. 1992).

Appellant filed his complaint on November 14, 2008. The record shows that appellant first mentioned an aching sensation in his knees to his primary care physician in January 2004. Appellant continued to treat with his primary care physician for knee aches throughout 2004 and 2005, and the primary care physician noted in April 2005 that appellant's symptoms were improving with medication and exercise and wrote in his August 2005 notes that appellant was getting better.

The record shows that on November 14, 2005, appellant saw his primary care physician, reporting that his knees were getting worse and that he had increased pain and swelling. His primary care physician ordered an MRI on his knees and referred appellant to an orthopedic surgeon, Dr. Richard Briggs. Appellant's first appointment with Dr. Briggs was on December 12, 2005. On the patient questionnaire for the orthopedic surgeon, appellant responded "no" to a question asking whether he was being seen as a result of an on-the-job injury. In Dr. Briggs' notes from appellant's July 21, 2006, appointment, the first reference is made to appellant's employment with the railroad.

On February 9, 2008, appellant experienced sudden pain in his left knee while working. Appellant filled out a Union Pacific Railroad Report of Personal Injury or Occupational Illness regarding the incident. On the form appellant noted his knee condition and in response to a question asking when he first became aware that the condition may have been caused by his work he responded "2005 Dr. Richard Briggs." In response to a question asking what specifically caused the accident,

appellant responded "[c]limbing on and off trains for 39 years" and "[a]ccumulative trauma."

At his deposition, appellant was asked what he thought was causing the pain in his knees while he was seeking treatment from his primary care physician, and appellant testified:

> My knees- I know they hurt after I got off work at night and during the shift I'd put salves and liniment on it, and I would take medication after I got off work, and it was pretty obvious walking around all night and stuff like that was, you know, causing my knees to hurt, and I don't know if that was the reason I don't know.

In response to a further question as to whether it was apparent to him that the pain in his knees was caused by his work, appellant answered "[i]t could have been—yeah that's where I spent my time working so that must be it." Appellant further testified, in response to a question asking whether he could think of any other possible cause for the pain in his knees other than work, "[n]o, I don't think I did. No."

A review of the record and the briefs on appeal shows that a genuine issue of material facts remains regarding when the accumulated effects of appellant's knee injury manifested themselves, resulting in the occurrence of an actionable injury under FELA. Based on the record presented, a jury could find that appellant filed his claim within three years of accrual of his claim. "Where the factual evidence raises different inferences, the time at which an impairment manifests itself is for a jury to determine," Hildebrandt, 839 F.2d at 398 (internal quotations omitted), and the issue of when appellant knew, or should have known, of both his actionable injury and its cause is a question of fact for the jury. Id. at 398–99. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Jessie Elizabeth Walsh, District Judge
Persi J. Mishel, Settlement Judge
Pyatt Silvestri & Hanlon
Rossi Cox Vucinovich Flaskamp PC
Sterling Law, LLC
Raleigh & Hunt, P.C.
Eighth District Court Clerk