

RENDERED: JANUARY 5, 2018; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2016-CA-001849-MR

LARRY M. BOGGS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE  
ACTION NO. 09-CI-000800

CSX TRANSPORTATION, INC.

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, J. LAMBERT AND NICKELL, JUDGES.

COMBS, JUDGE: Larry M. Boggs appeals from the judgment of the Jefferson Circuit Court entered upon a jury verdict in favor of CSX Transportation, Inc., (CSX). Boggs presents numerous issues for our review. However, our disposition of the appeal turns upon our resolution of a single issue: whether the trial court

erred in its instructions to the jury panel. After our review, we reverse and remand for further proceedings.

In February 1974, Boggs began working with CSX as a brakeman. In April 1977, he was promoted to locomotive engineer.

On January 30, 2009, Boggs filed a civil complaint against CSX pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.* Boggs claimed that during his employment, he was injured by excessive and harmful vibrations of the engine cab and its defective seats resulting in cumulative trauma, degenerative osteoarthritis, and disc disease in his back, neck, and shoulders. He further alleged that he suffered repetitive trauma injuries to his upper extremities attributable to overuse and improper placement of engine hand controls.

In its answer to the complaint, CSX contended that it had provided Boggs with a reasonably safe workplace and denied that it had been negligent in any way. It also asserted that Boggs's cumulative trauma claims were barred by the statute of limitations. Written discovery was exchanged, and CSX deposed Boggs.

On February 28, 2014, CSX filed a motion for summary judgment. CSX argued that -- more than three years before the FELA action was filed -- Boggs had suspected (or “certainly **should have** considered the possibility”) that

his work with the railroad was the cause of his alleged injuries. In support of its position, CSX relied upon notes supplied by Boggs's physical therapist indicating that "he [Boggs] wonders how much of his conditions [*sic*] is from repetitive activities that he has done over the last 30 years." This note is dated December 9, 2005, and it appears to link the repetitive activities that Boggs had undertaken "over the last 30 years" to his report of periodic numbness in both hands. CSX also contended that when Boggs met with Dr. William Brooks, a neurosurgeon, on February 2, 2006, Boggs unequivocally attributed his condition to his activities at work. CSX contended that the action was time-barred since it had not been commenced within three years from the day the cause of action (if any existed) had accrued. CSX argued that it was entitled to judgment as a matter of law.

During his deposition Boggs indicated that he attributed his aches and pains to the ordinary effects of aging and year after year of manual labor -- until January 22, 2008, when Dr. David Jackson told him that given the accumulated effects of his job, he could no longer do the work required at the railroad. (To reiterate, Boggs filed his complaint on January 30, 2009 -- approximately eight days within one year of this medical pronouncement.) Additionally, Boggs testified that Dr. Brooks **specifically rejected** his suggestion (gleaned from reading some literature) that excessive vibration from his work in the locomotive might be the cause of his back, neck, and shoulder injuries. In fact, Dr. Brooks never

indicated to Boggs or others that a causal connection could be drawn between locomotive engine vibration and Boggs's degenerative disc disease.

After evaluating the evidence, the trial court concluded that there existed a genuine issue of material fact as to when the limitations period began to run under the discovery rule and denied the railroad's motion for summary judgment. The court determined that Boggs's conditions could be explained by ordinary aging and other causes and that the evidence was sufficiently conflicting as to present a jury question concerning when the FELA action accrued.

The trial court bifurcated the proceedings. In a trial conducted on July 18 – 20, 2016, the jury was asked to determine a single issue: whether Boggs had filed his claims with respect to the injury to his back, neck, and shoulders within the period of limitations. Once the jury heard the evidence related to the date of accrual, the court instructed the jury to decide whether Boggs had filed his action

no more than three years after he knew, or, through the exercise of reasonable diligence, should have known, both that he had suffered an injury to his shoulders, neck, and upper back, *and that his work on the railroad was a potential cause of that injury.* (Emphasis added.)

After its deliberation, the jury concluded that Boggs did not file the action within the three-year period of limitations. The trial court dismissed Boggs's complaint in its entirety. This appeal followed.

On appeal, Boggs argues that the instructions tendered to the jury incorrectly stated the law and were biased in favor of CSX. He also contends that the trial court erred in dismissing his remaining claims. We agree with both contentions.

Instructions to the jury must be based upon the evidence, and they must properly state the law. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272 (Ky. App. 2006). Alleged errors regarding jury instructions pose questions of law that must be analyzed under a *de novo* standard of review. *Reece v Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440 (Ky. App. 2006). Erroneous instructions are presumed to be prejudicial. *McKinney v Heisel*, 947 S.W.2d 32 (Ky. 1997).

While our workers' compensation act provides relief without regard to fault, FELA provides a statutory cause of action sounding in negligence. 45 U.S.C. § 51. Thus, a locomotive engineer is required to show that the railroad's negligence was a legal cause of his injury. The railroad's negligence does not have to be the exclusive cause of his injury. *CSX Transp., Inc., v. McBride*, 564 U.S. 685, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011). Nevertheless, the employee is required to establish a causal link between his injury and the negligent acts or omissions of the railroad. *Lipsteuer v. CSX Transp. Inc.*, 37 S.W.3d 732 (Ky. 2000).

No action may be maintained under FELA unless commenced within three years from the day the cause of action accrued. 45 U.S.C. § 56. The discovery rule is used to determine when an employee's cause of action accrues under the act. This rule provides that the period of limitations begins to run when the accumulated effects of injury manifest themselves. *Urie v. Thompson*, 337 U.S. 163, 170, 69 S.Ct. 1018 (1949). Some courts have also incorporated into FELA jurisprudence the discovery rule utilized in the analysis of actions commenced under the Federal Tort Claims Act. *Lipsteuer, supra*. The discovery rule, as modified, provides that a cause of action accrues when a plaintiff knows or, in the exercise of reasonable diligence, should know both of the injury and of its cause. *United States v. Kubrick*, 444 U.S. 111, 122-23, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). The Supreme Court of Kentucky has held that the period of limitations cannot begin to run until the employee is aware of the **causal connection** between his injuries and his workplace. *Lipsteuer, supra*. The date of accrual often presents an issue of fact to be determined by a jury. *Id.*

Boggs contends that the trial court erred by instructing the jury that it could find that the cause of action accrued when he knew (or should have known) that he had suffered an injury and that it was *potentially* caused by his work at the railroad. On the other hand, CSX argues that the trial court's instructions to the jury were correct since the action accrued when Boggs began "actively

investigating [the] possibility” -- through discussions with his healthcare providers -- that excessive vibration of the engine might have caused his injuries. In view of the beneficent purpose of FELA, the intention of Congress to create a broad remedy for workers injured by a railroad’s negligence, and the specific facts of this case, CSX’s argument must fail.

CSX relies primarily upon the decision of the Seventh Circuit Court of Appeals in *Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092 (7th Cir. 1990), for its proposition that an employee “knows or should know” that his injury is work-related when he “suspects” such a causal relationship. In *Fries*, the court considered the time at which the railroad employee “knew or should have known” that he had suffered a hearing impairment related to work.

Fries had worked as a machinist from 1969 to 1987 amid loud industrial noise at the railroad. Fries acknowledged that he suspected that he had suffered hearing loss as early as 1980 and that he could not ascribe the hearing loss to a cause other than work. In May 1985, Fries was formally diagnosed with hearing loss. In November 1987, he filed the FELA action in federal court. Fries argued that his cause of action did not accrue until he had received an actual diagnosis of hearing loss in 1985 since he did not know until then that his injury was caused by his work environment.

In its discussion of when Fries's cause of action arose, the court distinguished from its analysis a case where an employee made inquiries in an attempt to verify her suspicion that her medical problems had been caused by environmental factors prevalent in her workplace. The court noted that the experts who were consulted in that case opined either that no causal connection existed or that medical science had not recognized any causal relationship between factors in the employee's work environment and her heart problems. The court concluded that this factual distinction was critical to its decision that the employee's cause of action had not accrued until the medical community recognized the causal connection. The full holding of *Fries* does not support the assertion of CSX that an employee's **mere suspicion** of an injury or its probable cause, standing alone, is the correct standard for determining when a cause of action accrues under FELA.

In this case, the trial court's instructions to the jury erroneously suggested that it could find that the cause of action accrued when Boggs first suspected that his illness was work related. Under the facts of this case, the instructions were clearly erroneous and plainly prejudiced Boggs because they did not fully and fairly inform the jury on the applicable law. Upon this basis, we must vacate and remand for further proceedings.

Upon remand, the trial court must also take into account that FELA provides a remedy to an employee who suffers an injury while employed by the



railroad “*resulting in whole or in part* from the negligence of any of the officers, agents, or employees” of the common carrier. 45 U.S.C. § 51 (emphasis added). If Boggs can show that he suffered injury caused “in whole or in part” by the railroad’s negligence within the three years preceding the filing of his claim, the discovery rule would not bar his claim, and he may pursue recovery for the injury.

Because FELA does not allow apportionment for any reason other than the employee’s contributory negligence, it is immaterial whether some portion of Boggs’s injury may have been caused by negligence that occurred prior to the limitations period -- even if it were discovered more than three years before the action was filed. 45 U.S.C. § 53; *see Anderson v. BNSF Ry.*, 380 Mont. 319, 354 P.3d 1248, 1264 (2015), *cert. denied* \_\_\_\_ U.S. \_\_\_\_, 136 S.Ct. 1493, 194 L.Ed.2d 586 (2016) (“Nothing in [FELA] suggests that a claim is time-barred because the injury was caused in part by earlier negligence by the railroad for which the worker could have brought suit, but did not.”). The Supreme Court of Montana recently set out the following summary which we find both pertinent and persuasive:

If the jury determines that a worker discovered his or her work-related injury *less* than three years prior to filing suit, then the jury may consider any of the railroad’s acts or omissions that the worker alleges contributed to the injury in determining liability. If the jury finds the railroad caused the worker’s injury, even to the slightest degree, then the worker is entitled to recover damages for the full scope of his or her injury – less any reduction for comparative negligence. If, however, the jury determines that a worker discovered his or her work-related injury

*more* than three years prior to filing suit, then the jury may consider only the railroad's acts or omissions that occurred within the three-year limitations period in determining liability. But if the jury finds the railroad caused the worker's injury, even to the slightest degree, during that three-year period, then the worker is entitled to recover damages for the full scope of his or her injury – less any reduction for comparative negligence.

*Anderson, supra*, at 1264.

The judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for further proceedings. On re-trial, the jury should be given appropriate instructions concerning the timeliness of Boggs's claims consistent with this opinion.

ALL CONCUR.

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