2014 IL App (3d) 120664-U
Order filed May 28, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

GEORGE MITCHELL,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellee,	)	Hancock County, Illinois,
	)	
v.	)	Appeal No. 3-12-0664
	)	Circuit No. 09-L-11
BNSF RAILWAY COMPANY,	)	
	)	Honorable
Defendant-Appellant.	)	Richard H. Gambrell,
	)	Judge, Presiding.
	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Lytton concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: A jury verdict in favor of a railway employee under FELA for a neck injury was upheld on appeal. A directed verdict on the issues of the three-year statute of limitations under FELA and contributory negligence was not in error where the injury for which the plaintiff sued did not manifest itself before the limitations period and there was no evidence that the plaintiff delayed treatment once that injury manifested itself. In addition, there was no error in the verdict form which contained a line entry for pain and suffering, separate from emotional distress, because there was no evidence of a double recovery where the elements of each claim were clearly explained to the jury. There was no error in refusing to give an inaccurate instruction tendered by the defense regarding mitigation of damages. Finally, the circuit court did not abuse its discretion in limiting the cross-

examination of the plaintiff's treating physician when the proposed evidence was too remote to show bias.

¶ 2 The plaintiff, George Mitchell, a trackman employed by the defendant, BNSF Railway, for over 14 years, obtained a judgment entered upon a jury verdict in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 (2006). BNSF appealed.

¶ 3 FACTS

¶ 4 The plaintiff began working for the defendant in 1995. One of his jobs in track maintenance was to use a claw bar to remove spikes from railroad ties. Sometimes, the claw bar would slip off of the spike. The plaintiff testified that, when the claw bar would slip, his hands would go down quickly and his neck would pop. When that would happen, he would have a whiplash sensation in his neck and he would see stars. He testified that would happen on average about once a month. From the beginning of his employment with the defendant, the plaintiff would experience temporary soreness in his neck, arms, and hands. He would take a few ibuprofens and hope to feel better the next day. He never missed a day of work because of the soreness. He first experienced numbness and tingling in his arms and hands in late 2007. Unlike the previous soreness, these symptoms did not go away.

¶ 5 Sometime in 2008, the plaintiff went to his family doctor, Dr. Douglas Peters, who thought that the plaintiff's symptoms indicated carpal tunnel syndrome. Dr. Peters prescribed pain medication, but said that the plaintiff could continue working. When the symptoms persisted, in early 2009, the plaintiff was referred to a neurosurgeon, Dr. Emilio Tayag. Dr. Tayag diagnosed the plaintiff with a herniated disk and nerve and spine compression (radiculopathy and myeloradiculopathy) and central canal stenosis at

his cervical spine or neck. According to Dr. Tayag, the plaintiff reported that he had some neck pops and neck pain when using a claw bar at work since 1995, but he started to have numbness in his first three fingers and electric pain in the fourth and fifth in October 2008. Dr. Tayag recommended that the plaintiff stop using the claw bar, and he recommended surgery. The plaintiff tried to work for a few more days, but, on October 9, 2009, he filled out an injury report and that was the last day he worked for the defendant. On the injury report, the plaintiff described his injury as "hand and arm going num[b]," and claimed the injury was caused by the claw bar repetitively slipping off and spikes breaking off.

¶ 6 The plaintiff testified that he was never trained about the early symptoms of cumulative trauma disorder and if he had been, he might have sought earlier treatment. The plaintiff noted that there were no defects with any of the tools he was provided to complete his job or with the equipment he used.

¶ 7 The plaintiff had surgery to remove the herniated disc. Dr. Tayag performed a three-level anterior cervical dissection and fusion. The plaintiff had significant pain after the surgery, and consulted a second physician, Dr. Keith Wilkey, an orthopedic spine surgeon, on August 24, 2010. The plaintiff had another surgery to remove another disc because of continuing pain. Dr. Wilkey opined that the plaintiff's occupation as a trackman significantly contributed to the development of arthritis in his neck, herniated discs, and nerve impingement. He also stated that, to a reasonable degree of medical certainty, the plaintiff would continue to suffer from nerve damage for the rest of his life.

¶ 8 The plaintiff filed suit against the defendant on December 11, 2009, under FELA, for damages from the defendant's negligence in causing the plaintiff's injuries. The case proceeded to a jury trial. After the close of evidence, the plaintiff moved for a directed

verdict with respect to three of the defendant's affirmative defenses: (1) contributory negligence, (2) statute of limitations, and (3) failure to mitigate. The circuit court granted the plaintiff's motion with respect to contributory negligence, finding that there was no evidence of lack of due care by the plaintiff, and with respect to the statute of limitations, finding that the plaintiff's cause of action accrued when he filed his injury report. It denied the motion with respect to the mitigation of damages defense. The defense also filed a motion for a directed verdict at the close of the evidence, arguing, *inter alia*, the same three issues. The circuit court denied that motion. Thereafter, the jury returned a verdict, awarding Mitchell $41,000 for past and future medical expenses, $1,050,000 in lost earnings, $172,000 for past and future disability, $172,000 for past and future pain and suffering, and $344,000 for past and future emotional distress. The circuit court entered judgment on the verdict. The defendant appealed, raising a number of issues, but not challenging the jury's finding that it was negligent or caused the plaintiff's injuries, or the severity of the plaintiff's injuries or permanent disability.

¶ 9 ANALYSIS

¶ 10 The defendant raises five issues on appeal. First, the defendant argues that the circuit court erred in granting the plaintiff a directed verdict, and denying the defendant a directed verdict, on the defendant's statute of limitations defense. Second, the defendant argues that the circuit court erred in granting the plaintiff a directed verdict on the issue of contributory negligence. Third, the defendant argues that the circuit court abused its discretion in submitting a verdict form to the jury that included a separate line item for emotional distress, separate from pain and suffering. Fourth, the defendant argues that the circuit court abused its discretion in limiting the defendant's cross-examination of the plaintiff's medical witness, Dr. Wilkey. Finally, the defendant argues that the circuit

court abused its discretion by refusing defendant's proposed mitigation of damages instruction. We will address each issue in turn.

¶ 11 I. Statute of Limitations

¶ 12 Prior to trial, the defendant moved for summary judgment on this issue, which was denied. The circuit court also denied the defendant's motion to direct a verdict in favor of the defendant at the close of the plaintiff's evidence and at the close of trial. The circuit court, however, granted the plaintiff's motion for a directed verdict on this issue. The defendant argues that the plaintiff's claim for damages was barred because he did not assert it within three years of discovering his injury, claiming that the plaintiff was put on notice of his injury from the very beginning of his career with the defendant in 1995. The plaintiff argues that while he suffered transient aches and pains over his years with the railroad, he did not experience the persistent symptoms associated with a herniated disk until 2008**.**

¶ 13 We review the circuit court's grant of the plaintiff's motion for a direct verdict, and the denial of the defendant's contrary motion on this issue, *de novo*. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215 (2010). We will uphold a directed verdict when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 123 (2004) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967)).

¶ 14 Cases filed under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (West 2006), must be filed within three years of the date the cause of action accrued. 45 U.S.C. § 56 (2006). In the case of a traumatic event, resulting in a noticeable injury, the time-of-event accrual rule applies, and the cause of action is considered to have

accrued at the moment of the tortious act. *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585 (2001). However, a discovery rule applies when there is no significant injury at the time of the tortious event, or if the cause of the injury is not apparent. *Fonseca*, 246 F.3d at 588.

¶ 15 Since there was no identifiable traumatic event in this case, we must apply the discovery rule. The plaintiff's cause of action accrued when he knew, or should have known, of both his injury and its cause. See *Axe v. Norfolk Southern Ry. Co.*, 2012 IL App (5th) 110277. The defendant argues that the plaintiff was put on notice of his injury from the very beginning of his career with the defendant, when he experienced pain and a whiplash effect when using a clawbar.

¶ 16 There was evidence that the plaintiff was aware of transient pain from using a claw bar since he began working for the defendant in 1995. However, he did not notice numbness and tingling, the symptoms that did not go away, until late 2007. He was not diagnosed with a herniated disc until after that date. There was no evidence in this case by which the plaintiff reasonably should have known before December 2006 (three years before filing suit in December 2009) that he had a herniated disk in his neck, radiculopathy, or myeloradiculopathy. Dr. Tayag testified that the plaintiff did not experience symptoms associated with a herniated disk until 2008. The plaintiff timely filed suit in December 2009 over an injury that was unknown and undiscoverable until 2008 (or, at least until late 2007 when the nerve symptoms first appeared). Based on these facts, no jury verdict in favor of the defendant on the limitations issue could stand, and the circuit court properly directed the verdict on this issue in favor of the plaintiff on the grounds that the injuries on which the plaintiff sued did not manifest themselves before the limitations period.

¶ 17 II. Contributory Negligence

¶ 18 The defendant argues that the plaintiff was contributorily negligent for not seeing a doctor during his first year of employment, which would have mitigated his neck injury. The defendant argues that the plaintiff should have reported the pain and whiplash effect that he experienced on average once a month to a doctor, who would have ordered appropriate rest and care. The plaintiff argues that the circuit court properly granted the plaintiff a directed verdict on the claim of contributory negligence because the defendant failed to present any evidence that the plaintiff failed to exercise reasonable care by not seeking medical attention until 2008, when he began experiencing persistent numbness and tingling.

¶ 19 Section 53 of FELA provides that an employee's contributory negligence does not bar recovery, but diminishes recovery in proportion to his or her fault. 45 U.S.C. § 53 (2008). Contributory negligence "is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537 (1993) (quoting *Taylor v. Burlington v. Northern R.R. Co.*, 787 F.2d 1309, 1316 (9th Cir. 1986). The burden is on the employer to produce evidence of a plaintiff's lack of due care. *Uhrhan*, 155 Ill. 2d at 547. If there is any evidence to support the theory, the defendant is entitled to have the jury instructed on contributory negligence. *Id.*

¶ 20 There was no evidence presented at trial of a careless act or omission with regard to the plaintiff's use of the defendant's tools. In addition, assumption of the risk is not a defense under FELA. *Uhrhan*, 155 Ill. 2d at 548. The question is whether the plaintiff's failure to seek medical attention for transient pain was a careless act or omission that caused his herniated disc, or at least made it worse.

¶ 21 The defendant argues that Dr. Wilkey's testimony was sufficient evidence of a lack of due care, such that a directed verdict on the issue of contributory negligence was in error. However, the testimony cited by the defendant was only Dr. Wilkey's testimony regarding the advice he would have given the plaintiff if he was developing nerve problems. However, the defendant does not point to any testimony making a causal connection between the plaintiff's reports of transient pain and his subsequent nerve damage symptoms. Thus, a directed verdict on the issue of contributory negligence was properly granted in favor of the plaintiff.

¶ 22 III. Verdict Form

¶ 23 The defendant argues that the circuit court erred in providing the jury with Plaintiff's Verdict Form A, which included separate itemized lines entitled "Past and Future Pain and Suffering" and "Past and Future Emotional Distress." The defendant argues that, by definition, damages awarded for "suffering" encompass damages for emotional distress. The plaintiff argues that the circuit court did not abuse its discretion.

¶ 24 The jury awarded the plaintiff $344,000 for past and future emotional distress, and $172,000 for past and future pain and suffering. The defendant argues that a plaintiff is entitled to a separate award for emotional distress only where emotional distress is alleged independent of the plaintiff's physical injury. For example, in *Hayes v. Illinois Power Co.*, the court held that a grandson who was with his grandfather when he was electrocuted could allege a claim for pain and suffering as a direct victim (he was injured trying to help his grandfather), and he could state a separate claim for negligent infliction of emotional distress because he was a bystander after he regained consciousness. 225 Ill. App. 3d 819 (1992).

¶ 25 The amount of damages to be assessed is a question of fact for the jury, and great weight must be given to the jury's determination. *Snelson v. Kamm*, 204 Ill.2d 1 (2003). A reviewing court should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no relationship to the loss suffered. *Id.* at 37. A trial court's determination of which instructions to be given to a jury is reviewed for an abuse of discretion. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260 (2002).

¶ 26 In this case, the defendant did not contend that the jury's award for pain and suffering and for emotional distress was not supported by the record, only that by instructing the jury that the plaintiff was entitled to a separate award for emotional distress, it authorized a double recovery for pain and suffering. However, in his closing argument, the plaintiff's attorney clearly described the damages sought under each category. The pain and suffering evidence all related to medical procedures and pain, while the emotional distress evidence related to depression and fear. There does not seem to be any overlap, and resulting double recovery, from separating the two categories on the verdict form, so we find no abuse of discretion in the use of Verdict Form A.

¶ 27 IV. Cross-examination of Dr. Wilkey

¶ 28 The circuit court sustained the plaintiff's objection to the defendant inquiring of Dr. Wilkey regarding a suspension from a hospital in Ohio in 2003. While cross-examining Dr. Wilkey, the defendant sought to elicit testimony that the plaintiff was referred to Dr. Wilkey by the plaintiff's attorneys and that Dr. Wilkey was biased because of the amount of railroad patients that he saw that were referred to him by the plaintiff's attorneys. The defendant argued that its inquiry into Dr. Wilkey's suspension from the hospital in Ohio was relevant to show how Dr. Wilkey ended up in his current position.

In an offer of proof, the defendant established that the Ohio hospital revoked Dr. Wilkey's privileges in February 2003. The defendant read a list of accusations of the hospital against Dr. Wilkey, which were disputed by Dr. Wilkey. The circuit court rejected the offer of proof, indicating, in denying post-trial motions, that the facts were too remote in the past to show bias in 2010. The defendant argues that it should have been allowed to question Dr. Wilkey in accordance with its offer of proof.

¶ 29 Limitation of cross-examination of a medical expert rests within the sound discretion of the trial judge. *Sears v. Rutishauser*, 102 Ill. 2d 402 (1984). In general, an opposing party should have the same ability to cross-examine a treating physician that he would have in cross-examining a retained expert. *Kim v. Evanston Hospital*, 240 Ill. App. 3d 881 (1992). As with an expert witness, opposing counsel must be given wide latitude to discover any interest or bias on the part of the treating physician. *Kim*, 240 Ill. App. 3d at 890. However, subtrials on issues remote from the subject of the lawsuit should be avoided. *Sears*, 102 Ill. 2d at 407.

¶ 30 Dr. Wilkey's privileges were revoked by the hospital in Ohio seven years before he saw the plaintiff as a patient. In the interim, Dr. Wilkey left Ohio and was licensed to practice medicine in another state. The circuit court's conclusion that the facts were too remote in the past to show bias in 2010 was not an abuse of discretion. The defendant was allowed to fully question Dr. Wilkey regarding his testimony in other railroad cases and, specifically, for the plaintiff's attorneys. Also, the defendant failed to demonstrate any harm from the claimed error. Dr. Wilkey was a treating physician, who did not see the plaintiff as a patient until 2010. Dr. Wilkey's causation testimony was corroborated by the plaintiff's family doctor and original surgeon. The defendant's expert, Dr. Blair, agreed that all of the plaintiff's doctors were qualified health care providers, and he

agreed that the plaintiff's injuries could have been caused by the defendant's railway tools.

¶ 31 V. Failure to mitigate damages

¶ 32 The defendant asserted the affirmative defense that the plaintiff failed to mitigate his damages by seeking other employment or re-training consistent with any physical limitations or problems. The circuit court denied both parties' motions for directed verdicts on this issue, finding that it was an issue for the jury to decide. However, the defendant argued that the circuit court effectively nullified the defense by refusing to instruct the jury as to how the plaintiff's damages could be reduced as a result of his failure to mitigate.

¶ 33 A circuit court has discretion to determine which instructions to give a jury, and we will not disturb that determination absent an abuse of that discretion. *Schultz v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). The standard for deciding whether a circuit court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles. *Schultz*, 201 Ill.2d at 273. However, once a circuit court decides that the jury should be instructed on an issue, there is a presumption that an Illinois Pattern Jury Instruction will be given, unless the court determines that the instruction does not accurately state the law. Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011); *Schultz*, 201 Ill. 2d at 273, 775 N.E.2d 964, 972 (2002). If the pattern instruction does not accurately state the law, then the trial court may give the jury a nonpattern instruction. *Schultz*, 201 Ill.2d at 273.

¶ 34 The circuit court instructed the jury that, if it found that the plaintiff's failure to mitigate his damages was a cause in whole or in part of his injury, then it would reduce

the plaintiff's damages in "the manner stated to it in the instructions." The circuit court refused to give the defendant's modified instruction based on IPI 160.13 (Defendant's Instruction No. 24A), which addresses diminishing damages because of contributory negligence under FELA. It was modified by the defense, removing references to contributory negligence and replacing them with failure to mitigate language. The modified instruction told the jury to "[r]educe the total amount of the plaintiff's damages by the percentage by which the plaintiff failed to mitigate his damages." The instruction was refused, even after defense counsel offered to remove the language regarding contributory negligence. During the conference on the instructions, the circuit court noted that, with the rejection of Defendant's Instruction No. 24A, there was no manner stated in the instructions by which to reduce the plaintiff's damages. Despite being given the opportunity to instruct on that issue, the defendant again argued for the inclusion of Defendant's Instruction No. 24A, which the circuit court again rejected as an inaccurate statement of the law, and the defendant did not submit an alternate instruction.

¶ 35 Failure to mitigate is a concept distinct from contributory negligence. *Brady v. McNamara*, 311 Ill. App. 3d 542 (2000). Under FELA, an employee has a duty to mitigate damages and secure employment within a reasonable time after his injury. *Dixon v. Union Pacific R.R.*, 383 Ill. App. 3d 453 (2008). The jury was correctly instructed that it had to consider whether the plaintiff failed to mitigate his damages, and that the defendant had the burden of proving that any failure to mitigate was a cause in whole or in part of his injury. The instructions further provided that if the jury found the defendant proved this proposition, then the jury should reduce the plaintiff's damages in the manner stated in the instructions. The circuit court acknowledged that the proper

manner by which to reduce the damages was not included in the instructions, however, because it had rejected the defense instruction and verdict form.

¶ 36 A court does not abuse its discretion by rejecting instructions that misstate the law. *Lawler v. MacDuff*, 335 Ill. App. 3d 144 (2002). The only instruction offered by the defendant required the plaintiff's recovery to be reduced by a percentage if it found that the plaintiff failed to mitigate his damages. However, the failure to mitigate requires a reduction of the amount of the plaintiff's damages by the amount that the plaintiff would have realized by resuming alternate employment. *Dixon v. Union Pacific R.R.*, 383 Ill. App. 3d 453 (2008). The defendant cites no authority that would support its instruction that the plaintiff's recovery could be reduced by a percentage due to his failure to mitigate damages. Thus, we find that the defendant was given opportunities to submit an instruction to give the jury a manner in which to reduce the plaintiff's recovery if it found that he failed to mitigate his damages, but failed to submit an instruction that accurately stated the law. Thus, we find that the circuit court's jury instructions, considered as a whole, were not an abuse of discretion.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Hancock County is affirmed.

¶ 39 Affirmed.

¶ 40 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 41 I agree that the trial court did not abuse its discretion when fashioning Verdict Form A, which included separate lines for pain and suffering and emotional distress or when limiting the cross-examination of Dr. Wilkey. I also agree that the trial court did not abuse its discretion when refusing to instruct the jury on the issue of mitigation of damages for failure to seek other employment or retraining within BNSF. I disagree with

the majority's conclusion that the trial court: (1) properly granted plaintiff's motion for a directed verdict on the statute of limitations issue; and (2) properly granted the plaintiff's motion for a directed verdict on the issue of contributory negligence for plaintiff's potential contributions to his own medical condition.

¶ 42 A. Statute of Limitations

¶ 43 Citing to *Axe*, the majority notes that this plaintiff's cause of action "accrued when he knew, or should have known, of both his injury and its cause." *Supra* ¶ 15. That is true, but more accurately and completely the *Axe* court, and many others, describe the time at which a cause of action accrues as the time "when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause. [Citation.] 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. [Citation.] It is not necessary that the plaintiff possess actual knowledge of causation in order to find that a cause of action has accrued. [Citation.] When a plaintiff is armed with the facts about the harm done to him, he can protect himself against the running of the statute of limitations by seeking advice in the medical and legal community about possible causes." (Internal quotation marks omitted.) *Axe*, 2012 IL App (5th) 110277, ¶ 11 (quoting *Fries v. Chicago & Northwestern Transportation Co.*, 909 F. 2d 1092, 1095 (7th Cir. 1990), and *United States v. Kubrick*, 444 U.S. 111, 123 (1979)).

¶ 44 Raising that standard to one of actual knowledge, the majority concludes that since the plaintiff "was not diagnosed with a herniated disc" until after 2007, there "was no evidence in this case by which the plaintiff reasonably should have known before

December 2006 (three years before filing suit in December 2009) that he had a herniated disk in his neck, radiculopathy, or myeloradiculopathy." *Supra* ¶ 16. I disagree.

¶ 45 The plaintiff's own testimony indicated that when using a claw bar, the bar would routinely slip off worn spikes causing his neck to "pop" and him to see stars from the whiplash sensation that followed. This occurred once a month, which equates to at least 120 times from 1995 until three years before he filed this lawsuit (December of 2006). Plaintiff also testified that he informed Dr. Tayag that he started experiencing neck pain in 1995, which had been "constantly and regularly going on" during the course of his employment. Despite experiencing trauma that caused him to see stars at least 120 times from 1995 until December of 2006 and, despite informing his doctor that he had been experiencing neck pain constantly and regularly since 1995, the majority concludes that there "was no evidence" in the record which should have put the plaintiff on notice of his injuries or the fact that they may be work related. *Supra* ¶ 16.

¶ 46 To arrive at its conclusion, the majority ignores defendant's argument that a plaintiff need not experience the full manifestation of the final injury to be found to possess knowledge of the injury and its governing cause. The majority does not even attempt to address defendant's arguments that any holding which finds defendant could not be charged with the knowledge of his injuries, for statute of limitations purposes, until they were formally diagnosed employs an actual knowledge standard, which has specifically been rebuked time and time again. See *Axe*, 2012 IL App (5th) 110277; *Fries v. Chicago & Northwestern Transportation Co.*, 909 (7th Cir. 1990); *United States v. Kubrick*, 444 U.S. 111,123 (1979). The majority evades analyzing numerous authorities cited by defendant, including *Axe*, which rejected the notion that the statute of limitations period did not begin to run "until he had actual knowledge of the cause of his

injury, that he bore no responsibility to seek out possible causes, but that the railroad had an undefined affirmative duty to warn him about the potential dangers of the job." *Axe*, 2012 IL App (5th) 110277, ¶ 13.

¶ 47 The majority also refuses to acknowledge that the time at which a party has or should have the requisite knowledge of injury under the discovery rule to maintain a cause of action is ordinarily a question of fact for the trier of fact. *County of Du Page v. Graham, Anderson, Probst & White, Inc.*, 109 Ill. 2d 143, 154 (1985); *Jackson Jordan, Inc., v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994). The question of when a party knew or reasonably should have known through the exercise of reasonable diligence of his or her injury and wrongful cause becomes a question of law *only* when one, singular conclusion can be drawn from undisputed facts. *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981).

¶ 48 I find each party adduced sufficient evidence to preclude a directed verdict. Plaintiff claims the location of his pain changed from early in his career until late 2007 when he started experiencing numbness and tingling in his arms. Therefore, plaintiff claims that until late 2007, he could not have known or discovered through reasonable diligence that he was injured from work-related activities. Defendant disagrees, noting plaintiff informed his doctor that he constantly and regularly experienced neck pain due to his employment. Defendant continues that this constant pain, coupled with the monthly incidents in which his neck would pop causing him to see stars, was more than enough to put plaintiff on notice that he needed to investigate the cause and severity of his condition.

¶ 49 As the majority correctly acknowledges, deciding this issue, as a matter of law, via a directed verdict can only stand when all the evidence, viewed in the light most

favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Supra* ¶ 13. The majority concludes that no jury could reasonably find that defendant was on notice of his neck-related injuries until December of 2006, despite the fact that he testified he experienced his neck popping, which caused him to see stars more than 120 times before December of 2006, and also informed his doctor that he constantly and regularly experienced neck pain related to work since 1995. *Supra* ¶ 16. This was a jury question.

¶ 50 B. Contributory Negligence

¶ 51 The majority also concludes that the defendant was not entitled to have the jury instructed on the issue of contributory negligence; that being, defendant's failure to seek medical attention until 2008 despite experiencing the symptoms discussed above. *Supra* ¶ 21. Again, I disagree.

¶ 52 Dr. Wilkey testified that the sooner a patient with a spinal injury can see a doctor and begin treatment, the better position a patient is in to minimize damage and long-term problems. Wilkey stated, "If I see a patient that's developing a significant arm problem from a herniated disk, I want that injury to heal on its own before I have to operate on it, before it develops further symptoms. There is some ability of the spinal cord and spinal nerves and spinal structures to heal themselves if they're allowed. If you don't allow that, then you can run and have a very devastating cascade develop." He also noted that plaintiff's smoking was absolutely a factor in the development of his spinal injuries.

¶ 53 Wilkey continued that as one develops problems from pressure being placed on nerve roots, scar tissue begins to develop, which increases the risk of developing permanent nerve damage. Wilkey stated that if plaintiff had come to him when he first started working for the railroad, Wilkey would not have tried to answer the question of

whether railroad work would hurt plaintiff, but rather would make "sure that if somebody had symptoms, that they got the appropriate rest and care." This, defendant says, is enough evidence to allow a jury to consider whether his failure to seek timely medical advice contributed to his injuries. I agree.

¶ 54 The majority acknowledges that a defendant is entitled to have the jury instructed on contributory negligence if there is *any* evidence to support the theory in the record. *Supra* ¶ 19 (citing *Uhrhan*, 155 Ill. 2d at 547). While admittedly taken from the medical malpractice arena, Illinois courts have noted that when " 'a patient delays in seeking treatment for his or her medical condition or injury," ' a defendant is entitled to a contributory negligence instruction. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 480 (2005).

¶ 55 At a minimum, plaintiff's failure to seek treatment for more than a decade after suffering work-related injuries that caused him to see stars, coupled with Dr. Wilkey's testimony that the earlier one seeks treatment for spinal injuries, the better chance one has to minimize long-term damage, equates to *some* evidence that plaintiff's failure to seek medical advice contributed to his injuries. Moreover, Wilkey specifically stated that the plaintiff's smoking was "a factor" in the development of his condition which is also *some* evidence of plaintiff's own actions contributing to his injuries. Therefore, I find that the trial court abused its discretion in refusing to instruct the jury on plaintiff's potential contributory negligence.