STATE OF MICHIGAN

COURT OF APPEALS

DWIGHT O. VICKERS,

Plaintiff-Appellant,

v

GRAND TRUNK WESTERN RAILROAD COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 29, 2012

No. 301727
Genesee Circuit Court
LC No. 08-089876-NI

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Plaintiff Dwight O. Vickers appeals as of right the trial court's order granting summary disposition in favor of defendant Grand Trunk Western Railroad Company in this action under the Federal Employer's Liability Act (FELA), 45 USC 51 *et seq*. We reverse and remand for further proceedings because we find that genuine issues of material fact exist regarding whether plaintiff's FELA claim is barred by the statute of limitations and whether his injuries were caused, in whole or in part, by defendant's negligence.

Plaintiff worked for defendant for 30 years, from 1976 to 2006.[1] In this action, plaintiff alleges that he sustained injuries in both of his shoulders as a result of defendant's negligence because he was required to perform manual-work duties that placed "unusual, unnecessary and extreme forces" on his upper extremities. Plaintiff also alleges that defendant knew or should have known that its negligence, including its failure to provide reasonably safe work methods, conditions, equipment, and tools, would injure plaintiff. Plaintiff is seeking damages for lost wages, loss of earning capacity, medical bills, and other compensation.

[1] Plaintiff testified in his deposition that he spent his first ten years of employment primarily on the "rip track." A "rip track" or "repair in place" track is a short track in a rail yard where minor repairs are performed on railroad cars. Plaintiff spent his last 20 years working primarily in the yard as a carman. He also worked a lot of overtime in a variety of positions, including at the loading dock, the prep dock, the rip, the yard, and doing welding, general repairs, and inspections.

Defendant moved for summary disposition and argued six grounds for dismissal. The trial court found genuine issues of material fact with respect to all but two of the grounds and held that summary disposition was warranted because (1) plaintiff knew or should have known of his shoulder injuries more than three years before the case was filed, and thus, the statute of limitations had run and (2) there was no issue of material fact with respect to causation because "the doctors' testimony would have to be far more assertive than it is to create an issue of fact as to the causation of the injuries." Plaintiff appeals the trial court's grant of summary disposition on the above grounds.

I. STATUTE OF LIMITATIONS

Plaintiff first argues that the trial court erred in concluding that his claim is barred by the statute of limitations as matter of law. We agree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc*, 290 Mich App 577, 584; 802 NW2d 682 (2010). In reviewing a grant of summary disposition under MCR 2.116(C)(7), this Court considers the pleadings and any other documentary evidence in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009). Summary disposition under MCR 2.116(C)(7) is proper when the claim is barred by the statute of limitations as a matter of law. *Id.* at 42.

The FELA imposes liability on common carriers by railroad for:

> [D]amages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [45 USC 51.]

The statute of limitations under the FELA is "three years from the day the cause of action accrued." 45 USC 56. This Court has held that the discovery rule applies when determining whether a claim is brought within the FELA's three-year statute of limitations. *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 423; 688 NW2d 296 (2004).

> The discovery rule imposes an affirmative duty on the plaintiff to exercise reasonable diligence to investigate the cause of a known injury. The relevant inquiry under the discovery rule is when the plaintiff knew or should have known that there was a causal connection between his employment and his injury, not when he knew that the repetitive exposure to the cause was the specific cause of that injury. [*Id.* at 428 (footnotes omitted).]

Plaintiff filed his complaint on October 21, 2008. Consequently, his action is not timely if before October 21, 2005, he had a known injury and knew or should have known that there was a causal connection between that injury and his employment for defendant. See *id.* at 423, 428.

Plaintiff has consistently claimed that he began experiencing continuous pain and limited range of motion in his shoulders in the beginning of 2006. When asked about the last 20 years of his employment with defendant, plaintiff testified:

> *Q.* So over those whole 20 years, no problems with your shoulder?
>
> *A.* Well, none that would consistently stay with me like that. When I go over there and work the bi-level docks, you close up 40 or 50 bi-levels a day, you going to feel a little soreness, your hands hurt a little bit but it just kind of went away.
>
> But I noticed around 2006 it was constant, I noticed the constant pain.
>
> *Q.* Okay. So—
>
> *A.* More so in my left shoulder than in my right.
>
> *Q.* All right. So between '86 and 2006, you would feel occasional twinges or pains but they didn't – what did you say, they didn't consistently stay with you?
>
> *A.* No.
>
> *Q.* No what?
>
> *A.* No, they didn't. No they didn't stay with me.

Defendant relies primarily on two points in arguing that plaintiff's claim accrued before October 21, 2005. First, according to defendant, plaintiff testified that he began having problems and expressing concern about tearing up his shoulders and back in the early 1980's. Consequently, plaintiff knew or should have known of injuries to his shoulders caused by his employment with defendant. In fact, plaintiff testified:

> *Q.* . . . But specifically, do you know of anyone who specifically said this work with these lousy doors [beginning in approximately 1980] will be leading to the development of upper extremity injuries?
>
> *A.* Well, all of those guys there, they – all of those – all of those guys, all of them.
>
> *Q.* All of them what?
>
> *A.* All of them would – you know, we talked – talked to the foremen and told them that, you know, this type of stuff *will* tear your arms up or back and shoulder up, your hand or whatever. You know, we talked to them and told them, you know.
>
> *Q.* Okay. So now you're saying that you – that you did, in fact, go to a foreman and say, "This type of work is going to tear up my shoulders"?

> *A.* We talked to them and told them. All of us, we went and complained to them, you know. We went and all of us said, "We need some help up in here. We got these bad doors and we need some help because *we're going to* tear our arms up and whatever. You know, we just need some help because you end up tearing your arm out of place, or messing your back up, you know."
>
> *Q.* And your shoulders?
>
> *A.* And your shoulders. [Emphases added.]

Thus, it appears that plaintiff and his coworkers went to their supervisors and expressed their concerns that the malfunctioning doors were *going* to cause problems in their shoulders, backs, and arms. Plaintiff did not testify that the doors had already caused injuries in his shoulders. In fact, plaintiff specifically testified:

> *Q.* Any time between '76 to '86 that you felt any concern or problems with your shoulders?
>
> *A.* No.

Secondly, defendant points to both a medical-history form filled out by plaintiff before an August 28, 2006, appointment with Dr. Bruce Lawrence about his shoulder pain and a letter written by Dr. Lawrence to Dr. Kavitha Baddam, plaintiff's primary-care physician. In a space on the medical-history form to describe the problems and symptoms the patient is seeing the doctor for, it says, "pain in left shoulder." There is a large space, and then at the end of the line it says, "(1 year)." Defendant focuses on the "(1 year)" to argue that plaintiff began experiencing these problems with his left shoulder in August 2005—one year before his appointment with Dr. Lawrence and more than three years before he filed his complaint in this case. However, plaintiff testified at his deposition that he did not remember writing "(1 year)" on the form and noted that it did not look like his handwriting. Instead, plaintiff insisted that he told Dr. Lawrence that the problems started at the beginning of 2006, and plaintiff hypothesized that, because that was eight months before his appointment, perhaps Dr. Lawrence thought it was *approximately* one year.

In his letter to Dr. Baddam, Dr. Lawrence writes, "The patient is complaining of pain that he has had for approximately one year . . . . He denies a history of shoulder problems prior to a year ago." Defendant argues that this shows that plaintiff became aware of his injury in August of 2005, more than three years before he filed his complaint. Again, plaintiff insisted that he told Dr. Lawrence that the consistent pain began at the beginning of 2006, which was about eight months before his appointment. The term "approximately one year" could certainly be used to describe eight months, and a denial of shoulder pain "prior to a year ago" does not equate to an admission of shoulder pain beginning one year ago. In addition, this medical form discusses only pain in plaintiff's *left* shoulder. Even if dispositive, the form would still not bar plaintiff's FELA claim with respect to injuries in his right shoulder.

In light of the record evidence, we find that a genuine issue of material fact exists as to whether plaintiff knew or should have known of his shoulder injuries and their connection to his

employment before October 21, 2005; thus, the trial court erred in granting summary disposition on the basis of the statute of limitations.

II. CAUSATION

Plaintiff also argues that the trial court erred in concluding that there are no genuine issues of material fact with respect to causation. We agree.

"A motion [for summary disposition] brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action." *Cedroni*, 290 Mich App at 584. When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmovant. *Id.* A motion for summary disposition should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when "reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

To recover under the FELA, plaintiff's injury must be a result, "in whole or in part," of defendant's negligence. See 45 USC 51. Causation is sufficiently established if the employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v Missouri Pacific R Co*, 352 US 500, 501, 506; 77 S Ct 443; 1 L Ed 2d 493 (1957).[2] "If the record contains evidence from which the court could draw the conclusion that the employer's negligence played any part in the plaintiff's injury then it must send the case to the jury." *Van Gorder v Grand Trunk Western R, Inc*, 509 F3d 265, 271 (CA 6, 2007).

Plaintiff has created a genuine issue of material fact with respect to causation; he has presented evidence that his injuries were caused, in whole or in part, by his employment with defendant. Plaintiff's injuries include rotator-cuff tears in both of his shoulders; he underwent surgeries to repair both. Neither Dr. Lawrence nor Dr. Charles Clark could say to a reasonable degree of medical certainty what caused plaintiff's rotator-cuff tears and other shoulder issues. In fact, Dr. Clark stated that no doctor could conclude with a reasonable degree of medical certainty what caused plaintiff's rotator-cuff tears. Both doctors said that rotator-cuff tears are caused by multiple factors, commonly a combination of degeneration and trauma.

However, Dr. Lawrence testified that plaintiff's acromion had a "prominent downward slope," and heavy overhead work can contribute to the development of this condition. A prominent downward slope in the acromion leads to rotator-cuff tearing. Dr. Lawrence also

[2] The United States Supreme Court recently reiterated that the standard of causation required under the FELA is an "any part" test and is more relaxed than that required in common-law tort litigation. *CSX Transp, Inc v McBride*, __ US __; 131 S Ct 2630, 2637-2638; 180 L Ed 2d 637 (2011).

opined that plaintiff's job duties involving "heavy manual labor, overhead lifting and jerking and pulling on switches, etc. . . . contributed to his shoulder problems." Finally, Dr. Lawrence was concerned that plaintiff could experience further pain and the rotator cuff could tear again if plaintiff returned to work after surgery and did heavy manual activity overhead or away from his body. Dr. Clark testified that repetitive activity "is the most common mechanism in rotator cuff tears." Dr. Clark also stated that the routine use of one's shoulders causes an anterior spur, which puts the rotator cuff under friction and adds to the risk of a rotator-cuff tear.

Finally, a report completed by William N. Nelson, a specialist in ergonomics and biomechanics, cited numerous studies and reports that concluded that "repeated or sustained shoulder abduction or flexion is associated [with] Work-Related Musculoskeletal Injuries of the shoulder." One report found that "work at shoulder height, versus below the shoulder, increased the risk of rotator cuff tendinitis by 1100%." Plaintiff's job duties as a carman exposed him to ergonomic risk factors, like force, repetition, and awkward postures, and these factors are known to contribute to shoulder injuries.

Given that plaintiff did not work anywhere else from 1976 to 2006 and that he did not lift weights or play any sports that would put strain on his shoulders, a reasonable juror could conclude that his shoulder injuries were caused, at least in part, by his job duties with defendant. Plaintiff's duties on the rip track included trying to jerk and move the wheels to line them up, using pry bars to strain and push parts into position, and working on the doors and pulling them to get them back on track. Plaintiff also worked on his back under the cars to perform repairs; he would lift his arms to hold up brakes or pistons, some weighing at least 30 pounds.

As a carman working in the yard, plaintiff had to "throw the switch" on the track, which could involve a lot of exertion because some of them were not working properly. Plaintiff would also have to buckle the air hoses in between cars, many of which had an armor-coat plate that was difficult to bend, especially in the winter when they froze. The bleed rods plaintiff needed to pull out to bleed the air off the cars were often rusted and frozen, especially once defendant stopped doing a clean-oil test and stencil every 90 days, so pulling them out required a lot of stress and exertion.

Finally, plaintiff's job duties required him to open and close the train-car doors, which on some cars (like the multi-level cars) required reaching overhead. He estimated that he closed 40 to 50 doors per day. The doors were supposed to open and close by hand, but they would often stick or get off track, and it would take a lot of straining and stress to get them opened or closed. Plaintiff experienced pain and soreness in his shoulders from work, but the pain did not become constant until the beginning of 2006.

These duties include "heavy overhead work," which Dr. Lawrence testified can contribute to a downward-sloping acromion and rotator-cuff tearing. Plaintiff's work tasks also involved the routine use of his shoulders and repetitive motions (like straining to close 40 to 50 doors per day), which Dr. Clark testified can contribute to rotator-cuff tearing. Consequently, plaintiff has created a genuine issue of material fact on the issue of whether his job duties for defendant contributed, in whole or in part, to his shoulder injuries. Because the trial court correctly concluded that there is a question of fact regarding whether defendant was negligent,

there is a question of fact regarding whether that negligence affected defendant's job duties and contributed to his shoulder injuries.

III. ALTERNATE GROUNDS FOR DISMISSAL

Defendant argues that the trial court's order of dismissal should be affirmed on alternate grounds because there are no genuine issues of material fact on the issue of negligence and plaintiff's claim is precluded as a matter of law because he was otherwise disabled. We disagree.

Generally, an appellee is limited to the issues raised by the appellant and must file a cross-appeal to introduce new issues. See MCR 7.207; *Vanslembrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). However, an appellee can argue on appeal for alternative grounds of affirmance. *Vanslembrouck*, 277 Mich App at 565.

Defendant first argues that plaintiff did not create a genuine issue of material fact with respect to negligence. To establish that defendant was negligent, plaintiff must show that defendant owed him a duty of care, defendant breached that duty, and plaintiff suffered reasonably foreseeable harm as a result. *Van Gorder*, 509 F3d at 269-270. Under the FELA, employers have the duty to maintain a reasonably safe workplace and warn employees of unsafe working conditions. *Id.* at 269; *Williams v Nat'l R Passenger Corp*, 161 F3d 1059, 1062-1063 (CA 7, 1998). To establish foreseeability, a plaintiff must show that the employer had actual or constructive notice of the condition that caused the injury. *Williams*, 161 F3d at 1062-1063.

Plaintiff has created a genuine issue of material fact regarding whether defendant breached its duty to maintain a reasonably safe workplace and whether defendant had notice of the conditions that caused plaintiff's injuries. Plaintiff pointed to multiple job duties that required him to place more stress and exertion on his shoulders to perform because of defendant's failure to maintain a safe workplace and keep the railroad cars and equipment in good condition. For example, plaintiff testified that some of the track switches did not work properly, so "throwing the switch" required a lot of exertion. Defendant's use of air hoses with armor-coat plates made them difficult to bend, especially in the winter, and several men would have to strain to buckle the hoses together; there were more flexible hoses available, which some of the cars used. Defendant stopped performing a clean-oil test and stencil on the bleed rods every 90 days, which caused them to rust and freeze and required plaintiff to strain to pull them out in order to bleed the air off cars.

In addition, the rail-car doors frequently stuck or got off track, which made them difficult to open and close. The carmen complained to defendant about these doors and expressed their concerns that they would "tear up" their shoulders, backs, and arms. However, the carmen were told to open and shut the doors in any way possible. Plaintiff also testified that he saw foremen threaten to discipline carmen for having too many bad orders. They were to fix the cars or get the doors shut in any way possible so the cars could move through the yard. Finally, plaintiff testified that there would be fly ash, rotted grain, and other debris in the yard that he would slip on while trying to buckle air hoses or perform his other job duties, causing extra strain on his shoulders. Plaintiff's coworker, Dan Bearbauer, went to safety meetings and reported this problem of debris in the yard, but nothing was done about it.

This testimony creates a question of fact on the issue of whether defendant breached its duty of care to plaintiff. In addition, there is a question of fact on the issue of whether defendant had notice of the unsafe conditions. Plaintiff's testimony shows that defendant had notice of the problems with the rail-car doors coming off track and sticking and notice of debris in the yard causing the carmen to slip and slide while trying to work. In addition, Nelson's report includes numerous studies conducted by the AAR, which defendant is a part of, that warn of injuries caused by the failure to properly maintain doors and other equipment.

Defendant also argues that plaintiff's claim based on injury to his right shoulder is barred because he was disabled as of April 25, 2007, by a time-barred condition, i.e., his left shoulder. In support of its contention that plaintiff's claim is barred because he was otherwise disabled, defendant cites *Harris v Illinois Central R Co*, 58 F3d 1140 (CA 6, 1995). After his work-related injury, the plaintiff in *Harris* developed a heart condition that would have rendered him unable to work as a carman (if he were not already unable to work because of his work injury). *Harris*, 58 F3d at 1142-1145. The Sixth Circuit concluded that the jury should not hear testimony on the amount of wages that the plaintiff would have received as a railroad carman if he had worked until retirement age. *Id*. at 1144-1145. Rather, the plaintiff could only produce evidence concerning lost wages from the period of his railroad injury until his heart condition would have left him unable to work. *Id*.

The court in *Harris* did not bar the plaintiff's claim because he suffered a subsequent injury. See *id.* Rather, the existence of a subsequent injury was relevant only to the amount of lost wages the plaintiff could recover. See *id*. Consequently, if *Harris* applies to the instant case at all, it would only limit the lost wages that plaintiff could recover, not other kinds of damages such as damages for medical bills or pain and suffering. See *id*. Plaintiff's entire claim would not be barred because of his left-shoulder injury. See *id*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher