IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Isaiah Allen,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 17 L 6237
Northeast Illinois Regional Commuter Railroad Corporation, d/b/a/ Metra/Metropolitan Rail,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Under the Federal Employers' Liability Act, a complaint for personal injury must be filed within three years from the day the cause of action accrued. In this case, the plaintiff waited more than three years from the accrual date before filing his complaint. As a result, the defendant's summary judgment motion must be granted and the case dismissed with prejudice.

Facts

On June 20, 2017, Isaiah Allen filed a single-count complaint under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, against the Northeast Illinois Regional Commuter Railroad Corporation (Metra). The complaint alleges that prior to October 2, 2014, Metra employed Allen as a carman, whose duties included inspecting and repairing passenger train cars at various Metra rail facilities in the Chicago metropolitan area. The complaint alleges that Allen's duties required that he frequently board and alight train equipment, climb and descend stairs, walk on uneven grade terrain, including walking sideways, bend and stoop on sloped terrain, and walk on ballast, including uneven grade terrain. Based on these allegations, Allen's complaint claims that

Metra acted negligently by: (a) failing to provide him with sufficient clearance so that he would not have to walk sideways frequently, including on sloped terrain, including ballast; (b) failing to provide him with a reasonable alternative to boarding and alighting train equipment, including climbing and descending stairs frequently; (c) requiring him to walk, including sideways, and bending and stooping on sloped terrain, including on ballast; (d) requiring him to carry heavy gear while walking, including sideways, and bending and stooping on sloped terrain, including on ballast; (e) requiring him to walk with bent knees frequently and for extended periods of time; (f) requiring him to walk with a hunched or stooped back frequently and for extended periods of time; and (g) requiring him to walk on loose ballast frequently and for extended periods of time.

At his two depositions, Allen testified that before 1998, he worked for Morrison-Knudsen Corporation, a civil engineering company, as a carman. As early as 1993, Allen complained to his employer that his work consistently aggravated his neck, shoulders, and lower back. In 1995, Allen filed a workers' compensation claim for lower-back strain injuries, for which he received $70,000 in compensation in addition to time off.

From 1998 to 2006 the Illinois Central Railroad (ICR) employed Allen as a carman. Allen estimates that during those years, he spent 95% of his time walking on ballast. During that time, he complained to supervisors about working conditions, especially heavy lifting and working on ballast that aggravated his knees, feet, hips, ankles, and lower back. The record also indicates that Allen sought and obtained medical care on many occasions for his back pain while working for ICR.

In 2006, Allen began working for Metra as a carman, and his job duties were very similar to those at ICR. Allen also continued to have many of the same physical complaints while working for Metra, including pain to his back, knees, shoulders, and neck. In 2011, Allen underwent an MRI on his lumbar spine that showed both mild, but broad based bulging and herniated discs. Also in

2011, Allen underwent an X ray and an MRI on his cervical spine, both of which showed degenerative changes.

From 2011 to 2013, Allen's primary care physician administered injections to relieve Allen's neck and shoulder pain. He recalls experiencing low-back and radiating pain and being held out of work. Allen testified that the use of power tools made his condition worse. A 2013 MRI of the lumbar spine resulted in a diagnosis of spondylosis. Allen's course of treatment for his back continued until 2015.

Allen testified that he knew his walking on ballast was damaging to his knees, back, and shoulders, and that is why he complained to both ICR from 1998 to 2006 and Metra after 2006. In 2011, Allen sought work leave under the Family Medical Leave Act based on his neck and shoulder pain, claiming that it was work related. Allen attributes his knee pain to having to walk on ballast. On October 2, 2014, Allen sustained a fall. There is no evidence in the record where the fall occurred, but on November 12, 2014, doctors performed an arthroscopy of Allen's right knee.

Allen's other physical complaints continued. One of his treating physicians testified that evidence of a degenerative cervical spinal condition in March 2015 was consistent with the same degenerative changes shown on the 2011 MRI. Further, Allen suffers from "steel toes," a condition that his doctor attributed to having to wear steel-toed boots at work. Allen began to complain about the condition in 2012, and in early 2014, he had an ingrown toenail surgically removed.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact,

but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill.2d 414, 421, 432 (2002). If the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

Metra argues that Allen's complaint is subject to summary judgment because his repetitive-injury claims began long before 2014 and he knew that they were work related. Given those facts, Allen's complaint runs afoul of FELA's three-year statute of limitations. In contrast, Allen argues that his claims are timely because the physical complaints forming the basis of his lawsuit began after June 20, 2014, the date he started working at Metra's University Park yard. By October 2014, Allen began to have knee pain that led to his knee surgery on November 12, 2014 – the date Allen argues is the accrual date for his claims.

FELA explicitly authorizes claims by railroad employees against their employers. As provided, in part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part . . . by reason of any defect or insufficiency, due to its negligence, in its cars, . . . or other equipment.

45 U.S.C. section § 51. An injured employee's ability to bring a cause of action is, however, limited because: "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. Compliance with 45 U.S.C. § 56 is a "condition precedent to an injured employee's recovery," and the failure to file suit in a timely fashion "not only bars the claimant's remedy, but it also destroys the employer's liability." *Emmons v. Southern Pac. Transp. Co.*, 701 F.2d 1112, 1117 (5th Cir. 1983) (citing cases). And because statutory compliance is a condition precedent, not an affirmative defense, the burden is on the plaintiff to establish that a cumulative injury accrued during the limitations period. *See id.*; *Axe v. Norfolk Southern Ry.*, 2012 IL App (5th) 110277, ¶ 11.

The crucial factual and legal issue on which Metra's motion turns is the accrual date of Allen's injuries. The accrual date for purposes of a FELA action is defined in two parts: "notice of injury and notice of cause." *Sweatt v. Union Pac. R.R.*, 796 F.3d 701, 707 (7th Cir. 2015) (citing and quoting *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990) ("[O]nce 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.")) Actual notice is not required for accrual. *See id.* (citing *Tolston v. Nat'l R.R. Passenger Corp.*, 102 F.3d 863, 866 (7th Cir. 1996)); *see also Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir. 1986). Rather, after a condition is manifest, "the question becomes whether the plaintiff knew or, through the exercise of reasonable diligence, *should have known* of the cause of his injury." *Id.* (emphasis in original); *see also Fries*, 909 F.2d at 1095. The application of the accrual rule requires an

"objective inquiry as to whether a diligent plaintiff would have been aware of his injury and its cause." *Fries*, 909 F.2d at 1095 (citing *Urie v. Thompson*, 337 U.S. 163, 170 (1949)).

A plaintiff's inability to state with absolute certainty when or how an injury occurred or accrued is not necessarily fatal to a cause of action. In *Urie*, for example, a worker allegedly contracted silicosis from repeated exposure to dust blown or sucked into train cars by locomotives. *See* 337 U.S. at 165-66. The Court held that the worker could maintain his action because:

> [i]n our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning.

Id. at 186-87. The Supreme Court subsequently modified its view of the discovery rule for purposes of the statute of limitations in a case interpreting the Federal Tort Claims Act. *See United States v. Kubrick,* 444 U.S. 111 (1979). There, the issue was whether a claim accrues when the plaintiff knows of the injury and its cause, but not that it was negligently inflicted. *See id.* at 116. The Court rejected the argument that a plaintiff must know of a tortfeasor's negligence before a cause of action accrues. *See id.* at 122. The Court reasoned that plaintiffs who know of their injury and its cause are able to protect themselves by seeking advice in the medical and legal communities. *See id.* at 123. Thus, "the Supreme Court applied the discovery rule in *Kubrick,* as it did in *Urie,* and refined that rule to clarify that discovery of the injury and its cause – and not the realization that a cause of action exists – marks the date the limitations period starts running." *White v. Mercury Marine*, 129 F.3d 1428, 1433 (11th Cir. 1997).

Although Allen has not raised the argument explicitly, he may be building his case on a distinct-injury theory. *See, e.g., Mix v. Delaware & Hudson Ry.*, 345 F.3d 82, 90 (2d Cir. 2003) (holding that "plaintiff can recover for injuries suffered during the three-year period preceding the suit, if these injuries are sufficiently distinct from those previously suffered"). Such a theory has been presented in exposure cases if there has been "a substantial delay before symptoms manifest themselves and a series of different symptoms may emerge at different times." *Nicolo* v. *Phillip Morris, Inc.*, 201 F.3d 29, 39 (1st Cir. 2000) (addictive cigarette smoking); *Mix*, 345 F.3d at 86 (progressive hearing loss). As found by the court in *Mix*, "[d]espite the apparent simplicity of the discovery rule, its application does not necessarily function effectively in the context of gradual injuries. Unlike traumatic injuries, the existence and causes of gradual injuries are often elusive." 345 F.3d at 88.

It is, however, plain that the Second Circuit's injury theory is a singular outlier and has not been adopted by most federal circuit courts. *See, e.g., Fries*, 909 F.2d at 1095 ("the tolling permitted by *Urie* only extends the limitations period to the date when the injury manifests itself, not beyond"). In *White v. Union Pacific Railroad*, the court adopted *Fries* and stated that,

> [a] medical diagnosis is certainly sufficient to put an injured party on notice, but it is not always required where, as here, the plaintiff acknowledges injury awareness before a medical diagnosis occurs. The better rule is that a claim accrues when one reasonably should know that his symptoms are fairly attributable to a workplace injury.

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867 F.3d 997, 1003 (8th Cir. 2017). *See also White,* 129 F.3d at 1433 ("[t]he discovery rule . . . is not to be applied only when it will benefit a plaintiff. It protects plaintiffs who are unaware of their injury, while requiring those plaintiffs who have 'discovered' their injury to file suit within the prescribed period."); *Aparicio v. Norfolk & Western Ry. Co.,* 84 F.3d 803, 814 (6th Cir.

1996) (following the holding in *Fries*); *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235-36 (10th Cir. 2001) ("a FELA claim accrues when the plaintiff knows or should know that his injury is merely work-related"); *DuBose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026 (5th Cir.) ("Once a plaintiff possesses critical facts, . . . legal and medical professionals are available to give advice to an injured person concerning whether he has been legally wronged"), *cert. denied*, 469 U.S. 854 (1984); *Albert v. Maine Cent. R.R. Co.*, 905 F.2d 541, 543-44 (1st Cir. 1990) ("the three year statute of limitations began to run when the appellants knew, or should have known, of their hearing loss and its cause"); *Young v. Clinchfield R.R.,* 288 F.2d 499, 503 (4th Cir. 1961) ("The cause of action accrues only when the plaintiff has reason to know he has been injured. Generally this will be when his condition is diagnosed, unless it is shown that the plaintiff 'should have known' at an earlier date that he was injured."); *Zeleznik v. United States,* 770 F.2d 20, 23 (3d Cir. 1985) ("the statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress").

The discovery rule adopted by nearly each federal circuit court in FELA cases has been acknowledged and adopted into Illinois FELA case law as well. *See Axe*, 2012 IL App (5th) 110277, ¶ 11. In *Axe*, the plaintiff retired in 2002 as a railroad conductor. *Id.* ¶ 12. Doctors had treated him for severe degenerative knee arthritis before July 2006, when one doctor indicated in the records for the first time that Axe was a retired railroad conductor. *See id.* Yet Axe stated that he did not learn that his condition was work related until he spoke with former colleagues in 2009 or 2010. *See id.* at ¶ 13. Based on the lack of information in his medical records, Axe argued that:

> there [was] nothing to show that he knew or should have known that the pain was related to his former work. Essentially, the plaintiff's position is that the statute of limitations did not begin to run until he had

> actual knowledge of the cause of his injury, that he bore no responsibility to seek out possible causes, but that the railroad had an undefined affirmative duty to warn him about the potential dangers of his job. The plaintiff's argument is contrary to the law.

Id. ¶ 13. Axe's medical records indicated that he did not seek advice from anyone in the medical or legal communities about the cause of arthritis in his knees for more than three years. *See id.* at ¶ 15. And although Axe retired in 2002, he waited until August 2010 to file suit. *Id.* Based on these significant gaps in time, the court concluded that:

> [t]he trial court did not err in finding that, in the exercise of reasonable diligence, the plaintiff should have known about the cause of his condition no later than July 24, 2006, and that the statute of limitations barred his cause of action that was filed more than three years after that date.

Id. The facts of this case are even more persuasive than those presented in *Axe*.

Allen argues that appropriate accrual date for his cause of action is July 1, 2014, when he began working at Metra's University Park facility. If that were the triggering date, then his October 2, 2014 fall and November 12, 2014 surgery would have occurred within the three years prior to his June 20, 2017 filing of the complaint. In contrast to *Axe*, the records in this case show that Allen knew through his own exercise of reasonable diligence that each of his physical injuries or conditions were workplace related. As early as 1993, Allen began complaining to Morrison-Knudsen that his work consistently aggravated his neck, shoulders, and lower back. In 1995, Allen filed a workers' compensation claim for lower-back strain injuries, for which he received $70,000 in compensation and time off. By statute, those benefits could be provided only if they were work related.

Allen's complaints as to his knees, feet, hips, ankles, and back increased when he worked at ICR between 1998 and 2006. Allen estimates that during those years he spent 95% of his time walking on ballast. He testified at his deposition that complained to supervisors about working conditions, especially heavy lifting and working on ballast because it aggravated his knees, feet, hips, ankles, and lower back. The record also confirms that, while with ICR, Allen sought medical care on many occasions for his back pain.

After 2006, when Allen began working for Metra, he continued to have many of the same physical complaints about his back, knees, shoulders, and neck. The complaints were significant enough that, in 2011, Allen underwent an MRI on his lumbar spine and an X ray and MRI on his cervical spine. Also in 2011, Allen sought work leave under the Family Medical Leave Act based on his neck and shoulder pain, claiming that it was work related. Beginning in 2011 and lasting through 2013, Allen's primary care physician administered injections to relieve Allen's neck and shoulder pain. During this time, Allen recalls experiencing low-back and radiating pain and being held out of work. Allen testified that the use of power tools made his condition worse. A 2013 MRI of the lumbar spine resulted in a diagnosis of spondylosis. In 2012, Allen began to complain about "steel toes," a condition attributed to wearing steel-toed boots at work. The condition continued and, in early 2014, a doctor surgically removed an ingrown toenail.

The record in this case objectively establishes that Allen's physical complaints throughout his entire work life have not been latent, but patent. The record also establishes that Allen acted reasonably and did precisely what he should have done – he sought medical treatment for his ailments and injuries and he filed complaints with his employers. Most important for this case, Allen's knowledge that his physical complaints were work related preexisted by many years his day-to-day work at ICR's University Park facility beginning in July 2014. For those reasons, there remains no question of material fact and that, as a matter of law,

Allen's claims are barred by FELA's three-year statute of limitations.

Conclusion

For the reasons presented above, it is ordered that:

1. ICR's summary judgment motion is granted; and
2. This case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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