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Analysis
As of: Aug 21, 2012

LARRY K. BERG vs. PROVIDENCE & WORCESTER RAILROAD.

07-P-1355

APPEALS COURT OF MASSACHUSETTS

2008 Mass. App. Unpub. LEXIS 586

May 19, 2008, Entered

SUBSEQUENT HISTORY: Reported at *Berg v. Providence & Worcester R.R., 71 Mass. App. Ct. 1125, 887 N.E.2d 312, 2008 Mass. App. LEXIS 541 (2008)*

PRIOR HISTORY: *Berg v. Providence & Worcester R.R. Co., 2007 Mass. Super. LEXIS 192 (Mass. Super. Ct., May 25, 2007)*

DISPOSITION: [*1] Judgment affirmed.

JUDGES: Kantrowitz, Kafker & Vuono, JJ.

OPINION

This is an action for personal injuries brought by Berg against the defendant Railroad under the Federal Employer's Liability Act. *45 U.S.C. § 51 (2001)* (FELA). Berg, a long-time railroad line employee, alleged that the Railroad negligently maintained or provided unsafe equipment and that he was injured thereby. A motion judge dismissed Berg's claim on the Railroad's summary judgment motion, reasoning that those claims were barred by the three-year limitations period provided by *45 U.S.C. § 56*. [1] (Memorandum at A. 193-199) The issue presented is whether the judge properly determined that Berg's claim accrued more than three years before he filed.

1 *Section 56* provides that '[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.'

Berg worked for the Railroad in a variety of capacities from 1976 until January, 2003. He began, in

the early 1990s, operating a machine from time to time known as a Mark III Tamper, a machine that aligns the rails so that trains can travel over them. The Tamper is a 'rough ride,' that is, it does not have a suspension and aligns track in [*2] part by subjecting both rail and operator to significant vibration.

Soon after he began operating the Tamper, Berg began taking time off work complaining of back pain. He was treated by a chiropractor. In 1991 or 1992, Berg starting complaining to co-workers that the Tamper vibrated so much that it bothered the operators. At some point in the late 1990s, Berg told co-workers on more than one occasion that the Tamper was 'killing' his back. In February, 1998, Berg was treated by a doctor for lower back pain that radiated down his left leg. In May, 2000, Berg went to the hospital, once again complaining of lower back pain that radiated from his hip to his left leg. In May and June, 2000, Berg was treated by two different chiropractors for back pain. At some point in 2000, Berg noticed that, while operating the Tamper, he suffered from neck pain so severe that he could not turn his head or neck.

In February, 2002, Berg was diagnosed as having 'lumbar facet syndrome 724.8 with sciatica.' In September, 2002, his chiropractor told Berg to stop operating the Tamper. In December, 2003, Berg underwent lumbar fusion surgery. Berg claims that the back pain he experienced in 1990, 2000, and 2003 [*3] was the same (albeit more severe each time), that his pain did not come on suddenly, and that his surgery was not precipitated by any particular traumatic injury.

The judge, relying primarily on *Ross v. Garabedian, 433 Mass. 360, 363, 742 N.E.2d 1046 (2001)*, and *Phinney v. Morgan, 39 Mass. App. Ct. 202, 208, 654 N.E.2d 77 (1995)*, generally concluded the Berg 'knew or should have known of the cause of his back and neck condition' by no later than sometime in 2000 when he was treated at a hospital and specifically noticed that he experienced severe neck pain while operating the Tamper. The judge also observed that Berg admitted that he complained to co-workers, at least as early as 1998, that the Tamper was 'killing' his back. Accordingly, the judge concluded that Berg's December, 2003, lawsuit was untimely. (A. 196-198)

Berg concedes that the discovery rule applies to his case. [2] He also concedes that he complained about the Tamper causing his difficulties to co-workers throughout the 1990s. Nonetheless, Berg here suggests that he had no reason to know that the Tamper had caused him an 'injury' until at least 2002, sometime after he was formally diagnosed. (See A. 140, Berg deposition testimony that he 'figured it out [*4] in 2002'). Until that time, Berg argues, he understood only that he was suffering from 'intermittent symptoms' that resolved each time with rest, i.e., that he was suffering from no more than 'normal wear and tear . . . attributed to the type of work that he did on the railroad.'

> 2 Berg appears to argue that the judge either formulated or applied the rule inappropriately, arguing that, under FELA, the inquiry is two part, requiring a determination that the rail employee knew or should have known of both (i) his 'injury,' and (ii) the injury's causal relation to rail work. In fact, this is essentially identical to the *Ross, supra*, formulation specifically cited by the judge.

After reviewing the summary judgment record, including the excerpts from Berg's deposition that have been provided, State and Federal decisions referenced in the briefs, and the motion judge's decision, we affirm. The significant cumulative injury to his back and neck was evident to Berg, and he knew or should have known that such injury was caused by his work on the railroad, particularly the Mark III Tamper, more than three years before he filed suit.

Judgment affirmed.

By the Court (Kantrowitz, Kafker & [*5] Vuono, JJ.)

Entered: May 19, 2008.

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