

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4866  
Summary Calendar

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GILBERT JOSEPH WHITTLE and,  
ALBERTA WHITTLE,

Plaintiffs-Appellants,

versus

ODECO OIL & GAS COMPANY,  
formerly known as Odeco, Inc.,

Defendant-Appellee.

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Appeal from the United States District Court for the  
Western District of Louisiana  
(92-CV-839)

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(November 15, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA Circuit Judges.

PER CURIAM:\*

The plaintiff, Gilbert Whittle, suffers hearing loss allegedly because of his exposure to loud engine noises on the vessels of his employer Odeco Oil & Gas Company (Odeco). The district court granted summary judgment to Odeco because it held that the statute

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of limitations expired on Whittle's Jones Act claim before Whittle filed suit. Finding no error, we affirm.

#### I

The facts as alleged by the plaintiff, Whittle, provide that he worked as a motorman in the engine rooms of Odeco's drilling barges for twenty-eight years. During this time, Whittle was exposed to loud and excessive engine noises. Beginning in the early 1980s, Whittle noticed that he had suffered some hearing loss. This hearing loss gradually became worse until, in 1991, Whittle voluntarily retired because he could not communicate with his superiors in the engine room and could not hear the emergency alarms.

#### II

Whittle filed the instant Jones Act suit against Odeco for damages arising from his work-related exposure to loud noises on May 8, 1992. 46 U.S.C. app. § 688 (1988). Odeco moved for summary judgment on the grounds that the three-year statute of limitations contained in 45 U.S.C. § 56 began to run when Whittle first noticed his hearing loss in the early 1980s and thus, the statutory period had expired before Whittle filed his suit. The district court agreed, granted Odeco summary judgment, and dismissed Whittle's action.

#### III

On appeal, Whittle argues that the statute of limitations did not begin to run until his hearing deteriorated to the point that

he could not function in his job, i.e., 1991. Odeco argues that the statute of limitations began to run when Whittle first noticed his hearing loss in the early 1980s. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Because the defendant does not dispute, for purposes of its summary judgment motion, the facts alleged by the plaintiff, this case turns solely on the legal question of when the applicable statute of limitations began to run.

The three-year statute of limitations applicable to claims brought under the Federal Employer's Liability Act, 45 U.S.C. § 52-60, also governs employment-related claims brought under the Jones Act. Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 228 (5th Cir. 1984). The relevant statute of limitations provides in part:

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

45 U.S.C. § 56 (1988).<sup>1</sup>

In Crisman v. Odeco, Inc., 932 F.2d 413, 415 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 337, 116 L.Ed.2d 278 (1991), we stated that a cause of action accrues under the Jones Act when the "plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two." We further stated:

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<sup>1</sup>The statute of limitations for general maritime torts is also three years. 46 U.S.C. app. § 763a (1988).

If some injury is discernible when the tortious act occurs, the time of event rule respecting statute[s] of limitations applies, and the plaintiff's cause of action is deemed to have accrued. If the plaintiff later discovers that his injuries are more serious than originally thought, his cause of action nevertheless accrues on the earlier date, the date he realized that he had sustained harm from the tortious act.

Id. (quoting Albertson, 749 F.2d at 229) (emphasis by the Crisman Court).

In the instant case, Whittle knew he sustained an injury in the early 1980s and knew at that time that the working conditions caused his injury.

Whittle argues, however, that his injuries worsened due to continued exposure to work conditions and, thus, the "continuing tort" theory should prevent his claim from being time barred. The defendant in Crisman made the same argument in an attempt to invoke the continuing tort theory. 932 F.2d at 417. Under the continuing tort theory, an employee is not required to file suit to avoid losing a valid claim if the employer negligently or intentionally continues to inflict new harm on the employee. Id. In Crisman, we rejected the plaintiff's argument that his injuries later worsened due to continued exposure to work conditions because the plaintiff did not allege that he requested a transfer to another job or that his employer knew of his injuries. Id. The rule in Crisman governs the instant case squarely. Whittle did not allege that he requested a transfer or that his employer knew of his worsening hearing condition. Odeco's only action was to continue to assign

Whittle to his job, which Odeco had no reason to believe was harmful to Whittle. Accordingly, the continuing tort theory does not apply, and Whittle's cause of action accrued in the early 1980s. Thus, the three-year statute of limitations expired prior to May 8, 1992, when Whittle filed this suit.

IV

For the forgoing reasons, we AFFIRM the district court's grant of summary judgment to the defendant.

A F F I R M E D.