

No. 07-1159

In the Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

**On Petition for a Writ of Certiorari to
the District Court of Appeal of Florida,
First District**

RESPONDENT'S BRIEF IN OPPOSITION

DENNIS K. LARRY

JASON W. PETERSON

Clark, Partington, Hart,

Larry, Bond &

Stackhouse

One Pensacola Plaza

Suite 800

125 West Romana Street

Pensacola, FL 32501

(850) 434-920

EVAN M. TAGER

DAN HIMMELFARB

Counsel of Record

Mayer Brown LLP

1909 K Street, NW

Washington, DC 20006

(202) 263-3000

FORREST C. WILSON III

McDowell Knight

Roedder & Sledge,

L.L.C.

Post Office Box 350

Mobile, AL 36601

(251) 432-5300

Counsel for Respondent

QUESTION PRESENTED

Whether this Court should grant certiorari to decide whether petitioner is correct in his contention that temporary pain or symptoms do not trigger the Federal Employers' Liability Act's three-year limitations period, 45 U.S.C. § 56, when (1) the parties *agreed* in the court below that temporary pain or symptoms do not trigger the limitations period (and disagreed only about whether petitioner's pain and symptoms were in fact temporary) and (2) the court below affirmed summary judgment for respondent in an unexplained, non-precedential order.

RULE 29.6 STATEMENT

CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10% of respondent's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
RULE 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES.....	v
STATEMENT	2
A. Statutory Background.....	2
B. Petitioner’s Lawsuit	3
C. The Trial Court’s Decision	4
D. The Appellate Court’s Decision.....	5
REASONS FOR DENYING THE PETITION.....	6
A. The Decision Below Has No Prospective Effect	7
B. The Decision Below Did Not Reject The Rule Advocated By Petitioner	8
C. If The Decision Below Should Be Presumed To Have Adopted Respondent’s Arguments, Then It <i>Accepted</i> The Rule Advocated By Petitioner	9
D. The Decision Below Is Correct	17
CONCLUSION	18
APPENDICES:	
A. Defendant’s Motion for Summary Judgment and Supporting Memorandum of Law	1a
B. Initial Brief of Appellant James A. Metz, Sr.	3a
C. Answer Brief of Appellee CSX Transportation, Inc.	12a

TABLE OF CONTENTS—continued

	Page
D. Reply Brief of Appellant James A. Metz, Sr.	21a
E. Motion for Rehearing and/or Clarification, and for a Written Opinion	23a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Albert v. Maine Cent. R.R. Co.</i> , 905 F.2d 541 (1st Cir. 1990)	3
<i>Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.</i> , 522 U.S. 192 (1997)	2
<i>CSX Transp., Inc. v. Adkins</i> , 442 S.E.2d 737 (Ga. 1994)	13
<i>Coots v. Southern Pac. Co.</i> , 322 P.2d 460 (Cal. 1958)	13
<i>Department of Legal Affairs v. District Court of Appeal</i> , 434 So. 2d 310 (Fla. 1983)	7
<i>Emmons v. S. Pac. Transp. Co.</i> , 701 F.2d 1112 (5th Cir. 1983)	3
<i>Florida Bar v. Greene</i> , 926 So. 2d 1195 (Fla. 2006)	14
<i>Fonseca v. Consolidated Rail Corp.</i> , 246 F.3d 585 (6th Cir. 2001)	13
<i>Fries v. Chicago & N.W. Transp. Co.</i> , 909 F.2d 1092 (7th Cir. 1990)	3
<i>Gay v. Norfolk & W. Ry. Co.</i> , 483 S.E.2d 216 (Va. 1997)	3
<i>Green v. CSX Transp., Inc.</i> , 414 F.3d 758 (7th Cir. 2005)	13
<i>Greene v. CSX Transp., Inc.</i> , 843 So.2d 157 (Ala. 2002)	3
<i>Lipsteuer v. CSX Transp., Inc.</i> , 37 S.W.3d 732 (Ky. 2000)	3
<i>Monaghan v. Union Pac. R.R. Co.</i> , 496 N.W.2d 895 (Neb. 1993)	3

TABLE OF AUTHORITIES—continued

	Page(s)
<i>Mounts v. Grand Trunk W. R.R.</i> , 198 F.3d 578 (6th Cir. 2000).....	3
<i>National R.R. Passenger Corp. v. Krouse</i> , 627 A.2d 489 (D.C. 1993).....	3
<i>Nichols v. Burlington N. & Santa Fe Ry. Co.</i> , 56 P.3d 106 (Col. App. 2002)	13
<i>Norfolk S. Ry. Co. v. Sorrell</i> , 127 S. Ct. 799 (2007).....	2
<i>Rawlings v. Ray</i> , 312 U.S. 96 (1941)	2
<i>Reasons v. Union Pac. R.R. Co.</i> , 886 S.W.2d 104 (Mo. App. 1994)	13
<i>Sabalka v. Burlington N. & Santa Fe Ry. Co.</i> , 54 S.W.3d 605 (Mo. App. 2001)	13
<i>Urie v. Thompson</i> , 337 U.S. 163 (1949).....	2
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797 (1991).....	8
STATUTES, RULES AND REGULATIONS	
Act of Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66.....	2
Act of Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404	2
Federal Employers' Liability Act, 45 U.S.C.	
§§ 51-60.....	1
45 U.S.C. § 51	2
45 U.S.C. § 56	2
Sup. Ct. R. 10	17

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007).....	7
---	---

RESPONDENT'S BRIEF IN OPPOSITION

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which governs claims by railroad employees against their employers for workplace injuries, a cause of action accrues, and the three-year limitations period begins to run, when the plaintiff has actual or constructive knowledge that he has suffered a work-related injury. Petitioner contends that work-related pain or symptoms that are merely temporary do not trigger FELA's limitations period. He argues that the Florida District Court of Appeal held otherwise and that this Court should grant review to decide whether the lower court's decision is correct.

For multiple reasons, the petition should be denied. *First*, even if the appellate court actually had rejected petitioner's position on the issue he raises here, review would be unwarranted because the decision below is a non-precedential per curiam summary affirmance with no binding effect on parties or courts in future cases. *Second*, because the court below affirmed without opinion, the court did *not* reject petitioner's position on that issue. *Third*, if the court below is presumed to have adopted the arguments of respondent (the party in whose favor it ruled), then the only possible conclusion is that the court in fact *accepted* petitioner's position. That is because respondent never denied that temporary pain or symptoms do not trigger the limitations period, and argued only that petitioner's pain and symptoms were not temporary. *Fourth*, because petitioner's own deposition testimony established that the pain and symptoms he experienced more than three years before filing suit were not temporary, the decision of

the court below affirming summary judgment for respondent was correct.

STATEMENT

A. Statutory Background

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The statute preempts state-law remedies. *Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 805 (2007). Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove that his employer was negligent. 45 U.S.C. § 51. The statute provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Sorrell*, 127 S. Ct. at 805.

Originally, the limitations period for a FELA action was two years. Act of Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66. Since 1939, however, the limitations period has been three years. Act of Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404. FELA now provides that “[n]o 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. An action not brought within three years of accrual is therefore barred.

The “standard rule” is that “the limitations period commences when the plaintiff has ‘a complete and present cause of action.’” *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). In *Urie v. Thompson*, 337 U.S. 163 (1949), however, this Court adopted a different rule for FELA actions. Under lower courts’

interpretation of that decision, a “discovery” rule governs the question of when a cause of action “accrued” under FELA, at least where the plaintiff alleges a “cumulative” illness or injury resulting from long-term exposure to a harmful condition or substance. That means that a cause of action accrues when the plaintiff knows or, in the exercise of reasonable diligence, should know both that he has been injured and that his injury is work-related.¹ Under this “objective” standard, a plaintiff “must act diligently and cannot wait until the injury is actually made known to him”—by, for example, a “medical diagnosis.” *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1095-1096 (7th Cir. 1990).

B. Petitioner’s Lawsuit

On April 5, 2005, petitioner filed a complaint in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, asserting that he had been injured as a result of respondent’s negligence and that respondent was liable under FELA. The complaint alleged that petitioner had suffered injuries to his right shoulder, right arm, and upper extremities while working for respondent as a carman and that the injuries were cumulative in nature. 1 C.A. R. 1-3.

¹ See, e.g., *Albert v. Maine Cent. R.R. Co.*, 905 F.2d 541, 544 (1st Cir. 1990); *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1119 (5th Cir. 1983); *Mounts v. Grand Trunk W. R.R.*, 198 F.3d 578, 581 (6th Cir. 2000); *Greene v. CSX Transp., Inc.*, 843 So.2d 157, 159 (Ala. 2002); *National R.R. Passenger Corp. v. Krouse*, 627 A.2d 489, 495 (D.C. 1993); *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 737 (Ky. 2000); *Monaghan v. Union Pac. R.R. Co.*, 496 N.W.2d 895, 901 (Neb. 1993); *Gay v. Norfolk & W. Ry. Co.*, 483 S.E.2d 216, 218 (Va. 1997).

In November 2005, petitioner was deposed. He testified that, while he had experienced random aches and pains—which he described as “pulls”—over the course of his employment with respondent, he experienced a different type of pain in January 2002. Petitioner testified that he first experienced that pain when he was attempting to close the door of a box car or loosen a hand brake and that the pain became progressively worse over the next four months. Petitioner also testified that his pain could only have been caused by his work for respondent. 2 C.A. R. 237-238, 244-253.

In March 2006, petitioner was again deposed. He again testified that he had first experienced his pain and symptoms in January 2002. 1 C.A. R. 35-38.

Medical documents that petitioner placed in the trial-court record reflect that he saw a doctor on a number of occasions between March 1 and November 6, 2002, including on May 6 and August 23, 2002. Consistent with his deposition testimony, the record of a doctor’s visit on July 3, 2002 indicates that petitioner had been experiencing pain in his right shoulder for six to seven months. 3 C.A. R. 324-339.

C. The Trial Court’s Decision

Respondent moved for summary judgment. It argued that petitioner’s own deposition testimony established as a matter of law that, no later than January 2002, petitioner was aware or, in the exercise of reasonable diligence, should have been aware of both (1) the injuries that were the subject of his lawsuit and (2) the fact that the injuries were work-related. Because petitioner’s suit was not filed until April 2005, more than three years later, respondent

argued that the suit was time-barred under FELA's three-year statute of limitations. 1 C.A. R. 8-23.

In opposing summary judgment, petitioner argued that a jury could find that he had no actual or constructive knowledge of his injuries until May 6 or even August 23, 2002. The former date, according to petitioner, was when he first complained to a doctor about the injuries that are the subject of his suit; the latter date, according to petitioner, was when he was first diagnosed with an injury. Because both of those dates are less than three years before the date on which he filed his complaint, petitioner argued that the action was not time-barred. 3 C.A. R. 286-298.

The trial court granted respondent's motion for summary judgment. Pet. App. 2-4. In a brief order, the court stated that "Defendant's Motion for Final Summary Judgment is granted," that "final summary judgment shall be entered in favor of Defendant," and that "Plaintiff shall take nothing by his Complaint." *Id.* at 3.

Petitioner then filed a motion to alter or amend the order granting summary judgment. 3 C.A. R. 345-354. The trial court denied the motion. Pet. App. 5-6.

D. The Appellate Court's Decision

Petitioner appealed to the District Court of Appeal of Florida, First District. He argued that (1) a cause of action does not accrue under FELA when the plaintiff experiences pain or symptoms that he reasonably believes to be temporary and (2) a jury could find that he reasonably believed that the pain and symptoms he experienced in January 2002 were temporary. App., *infra*, 4a-11a, 22a. Respondent did not take issue with petitioner's argument that tem-

porary pain or symptoms do not trigger FELA's limitations period. *Id.* at 13a. Instead, respondent argued that summary judgment was proper because petitioner's own deposition testimony established, as a matter of law, that his January 2002 pain and symptoms were not temporary. *Id.* at 13a-19a.

The appellate court issued a per curiam order stating that the judgment of the trial court was "AFFIRMED." Pet. App. 1. It did not issue an opinion or otherwise explain its reasoning.

Petitioner then filed a motion for rehearing and/or clarification, and for a written opinion. He argued that his deposition testimony did not establish that the pain and symptoms he experienced in January 2002 were not temporary. App., *infra*, 23a-28a. The appellate court denied the motion. Pet. App. 8.

REASONS FOR DENYING THE PETITION

Petitioner contends that, when deciding whether a plaintiff had either actual or constructive knowledge of his injury for purposes of FELA's statute of limitations, a distinction must be drawn between "permanent compensable conditions" and "symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature." Pet. 23. Petitioner's position is that "[a]n employee is not deemed 'injured' under FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary." *Ibid.* Petitioner claims that the Florida District Court of Appeal rejected that position in affirming summary judgment for respondent, and he asks this Court to grant certiorari to decide whether the Florida court erred in that respect.

The petition should be denied. Even if the court below rejected petitioner's position on the legal issue as to which he seeks review here, its decision does not bind parties or courts in future cases. In any event, the court did *not* reject petitioner's position on that issue, because it affirmed without opinion. Indeed, if the court below should be presumed to have adopted the arguments of respondent, then it ruled in petitioner's *favor* on the issue, because respondent did not dispute petitioner's position on the applicable law. Finally, the decision below is correct in light of the agreed-upon legal standards and the particular evidence in this case.

A. The Decision Below Has No Prospective Effect

The decision of which petitioner seeks review is a per curiam summary affirmance issued without an opinion. For that reason, it has no precedential force. *Department of Legal Affairs v. District Court of Appeal*, 434 So. 2d 310, 311-312 (Fla. 1983). Even assuming that the court below rejected the proposition of law petitioner urges, therefore, its order will not bind future panels of the Florida First District Court of Appeal (or circuit courts in that district). The argument that temporary pain or symptoms do not trigger FELA's limitations period will remain open to any litigant. Indeed, the appellate court is free to adopt the position urged by petitioner "in the next case presenting the issue." E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, *SUPREME COURT PRACTICE* § 6.37, at 506 (9th ed. 2007). There is thus no need for this Court's intervention.

B. The Decision Below Did Not Reject The Rule Advocated By Petitioner

Petitioner is in any event mistaken in his assertion that the court below rejected the proposition of law he urges. Precisely because the court did not explain why it was affirming the grant of summary judgment, its reasons cannot be known with certainty. Petitioner tacitly concedes as much. He is unable to say that the court below explicitly *held* that a cause of action accrues under FELA when the plaintiff experiences temporary pain or symptoms, or even that the court explicitly *stated* that a cause of action accrues in that circumstance. That is because the court did not explicitly hold, or explicitly state, *anything*—other than that the trial court’s decision was “AFFIRMED.” Pet. App. 1. “The essence of unexplained orders is that they say nothing.” *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

Petitioner is thus constrained to argue that the “result” reached by the court below “effectively” rejected his position that a cause of action does not accrue when the plaintiff experiences pain or symptoms that are merely temporary. Pet. 17, 18, 30. But even that is pure speculation. The court did not have to reject petitioner’s position to rule against him. Indeed, as we explain below, it is far more likely that the court *agreed* with petitioner about the applicable legal standard and determined that his complaint was time-barred because the pain and symptoms he experienced were not temporary.

Petitioner also argues that the “result” reached by the court below is “contrary” to decisions of lower federal and state courts that have considered when a plaintiff is deemed “injured,” and thus when a cause of action accrues, under FELA’s limitations provi-

sion. Pet. 18. After discussing several lower-court decisions (Pet. 23-30), petitioner claims that those decisions “properly recognize” that a FELA cause of action does not accrue when “a railroad employee experiences symptoms he reasonably believes to be temporary” (Pet. 30). There is no such conflict. The decision of the court below is not inconsistent with the decisions on which petitioner relies because, as explained above, the appellate court expressed no view on the issue addressed in those decisions—or, for that matter, on any issue.

C. If The Decision Below Should Be Presumed To Have Adopted Respondent’s Arguments, Then It *Accepted* The Rule Advocated By Petitioner

When an appellate court affirms a trial court’s decision without an explanation, it may be appropriate to presume that the appellate court’s decision rests on the same grounds as the trial court’s. But the trial court in this case did not provide an explanation either. Pet. App. 3, 6. When both the appellate court and the trial court issue unexplained orders, it may be appropriate to presume that the appellate court is adopting the arguments of the party in whose favor it rules. That appears to be petitioner’s view. See Pet. 17-18, 30-31. Such a presumption, however, affords no assistance to petitioner. Quite the contrary.

If it is appropriate to presume that a court’s unexplained decision adopts the arguments of the party in whose favor it rules, then it follows that the Florida District Court of Appeal did not reject—and indeed *accepted*—petitioner’s position that temporary pain or symptoms are insufficient to trigger FELA’s three-year limitations period. The party for which

the court below ruled is respondent, and respondent did not argue in that court that the limitations period is triggered by temporary pain or symptoms. Instead, respondent argued that the summary-judgment record established, as a matter of law, that the pain and symptoms experienced by petitioner in January 2002—more than three years before he filed suit—were not temporary.

1. In his brief on appeal, petitioner made the same argument that he makes in this Court. “An employee is not deemed ‘injured’ under the FELA, and his cause of action does not accrue,” petitioner said, “when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary.” App., *infra*, 4a. In support of that argument, petitioner relied on the same lower-court decisions on which he relies in this Court. Compare *id.* at 4a-11a with Pet. 23-30.

In responding to that argument in *its* brief on appeal, respondent said that it “*does not dispute* the general premise of plaintiff’s argument or that the cases he cites support this argument.” App., *infra*, 13a (emphasis added). Respondent went on to say that petitioner’s argument “nevertheless fails,” because petitioner’s own deposition testimony establishes that the pain and symptoms he experienced in January 2002 were not temporary. *Ibid.* Respondent’s brief made that point repeatedly. For example:

- “While plaintiff had experienced temporary symptoms or ‘pulls’ throughout his employment with the railroad, the symptoms he experienced in January of 2002 were different and distinguishable. By plaintiff’s own admission, these symptoms were not ‘tempo-

rary in nature,’ but instead progressively worsened from their onset in January [2002].” *Ibid.*

- “[T]he January symptoms were different from the temporary symptoms that plaintiff experienced over the course of his career[.]” *Id.* at 14a.
- “It is clear that plaintiff differentiated between the temporary aches and pains (or ‘pulls’) that he experienced during the course of his career and the new and specifically identifiable symptoms that manifested themselves during January of 2002. It is therefore undisputed that the January symptoms were not temporary—they did not resolve themselves, but instead grew progressively worse.” *Id.* at 16a-17a.
- “From a factual standpoint, it is undisputed that plaintiff’s January pain was not temporary.” *Id.* at 17a.

To demonstrate that the January 2002 symptoms were not temporary, respondent’s brief quoted extensively from petitioner’s deposition testimony. *Id.* at 14a-16a.

In its brief on appeal, respondent also distinguished the lower-court decisions on which petitioner relied. It argued that, in those cases, unlike in this one, the evidence showed that the plaintiff experienced only “temporary aches and pains of everyday work,” and the defendant argued that “it was these random aches and pains that triggered the statute of limitations.” App., *infra*, 17a. In this case, respondent argued, “the statute of limitations was not triggered by the temporary aches and pains that plain-

tiff experienced over the course of his career, but instead was triggered in January of 2002, when plaintiff specifically recalls experiencing a new and different pain that did not go away, but became progressively worse.” *Id.* at 18a-19a. Respondent’s brief thus took the position that petitioner’s asserted distinction between temporary and permanent symptoms “has no bearing on this Court’s decision.” *Id.* at 17a.

In his reply brief on appeal, petitioner stated his understanding that respondent “*concedes* that an employee is not deemed to be ‘injured’ under the FEOLA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature.” App., *infra*, 22a (emphasis added). Petitioner went on to argue that summary judgment should not have been granted because, according to him, the record permitted a jury to find that he “reasonably believed any pain or symptoms he experienced in January 2002 were temporary in nature, and that he did not experience symptoms sufficient to put a reasonable person on notice that he had suffered an injury until after April 5, 2002.” *Ibid.*

The briefs in the court below thus confirm, beyond any doubt, that there was no dispute between the parties as to the governing legal standard and that the only disagreement was over the application of that standard to the record in this case. If the fact that the Florida District Court of Appeal ruled in respondent’s favor means that the court should be deemed to have adopted respondent’s arguments, then all that court decided was that, under an agreed-upon legal standard and the unique facts of this case, petitioner’s suit was time-barred. If that is

what the court decided, moreover, then, far from being “contrary” (Pet. 18) to the decisions on which petitioner relies (Pet. 23-30), the decision below is entirely consistent with them. The other decisions applied the same legal standard and reached a different result only because the evidence in those cases permitted a finding that the plaintiff’s pain or symptoms were temporary.²

2. To support his contention that the Florida District Court of Appeal rejected the standard he advocates, petitioner relies entirely (Pet. 6, 17, 30-31, 34) on a single sentence from respondent’s motion for summary judgment in the trial court. That sentence reads as follows: “The first onset of symptoms, even those minor in nature, creates an affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s).” App., *infra*, 2a. But petitioner is seeking review of the appellate court’s decision, not the trial court’s, and respondent’s arguments in the trial court are not evidence of the basis for the appellate court’s unexplained order. That is particularly so because grants of summary judgment are reviewed *de novo*. See,

² See *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585, 592 (6th Cir. 2001) (“transient” pain); *Green v. CSX Transp., Inc.*, 414 F.3d 758, 764 (7th Cir. 2005) (“intermittent” pain); *Coots v. Southern Pac. Co.*, 322 P.2d 460, 466 (Cal. 1958) (Spence, J., concurring) (“temporary” symptoms); *CSX Transp., Inc. v. Adkins*, 442 S.E.2d 737, 739 (Ga. 1994) (“temporary” symptoms); *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 56 P.3d 106, 110 (Col. App. 2002) (“occasional” and “sporadic” pain and symptoms); *Sabalka v. Burlington N. & Santa Fe Ry. Co.*, 54 S.W.3d 605, 612 (Mo. App. 2001) (“temporary,” “intermittent,” and “transitory” pain and symptoms); *Reasons v. Union Pac. R.R. Co.*, 886 S.W.2d 104, 109 (Mo. App. 1994) (“temporary” symptoms).

e.g., *Florida Bar v. Greene*, 926 So. 2d 1195, 1200 (Fla. 2006).

In any event, the sentence seized upon by petitioner does not suggest that the limitations period would be triggered if the January 2002 symptoms were, in petitioner's words, "merely a temporary result of performing heavy manual labor that would go away, as similar 'little pulls' he had experienced before * * * had gone away." Pet. 18. Even a symptom that has not reached its full severity—*i.e.*, a symptom that may be "minor in nature" (App., *infra*, 2a)—can, depending on the circumstances, put a reasonable person on notice that he has a "permanent compensable condition[]" (Pet. 23) rather than a temporary one. Indeed, in the immediately prior sentence in its motion, respondent argued that summary judgment was proper because petitioner's "own testimony indicates that his symptoms relat[ing] to the injuries he is claiming in the litigation manifested themselves in January 2002 at the latest." App., *infra*, 2a. That language is entirely consistent with what petitioner characterizes as the applicable legal standard: whether he "knew or, with reasonable diligence, should have known before April 5, 2002" that he had sustained the injuries that are "the subject of this action." Pet. 23.

Insofar as petitioner is suggesting that respondent's position in the trial court was that FELA's limitations period is *always* triggered by "[t]he first onset of symptoms, even those minor in nature," App., *infra*, 2a, that suggestion is incorrect. Any such notion is dispelled by the second sentence in respondent's summary-judgment motion after the one on which petitioner relies: "an event resulting in minor physical symptoms *that puts a claimant on notice*

to check for injury constitutes knowledge giving rise to the accrual of a cause of action.” *Ibid.* (emphasis added). That language, which also appears in respondent’s brief on appeal (*id.* at 19a), makes clear that respondent’s position was that the limitations period is triggered by minor symptoms only if—as with any other symptoms—they are sufficient to place the plaintiff on inquiry notice.

3. It is telling that, when petitioner filed his motion for rehearing in the Florida District Court of Appeal, he did not assert—as he asserts here—that the court erroneously held that temporary pain or symptoms can trigger FELA’s limitations period. Instead, he argued that the court’s error was its conclusion that petitioner’s deposition testimony established that his pains and symptoms were not temporary. App., *infra*, 24a-28a.

Petitioner’s motion for rehearing said the following:

Based upon questions from the Court during argument, this Court appears to have been under the misapprehension that in his deposition testimony, Plaintiff stated that the symptoms he experienced in his shoulder and neck in January 2002, were different from the “little pulls” he had temporarily experienced in the past; that in January 2002 he had pain in his neck and shoulders that was different from what he had temporarily experienced in the past; that he had never felt similar pain or symptoms before; and that those symptoms, already different from any he had experienced before, thereafter persisted continuously from January 2002 forward and progressed.

App., *infra*, 25a. The motion went on to argue that

[t]he answers given at deposition, when all reasonable inferences are drawn in Plaintiff's favor, indicate that Plaintiff did not seek medical attention when he first experienced symptoms in his shoulder and neck for precisely the reason that those symptoms were in fact similar to and not different from the temporary "little pulls" he had experienced previously in his railroad career that had gone away with time, and that he reasonably believed they were similarly temporary in nature as well and would also go away with time.

Id. at 27a.

Petitioner's motion for rehearing thus demonstrates that he initially interpreted the appellate court's decision precisely as respondent does. That is, he agreed that the court had affirmed the grant of summary judgment, not because it believed that temporary pain or symptoms trigger the limitations period, but because it believed that petitioner's January 2002 pain and symptoms were not temporary. Indeed, petitioner reached that conclusion "[b]ased upon questions from the Court [itself] during argument." App., *infra*, 25a. The video of the argument confirms that petitioner's initial view was correct. See <http://www.1dca.org/video.html>. It shows that the oral argument, like the parties' briefs, proceeded on the premise that temporary pain or symptoms do not trigger the limitations period and that the only issue on appeal was whether the summary-judgment record established that petitioner's January 2002 pain and symptoms were not temporary.

D. The Decision Below Is Correct

As explained above, the dispute between the parties in the lower courts involved only the fact-specific question whether the pain and symptoms petitioner experienced in January 2002 were the typical “pulls” he had previously experienced, as petitioner contended, or the distinct pain and symptoms that were the subject of his lawsuit, as respondent contended. Petitioner does not argue that this Court should grant certiorari to decide whether the summary-judgment record in this case justifies a conclusion that, as a matter of law, the January 2002 symptoms were permanent rather than temporary. But even if he had made such an argument, review would be unwarranted, because this Court rarely grants certiorari “when the asserted error consists of * * * the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

In any event, petitioner’s January 2002 symptoms clearly were *not* temporary. At his deposition, petitioner testified without qualification that the pain and symptoms he experienced in January 2002 “kept progressing” and “kept getting worse and worse and worse” over “the next four months or so.” 2 C.A. R. 244. That testimony refutes petitioner’s assertion that his cause of action did not accrue until after April 5, 2002, and therefore less than three years before he filed suit. That the symptoms differed from the temporary aches and pains he had previously experienced is confirmed by petitioner’s ability to recall, at his deposition, precisely when the January 2002 symptoms manifested themselves—namely, when he was “trying to close a door on a boxcar or knock a hand brake off.” 2 C.A. R. 246. Petitioner’s deposition testimony is corroborated by

his own medical records, which show that, as of July 2002, petitioner's shoulder pain had been "going on for 6-7 months." 3 C.A. R. 336.³

In light of this evidence, no rational jury could find that petitioner did not have at least constructive knowledge of his injury more than three years before he filed suit. Accordingly, summary judgment was properly entered for respondent, and the decision below affirming it was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

³ Petitioner suggests that, even if his pain and symptoms were not temporary, the record does not establish that he first experienced them in January 2002, because his deposition testimony was that he "guess[ed]" he had first experienced the pain and symptoms around that time. Pet. 11 (quoting 2 C.A. R. 244). Petitioner's suggestion is baseless. Despite having had numerous opportunities to correct or clarify the point, petitioner steadfastly held to the January 2002 date throughout both days of his testimony. 1 C.A. R. 35-40; 2 C.A. R. 244-246, 250, 252-253, 255, 263, 266, 260-270.

Respectfully submitted.

DENNIS K. LARRY

JASON W. PETERSON

*Clark, Partington, Hart,
Larry, Bond &
Stackhouse*

*One Pensacola Plaza
Suite 800*

*125 West Romana Street
Pensacola, FL 32501
(850) 434-920*

EVAN M. TAGER

DAN HIMMELFARB

*Counsel of Record
Mayer Brown LLP
1909 K Street, NW*

*Washington, DC 20006
(202) 263-3000*

FORREST C. WILSON III

*McDowell Knight
Roedder & Sledge,
L.L.C.*

*Post Office Box 350
Mobile, AL 36601
(251) 432-5300*

Counsel for Respondent

JUNE 2008