Sponcler v. Bnsf Ry. Co.

United States District Court for the Eastern District of Washington

January 6, 2021, Decided; January 6, 2021, Filed

No. 2:19-CV-00286-SMJ

Reporter
2021 U.S. Dist. LEXIS 41838 *

SANDRA SPONCLER, as the personal representative of the estate of GENE C. SPONCLER, deceased, Plaintiff, vs. BNSF RAILWAY COMPANY, F/K/A BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, Defendants.

Core Terms

cancer, exposure, summary judgment, workplace, railroad, statute of limitations, ***asbestos***, potential cause, RECOMMENDATION, diagnosed, diagnosis, exposed, kidney, contends, exhaust, diesel, suspected, renal, hazardous material, conditions, accrued cause of action, exposure to ***asbestos***, reasonable person, investigate, discovery, survival, genuine

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For sandra sponcler, as the personal representative of the Estate of Gene C. Sponcler, Plaintiff: Luke Pepper, LEAD ATTORNEY, PRO HAC VICE, Marc J Bern & Partners LLP, Conshohocken, PA; Victoriya Stolyar, LEAD ATTORNEY, PRO HAC VICE, Bern Cappelli LLP, Conshohocken, PA; Wayne E Mitchell, Anderson & Mitchell PLLC, Seattle, WA.

Judges: MARY K. DIMKE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: MARY K. DIMKE

Opinion

REPORT AND RECOMMENDATION TO DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court on report and recommendation is Defendant's Motion for Summary Judgment, ECF No. 58. *See* ECF No. 64 (Order Referring Motion). The undersigned has reviewed the motion and the record herein and is fully informed.

Defendant seeks summary **[*2]** judgment on its statute of limitations defense. *See* ECF No. 11 at 5. Defendant contends Plaintiff's claims brought under the Federal Employers' Liability Act ("FELA"), *45 U.S.C. § 52, et seq.*, accrued in 2010 and therefore are barred by the applicable three-year statute of limitations. Plaintiff contends summary judgment is not appropriate because Defendant has failed to establish the Decedent knew or should have known that his workplace exposure to hazardous materials could be a cause of his cancer more than three years prior to the filing of this action or his death. ECF No. 65 at 15. For the reasons set forth below, the undersigned recommends the motion be denied.

FACTUAL BACKGROUND

Decedent Gene Sponcler (Decedent) worked for over 40 years for BNSF Railway Company (BNSF) and its predecessor in interest, Burlington Northern, from approximately 1963 until 2004 as a laborer, brakeman, and conductor. ECF No. 59 at 1; ECF No. 65 at 1-2. Plaintiff is Decedent's spouse and the personal representative of his estate. ECF No. 1 at 1. BNSF is a common carrier by railroad and its liability is governed by FELA, *45 U.S.C. § 52, et seq.* ECF No. 1 at 2; ECF No. 11 at 2.

As an initial matter, the precise date of Decedent's kidney cancer diagnosis **[*3]** is disputed. Plaintiff contends Decedent was diagnosed on November 23, 2010, ECF No. 60-1 at 7,[1] and Defendant contends Decedent was diagnosed on October 26, 2010, ECF No. 68 at 4. It is undisputed that Decedent was diagnosed with kidney cancer by late 2010.

Defendant's motion for summary judgment relies upon medical records from examinations on October 26, 2010 and March 2, 2012 associated with Plaintiff's diagnosis with and treatment of kidney cancer.

Plaintiff's kidney cancer was diagnosed and treated by Arvind Chaudhry, M.D. of Medical Oncology Associates, P.S.[2] *Id.* at 11. On October 26, 2010, Decedent was examined by Dr. Chaudhry. ECF No. 60-2 at 2-3. According to Dr. Chaudhry's medical record for the visit, Plaintiff was referred after test results earlier that month showed "mediastinal lymphadenopathy, hilar nodes, and adrenal nodule." ECF No. 60-2 at 2-3; ECF No. 59 at 3. The section of the record titled "Social History" states:

> Patient discontinued tobacco use 25 years ago. Patient has a pack year history of [] 52. Denies any prior alcohol use. Worked as brakeman in the Railroad. Was exposed to ***asbestos*** as he drove through Libby. Also has documented exposure to Radon in his house since 1978.

ECF No. 60-2 at 2.[3] Dr. Chaudhry recommended further testing **[*4]** for diagnosis and determination of malignancy. *Id.* Defendant's assertion that Decedent was "first diagnosed with [cancer] on October 26, 2010," ECF No. 68 at 4, does not appear to be supported by the record presented to the court at this stage, and thus, is a disputed fact. ECF No. 60-2 at 3 (noting both malignant and non-malignant causes were "in the differential" and further testing was necessary).

On March 2, 2012, Decedent consulted with oncologist Susan Laing, M.D. of Providence Cancer Center for his diagnosis of "metastatic renal cell carcinoma," a form of kidney cancer. ECF No. 69 at 10. The "Social History" section of the medical record for this visit states:

> He is married and accompanied by his wife Sandra. They have a supportive family. 52-pack-year tobacco use quit 25 years ago. Alcohol use 2-3 beers per week quit 11 years ago. He was employed as a break[sic] man at the railroad and reports a history of asbestosis exposure in Libby[,] Montana. Also radon exposure in his house.

ECF No. 60-3 at 3.

Decedent died on January 25, 2016. ECF No. 69 at 15.

PROCEDURAL BACKGROUND

Plaintiff filed this action on January 24, 2019 - one day shy of three years after the date of **[*5]** Decedent's passing—as the personal representative of his estate.[4] ECF No. 1. The Complaint, broadly construed, asserts a wrongful death and survival action under FELA. Plaintiff claims that during Decedent's work for BNSF, Decedent was exposed to "various toxic substances and carcinogens including but not limited to diesel fuel/fumes/exhaust, benzene, creosote, herbicides, and

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[1] Plaintiff asserts Decedent was diagnosed with kidney cancer on November 23, 2010 and subsequently bone cancer in 2016. ECF No. 60-1 at 7 (Plaintiff's Answers to Defendant BNSF's First Set of Interrogatories and Requests for Production to Plaintiff).

[2] The parties refer to the medical provider as Dr. Chaundhry. *See, e.g.*, ECF No. 58 at 4; ECF No. 65 at 14. From the undersigned's review of the record, it appears as though the proper spelling is Dr. Chaudhry. *See* ECF No. 60-2 at 3.

[3] According to Plaintiff's expert, R. Leonard Vance, Libby, Montana was the site of "the most notorious ***asbestos*** contamination" and "a Superfund site, a status accorded only to the most environmentally contaminated locations in the United States." ECF No. 67-2 at 3-6. The Environmental Protection Agency began investigating vermiculate from the W.R. Grace mine in Libby in 2000 and placed the Superfund site on the National Priorities List in 2002. *See* https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.clean up&id=0801744 (last visited Jan. 5, 2021).

[4] This matter was initially filed in the Western District of Washington and was transferred on August 20, 2019. *See* ECF Nos. 23-24.

asbestos and fibers." ECF No. 1 at 2. On October 28, 2019, Plaintiff withdrew her claims based on Decedent's exposures other than to diesel exhaust and ***asbestos***. ECF No. 35 at 1-2. Plaintiff claims Decedent was exposed to "diesel exhaust from the locomotive's exhausts" and ***asbestos*** "dust from locomotive insulation and brake shoes." ECF No. 1 at 3. Plaintiff claims these exposures occurred by "touch, inhalation, or consumption" and caused Decedent to develop kidney cancer which metastasized to his bones. ECF No. 1 at 3. Plaintiff alleges Decedent's cancer was the result of BNSF's negligence. ECF No. 1 at 3. Plaintiff also alleges negligence *per se* for BNSF's alleged violations of the Federal Locomotive Inspection Act (LIA), *49 U.S.C. § 20701, et seq.*, and various federal regulations, including *49 C.F.R. §§ 229.7*, *229.45*, and *229.43(a)*.[5] ECF No. 1 at 5. Plaintiff seeks "all **[*6]** damages recoverable under the FELA" related to Decedent's death. ECF No. 1 at 5.

On August 31, 2020, Defendant moved for summary judgment, arguing that Plaintiff's FELA claims are barred by FELA's three-year statute of limitations. ECF No. 58. The Court stayed all deadlines pending resolution of the motion. ECF No. 57. On September 24, 2020, Plaintiff responded to the Motion.[6] ECF Nos. 65-67. Defendant filed a reply. ECF No. 68.

LEGAL STANDARD

The Court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002)*. The party moving for summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)*. The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)*. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for **[*7]** the plaintiff." *Id. at 252*.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id. at 248*. Further, a dispute is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id.* The Court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris, 550 U.S. 372, 378 (2007)*. Summary judgment will thus be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

DISCUSSION

The sole issue before the Court is whether Plaintiff's claims are barred by FELA's three-year statute of limitations. *See generally* ECF No. 58. Under the authority cited by both parties, the key question is whether Defendant has shown Decedent knew, or should have known, that his workplace exposure to hazardous materials could be a cause of his kidney cancer. According to Defendant, by the time of

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[5] The LIA was enacted by Congress to supplement FELA. It imposes an absolute duty on railroad carriers to ensure that locomotives and their parts and appurtenances "[a]re in proper condition and safe to operate without unnecessary danger of personal injury." *49 U.S.C. § 20701*; *see also Lilly v. Grand Trunk W. R.R. Co., 317 U.S. 481, 485 (1943)*. The LIA does not create an independent cause of action but instead establishes that violating the LIA is negligence per se under FELA. *Urie v. Thompson, 337 U.S. 163, 189 (1949)*.

[6] Plaintiff did not timely respond. The deadline for Plaintiff's response was September 21, 2020, 21 days after the motion was filed. *See* LCivR 7(c)(2)(B). Plaintiff's response provided no explanation for its lateness, nor did Plaintiff seek leave of Court to file a late response. Failure to comply with filing deadlines "may be deemed consent to the entry of an order adverse to the party who violates these rules." LCivR 7(e); *see also Fed. R. Civ. P. 56 (e)* ("If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party."). Because summary judgment is not appropriate and Defendant had the opportunity to reply, the undersigned finds it is unnecessary for the Court to strike the response or consider the motion unopposed. However, it is expected that Plaintiff's counsel is familiar with and will adhere to the Local Civil Rules. The belated response also fails to comply with a number of the formatting requirements of LCivR 10 and is replete with errors including references to Seattle as the location of the Court, unrelated litigant ("Mr. Bluel") and diagnosis (colon cancer), withdrawn claims, and "Libby Mountain" instead of Libby, Montana.

Decedent's cancer diagnosis in 2010, Decedent was on notice of both his injury and its potential work-related cause. *Id.* at 4. Thus, Defendant argues the statute of **[*8]** limitations began to run as of October 26, 2010 and expired on October 26, 2013, more than two years prior to his death and more than five years before this case was filed. *Id.*

A. FELA

FELA imposes liability on railroad companies for "damages to any person suffering injury while he is employed . . . resulting in whole or in part from the negligence" of the railway. *45 U.S.C. § 51*. Two causes of action exist under FELA when an injury allegedly contributed to an employee's death; a survival action and a wrongful death action. *See* *45 U.S.C. § 51*, *59* ("Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow . . .").

The statute of limitations for FELA claims is "three years from the day the cause of action accrued."[7] *45 U.S.C. § 56*. Because this action was commenced on January 24, 2019, it is undisputed that if the statute of limitations expired prior to Decedent's death in January 2016, her claims are untimely. ECF No. 65 at 11. Defendant can obtain summary judgment only if "the statute of limitations has run and . . . there exists no genuine issue of material fact as to when the plaintiff's cause of action accrued." *Fries v. Chicago & Nw. Transp. Co., 909 F.2d 1092, 1094 (7th Cir. 1990)*.

B. [*9] The "Discovery Rule"

FELA does not define when a cause of action accrues. Where a plaintiff's injury is not the result of a specific, identifiable accident, but is the result of ongoing exposure to certain harmful conditions over a period of time, the Supreme Court has applied the "discovery rule" to determine when a cause of action accrues. *See* *Urie v. Thompson, 337 U.S. 163, 170-75 (1949)* (holding that FELA statute of limitations accrues when the injury "manifest[s]" itself, taking into account whether the plaintiff "should have known" of his injury); *United States v. Kubrick, 444 U.S. 111, 122 (1979)* (addressing similar limitations question under Federal Tort Claims Act and noting the discovery rule is intended to protect a plaintiff when "the fact of injury ... may be unknown or unknowable . . . and the facts about causation may be . . . unavailable to the plaintiff or at least very difficult to obtain."). Under this rule, "a cause of action accrues when "a reasonable person knows or in the exercise of reasonable diligence should have known both the injury and its governing cause." *Fries, 909 F.2d at 1094*;[8] *see also* *Hajek v. Burlington N. Santa Fe R.R. Co., 14 F. App'x 974, 975-96 (9th Cir. 2001)* (affirming summary judgment award noting an action accrues when a plaintiff "has actual or constructive knowledge" of both the existence of his "injury and its cause"; where "Hajek **[*10]** knew his work was a possible cause of his injury" it was enough "to trigger a duty to investigate his work conditions and pursue potential claims").

> 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, 909 F.2d at 1095 (citations omitted) (citing *Kubrick, 444 U.S. at 117*).

1. Knowledge of Injury

In the instant case, Plaintiff does not appear to

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[7] The wrongful death action is "derivative and dependent upon the continuance of right in the injured employee at the time of his death." *McGhee v. Chesapeake & Ohio R.R. Co., 173 F. Supp. 587, 590 (W.D. Mich. 1959)*. Thus, Plaintiff's wrongful death action is barred if the statute of limitations "expire[d] during the lifetime of the decedent." *Id.*

[8] Both parties cite the Seventh Circuit's decision in *Fries* in support of their positions. *See* ECF No. 65 at 10; ECF No. 68 at 6. Circuit courts nationwide have likewise interpreted *Urie* and *Kubrick*. *See, e.g.*, *Albert v. Maine Cent. R.R. Co., 905 F.2d 541, 543-44 (1st Cir. 1990)*; *Mix v. Delaware and Hudson Ry Company, 345 F.3d 82, 86 (2d Cir. 2003)*, *cert. denied*, ***540 U.S. 1183 (2004)***; *Kichline v. Consolidated Rail Corp., 800 F.2d 356* (3d Cir. 1986)*; Townley v. Norfolk & Western Ry. Co., 887 F.2d 498 (4th Cir. 1989)*; ***Dubose v. Kansas City S. Ry., 729 F.2d 1026, 1029-30 (5th Cir. 1984)***; *Fonseca v. Consolidated Rail Corp., 246 F.3d 585, 590 (6th Cir. 2001)*; *Green v. CSX Transp., Inc., 414 F.3d 758, 763 (7th Cir. 2005)*; *Matson v. Burlington N. Santa Fe R.R., 240 F.3d 1233, 1236 (10th Cir. 2001)*.

challenge the first prong of the discovery rule—the Decedent's knowledge of the injury. *See* ECF No. 65 at 11, 15. The undisputed facts establish the Decedent had knowledge of his cancer by at least late 2010.

2. Knowledge of Cause

The determining issue is the outcome of the second prong, whether Decedent knew or should have known that his workplace exposure to hazardous substances **[*11]** could be a cause of his cancer—more than three years prior to the filing of this lawsuit alleging wrongful death and survival action claims. *See* Hajek, 14 F. App'x at 975 (noting the "only question" was whether Plaintiff "should have suspected his back problem was linked to his work.").

"There are many suspected causes of cancer, many of which are natural or non-negligent and would not give rise to a legal cause of action." Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1385 (10th Cir. 1985). "Thus a potential plaintiff, on learning that he has cancer, lacks the usual incentive to investigate the possibility that the known injury may give rise to a legal claim." *Id.* "In addition, even if he attempts to determine the cause of the disease, he is confronted with a mass of complex, controversial and rapidly changing scientific data and opinions." *Id.*; *see also* O'Connor v. Boeing N. Am., Inc., 311 F.3d 1139, 1150 (9th Cir. 2002) (same). "When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury." *Dubose v. Kansas City S. Ry., 729 F.2d 1026, 1031 (5th Cir. 1984)*.

Defendant's argument relies entirely upon language contained within the "Social History" sections of two doctors' **[*12]** treatment notes. These sections address familial, occupational, and recreational aspects of Decedent's personal life, including alcohol use, smoking habits, and workplace exposure to ***asbestos***. Defendant contends the record establishes "[Decedent] specifically discussed his occupational exposure to ***asbestos*** with physicians in the course of treating his cancer," and therefore constructive notice existed well outside the limitations period that workplace exposure was a potential cause of his cancer which triggered an affirmative duty to investigate the potential cause of his cancer and pursue potential claims. ECF No. 58 at 10, 13; ECF No. 68 at 6, 9.

Plaintiff contends Defendant is not entitled to summary judgment as it cannot show that the claim falls outside the statute of limitations, as that is a question of fact for the jury. ECF No. 65 at 15. First, Plaintiff notes there is no record which shows any medical provider offered Decedent "any opinion that his workplace exposures were a potential cause of his cancer." ECF No. 65 at 11. Plaintiff's Complaint alleges Decedent was "never informed as to the cause of his cancer." ECF No. 1 at 5.[9] However, "[a]ctual notice is not required for **[*13]** accrual. After a condition manifests itself, the question becomes whether the plaintiff knew or, through the exercise of reasonable diligence, should have known of the cause of his injury." White v. Union Pac. R.R. Co., 867 F.3d 997, 1002-03 (8th Cir. 2017); Emmons v. S. Pac. Transp. Co., 701 F.2d 1112, 1117 (5th Cir. 1983) ("[I]t [is] sufficient for purposes of commencement of the limitations period that the plaintiff knew his complained of condition was work related, and that it is not additionally necessary that he have been formally so advised by a physician.").

The question is not whether he actually knew the cause, but whether objectively, Decedent possessed enough knowledge necessary to trigger the duty to investigate his workplace exposure as a potential cause of his cancer. Here, the record evidences that as of 2010 Decedent was aware that his work in Libby, Montana exposed him to ***asbestos*** and this information was shared with his provider during his doctor visit. However, the Court cannot conclude, as a matter of law on the current record, that Decedent knew or a reasonable person in Decedent's position should have known the exposures to ***asbestos*** in the workplace caused or were a potential cause of his kidney cancer.

This record is distinguishable from the two decisions relied upon by Defendant, *Poland v.* ***[*14]*** *Union Pac. R.R. Co.*, No. 8:18CV503, 2020 WL 469971 (D. Neb. Jan. 29, 2020) and *West v. Union Pac. R.R. Co.*, No. 8:17CV36, 2019 WL 7586542 (D. Neb. Dec. 20, 2019).[10] ECF No. 58 at 12-13. In *Poland*, plaintiff alleged her husband's workplace exposure to creosote, diesel fumes and other conditions over the span of his

[9] According to Plaintiff's answers to Defendant's First Set of Interrogatories, Plaintiff claims to have first became aware that Decedent's cancer might be related to his work with BNSF on an unknown date while watching a television advertisement. ECF No. 60-1 at 21-22.

[10] Both cases cited were filed in the District of Nebraska and involve the same law firm that represents Plaintiff in this case.

30-year career caused his colon cancer. 2020 WL 469971, at *1. The record established the decedent knew he had been exposed to hazardous materials at work, and for years he complained to plaintiff and at a union meeting about the degree of exposure and impact of his workplace conditions on his throat, eyes, and skin. *Id.* The court concluded the FELA claims were time-barred because decedent was "armed with" the "essential facts" on the date he was diagnosed with colon cancer, including that he had been exposed to hazardous materials at work. *Id.* at *3.

Similarly, in *West*, the record evidenced the decedent, a railroad conductor for 20 years, had complained that his conditions were "unhealthy" and "unsafe," had "suspected these conditions could be causing him injury," and said "many times that his work was going to kill him." 2019 WL 7586542, at *1. The court found the FELA claim time-barred because the claim accrued on the date decedent knew he had renal cancer because he knew his workplace exposure "posed **[*15]** a risk of harm to his health." *Id.* at *3; *see also Smith v. BNSF Ry. Co.*, No. 4:17-cv-3062, 2018 WL 6529503, at *3 (D. Neb. Oct. 16, 2018) (FELA claim was time-barred because "bottom line is that Smith doesn't know anything now that he didn't know the day his cancer was diagnosed."); *Hunt v. Union Pac. R.R. Co.*, No. 4:17-cv-3062, 2020 WL 58435, at *2 (D. Neb. Jan. 6, 2020) (FELA claim was time barred where record included deposition testimony that the plaintiff "pretty much always" suspected his cancer was caused by occupational exposure, he "saw the sticker regarding diesel exhaust, and in fact he posted many of the stickers, and he knew this exposure could cause cancer."); *McLaughlin v. BNSF Ry Co.*, No. 4:18-CV-3047, 2019 WL 4855147, at *2 (D. Neb. Oct. 1, 2019) (FELA claim of 39-year employee of BNSF was time-barred because the record established "Plaintiff knew, for decades prior to his diagnosis, that he had been exposed to hazardous materials at work" as he had received training and knew that diesel exhaust, solvents and ***asbestos*** were potential health risks" and admittedly knew that "things in that environment that wasn't probably good" for him); *Garza v. Union Pac. R.R. Co.*, No. 8:18CV391, 2020 WL 2037087, at *4 (D. Neb. Apr. 28, 2020) (FELA claim was time barred where Plaintiff knew he had been exposed to hazardous materials and was told by doctors his work environment **[*16]** is one potential cause of cancer).

In both *Poland* and *West*, there was evidence that the employee was aware of the workplace exposure, had complained of the degree of exposure, and had linked workplace exposures to potential adverse health effects. Here, Defendant has not presented any facts beyond the fact the Decedent was aware of the workplace exposure. To infer the Decedent possessed facts similar to those in *Poland* and *West* based upon the mere mention of exposure to ***asbestos*** to his physician requires speculation and the drawing of inferences that is not appropriate at the summary judgment stage.

In *Greger v. Union Pac. R.R. Co.*, the court denied summary judgment premised on a statute of limitations argument on similar facts to those present here, though the factual record was far more developed. No. 8:18CV577, 2020 WL 3489521, at *3-5 (D. Neb. June 26, 2020). There, the plaintiff had worked for the railroad for 46 years until 2001 and was diagnosed with renal cancer on June 30, 2010. *Id.* at *1. The plaintiff testified that at the time he was diagnosed he suspected that it could have been from his railroad work because it "was the only job [he] ever had." *Id.* at *1-2. He spoke with his physician on November 8, 2010, about possible causes of his cancer **[*17]** and denied exposures to defoliants or Agent Orange during his military service. *Id.* at *2. By November 26, 2012, the plaintiff's cancer had metastasized and spread to his adrenal gland. *Id.* The plaintiff filed his FELA claim on December 13, 2018, after seeing a law firm advertisement linking cancer to railroad work. *Id.* at *1-2. Plaintiff testified he knew since the 1990s that ***asbestos*** caused cancer, but did not know that ***asbestos*** i the brake shoes, or fumes from the ***asbestos***, could cause cancer, and when he asked his doctors what caused his cancer, they told him they did not know. *Id.* at *2.

In denying summary judgment based on statute of limitations, the court reasoned:

> The evidence presently before the Court does not show conclusively that the plaintiff was aware of the critical fact that his work on the railroad could have caused his renal (and subsequently adrenal) cancer during the time between his diagnosis in 2010 and the limitations date of December 13, 2015, so as to be barred by the statute of limitations. His deposition testimony is equivocal and/or contradictory at best and establishes only that he knew some aspects of his work over forty-six years may have been bad for his health. That is different **[*18]** than having knowledge of the fact that exposures at work caused his cancer. The defendant has not shown that Greger was ever informed by a doctor, or by anyone, that there was a connection between his work on the railroad and

> his development of renal cancer.
>
> The evidence shows that the plaintiff may have suspected at the time of the diagnosis that his work was connected to the cancer because railroad work was the only work he had ever done. He then conducted some investigation—he asked his doctors what caused his cancer and was told the cause was unknown. There is no evidence that a reasonable person, in the face of such a response, would have continued to connect the cancer to exposures at work. Nor has the defendant shown that there was publicly available information, notoriety, news reports, publicity, or knowledge from other sources linking renal cancer to the sort of environmental exposures Greger had so as to prompt further inquiry. Also, there is no evidence that a more diligent search would have resulted in a different outcome. Nothing in the record indicates that a reasonably diligent person would have done more to discern the cause, or that a more searching inquiry would have **[*19]** provided Greger with knowledge of the connection between the cancer and his exposures. There is no evidence that a timely investigation would have revealed the relationship between Greger's exposures at the Railroad and renal cancer.

Id. at *5.

Like in *Greger*, the limited record herein does not demonstrate that a reasonable person would have connected the cancer to exposures at work. Instead, the record is, as Plaintiff contends, more analogous to *York v. BNSF Ry. Co.*, No. 1:17-cv-1088-*RM-STV, 2019 WL 764574 (D. Colo. Feb. 21, 2019)*. ECF No. 65 at 12. *York* involved a FELA claim where a conductor and brakeman who alleged occupational exposure to diesel exhaust (benzene) and ***asbestos*** during his 15-year employment for BNSF contributed to his development of bladder cancer. *2019 WL 764574, at *1*. It was undisputed plaintiff knew he was exposed to ***asbestos*** and diesel exhaust during his tenure with the railroad, however, his work predated his diagnosis by at least thirteen years. *2019 WL 764574, at *5*. The court concluded that unlike in other cases, the record did not reflect that *York* subjectively considered the railroad to be a cause. *Id.* Though characterizing the discovery rule standard as a "low bar," the court concluded there was "nothing available on this record that could lead a **[*20]** reasonable person in York's position REPORT AND RECOMMENDATION - 20 would have considered his work a potential cause of bladder cancer . . ." *2019 WL 764574, at *1*. Accordingly, the court denied BNSF summary judgment on statute of limitations grounds. *Id.* at *5.

Defendant failed to address *York* in its reply. *See* ECF No. 68. The undersigned must view the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Harris, 550 U.S. at 378*. Here, the record evidences that 1) Decedent's social history was relayed to Drs. Chaudhry and Laing during Decedent's appointments in 2010 and 2012; and 2) Drs. Chaudhry and Laing considered the reported workplace exposure to ***asbestos*** in Libby, Montana clinically significant enough to include their reports. Construed in the light most favorable to Plaintiff, these records establish Decedent was aware of his exposure to ***asbestos*** in Libby. They do not establish, as Defendant contends, that Decedent suspected workplace exposure was a potential cause of his cancer, nor that he "voiced his suspicions" to his oncologist that exposure in Libby was a potential cause of his cancer. ECF No. 58 at 13.

At the time of his 2010 visit with Dr. Chaudhry, Decedent had been retired **[*21]** for over five years. The limited phrases in these two medical records are insufficient to claim Decedent knew or an individual reasonably should have known his kidney cancer was potentially attributable to his workplace exposure. Accordingly, this record does not reflect the requisite actual or constructive knowledge of a potential work-related cause of his injury to begin the accrual clock. Accordingly, the undersigned recommends that the motion be denied without prejudice to renewal after additional discovery is conducted.

RECOMMENDATION

Accordingly; IT IS HEREBY RECOMMENDED that:

1. Defendant's Motion for Summary Judgment (**ECF No. 58**) be **DENIED**.

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after

receipt of the objection. Attention is directed to *Fed. R. Civ. P. 6(d)*, which adds additional time after certain kinds of **[*22]** service.

A district judge will make a *de novo* determination of those portions to which objection is made and may accept, reject or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000)*; *28 U.S.C. § 636(b)(1)(B)* and *(C)*, *Fed. R. Civ. P. 72*; LMJR 2, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to enter this Report and Recommendation, forward a copy to counsel, and **SET A CASE MANAGEMENT DEADLINE ACCORDINGLY**.

DATED January 6, 2021.

/s/ Mary K. Dimke

MARY K. DIMKE

UNITED STATES MAGISTRATE JUDGE

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