NOT DESIGNATED FOR PUBLICATION

No. 112,925

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CHARLES DAWSON,
*Appellee*,

v.

BNSF RAILWAY COMPANY f/k/a BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
*Appellant*.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; DANIEL A. DUNCAN, judge. Opinion filed May 27, 2016. Reversed and remanded with directions.

*Kenneth L. Weltz* and *Andrew J. Ricke*, of Lathrop & Gage, LLP, of Overland Park, *Chad M. Knight*, of Hall & Evans LLC, of Denver, Colorado, and *Marianne M. Auld*, of Kelly Hart & Hallman LLP, of Fort Worth, Texas, for appellant.

*Steven L. Groves*, of Groves Powers, L.L.C., of St. Louis, Missouri, *Daniel J. Cohen*, of Law Offices of Daniel J. Cohen, of St. Louis, Missouri, and *Davy C. Walker*, of Law Offices of Davy C. Walker, of Kansas City, for appellee.

Before MCANANY, P.J., PIERRON and SCHROEDER, JJ.

*Per Curiam*: BNSF Railway Company f/k/a Burlington Northern and Santa Fe Railway Company (hereinafter BNSF) appeals the denial of judgment as a matter of law and all adverse rulings by the district court in finding Charles Dawson timely filed his cumulative trauma disorder claim. BNSF claims on appeal the district court erred by not finding Dawson failed to show he filed his claim for cumulative trauma disorder within the statutory timeframe. We agree with BNSF. The decision of the

district court denying BNSF's motion for judgment as a matter of law is reversed, and we remand with instructions to the district court to grant judgment in favor of BNSF.

## FACTS

Dawson began working for BNSF in 1979 and shortly thereafter became a brakeman riding in the engines. Dawson quit the railroad in the 1980's and worked at a tire store. Dawson returned to the railroad as a brakeman, eventually became a conductor, and worked in that role until he left the railroad in late 2011.

In 2001, Dawson complained of lower back pain to Dr. Gary Thomsen. In 2004, Dr. Thomsen diagnosed Dawson with osteoarthritis of the lower back and prescribed Dawson medication. In 2005, Dr. Thomsen diagnosed Dawson with degenerative disc disease. In June 2007, Dawson also began seeing a chiropractor. As his back pain worsened, Dr. Thomsen referred Dawson to a pain management specialist, Dr. Timothy Lair, in July 2007. Dr. Lair diagnosed Dawson with intervertebral disk displacement without myelopathy and degenerative disc disease. Dr. Lair administered a series of three epidural injections. Between July 2007 and March 19, 2008, Dawson visited doctors 24 times seeking treatment for lower back pain.

On March 19, 2008, Dawson called Dr. Lair's office complaining of pain in the right hip and through his right leg and scheduled another epidural for March 25, 2008. On March 24, 2008, Dawson completed an injury report for the railroad indicating an on-the-job injury that occurred on March 21, 2008.

Dawson's supervisor took him to the hospital where Dawson saw Dr. Norvell. Dawson did not tell Dr. Norvell or his subsequent doctors about his prior back pain. Dr. Harold Hess ultimately performed an "X-STOP" procedure in March 2009. The X-STOP, which stands for "Interspinous Process Decompression System," is a titanium implant

inserted into the back at the lumbar spine segment that has a narrowing of the bony canal which can cause crowding of the nerve roots. Dawson returned to full duty. However, in 2010, Dawson's back pain returned.

Dawson saw Dr. Glenn Amundson who fused Dawson's L-2 through L-5 vertebrae in February 2011. Dawson filed this action on February 22, 2011, alleging injuries resulting from cumulative trauma and acute injuries occurring on three specific dates: March 21, 2008; March 22, 2008; and January 29, 2009.

A 10-day jury trial began on August 11, 2014. At trial, Dawson testified the locomotive he was riding on "hit a big pothole and the train—engine bottomed out excessively" on March 21, 2008. His engineer on that date, Mark Shumate, testified similarly. Regarding the March 22, 2008, incident, Dawson testified:

> "We were called to Kansas City to Wellington. And I was on a 70 miles[-per-] hour train going along pretty good. But the engine felt like shocks were wore out. Every time we hit a road crossing, it bottomed out real [bad]. There might have been a few smooth ones, but most of them were bottoming out on us."

Neither Dawson nor the engineer remembered anything regarding the January 29, 2009, ride.

Dawson also testified that prior to working for BNSF, he injured his back four times while he served in the military and received medical attention for those injuries. Dawson testified he thought his pain was just muscle aches in 2007, and no one explained to him what degenerative disc disease was or what its symptoms were. He testified he never suspected his pain was work-related until October 2009.

The jury found BNSF was negligent and awarded Dawson $265,000 in past economic loss, $345,000 in future economic loss, $500,000 in past noneconomic loss, and $2 million in future noneconomic loss. BNSF timely appealed.

Additional facts will be provided as necessary.

## ANALYSIS

As an initial note, Dawson's brief appears to cite to his medical records to support some of his factual allegations. These citations do not comply with Supreme Court Rule 6.02(a)(4) (2015 Kan. Ct. R. Annot. 41). First, these citations do not pinpoint where in the respective medical records support for the fact appears; the citations merely refer to the records by doctor. Second, these medical records do not appear in the record. Without proper citations to the record or the inclusion of these medical records in the record on appeal, we presume Dawson has no support for these claims.

### *Dawson's cumulative trauma claim was not filed within 3 years of when he should have known he had a work-related claim.*

A trial court's decision on a motion of judgment as a matter of law is reviewed under the former directed verdict standard of review. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 706, 317 P.3d 70 (2014). The trial court is required to resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the directed verdict is sought. 298 Kan. at 706. A motion for judgment as a matter of law must be denied if reasonable minds could reach different conclusions based on the evidence. 298 Kan. at 706-707. Appellate courts conduct a similar analysis when reviewing the grant or denial of a motion for judgment as a matter of law. 298 Kan. at 706-07.

At the close of Dawson's case in chief, BNSF moved for judgment as a matter of law pursuant to K.S.A. 2015 Supp. 60-250 and/or a new trial pursuant to K.S.A. 2015 Supp. 60-259 because Dawson had not shown the lawsuit was filed within the statute of limitations. BNSF also raised this issue in its memorandum supporting its motion for judgment as a matter of law. The issue is properly preserved.

Pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2012) *et seq.*, a railroad is liable for its employee's injuries resulting from the railroad's negligence. Unlike traditional negligence where the statute of limitations is a defense, under FELA, the plaintiff has the affirmative duty to prove the action was filed within 3 years from the day the cause of action accrued. *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1235 (10th Cir. 2001). When latent injuries are at issue, as in cumulative trauma claims, the discovery rule applies to FELA claims. 240 F.3d at 1235-36. "Under this rule, a federal 'statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action.'" 240 F.3d at 1235 (quoting *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 969 [10th Cir.1994]).

Here, Dawson filed his lawsuit on February 22, 2011. Therefore, Dawson had the burden of proving his injury accrued on or after February 22, 2008.

When a plaintiff has a known injury, the plaintiff has a duty to exercise reasonable diligence and investigate the injury's cause. *Matson*, 240 F.3d at 1235. Knowledge of the specific cause is unnecessary; the statute of limitations begins to run when a plaintiff knows or should know the injury is "merely" work-related. 240 F.3d at 1236.

Since he did not have actual knowledge of the injury, Dawson argues the statute of limitations issue is a jury question (citing *Christiansen v. BNSF Ry. Co.*, No. 107,640, 2012 WL 5392184 [Kan. App. 2012] [unpublished opinion]). In *Christiansen*, BNSF

filed a motion for summary judgment arguing Christiansen knew or should have known his work at the railroad caused his back injury. Christiansen complained of intermittent back pain aggravated by riding in his work truck or car. The district court granted BNSF's motion for summary judgment. On appeal, a panel of court held:

> "Although a doctor's diagnosis that the injury is work related or a doctor's discussion with the patient regarding the connection of the injury to the patient's work are not necessary to trigger the statute of limitations for a FELA claim, such evidence would be a clear indication that an employee was put on notice to further investigate. *Matson*, 240 F.3d at 1236. Such clear evidence would support summary judgment. Although the burden is on Christiansen, not BNSF, to establish that his claim was brought within FELA's 3-year statute of limitations, absent any evidence in the record of actual knowledge, a material question of fact remains as to whether Christiansen knew or even should have known of the existence of a compensable injury under FELA." *Christiansen*, 2012 WL 5392184, at *6.

*Christiansen*'s holding is distinguished on its facts. Christiansen complained of intermittent pain prior to 2003. He also testified the pain in 2009 varied significantly from his earlier pain. In addition, Christiansen did not indicate he attributed the pain to anything except driving, an activity that is both work and nonwork related. Further, at his 2003 visit, Christiansen's doctor did not believe he had degenerative disc disease but that Christiansen may have had a hereditary sensory motor condition or diabetes. Based on these facts, whether Christiansen knew or should have known his work caused his injuries, was a question of fact. Here, it is not.

Unlike Christiansen, Dawson began taking prescription medication for chronic back pain beginning in 2001. His physician diagnosed him with osteoarthritis and degenerative disc disease more than 5 years before Dawson filed his lawsuit. Significantly, Dennis Musch, Dawson's coworker, testified Dawson told him prior to 2007 that he had back pain from sitting on toadstool seats and riding on rough track. In 2007, he also told his chiropractor, Dr. Cherie Wickham, that nothing hurt his back

except "rough engines and track." Dawson argues his pain was worse after mowing, but even then, Dr. Wickham said Dawson told her he had had a rough-riding train the prior Sunday. Dawson did not inform his pain doctor, Dr. Lair, of any nonwork-related activities that aggravated his symptoms.

Dawson testified he did not know what caused his problems but did not rule out that his job caused his back pain. However, he also testified: "[E]very time I went to work, my back got sore. I felt increased pain after working." According to the record, nearly every instance of Dawson's pain appears to be at least partially attributable to his work on the railroad. Dawson had a duty to investigate the cause of his pain. He cannot ignore years of chronic pain, consistently exacerbated by his job duties, and claim ignorance of the cause because no one told him his pain and injury was work related. Clearly, Dawson knew or should have known his back pain was caused by his alleged working conditions long before he filed this lawsuit. Dawson has failed to show his claim was filed within 3 years from the date of his cumulative trauma injury. His cumulative trauma disorder claim is time barred as a matter of law.

Citing *Mix v. Delaware and Hudson Ry. Co.*, 345 F.3d 82 (2d Cir. 2003), *cert. denied* 540 U.S. 1183 (2004), Dawson argues that even if his cumulative trauma disorder claim is time barred, his acute injuries are not. Dawson asserts BNSF's reliance on *Henry v. Norfolk Southern Ry. Co.*, 605 Fed. Appx. 508 (6th Cir. 2015), is misplaced since the plaintiff in *Henry* only asserted a cumulative trauma claim. In *Henry*, there was no acute injury claim and the question was when the cumulative trauma claim accrued; however, the same is true of *Mix*.

The Second Circuit Court of Appeals in *Mix* held: "We also recognize that a plaintiff may assert a claim for 'aggravation' of an existing injury, provided there is evidence that the additional damage was caused by a distinct act of negligence of which the plaintiff became aware only during the three-year period preceding his suit." 345 F.3d

at 91. In contrast, in *Henry*, the Sixth Circuit Court of Appeals held: "For cases where the alleged tortious conduct aggravates an existing injury, however, we have held that such aggravation is not a severable cause of action for purposes of the statute of limitations." 605 Fed. Appx. at 511. *Henry* is persuasive. To hold otherwise would allow a FELA plaintiff to allege an acute injury aggravating an existing, time-barred injury, and recover as though the lawsuit was timely filed. As the *Henry* court noted:

> "'[T]he 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. Any "aggravation" of the original negligently caused injury would only affect the plaintiff's damages, and would not require a separate determination of liability or causation. Furthermore, a rule permitting severability of a claim that an original, continuing injury has been aggravated would contravene the purpose of the discovery rule articulated in *Urie* [*v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949)] requiring [FELA] plaintiffs to use reasonable diligence to discover the cause of an injury once the injury manifests itself.'" 605 Fed. Appx. at 511 (quoting *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 [6th Cir. 1996] [quoting *Fries v. Chi. & Nw. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990)]).

Dawson's claims were time barred because he knew or should have known his injury was work related prior to February 22, 2008. Any injuries suffered on March 21, 2008, March 22, 2008, and January 29, 2009, were an aggravation of his time-barred cumulative trauma injuries. Dawson started taking medication for chronic back pain in 2001 and received a diagnosis of degenerative disc disease in 2005 which was confirmed in 2007. Further, the record indicates nearly every time Dawson complained of increased pain, his job duties were an aggravating cause. The district court erred when it denied BNSF's motion for judgment as a matter of law since the injuries referred to above are aggravations of his cumulative trauma. Dawson's suit was not filed within 3 years of when he knew or should have known his cumulative trauma was work related.

With our finding that Dawson's claim is time barred, all other issues raised by BNSF on appeal are moot. As a general rule, an appellate court does not decide moot questions or render advisory opinions. *State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012).

Judgment of the district court denying BNSF's motion for judgment as a matter of law is reversed and the case is remanded with directions for the district court to enter judgment for BNSF.

Judgment is reversed and the case is remanded with directions.