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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000989-MR

ROBERT PAIGE ISON — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 09-CI-00860

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Robert Ison appeals the summary judgment dismissing his injury claim in Greenup Circuit Court. Following our review, we affirm.

Ison began working for CSX Transportation, Inc., (CSX) in 1981. He worked as a brakeman for several years and then as a conductor until he left CSX in December 2006. On November 3, 2009, Ison filed a lawsuit alleging that CSX

had negligently failed to provide a safe workplace – resulting in career-ending injuries to Ison. The injury at issue is cumulative trauma to his knee and to his hips. The lawsuit was filed pursuant to the Federal Employers Liability Act (FELA). 45 U.S.C. §51, *et seq*.

On July 2, 2010, CSX filed a motion for summary judgment. It argued that Ison had not filed his lawsuit within the proper timeframe according to FELA's statute of limitations. The trial court held a hearing on the motion on April 8, 2011. On April 19, 2011, it entered an order granting summary judgment. Ison filed a motion to have the judgment amended, altered, or vacated, which the trial court denied. This appeal follows.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*. The trial court views the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). The non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*.

On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party

was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Further, because summary judgments do not involve fact finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

45 U.S.C. §56 provides that claims arising under FELA must be "commenced within three years from the day the cause of action accrued." Accrual occurs "once a plaintiff is in possession of the critical facts of both injury and governing cause of that injury[.]" *Fries v. Chicago and Northwestern Transp. Co*., 909 F.2d 1092, 1095 (7th Cir. 1990). A plaintiff can be in possession of the facts of the injury and the governing cause without a diagnosis by medical professionals. *Albert v. Maine Cent. Ry. Co*., 905 F.2d 541 (1st Cir. 1990). In fact, a plaintiff has a duty to investigate known physical problems, and the cause of action accrues at the time he "reasonably must have recognized the connection" between his physical ailments and his occupation. *Campbell v. Grand Trunk Western Ry. Co*., 238 F.3d 772, 776 (6th Cir. 2001).

Ison filed his lawsuit in November 2009 – thirty-five months after the last day that he worked at CSX. He argues that December 3, 2006, was the date of his injury, making his claim compatible with the statute of limitations. Ison also contends that he did not know that his injuries were work-related until September 2, 2009. On that date, Ison's physician provided him with a letter which explicitly stated that his knee and hip problems were caused by excessive climbing on railroad cars. The trial court disagreed because Ison's injuries were of a

cumulative nature, and his problems began long before November 2006 – three years prior to the filing of his complaint.

We have examined the record closely and conclude that it only supports the trial court's findings. Ison testified in his deposition that on December 3, 2006, he did not experience an injurious episode. Rather, he determined that he could no longer safely perform his job. He testified that he had taken extended absences from work due to his physical ailments. The record confirms that Ison had excessive absences beginning in January 2005. Furthermore, Ison stated in his deposition that he noticed in 2005 that over the years, the railroad had caused "wear and tear" on his body, causing pain that eased when he was at home. By June 2006, he had trouble walking on the ballasts in the railroad yard. Ison also recollected that in June 2006, when he sat down after working a shift, he had considerable trouble standing up. At that time, he attributed his knee and hip pain to walking on ballasts. Ison testified that he took an extended medical leave in 2006, and the record shows that he had excessive absences beginning in June.

Ison's testimony demonstrated that there was no question of fact remaining as to whether his injury accrued within three years of the date he filed his lawsuit. It is clear that at least by June 2006, he was aware that he had been injured and that his injury was caused by the work that he had been performing for CSX. Although he had not received a diagnosis which identified working as the source of his pain, he admitted that it abated when he was at home and that he believed that walking on ballasts was the source of leg and knee pain. Pain that occurs only at work and

not at home conclusively puts "a plaintiff on notice that he has suffered an injury." *Crisman v. Odeco, Inc*., 932 F.2d 413, 416 (5th Cir. 1991). Therefore, Ison had a legal duty to investigate the known problem and its cause. *Campbell, supra*. Because he did not meet the pertinent legal criteria, we cannot conclude that the trial court erred in granting summary judgment to CSX.

Accordingly, we are compelled to affirm the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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