

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS : CONSOLIDATED UNDER
LIABILITY LITIGATION (No. VI) : MDL 875

VARIOUS PLAINTIFFS

v.

VARIOUS DEFENDANTS

FILED
APR 18 2011
Cases transferred from
the Southern District of
Georgia listed in Exhibit
"A," attached
By MICHAEL E. KUNZ, CMAA, Dep. Clerk

O R D E R

AND NOW, this 14th day of **April 2011**, it is hereby **ORDERED** that Plaintiffs' objections to Magistrate Judge M. Faith Angell's Report and Recommendation, listed in Exhibit "A," attached, are **OVERRULED**.¹

¹Before the Court are Plaintiffs' Objections to three Report and Recommendations issued by Magistrate Judge M. Faith Angell. The evidence produced, Judge Angell's Report and Recommendations, and Plaintiffs' Objections are identical in all three cases, and the Court will therefore address them together. All citations to the record are from the case Lancaster v. CSX Transportation, Inc., 09-74185.

Pursuant to 28 U.S.C. § 636(a)(1)(c), "a judge of the Court shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made. A judge of the Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

Magistrate Judge M. Faith Angell recommended that Defendant CSX Transportation, Inc.'s Motions for Summary Judgment in the instant cases be granted. Plaintiffs in these cases rely on three pieces of evidence to raise a genuine issue of material fact as to whether Defendant employer CSX Transportation, Inc. ("Defendant") negligently caused Plaintiffs' asbestos-related injuries in violation of the Federal Employers Liability Act, 45

U.S.C. § 51 ("FELA").

First, Plaintiffs rely on decedents' answers to their interrogatories, identifying their exposure to asbestos at the worksite. This testimony cannot be reduced to an admissible form at trial and Defendant's objections to it under Federal Rule of Civil Procedure 56(c)(2) are sustained. See Vickers, 09-74209.

Second, introduce the general testimony of Robert Rollins, William Edwin Mims, and Mark Badders, establishing the presence of asbestos at the worksite. Even assuming the admissibility of this general testimony, this testimony alone is insufficient to overcome summary judgment, as the Plaintiffs must produce some admissible evidence placing decedents in the proximity of asbestos at the worksite. See Vickers, 09-74209.

Third, Plaintiffs produced the affidavit of Hubert Hobbs, stating that he worked with the decedents and that decedents were exposed to asbestos. Mr. Hobbs testifies that he worked at the Waycross facility from 1947-1991 and that he recalls working with the decedents, Bobby Lancaster, Hyman Adams, and John Hinson, among others. (doc. no. 13-2, at 2-3.) He states that "[t]he above listed co-workers worked in the vicinity of asbestos-containing products at the CSX Shops in Waycross, Georgia and were exposed to the dust created by the use of asbestos-containing products." (Id. at 3.) Plaintiffs ability to overcome summary judgment turns on the coworker testimony of Hubert Hobbs.

For a defendant employer in a FELA case to prevail on summary judgment, they have the heavy burden of foreclosing a genuine issue of fact as to at least one of the required elements for negligence in FELA cases. McCain v. CSX Transportation, Inc., 708 F.Supp. 2d 494, 497-98 (E.D. Pa. 2010) (Robreno, J.). The elements for establishing negligence in FELA cases are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; (4) the employer's negligence played some part in causing the injury for which compensation is sought. 45 U.S.C. §§ 51 et. seq. In a FELA claim, "an employee can recover . . . as long as the employer's negligence 'played any part, even the slightest, in producing the injury or death for which damages are sought.'" Outten v. Nat'l R. Passenger Corp., 928 F.2d 74, 76 (3d Cir. 1991) (quoting Rogers v. Missouri Pac. R. R. Co., 352 U.S. 500,

506 (1957)). Therefore, summary judgment in favor of defendant in FELA cases will be granted "only in those extremely rare instances where there is zero probability of employer negligence or that any such negligence contributed to the injury of an employee." McCain, 708 F.Supp. 2d at 497 (quoting Hines v. Conrail, 926 F.2d 262, 268 (3d Cir. 1991)).

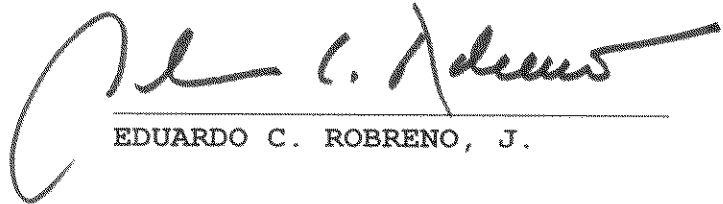
In her Report and Recommendation, Magistrate Judge M. Faith Angell concluded that Plaintiffs could not overcome summary judgment, because Mr. Hobbs's affidavit was not specific enough, as it did not speak to decedents' "actual work activities" or the "frequency or level of any alleged exposure." (doc. no. 15, at 6.) Plaintiffs object "on the grounds that the Hobbs' Affidavit is sufficient to create a genuine issue of fact." (Pl.'s Objects., doc. no. 16, at 2.) Defendants have opposed the Hobbs Affidavit on the grounds that Mr. Hobbs was not noticed for deposition during the discovery period and that, as a lay witness, he cannot offer testimony regarding decedents' dose of exposure to asbestos.

The Third Circuit Court of Appeals decision in Hines v. Consolidated Rail Corporation, 926 F.2d 262 (3d Cir. 1991) is illustrative of the type of showing required to defeat summary judgment in a FELA case where plaintiff alleges exposure to a hazardous substance. Defendant in Hines moved for summary judgment on the ground that plaintiff "did not spend any significant amount of time at the Paoli Yard and offered no evidence of the presence of PCBs along any portion of the hundreds of miles of track that he worked." Id. at 275. The Third circuit concluded that plaintiff's medical expert's testimony regarding the level of PCBs present in plaintiff's body, and the health effects of PCBs broadly, was enough for the plaintiff to survive summary judgment. Citing the "zero probability" test articulated in Pehowic v. Erie Lackawanna R.R., 430 F.2d 697, 699-700 (3d Cir. 1970), the Third Circuit held that plaintiff had met the showing necessary to overcome a motion for summary judgment.

However, there was specific evidence of work history in Hines that is notably absent from the instant cases. Plaintiff testified as to the work he did at the Paoli yard: from 1964-1976 he was responsible for maintaining tracks and sweeping them either manually or with a mechanical regulator, and was exposed to what he believed to be PCB-contaminated dust. Hines, 926 F.2d at 266.

It is further **ORDERED** that Defendant's Motions for Summary Judgment for Lack of Exposure Evidence, listed in Exhibit "B," attached, are **GRANTED**.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

In the instant cases, even given the low threshold of causation in FELA cases, there is nothing on record regarding decedents' specific work history, once the answers to interrogatories are taken out of consideration. Without testimony regarding what these decedents actually did at Waycross, there is insufficient evidence to submit to a jury to enable them to make a determination as to whether Defendant "played some part" in causing decedents' asbestos-related injuries. With no evidence linking the actions taken in the course of employment to the injury complained of, there remains "zero probability" that Defendant's negligence was responsible for decedents' injuries. Indeed, even under the liberal FELA causation standards, it is well-established that FELA "is not a workers' compensation statute and does not require railroad employers to insure the safety of their employees." McCain, 708 F.Supp. 2d at 497 (citing Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994)). Therefore, something more than mere presence of asbestos at the worksite is required. Even considering the Hobbs Affidavit, Plaintiffs have failed to raise a genuine issue of fact as to causation, as they have failed to establish some link between the nature of decedent's work and the injuries complained of. Under these circumstances, summary judgment will be granted.

Exhibit A (Report and Recommendations)

Lancaster,	09-74185	doc. no. 15
Adams,	09-74307	doc. no. 22
Hinson,	09-74310	doc. no. 17

Exhibit B (Motions for Summary Judgment)

Lancaster, 09-74185 doc. no. 12

Adams, 09-74307 doc. no. 18

Hinson, 09-74310 doc. no. 14