IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HILDA ROBINSON,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	Transferred from the Southern District of Illinois
v.	:	(Case No. 00-00124)
ILLINOIS CENTRAL RAILROAD CO.,	:	E.D. PA CIVIL ACTION NO. 2:08-89339
Defendant.	:	

O R D E R

AND NOW, this **11th** day of **February, 2011**, it is hereby **ORDERED** that the Motion for Partial Summary Judgment of Defendant Illinois Central Railroad Co., filed on December 10, 2010 (doc. no. 10), is **GRANTED**.[1]

[1]This case was transferred to the United States District Court for the Eastern District of Pennsylvania as part of MDL 875 on October 1, 2008. (Transfer Order, doc. no. 1.) On February 23, 2005, Plaintiff filed a suit against Illinois Central pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, alleging that Mr. Robinson developed asbestos-related lung cancer as a result of occupational exposure to asbestos during his employment with Illinois Central. (Def.'s Mot. Summ. J., doc. no. 10 at 4.)

I. FACTS

According to the medical records submitted by Plaintiff in accordance with Administrative Order No. 12, Mr. Robinson was diagnosed with small cell lung cancer in the upper lobe of his right lung in January of 1996. (Id. at 3.) Mr. Robinson underwent treatment in 1996 and had no reoccurrence of small cell lung cancer. (Id.) Mr. Robinson was then diagnosed with non-small cell

lung cancer with a left lower lobe mass in September of 2002. (Id.) On May 30, 2001, Mr. Robinson was diagnosed with asbestosis. (Id.) Defendant only seeks summary judgment as to Plaintiff's claim based on the 1996 small cell lung cancer diagnosis. Defendant argues that Plaintiff's claims related to Mr. Robinson's 1996 lung cancer diagnosis is time barred because Plaintiff did not file suit within FELA's three year statute of limitations. (Def.'s Mot. Summ. J. at 6.) Plaintiff argues that her claim related to the 1996 lung cancer is not barred by the statute of limitations since Defendant has not presented evidence that Mr. Robinson knew or should have known in 1996 that his lung cancer was caused by exposure to asbestos during his employment with Defendant. (Pl.'s Reply Br., doc. no. 11 at 6.)

II. SUMMARY JUDGMENT STANDARD

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden, the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

III. JURISDICTION AND CONFLICTS OF LAW ANALYSIS

Federal jurisdiction in this case is based on diversity of citizenship under 28 U.S.C. § 1332. Federal and state courts have concurrent jurisdiction over FELA cases. Burnett v. New York Central R. Co., 380 U.S. 424, 434 (1965) (citing Great Northern R. Co. v. Alexander, 246 U.S. 276 (1918)). A case is not subject to removal merely because the plaintiff has asserted FELA claims. Id. However, for FELA cases, federal law governs substantive issues and the law of the forum governs procedural issues. Laird v. Illinois Central Gulf R. Co., 566 N.E.2d 944, 954 (Ill. Ct. App. 1991) (citing Avance v. Thompson, 51 N.E.2d 334, 340 (Ill. Ct. App. 1943), rev'd on other grounds, 325 U.S. 77 (1945)); see also Burnett, 380 U.S. at 434. The United States Supreme Court has recognized that "the period of time within which an action may be commenced is a material element in the uniform operation" of FELA. Burnett, 380 U.S. at 433 (quoting Engel v. Davenport, 271 U.S. 33, 39, 46 (1926)). The application of FELA's three-year statute of limitations is a substantive issue and is "a condition of liability constituting a substantial part of the right created" under FELA. Huett v. Illinois Central Gulf R. Co., 644 N.E.2d 474, 477 (Ill. Ct. App. 1994) (quoting Herb v. Pitcairn, 51 N.E.2d 276-77 (Ill. Ct. App. 1943). Therefore, this Court will apply federal law in deciding Defendant's Partial Motion for Summary Judgment. The MDL transferee court applies the federal law of the circuit where it sits, which in this case is the law of the United States Court of Appeals for the Third Circuit. In re Asbestos Prods. Liability Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (citing In re Diet Drugs Liability Litig., 294 F. Supp. 2d 667, 672 (E.D. Pa. 2003)).

IV. STATUTE OF LIMITATIONS - LEGAL STANDARD

No action may be brought under FELA "unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. The statute of limitations on a FELA occupational disease claim begins to run "when the employee becomes aware of his disease and its cause." Kichline v. Consolidated Rail Corp., 800 F.2d 356, 358 (3d Cir. 1986) (citing Urie v. Thompson, 337 U.S. 163, 169-70 (1949) (holding that plaintiff's silicosis claim accrued when the disease manifested itself)). Under the discovery rule, "[w]hen 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." McCain v. CSX Transp., Inc., 708 F. Supp. 2d at 498 (quoting Czyzewski v. Conrail, 1997 WL 9791 *2 (E.D. Pa. 1997)). The key inquiry is whether the

plaintiff has knowledge of the injury and its cause. McCain, 708 F. Supp. 2d at 498 (citing United States v. Kubrick, 444 U.S. 111, 122-23 (1979) (interpreting the Federal Tort Claims Act). The plaintiff must act in a reasonably diligent manner by gathering facts to establish the injury and its causation. McCain, 708 F. Supp. 2d at n. 3 (citing Kubrick, 444 U.S. at 122). At the summary judgment stage, under Rule 56(c), the moving party bears the burden of proving that there is no genuine issue of material fact as to whether the plaintiff knew or should of known of his injury and its cause within the statute of limitations period. McCain, 708 F.2d at 498. The burden then shifts to the nonmoving party to point to the record and raise a genuine issue of material fact that the injury and its cause were not discoverable prior to three years before the suit was filed. Id. In accordance with Kubrick, the statute of limitations on Plaintiff's FELA claims started to run when a person, acting in a reasonably diligent manner, would have acquired knowledge of both the injury and its governing cause. 444 U.S. at 122. Therefore, the issue here is whether a reasonably diligent person, in Mr. Robinson's position, would have inquired about the cause of his lung cancer when he was diagnosed in 1996.

In Kubrick, the plaintiff was treated with neomycin, an antibiotic, at a Veterans' Administration Hospital in 1968. 444 U.S. 111, 111 (1979). In 1969, the plaintiff suffered hearing loss and was informed by a doctor that it was likely that his hearing loss was a result of exposure to neomycin. Id. In 1971, another doctor told plaintiff that exposure to neomycin had likely caused his hearing loss and that the neomycin should not have been administered. Id. The United States Court of Appeals for the Third Circuit held that plaintiff's cause of action under the Federal Tort Claims Act did not accrue until he was informed in 1971 that the neomycin should not have been administered. Id. at 116. The United States Supreme Court reversed holding that a plaintiff with knowledge of the facts "about the harm done to him can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so would undermine the purpose of the limitations statute." Id. at 123. The Court cited to Urie and noted that many courts have incorporated the manifestation rule used in the FELA context to claims filed under the Federal Tort Claims Act. Id. at n. 7 (citing Urie, 337 U.S. at 169-70; Quinton v. United States, 304 F.2d 234 (5th Cir. 1962)).

This Court addressed FELA's three year statue of limitations in the McCain case. In McCain, plaintiff first visited a doctor on July 30, 2003 when he was experiencing pain in his left knee.

708 F. Supp. 2d at 498. The plaintiff was diagnosed with joint disease on February 13, 2003 and filed his FELA claim on January 27, 2006. Id. The defendant presented evidence proving that the plaintiff was aware of his knee injury as early as 2001. Id. at 499. The defendant then argued that plaintiff "knew or should have known that the injury in his left knee was likely caused by his work history, and that he failed to timely investigate the nature and cause of injury." Id. Defendant presented evidence that plaintiff had attended a screening for carpal tunnel syndrome and thus was aware of the effects repetitive activity syndrome could have on the body. Id. Also, in his deposition, plaintiff testified that nothing, other than his work, could have caused his injuries. Id. The Court found that defendant was entitled to summary judgment on this claim as plaintiff failed to make any investigation into the cause of his injury. Id. at 500.

FELA's three year statute of limitations has been analyzed by the United States Court of Appeals for the Seventh Circuit and thus, this Court looks to this persuasive authority for guidance. In Tolston v. National Railroad Passenger Corp., plaintiff sued her former employer, Amtrak, under FELA alleging injuries to her knees as a result of Amtrak's negligence. 102 F.3d 863, 864 (7th Cir. 1996). The district court granted Amtrak's motion for summary judgment finding that plaintiff's claims were barred by FELA's three year statute of limitations. (Id.) Around 1989, plaintiff's doctors informed her that she had degenerative joint disease and on May 1, 1992, plaintiff had knee replacement surgery. (Id. at 865.) After her surgery, plaintiff's doctor informed her that her knee problems may have been caused by her job duties. (Id.) On April 27, 1995, plaintiff filed her FELA action against Amtrak. (Id.)

The Tolston court explained that § 56 of FELA incorporates two components: the injury and its cause. Id. at 865. "When the specific date of injury cannot be determined because it resulted from continuous exposure to a harmful condition over a period of time, plaintiff's cause of action accrues when the injury manifests itself." Id. (citing Fries v. Chicago & Northwestern Transp. Co., 909 F.2d 1092, 1094 (7th Cir. 1990)). The key inquiry is whether the plaintiff has knowledge of an injury and its cause, but this does not require that the plaintiff knows that a legal wrong has occurred. 102 F.3d at 865 (citing United States v. Kubrick, 444 U.S. 111, 122-23; Goodhand v. United States, 40 F.3d 209, 212 (7th Cir. 1994)). The statute of limitations begins to run when "a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." Tolston, 102 F.3d at 865

(citing Fries, 909 F.2d at 1095). This is an objective inquiry and imposes an affirmative duty on the plaintiff to investigate what caused his or her injury. Tolston, 102 F.3d at 865. "At some point, persons with degenerative conditions have a duty to investigate the cause." Id. at 866 (internal citations omitted).

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision granting summary judgment in favor of Amtrak. 102 F.3d at 866. The court found that plaintiff knew that she had a problem in 1989 when she began actively seeking medical treatment, and that she had a duty to investigate the cause of her injury at that time. (Id.) It made no difference that the plaintiff did not ask anyone about the cause of her injury and therefore, did not learn of the cause until a doctor told her in 1992 that it might be work-related. (Id.) The plaintiff had a duty to investigate the source of her injury. (Id.)

Under these authorities and in accordance with Kubrick, the statute of limitations on Plaintiff's FELA claims started to run when a person, acting in a reasonably diligent manner, would have acquired knowledge of both the injury and its governing cause. 444 U.S. at 122.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

V. ANALYSIS

It is undisputed that Mr. Robinson learned of his injury in 1996 when he was diagnosed with small cell lung cancer in the upper lobe of his right lung. The issue then is whether a reasonably diligent person, at that point, would have investigated the underlying cause of the injury. There is no evidence that Mr. Robinson took any action to discover the cause of his injury. Given that Mr. Robinson did not exercise any diligence by inquiring into the cause of his lung cancer, Plaintiff's claims based on the 1996 small cell lung cancer are barred by the statute of limitations. Accordingly, as there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law, Defendant's Motion for Summary Judgment is granted as to Plaintiff's claims stemming from the 1996 small cell lung cancer diagnosis.