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James Murnion
Alexander Blewett III School of Law

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**ANDERSON V. BNSF: CAN FELA AFFORD
INJURED WORKERS A CONTINUING TORT CLAIM?**

James Murnion

No. DA 14-0253

Montana Supreme Court

Oral Argument: Wednesday, January 28, 2015, at 9:30 am in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana.

I. INTRODUCTION

Robert Anderson, Plaintiff and Appellant, and BNSF Railway, Defendant and Appellee, present three separate questions on appeal: (1) were Mr. Anderson's Federal Employers Liability Act¹ ("FELA") claims properly barred by the statute of limitations per a jury determination; (2) should a negligent work assignment theory replace the discovery rule in cumulative injury cases; and (3) did BNSF's council make improper arguments at trial such as to deprive Anderson of a fair trial.

II. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Anderson worked as a carman for BNSF from 1978 to 2009 in Havre, Montana.² Carmen are responsible for inspecting and repairing railroad cars when trains come into the yard. The work is physically demanding and exposes workers to a number of injury risks. Of interest to this case is the risk of a cumulative trauma back injury. OSHA clarifies that a cumulative trauma injury "develop[s] gradually as a result of a microtrauma brought about by repetitive activity over time."³ Mr. Anderson was subjected almost daily to repetitive shock and vibration caused by operating inspection tractors and pickups over rough and unmaintained roads. Mr. Anderson and virtually every one of his fellow carmen suffered from frequent aches and pains caused by their work, primarily in their backs.

In September of 2005, Mr. Anderson attended a union meeting where a presentation was given on cumulative trauma injuries. He received a blank injury reporting form on which he made notes about his own symptoms, noting that he believed they were caused by his work at BNSF. In March of 2006, Mr. Anderson submitted an injury report to

¹ 45 U.S.C. §§51-60.

² The facts presented in this section are derived from three documents: (1) Appellant's Br., *Robert W. Anderson v. BSNF Railway* (Mont. Aug. 7, 2014) (No. DA 14-0253); and (2) Appellee's Br., *Robert W. Anderson v. BSNF Railway* (Mont. Oct. 6, 2014) (No. DA 14-0253).

³ Appellant's Br., *supra* n. 2, at 3.

BNSF, claiming that he first noticed pain in January of 2005, and first sought medical treatment in February of 2006. He noted that he was unaware of the full extent of his injuries, but he believed that his heavy and awkward work as a carmen had something to do with it; specifically, riding tractors with no suspension and rough roads. Even after the injury report, BNSF continued to assign Mr. Anderson to the same work. In December of 2008, Mr. Anderson tripped at work, aggravating his back issues. He was treated by a physician and continued to work, but his back only got worse. Finally, in October of 2009, BNSF permanently removed Mr. Anderson from the workplace due to his back injuries. He later underwent surgery for his back and was declared permanently disabled from railroad work.

On December 16, 2008, Mr. Anderson sued BNSF under FELA. His first cause of action was that BNSF negligently and continuously assigned him to hazardous work, causing repetitive traumas which culminated in a disabling back injury. Mr. Anderson's second cause of action was that BNSF negligently left a hole in the railroad yard, causing him to trip and aggravate his back problems. The District Court granted BNSF partial summary judgment, dismissing the negligent work assignment claim before trial. After a seven-day trial, Mr. Anderson's claim for cumulative trauma injuries went to the jury, subject to the statute of limitations. The jury was instructed on the discovery rule, i.e. the three-year time period for Mr. Anderson to sue began when he knew or had reason to know that the existence and cause of his injuries were work related. The jury found that Mr. Anderson's claim was barred by the statute of limitations. They also found BNSF not negligent for leaving the hole in the railroad yard. Judgment was entered in favor of BNSF. Mr. Anderson's motion for a new trial was denied and this appeal followed.

III. ARGUMENTS FROM THE PARTIES' BRIEFS

A. *Mr. Anderson's arguments on appeal*⁴

1. *The evidence of a back "injury" was insufficient as a matter of law to cause the statute of limitations to run.*

Two conditions must be met before an injury can exist: (1) "the plaintiff must have possession of the critical facts of the injury and its cause;" and (2) "the accumulated effects of the [hazardous exposures must have] manifest[ed] themselves."⁵ The courts' definition of injury must comply with the humane legislative plan intended by Congress, i.e. to shift the burden of workplace injuries from workers to railroad

⁴ All arguments come from Appellant's Br., *supra* n. 2, and Appellant's Reply Br., *Robert W. Anderson v. BSNF Railway* (Mont. Oct. 20, 2014) (No. DA 14-0253).

⁵ *Urie v. Thompson*, 337 U.S. 163 (1949); *U.S. v. Kubrick*, 444 U.S. 111 (1979).

companies. Mr. Anderson argues that his temporary aches and pains leading up to his disabling injury did not arm him with the “critical facts of injury.” Nor are they the “accumulated effects” of a cumulative trauma injury. Instead, Mr. Anderson argues that all the evidence shows he was unaware of how serious the cumulative trauma in his back was prior to the three year statute of limitations window. Thus, because substantial evidence to the contrary did not exist, the District Court judge abused his discretion by not ruling as a matter of law that Mr. Anderson was not injured before the three-year window and instead submitting the issue to the jury.

2. Mr. Anderson’s negligent work assignment claim should not have been dismissed.

FELA imposes upon railroads the non-delegable duty to assign workers to jobs within their physical capabilities. If this duty is violated, a claim arises for negligent work assignment. Instead of the discovery rule, which was applied by the District Court, Mr. Anderson argues that the Court should adopt a continuing tort theory or an aggravation of injury theory to toll the statute of limitations. Mr. Anderson relies on *Fletcher v. Union Pac. R.R.*⁶ for the proposition that the statute of limitations may be tolled until the tortious conduct ceases. Without this theory, Mr. Anderson argues the railroad could continue to violate its assignment duty with impunity once the three year limit is reached. The aggravation of injury theory allows recovery if an injury is aggravated within the three year window. Under either theory, Mr. Anderson’s negligent work assignment claim would not be barred by the statute of limitations.

3. BNSF’s misconduct at trial deprived Mr. Anderson of a fair trial.

Anderson filed motions *in limine* to prevent BNSF from making improper commentary on Mr. Anderson or his attorneys. Mr. Anderson alleges that BNSF violated this motion on several occasions: by suggesting Mr. Anderson was trying to “double dip” for his injuries; suggesting cumulative trauma injuries like Mr. Anderson’s are fabricated and his lawyers are a part of the conspiracy; and appealing to the public’s cynicism concerning the legal profession and personal injury victims. This misconduct culminated in a violation of Mr. Anderson’s substantial rights, requiring a new trial.

⁶ *Fletcher v. Union Pac. R.R.*, 621 F.2d 902 (8th Cir. 1980).

*B. BNSF's arguments on appeal*⁷

1. *The jury verdict was supported by substantial evidence that Anderson's cumulative trauma claim was time barred.*

Under *Urie* and *Kubrick*, it is well settled that in latent-injury cases, the FELA three year period begins to run when a reasonable person knows, or should know, of the injury and that the injury is work related. A similar FELA case in Montana stated that this limitation “imposes an affirmative duty on the potential plaintiff to exercise reasonable diligence and investigate the cause of a known injury.”⁸ BNSF points to the fact that Mr. Anderson filled out an injury report form and identified the work related cause, noting that he was first aware of his cumulative trauma in January of 2005. This evidence proves Mr. Anderson was on notice that his injuries were work related and thus gave him three years to sue, making his December of 2008 suit time barred.

BNSF argues that a continuing tort theory should not be adopted because it is inconsistent with the discovery rule. It notes that nearly every court to contemplate the continuing tort theory has rejected it, and the court that did apply the theory did so by misinterpreting *Fowkes v. Pennsylvania R.R. Co.*⁹ BNSF also argues that an aggravation theory does not apply to this case because the jury found no negligence on BNSF for the December 2008 hole incident. Even if the aggravation theory does apply to this case, BNSF points out that it too has been rejected and criticized by many courts. Thus, the discovery rule applies to this case, which time bars Mr. Anderson's claims.

2. *BNSF made no improper arguments and Anderson received a fair trial.*

BNSF denies it violated Mr. Anderson's motion *in limine* or made any improper arguments during trial. Even if they did make an improper argument, it was only to the issue of damages, which the jury never reached. The general rule is that the trial judge is in the best position to determine the prejudicial effect of an attorney's conduct. BNSF points to the fact that at no time did the trial judge reprimand BNSF's counsel. Additionally, Anderson objected only once to the alleged improper remarks, and that objection was overruled. Thus, the trial judge did not abuse his discretion in denying Mr. Anderson's motion for a new trial.

*C. Amicus curiae brief of Montana Trial Lawyers Association*¹⁰

⁷ All arguments taken from Appellee Br., *supra* n. 2.

⁸ *Bridgman v. Union Pac.*, 960 P.2d 273 (Mont. 1998).

⁹ *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397 (3rd Cir. 1959).

¹⁰ All arguments taken from Mont. Tr. Lawyers Assn. Amicus Curiae Br., *Robert W. Anderson v. BSNF Railway* (Mont. Aug. 8, 2014) (No. DA 14-0253).

MTLA supports the adoption and application of negligent work assignment and aggravation claims under FELA. They argue that because the claims are premised on the worsening of an existing injury or condition, the statute of limitations analysis is different than the discovery rule, which is applied to the underlying injury. MTLA further argues that the District Court erred in dismissing Mr. Anderson's negligent work assignment claim because at a minimum there were questions of fact that should have been submitted to the jury.

*D. Amicus curiae brief of the Association of American Railroads*¹¹

The AAR argues that the discovery rule alone governs the statute of limitations in FELA cases. A continuing tort theory would allow a plaintiff to sit on their claim for years on the theory that, as long as they continue to work, a new tort claim arises every day. This result would completely undermine the discovery rule. Furthermore, the AAR argues that liberally construing FELA does not mean creating exceptions to the discovery rule and that FELA was never intended to provide recovery in every single case, especially when the plaintiff was not diligent in investigating his injuries and filing suit.

IV. ANALYSIS

Mr. Anderson's claim that BNSF made improper arguments at trial will likely be addressed rather quickly during oral argument. The parties do not disagree as to the applicable law; rather, they dispute the effects of BNSF council's remarks on the jury. This fact intensive inquiry will likely lead the Supreme Court to grant deference to the trial court judge under an abuse of discretion standard. Furthermore, this issue is merely collateral to the reason why the Supreme Court of Montana selected this case for oral argument.

The real reason for selecting this case for oral argument is surely the dispute over FELA interpretation. With two *amici curiae* briefs filed on the matter, most of the oral argument time will be spent discussing FELA. The first big issue to be argued is whether or not Mr. Anderson was "injured" in 2005. Mr. Anderson admits that in 2005 he had aches and pains, and that he suspected they were work related, but is this enough to meet the *Urie / Kubrick* standard? Anderson has the liberal construction requirement of FELA argument on his side, while BNSF has the argument that the jury had substantial evidence to decide the issue.

¹¹ Arguments come from The Assn. of Am. R.R. Amicus Curiae Br., *Robert W. Anderson v. BSNF Railway* (Mont. Oct. 6, 2014) (No. DA 14-0253).

The parties may briefly discuss the aggravation theory at oral argument, but it is unlikely given the fact that the jury declared BNSF not negligent in the hole incident. Furthermore, Anderson did not address the issue of aggravation in his reply brief, suggesting he has conceded the issue. The biggest issue will most likely be whether or not a continuing tort theory is compatible with FELA. The decision could have a big impact on FELA law if the theory is adopted, possibly spawning more suits based on the continuing tort theory. BNSF is in a great position on this issue because almost every court to address continuing tort theory in FELA has rejected it. However, Anderson makes a poignant policy argument that railroads should not be able to continue tortious activity with impunity simply because the statute of limitations (under the discovery rule) has run. It's the classic precedent versus policy showdown in Helena, Montana.