

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

BRAXTON STREET, ET AL. :
 :
 Plaintiffs, : CONSOLIDATED UNDER
 : MDL 875
 :
 : Transferred from the District
 : of Maryland
 v. : (Case No. 07-62599)
 :
 :
 ACANDS, INC., ET AL. :
 :
 : E.D. PA CIVIL ACTION NO.
 : 93-03466
 Defendant. :

ORDER

AND NOW, this **9th** day of **December, 2010**, it is hereby
ORDERED that Defendant MCIC, Inc.'s Motion for Summary Judgment,
filed on October 15, 2010 (doc. nos. 13, 14 & 15), is **GRANTED**.¹

¹This case was transferred to the Eastern District of Pennsylvania as part of MDL 875 on February 13, 2007. (Transfer Order, doc no. 1).

Braxton Street worked as a rigger at the Bethlehem Steel Key Highway Shipyard from 1964 until 1982. (Pl.'s Reply Br., doc. no. 17 at 14; Street Depo., doc. no. 16-1 at 8). He saw "ladders" using asbestos-containing pipe-covering, block, and cement. (Street Depo. at 13-16). Mr. Street testified that ladders were present at every location he worked at in the shipyard. (Id. at 46-47). Mr. Street testified that he saw ladders using "half-rounds" manufactured by Armstrong, Ruberoid, Pittsburgh Corning, and Johns-Mansville. (Id. at 19-20). Mr. Street could not recall the name of any outside contractors in the shipyard, but recalled outside contractors being present. (Id. at 53-54).

Plaintiffs provide general product identification testimony to establish that MCIC employees supplied and/or installed asbestos-containing products at the Bethlehem Steel Key Highway

Shipyard when Mr. Street worked there. (Pl.'s Reply Br. at 15). Plaintiffs present invoices showing that MCIC sold asbestos-containing products to the Key Highway shipyard. Id. John Schauman testified that he worked as an insulator for MCIC at Key Highway from 1972 until 1973. Id. He installed pipe-covering, block, and cement on ships. Id. John Rannie testified that he was an insulator for MCIC in the 1960s and worked on pipes using asbestos insulation materials on ships at the Key Highway Shipyard. Id. Harry Myers, who worked at the Key Highway Shipyard as a pipefitter from 1964 until 1981, testified that several outside contractors, including McCormick, were used to perform pipe-covering or lagging. (Id.; Myers Depo. at 8-13).

MCIC f/k/a McCormick Asbestos Co. was founded in 1934. (Def.'s Mot. Summ. J., doc. no. 15 at 2). MCIC was primarily an insulation contractor and also had a roofing and cold storage department. (Id.).

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact" Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R.

Civ. P. 56(e) (2).

In Eagle-Picher Industries, Inc. v. Balbos, two shipyard workers alleged that they had contracted mesothelioma due to exposure to several defendants asbestos-containing products at different Bethlehem Steel Shipyards. 604 A.2d 445, 449 (Md. 1992). In considering whether Eagle's powder, which contained asbestos, was a substantial cause of either plaintiffs' mesothelioma, the court noted that, "evaluation of that argument requires an appreciation of the workplace environment of each decedent." Id. at 457. The court determined that direct evidence of exposure is not required and that rather, circumstantial evidence can be sufficient. Id. at 460 (citing Roehling v. Nat'l Gypsum Co. Gold Bond Bldg. Products, 786 F.2d 1225, 1228 (4th Cir. 1986)). The court determined that,

Whether the exposure of any given bystander to any particular supplier's product will be legally sufficient to permit a finding of substantial-factor causation is fact specific to each case. The finding involves the interrelationship between the use of a defendant's product at the workplace. This requires an understanding of the physical characteristics of the workplace and of the relationship between the activities of the direct users of the product and the bystander plaintiff. (Internal citation omitted). Within that context, the factors to be evaluated include the nature of the product, the frequency of its use, the proximity, in distance and in time, of a plaintiff to the use of a product, and the regularity of the exposure of that plaintiff to the use of that product. (See Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir.); other internal citations omitted). In addition, trial courts must consider the evidence presented as to medical causation of the plaintiff's particular disease. (Internal quotations omitted).

Balbos, 604 A.2d at 460. In AC&S, Inc. v. Godwin, the Court of Appeals of Maryland applied the "frequency, regularity, and proximity" test in deciding the appeals of three plaintiffs who had never worked directly with asbestos-containing products. 667 A.2d 116, 123 (Md. 1995). Plaintiff presented product identification witness Mr. Webb, a pipe coverer, who testified that he worked in the open hearth furnaces, the soaking pits, and the blast furnaces and that products supplied by Defendant were

used in these areas. Id. Mr. Russell, one of the plaintiffs in Godwin, was a pipefitter who worked for various contractors at Bethlehem Steel. Id. at 125. Mr. Russell testified that he worked with pipe coverers in the soaking pits and the open hearth. Id. The court found that since Mr. Webb had testified that pipe coverers regularly used products supplied by Defendant and since Mr. Russell worked with pipe coverers, there was sufficient evidence of substantial causation to take the case to the jury on the behalf of Mr. Russell. Id. at 126.

In Reiter v. Pneumo Abex, LLC, the Maryland Court of Appeals granted defendants' motions for summary judgment as to several plaintiffs' bystander claims. 2010 WL 4670579 at 5 (Md. Nov. 19, 2010). Plaintiffs each presented evidence that they had worked in certain mills at the Bethlehem Steel Sparrows Point facility and that defendants' asbestos-containing brakes were in these mills. Id. at 2. The court held that taking into account the "massive cavernous size" of the facilities as well as the distance from laborers to the braking systems on the cranes" plaintiffs failed to present sufficient evidence of proximity to survive summary judgment. Id. at 5.

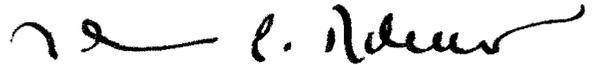
In summary, the Court of Appeals of Maryland has liberally applied the "frequency, regularity, and proximity" test and allowed plaintiffs to survive summary judgment with circumstantial evidence of exposure. However, the Court of Appeals of Maryland has required plaintiffs to identify their specific area of exposure and has considered the size of the facility at issue in determining whether plaintiffs have shown proximity through circumstantial evidence of exposure.

Plaintiffs have presented evidence, through Mr. Street's own deposition testimony, that Mr. Street worked in proximity to ladders at the Key Highway Shipyard. Mr. Street testified that these ladders worked on and with asbestos-containing pipe-covering, block, and cement. Plaintiffs have provided generic testimony from co-workers who testified that McCormick employees worked with asbestos-containing products at the Key Highway Shipyard. Mr. Myers testified that McCormick was an outside contractor at Key Highway Shipyard during the time that Mr. Street worked there and that McCormick employees performed "lagging" work.

Mr. Street's case is distinguishable from Godwin since in that case, Plaintiff Russell was able to place himself at certain locations within the Bethlehem Sparrows Point Shipyard. In

IT IS FURTHER ORDERED that judgment is entered in favor of Defendant MCIC, Inc. and against Plaintiffs.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

contrast, Mr. Street asks this Court to make the inference that since he worked at the Bethlehem Steel Key Highway Shipyard and since McCormick employees were at the same shipyard, he must have worked in proximity to these McCormick employees. Plaintiffs have presented evidence that Mr. Street worked around "lagers" and that McCormick employees performed lagging work, but Plaintiffs have offered no further evidence as to proximity. This case is more analogous to Reiter in that Plaintiffs have merely shown that Mr. Street was at the same facility as Defendant's asbestos-containing products or Defendant's employees working with asbestos-containing products.

The Balbos court noted that in applying the frequency, regularity, and proximity test, the court should consider the physical characteristics of plaintiff's workplace and the type of work people physically near the plaintiff are performing. Plaintiffs have made this task unfeasible because Plaintiffs have presented insufficient evidence as to which areas Mr. Street worked in at the Bethlehem Steel facility. Viewing the evidence in the light most favorable to Plaintiffs, what Plaintiffs have shown is that Mr. Street "worked around" outside contractors who worked with asbestos-containing products and that McCormick was one of the outside contractors performing work at the facility. However, there is insufficient evidence placing Mr. Street in proximity to McCormick employees. Thus, Defendant's motion for summary judgment is granted.