

12-0420

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

GARY L. CAUDILL

Plaintiff,

v.

Civil Action No.: 10-C-304  
Honorable Michael Thornsbury

CSX TRANSPORTATION, INC.

Defendant.

FINAL ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT BASED UPON THE STATUTE OF LIMITATIONS

This matter is currently before the Court on the Defendant, CSX Transportation, Inc.'s, Motion For Summary Judgment and Motions For Partial Summary Judgment. A hearing was held on the matter on the 6<sup>th</sup> day of February 2012, at which the parties appeared as follows: the Plaintiff, in person and through counsel, Richard N. Shapiro, Stephen L. Groves, and Greg K. Smith; and the Defendant through counsel, J. David Bolen and Todd R. Meadows. After thorough consideration of the Motions, the oral argument relating thereto, the applicable legal authorities, and all evidence of record, the Court FINDS that the Motion For Summary Judgment based on the statute of limitations should be GRANTED. Thus, the Motion is hereby GRANTED based on the following Findings Of Fact And Conclusions Of Law, to wit:

Findings Of Fact

1. The Plaintiff filed this action in September 2010, pursuant to the Federal Employers' Liability Act, ("FELA"), alleging that through the course of his employment with the Defendant he was exposed to "cumulative trauma that ultimately led to his spinal injuries."

2. The Plaintiff alleged in the Complaint that he suffered "injuries and/or aggravation to his spine and related nerves and soft tissues."
3. The Plaintiff commenced his employment with the Defendant in 1977 and concluded his employment in June 2008, allegedly due to injuries which are the basis for this suit.

#### Conclusions Of Law

4. In West Virginia it is well established that "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of material fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).
5. "The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined." Syllabus Point 5, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).
6. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syllabus Point 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).
7. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element

- of the case that it has the burden to prove.” Syllabus Point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).
8. “Roughly stated, a ‘genuine issue’ for purposes of West Virginia Rule of Civil Procedure 56 (c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syllabus Point 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).
  9. “While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some “concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor” or other “significant probative evidence tending to support the complaint.” *Anderson v. Liberty Lobby*, 477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217; *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59-60, 459 S.E.2d 329, 336 - 37 (1995).
  10. The above standards are somewhat relaxed in a FELA case and less evidence is needed to survive the Motion For Summary judgment than in a typical civil case. See *Generally Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 268 (3<sup>rd</sup> Cir. 1991); *Harbin v. Burlington, N. R.R. Co.*, 921 F.2d 129, 132 (7<sup>th</sup> Cir. 1990); *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1<sup>st</sup> Cir. 1987).

*I. Motion For Summary Judgment Based On Statute Of Limitations*

11. The Defendant argues that the Plaintiff failed to file the instant action within the appropriate statute of limitations period. The Defendant argues that pursuant to FELA the Plaintiff had a three year statute of limitations, which accrues from the date of injury or manifestation of the injury, to file suit. The Defendant asserts that the Plaintiff exhibited symptoms and knew, or reasonably should have known, that his injuries could be attributed to his employment well exceeding the three year window for filing suit. Further, the Defendant contends that the Plaintiff cannot merely choose to ignore the cause of his injuries or wait until the symptoms are severe to file suit.
12. The Plaintiff argues that he filed suit within three years of attributing his lower back pain and injuries with his employment. The Plaintiff asserts that he initially attributed his pain and injuries to the aging process. However, the Plaintiff contends that in 2008 he realized that his employment with the Defendant was the likely cause of his pain and then filed suit.
13. The relevant statute of limitations is codified at 45 U.S.C. § 56, which provides that “[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.”
14. The parties are in agreement that the statute of limitations is three years and that it is a requisite to the institution of bringing suit; however, they disagree on when the action accrued.
15. A cause of action brought under the FELA begins to accrue when the injury manifests itself. See *Urie v. Thompson*, 337 U.S. 163, 170 (1949). Analyzing

*Urie*, other relevant cases, and the FELA statute of limitations period, the Seventh Circuit stated that

[the Seventh C]ircuit adopted the rule that a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause. Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Moreover, the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a potential cause. That this rule imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury has not been lost on the courts. However, to apply any other rule would thwart the purposes of repose statutes which are designed to apportion the consequences of time between plaintiff and defendant, and to preclude litigation of stale claims.

*Fries v. Chicago & Northwestern Transp. Co.*, 909 F.2d 1092, 1095 (7<sup>th</sup> Cir., 1990) (citations omitted).

16. In *Aparicio v. Norfolk & Western Railway Company*, 84 F.3d 803 (6<sup>th</sup> Cir. 1996) (overruled on alternate grounds *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)), the Sixth Circuit, citing *Fries*, found that

In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), the Supreme Court stated that when 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. *Id.* at 170, 69 S.Ct. at 1025.... In [*United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)] ... [t]he Court stated that once 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.

17. "The fact that an injury 'has not reached its maximum severity ... but continues to progress' does not relieve the plaintiff of the duty to use reasonable diligence to discover the original injury and its cause." *Aparicio*, 83 F.3d at 815 (citing *Fries*, 909 F.2d at 1096).

18. The Fourth Circuit Court of Appeal in *Young v. Clinchfield Railroad Company*, 288 F.2d 499, 504 (4<sup>th</sup> Cir. 1961), stated that “[t]he Urie case unquestionably demonstrates the Court's view that when the nature of the injury is such that it does not manifest itself immediately, the determination of when the cause of action accrued does not depend on when the injury was inflicted. To the contrary, 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.” Additionally, the Fourth Circuit held that a “medical judgment that eluded the specialist cannot be reasonably expected from the plaintiff.” *Id.*

19. The Virginia Supreme Court has held that

An employee's mere suspicion of an injury or its probable cause, standing alone, is not the operative standard for determining when a cause of action accrues under FELA. Rather, all the relevant evidence must be considered. In making this determination, several factors have been identified, including the degree of inquiry made by the employee, the number of possible causes of the injury, whether medical advice indicated no causal connection between the injury and the workplace, the complexity of the employee's symptoms, the expert knowledge or diagnostic skill of the medical doctors or experts consulted, and the existence of a medically recognized and documented causal link between the employee's symptoms and his working conditions. On remand, considering all the relevant evidence, if reasonable persons could disagree about when [the Plaintiff] “knew or should have known” that his injury was work-related, the issue should be submitted to the jury. It is improper, however, to resolve the issue solely on the basis that an employee suspected that his illness was work-related.

*Gay v. Norfolk and Western Ry. Co.*, 253 Va. 212 (1997) (citations omitted).

20. Here, the Plaintiff has a long and documented history of back problems. The Plaintiff presented to Dr. Darnell in October 1985 “reporting low back pain that has been going on for around a week. [The Plaintiff] report[ed] an intermittent

nature of pain in the past. [That was] going on for one year.” The Plaintiff then began receiving sporadic treatment for his lower back pain.

21. The Plaintiff was seen by a chiropractor on multiple occasions between 2001 and 2005, with additional treatments occurring between June 19, 2006 and October 30, 2007.
22. On November 11, 2005, a lumbar spine x-ray of the Plaintiff demonstrated a Grade I anterolisthesis of L5 on S1 secondary to L5 bilateral spondylolysis.
23. A May 19, 2008, lumbar spine x-ray of the Plaintiff exhibited spondylolisthesis at L5-S1.
24. A June 26, 2008, MRI of the Plaintiff noted chronic bilateral L5 spondylolisthesis.
25. The Plaintiff’s neurosurgeon, Dr. Phillip Tibbs, testified at his deposition, taken in July 2011, that the Plaintiff “had some symptoms in the past, but it became worse for at least two years, and in other notes I noticed that it had been going on for at least five or seven years, so that actually fits the classic history of the development of spondylolisthesis over time . . .”
26. Thus, as argued by the Defendant, and evidenced by the record, the condition with which the Plaintiff centers the current case that was diagnosed by the June 26, 2008, MRI, was also diagnosed with a November 2005, lumbar spine x-ray.
27. Additionally, and importantly, the Plaintiff linked his back problems with his employment conditions. At the Plaintiff’s deposition he testified, in pertinent part, as follows:

Q: When we were talking earlier, you told me some things about the conditions of the seats that you were using. During this first

ten-year time frame, did you have a problem with the conditions of the seats?

A: Yes, sir.

Q: Okay. What was your problem?

A: They were hard.

Q: Let's talk about the caboose first. What were your problems with the seats on the caboose?

A: They weren't stationary.

Q: When you say they weren't stationary, what do you mean by that?

A: I mean when you had slack action you could - - you would get knocked out of the seats sometimes[.]

Q: Did you ever get injured by being knocked out of the seats?

A: I've had some pain when I've got knocked out.

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Q: Okay. What about the seats on the locomotive? And I want to focus now just on this first ten-year time frame. What were your problems with the seats on the locomotives then?

A: They weren't supportive.

Q: What do you mean by that?

A: I mean you didn't have no support when you sat down to hold you. You didn't have no side armrest. They were hard and the backs of the seat were straight up and down and short, meaning they weren't real tall in the back.

Q: How far up your back do you think the backs went? Do you think it went up to your mid-back?

A: A little bit about your belt line.

Q: Okay. You said you made complaints about these seats?

A: Yes, sir.

Q: Who'd you complain to?

A: I complained to the railroad officers and the trainmasters.

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Q: What did you say about the seats to him?

A: I told him they were uncomfortable to ride in and they weren't supportive to your back.

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Q: Okay. Did you ever make any complaints during this time to your union officers about the seats?

A: I brought it up during the safety meetings.

28. Accordingly, the Plaintiff had made multiple complaints regarding the seats, and logic would dictate that he associated his back troubles with the seats he complained of not supporting his back.

29. The Plaintiff filed suit in September 2010; however, the injury complained of manifested itself well in excess of three years preceding that date. The Plaintiff first began seeking treatment for his back in 1985, and was diagnosed with the same condition providing the basis for this suit in 2005. Furthermore, the Plaintiff had associated that the seats he used while employed with the Defendant were not supportive of his back, and complained of such seats. Thus, the Plaintiff knew, or reasonable should have known, that the seats were the cause of his injury.

30. The Court FINDS that the injuries the Plaintiff complains of in this action manifested themselves at the latest in November 2005.

31. The Court FINDS that the Plaintiff knew, or reasonable should have known, that his employment with the Defendant was the cause, or an attributing cause, of his injury.

32. The Court FINDS that the injuries manifest themselves more the three years preceding the filing of this suit.

33. According, the Court FINDS that the Motion should be GRANTED.

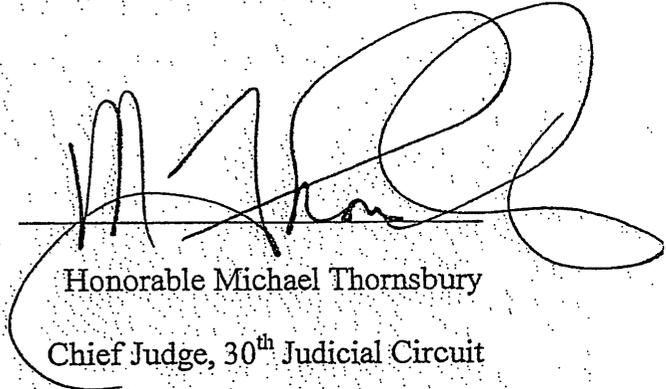
34. The Court need not rule on the rest of the pending matters as this is a final disposition of the case.

#### **Judgment**

Wherefore, based upon the foregoing Findings Of Fact And Conclusions Of Law, the Motion For Summary Judgment based upon the statute of limitations is hereby GRANTED and the matter is DISMISSED WITH PREJUDICE. This Order is Final and Appealable.

The Clerk is DIRECTED to send an attested copy of this Order to all parties of record.  
The Clerk is FURTHER DIRECTED to strike this case from the Court's active docket  
and statistics.

Entered: this the 2<sup>nd</sup> day of February.



Honorable Michael Thornsby  
Chief Judge, 30<sup>th</sup> Judicial Circuit

**A COPY TESTE**  
*Grant Pease*  
CIRCUIT CLERK, MINGO COUNTY, W.VA.

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IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

GARY L. CAUDILL

Plaintiff,

v.

Civil Action No.: 10-C-304  
Honorable Michael Thornsberry

CSX TRANSPORTATION, INC.,

Defendant.

FINAL ORDER DENYING PLAINTIFF'S MOTION TO ALTER/AMEND UNDER WEST VIRGINIA RULE OF CIVIL PROCEDURE 59(e) AND MOTION FOR RECONSIDERATION

This matter is currently before the Court on the Plaintiff, Gary Caudill's, Motion To Alter/Amend Under West Virginia Rule Of Civil Procedure 59(e) And Motion For Reconsideration. After Thorough review of the Motion, the Court's underlying Final Order, and all evidence of record, the Court FINDS that the current motion should be DENIED. Thus, the Motion is hereby DENIED based upon the following Findings Of Fact And Conclusions Of Law, to wit:

Findings Of Fact And Conclusions Of Law

1. The Plaintiff filed this action in September 2010, pursuant to the Federal Employers' Liability Act, ("FELA"), alleging that through the course of his employment with the Defendant he was exposed to "cumulative trauma that ultimately le[ ]d to his spinal injuries."
2. The Plaintiff alleged in the Complaint that he suffered "injuries and/or aggravation to his spine and related nerves and soft tissues."
3. The Plaintiff commenced his employment with the Defendant in 1977 and concluded his employment in June 2008, allegedly due to injuries which are the basis for this suit.

4. On February 27, 2012, the Court granted the Defendant's Motion For Summary Judgment based upon the Statute Of Limitations.

5. The Court held that

29. The Plaintiff filed suit in September 2010; however, the injury complained of manifested itself well in excess of three years preceding that date. The Plaintiff first began seeking treatment for his back in 1985, and was diagnosed with the same condition providing the basis for this suit in 2005. Furthermore, the Plaintiff had associated that the seats he used while employed with the Defendant were not supportive of his back, and complained of such seats. Thus, the Plaintiff knew, or reasonable should have known, that the seats were the cause of his injury.

30. The Court FINDS that the injuries the Plaintiff complains of in this action manifested themselves at the latest in November 2005.

31. The Court FINDS that the Plaintiff knew, or reasonable[y] should have known, that his employment with the Defendant was the cause, or an attributing cause, of his injury.

32. The Court FINDS that the injuries manifest[ed] themselves more the three years preceding the filing of this suit.

33. According, the Court FINDS that the Motion should be GRANTED.

6. The Plaintiff then filed the current Motion pursuant to West Virginia Rules Of Civil Procedure Rule 59(e), which provides that

**(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

**(b) Time for Motion.** Any motion for a new trial shall be filed not later than 10 days after the entry of the judgment.

**(c) Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

**(d) On Court's Initiative; Notice; Specifying Grounds.** No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

**(e) Motion to Alter or Amend a Judgment.** Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

**(f) Effect of Failure to Move for New Trial.** If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, the party is deemed to have waived all errors occurring during the trial which the party might have assigned as grounds in support of such motion; provided that if a party has made a motion under Rule 50(b) for judgment in accordance with the party's motion for judgment as a matter of law and such motion is denied, the party's failure to move for a new trial is not a waiver of error in the court's denying or failing to grant such motion for judgment as a matter of law.

7. The Plaintiff argues that the Court erred in its decision and that it did not have allegedly useful information, i.e. the deposition testimony of the Plaintiff's family doctor.
8. However, the deposition of the Dr. John Darnell, M.D., was taken on August 25, 2011, thus, it is not newly discovered evidence. The Plaintiff states that "[t]he court did not have the benefit of plaintiff's own family doctor's discovery deposition . . ."
9. Aside from the fact that Dr. Darnell's deposition was not newly discovered evidence justifying a reconsideration of the Court's Final Order, it does not negate the remaining

supporting evidence. The fact remains that the Plaintiff reasonably should have known that his employment with the Defendant contributed to his injuries.

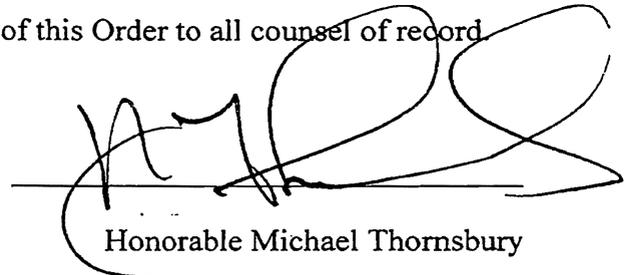
10. Thus, the Motion is hereby DENIED.

**Judgment**

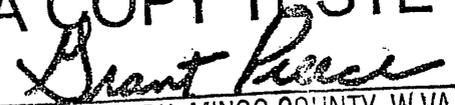
Wherefore, based on the foregoing Findings Of Fact And Conclusions Of Law, the Motion is hereby DENIED.

The Clerk is DIRECTED to send an attested copy of this Order to all counsel of record.

Entered: this the 12<sup>th</sup> day of March 2012.



Honorable Michael Thornsbury  
Chief Judge, 30<sup>th</sup> Judicial Circuit

A COPY TESTE  
  
CIRCUIT CLERK, MINGO COUNTY, W.VA.