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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001959-MR

CHARLES MILBY APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CI-008052

CSX TRANSPORTATION, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND WINE, JUDGES.

WINE, JUDGE: Charles Milby appeals from a summary judgment by the Jefferson Circuit Court dismissing his claims against CSX Transportation, Inc. ("CSX") under the Federal Employers' Liability Act ("FELA"). We agree with the trial court that Milby's action was barred by the Act's statute of limitations because

he filed it more than three years after his cause of action accrued. Hence, we affirm.

Because summary judgment was granted to CSX, we review the facts in the light most favorable to Milby, and all doubts are to be resolved in his favor. *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Milby was employed by L&N Railroad, and its successor CSX, from 1974 to 1989. Over the course of his employment, he worked as a machinist helper, apprentice machinist, and journeyman machinist. Milby states that he was exposed to various solvents in his work, including DowClene, trichloroethylene, perchloroethylene, 1-1-1 trichloroethylene, and other chemicals, including lye and mineral spirits. While still working for CSX, Milby states that he developed headaches and skin irritation. Milby adds that, after he left his employment with CSX in 1989, he began suffering from additional problems, including concentration difficulties, memory loss, ringing sounds in his ears, and depression.

In June of 2001, Milby was contacted by Dr. Martine RoBards, a neuropsychologist, who was conducting a case study on railroad workers who had been exposed to cleaning solvents. Milby met with Dr. RoBards, discussed his symptoms and work history, and underwent testing. On July 6, 2001, Dr. RoBards told Milby that his symptoms could be chronic toxic encephalopathy caused by his workplace exposure to solvents. Dr. RoBards recommended that Milby undergo additional evaluation and testing, which was conducted from July 6 to October 2, 2001.

At some point after October 2, 2001, Dr. RoBards told Milby that she believed his symptoms were caused by his workplace exposure to solvents. On December 17, 2001, Dr. RoBards sent a letter to Milby's family doctor stating that Milby was "permanently partly neuropsychologically disabled," and that the injury arose from his workplace exposure to solvents. On September 19, 2003, Dr. RoBards issued a final report which set out the details of her diagnosis.

Thereafter, on September 22, 2004, Milby filed this action against CSX under FELA, 45 U.S.C. § 51, *et seq*. Subsequently, CSX moved for summary judgment, arguing that the action was barred by the three-year statute of limitations contained in 45 U.S.C. § 56. After considering the record and arguments of counsel, the trial court granted the motion. The court found that Milby's cause of action accrued no later than July 6, 2001, when Dr. RoBards first advised him that his symptoms could be caused by his workplace exposure to solvents. Since Milby filed this action more than three years from that date, the trial court concluded that the action was barred by the statute of limitations. This appeal followed.

As the trial court correctly noted, an action under FELA must be commenced "within three years from the day the cause of action accrued." 45 U.S.C. § 56. In *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949), the United States Supreme Court stated that when the specific date of injury cannot be determined because an injury results from continual exposure to a harmful condition over a period of time, a plaintiff's cause of action accrues when the injury manifests itself. *Id.* at 170, 69 S. Ct. at 1024-25. Urie had been

continuously exposed to silica in his work environment over the course of several years. In the absence of a rule that tolled the limitations period until the injurious effects manifested themselves, the Court reasoned, the law would require a blamelessly ignorant plaintiff to discover the inherently unknowable injury at its inception. Such a reading of FELA would provide persons injured in this manner with a "delusive remedy." *Id.* at 169-70, 69 S. Ct. at 1024.

In *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979), the Supreme Court refined the rule announced in *Urie*. In *Kubrick*, the plaintiff brought a malpractice suit pursuant to the Federal Tort Claims Act, alleging he was injured when a doctor improperly treated his wound with neomycin. The Court stated that once a plaintiff is in possession of the critical facts of both injury and governing cause of that injury, the action accrues even though he may be unaware that a legal wrong has occurred. *Id.* at 122-23, 100 S. Ct. at 359-60.

In interpreting *Urie* and *Kubrick*, the Federal Courts have generally adopted the rule that a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause. *See Nemmers v. United States*, 795 F.2d 628, 629 (7th Cir. 1986). Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. *Urie*, 337 U.S. at 170, 69 S. Ct. at 1024-25 (did plaintiff have reason to know he was injured at an earlier

date); *Nemmers*, 795 F.2d at 631 (employing objective standard to evaluate question of when diligent plaintiff would have discovered the cause).

Milby argues that his cause of action could not have accrued before October 2, 2001, when he completed testing and Dr. RoBards ruled out other causes of his symptoms. However, a formal medical diagnosis is not necessary for the cause of action to accrue. The injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only needs to know or have reason to know of a potential cause. *Id.* at 631-32. *See also Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1094-95 (7th Cir. 1990). Some courts, however, have held that an employee's cause of action under FELA does not accrue upon a mere suspicion of an injury or its probable cause. *See Gay v. Norfolk and Western Railway Co.*, 253 Va. 212, 483 S.E.2d 216 (1997), and *CSX Transportation, Inc. v. Adkins*, 264 Ga. 203, 204, 442 S.E.2d 737, 739 (1994). *See also Dubose v. Kansas City Southern Railway Co.*, 729 F.2d 1026 (5th Cir. 1984), holding that a determination of when a plaintiff can be charged with an awareness of his injury may depend upon factors unique to each case such as, for example, how many potential causes exist and erroneous medical advice. *Id.* at 1031.

But under either standard, we agree with the trial court that CSX was entitled to summary judgment. Milby may have had no reason to suspect that there was a connection between his exposure to solvents in the workplace and the symptoms which developed after he left his employment with CSX. Nevertheless, Dr. RoBards advised Milby about the possible connection in June of 2001. On

July 6, 2001, Milby completed a questionnaire which detailed his symptoms and work history. Based on Milby's responses, Dr. RoBards recommended that Milby undergo further testing. In other words, Milby's "mere suspicion" about the injury and its cause crystallized on that date into an objective awareness that his workplace exposure had likely caused his symptoms.

And as the trial court noted, Milby admitted in his deposition that, after he met with Dr. RoBards in June of 2001, he believed his symptoms were related to his workplace exposure to solvents. To his credit, he immediately underwent testing to confirm this suspicion. But while the formal diagnosis came later, Milby came into possession of the "critical facts" of both injury and causation no later than July 6, 2001. Consequently, we agree with the trial court that his cause of action under FELA accrued at that point. Because this action was filed more than three years later, the action was barred by FELA's statute of limitations.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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