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

TERRY CARDARO and JO ANN CARDARO,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	Transferred from the Eastern District of Louisiana (Case No. 11-00876)
v.	:	
AEROJET GENERAL CORP. ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-66763-ER
Defendants.	:	

O R D E R

AND NOW, this **26th** day of **July, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Crane Co.** (Doc. No. 48) is **GRANTED.**[1]

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[1] This case was transferred in June of 2011 from the United States District Court for the Eastern District of Louisiana to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Terry Cardaro alleges that he was exposed to asbestos while serving as a welder in the Navy. Defendant Crane Co. ("Crane Co.") manufactured valves. The alleged exposure pertinent to Defendant Crane Co. occurred during the following period of Plaintiff's work, aboard the following vessels:

- Navy service (welder) - 1969 to 1977:
  - Submarine tenders: USS L.Y. Spear
    USS Orion
  - Various submarines (approximately 20)
  - USS Charles P. Cecil (DD-835)

Plaintiff was diagnosed with mesothelioma in May of 2004. Plaintiff asserts that he developed this disease as a result of exposure to asbestos from Defendant Crane Co.'s valves, *including from original gaskets and packing supplied by Crane Co., as well as replacement parts manufactured by Crane Co.*

Plaintiff brought claims against various defendants. Defendant Crane Co. has moved for summary judgment, arguing that (1) it is entitled to the bare metal defense, (2) there is insufficient product identification evidence to establish causation with respect to its product(s), and (3) it is immune from liability by way of the government contractor defense. The parties assert that maritime law applies.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of

the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362-63 (E.D. Pa. 2009)(Robreno, J.).

2. State Law Issues (Maritime versus State Law)

The parties assert that maritime law applies. Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. See Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009)(Robreno, J.). This court has previously set forth guidance on this issue. See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. Id. at 463-66 (discussing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. Id. In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. See Sisson v. Ruby, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." See Deuber v. Asbestos Corp. Ltd., No. 10-78931, 2011 WL 6415339, at *1 n.1 (E.D. Pa. Dec. 2, 2011)(Robreno, J.)(applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in Conner) is land-based work. The connection test requires that the incident could have "'a potentially disruptive impact on maritime commerce,'" and that "'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a

ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." Conner, 799 F. Supp. 2d at 466; Deuber, 2011 WL 6415339, at *1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d at 467-69 (citing Grubart, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. See id. But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. Id.

It is undisputed that the alleged exposure pertinent to Defendant Crane Co. occurred during Plaintiff's work as a welder aboard various Navy vessels. Therefore, this exposure was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Crane Co. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by - and no duty to warn about hazards associated with - a product it did not manufacture or distribute. Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364, at *7 (E.D. Pa. Feb. 1, 2012)(Robreno, J.).

D. Product Identification/Causation Under Maritime Law

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the

product was a substantial factor in causing the injury he suffered." Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005); citing Stark v. Armstrong World Indus., Inc., 21 F. App'x 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in Conner v. Alfa Laval, Inc., No. 09-67099, - F. Supp. 2d -, 2012 WL 288364 (E.D. Pa. Feb. 1, 2012)(Robreno, J.), there is also a requirement (implicit in the test set forth in Lindstrom and Stark) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. Abbay v. Armstrong Int'l., Inc., No. 10-83248, 2012 WL 975837, at *1 n.1 (E.D. Pa. Feb. 29, 2012)(Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. Stark, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. Id. at 376 (quoting Harbour v. Armstrong World Indus., Inc., No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. Lindstrom, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show "'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.'" Id. (quoting Harbour, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." Stark, 21 F. App'x at 376 (citing Matthews v. Hyster Co., Inc., 854 F.2d 1166, 1168 (9th Cir. 1988)(citing Restatement (Second) of Torts, § 402A (1965))).

E. Government Contractor Defense

To satisfy the government contractor defense, a defendant must show that (1) the United States approved reasonably precise specifications for the product at issue; (2) the equipment conformed to those specifications; and (3) it

warned the United States about the dangers in the use of the equipment that were known to it but not to the United States. Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988). As to the first and second prongs, in a failure to warn context, it is not enough for defendant to show that a certain product design conflicts with state law requiring warnings. In re Joint E. & S.D.N.Y. Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990). Rather, the defendant must show that the government "issued reasonably precise specifications covering warnings-specifications that reflect a considered judgment about the warnings at issue." Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010)(Robreno, J.)(citing Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129, 143 (D. Mass. 2009)). Government approval of warnings must "transcend rubber stamping" to allow a defendant to be shielded from state law liability. 739 F. Supp. 2d at 783. This Court has previously cited to the case of Beaver Valley Power Co. v. Nat'l Engineering & Contracting Co., 883 F.2d 1210, 1216 (3d Cir. 1989), for the proposition that the third prong of the government contractor defense may be established by showing that the government "knew as much or more than the defendant contractor about the hazards" of the product. See, e.g., Willis v. BW IP Int'l, Inc., 811 F. Supp. 2d 1146 (E.D. Pa. Aug. 29, 2011)(Robreno, J.); Dalton v. 3M Co., No. 10-64604, 2011 WL 5881011, at *1 n.1 (E.D. Pa. Aug. 2, 2011) (Robreno, J.). Although this case is persuasive, as it was decided by the Court of Appeals for the Third Circuit, it is not controlling law in this case because it applied Pennsylvania law. Additionally, although it was decided subsequent to Boyle, the Third Circuit neither relied upon, nor cited to, Boyle in its opinion.

F. Government Contractor Defense at Summary Judgment Stage

This Court has noted that, at the summary judgment stage, a defendant asserting the government contractor defense has the burden of showing the absence of a genuine dispute as to any material fact regarding whether it is entitled to the government contractor defense. Compare Willis, 811 F. Supp. 2d at 1157 (addressing defendant's burden at the summary judgment stage), with Hagen, 739 F. Supp. 2d 770 (addressing defendant's burden when Plaintiff has moved to remand). In Willis, the MDL Court found that defendants had not proven the absence of a genuine dispute as to any material fact as to prong one of the Boyle test since plaintiff had submitted affidavits controverting defendants' affidavits as to whether the Navy issued reasonably precise specifications as to warnings which were to be placed on

defendants' products. The MDL Court distinguished Willis from Faddish v. General Electric Co., No. 09-70626, 2010 WL 4146108 at *8-9 (E.D. Pa. Oct. 20, 2010)(Robreno, J.), where the plaintiffs did not produce any evidence of their own to contradict defendants' proofs. Ordinarily, because of the standard applied at the summary judgment stage, defendants are not entitled to summary judgment pursuant to the government contractor defense.

II. Defendant Crane Co.s' Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation / Bare Metal Defense

Crane Co. argues that there is insufficient product identification evidence to support a finding of causation with respect to its products. Specifically, Crane Co. argues that it is entitled to summary judgment because it cannot be liable for products or component parts that it did not manufacture, sell, or otherwise place into the stream of commerce.

Government Contractor Defense

Crane Co. asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by it for the products at issue, it provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards. In asserting this defense, Crane Co. relies upon on the affidavits of Dr. Samuel Forman, Admiral David Sargent, and Anthony Pantaleoni (a company witness).

B. Plaintiff's Arguments

Bare Metal Defense

Plaintiff acknowledges that this Court has made clear that maritime law recognizes the so-called "bare metal defense." Plaintiff contends that this does not preclude his claims against Crane Co. because there is evidence that the asbestos-containing component parts to which he was exposed in connection with Crane Co. valves included original asbestos-containing parts supplied by Crane Co. with its valves, as well replacement gaskets that were "identical, pre-formed bonnet gaskets that matched the bonnet of the particular valve he was working on." (Opp. at 14.)

Product Identification / Causation

In support of his assertion that he has identified sufficient product identification/causation evidence to survive summary judgment, Plaintiff cites to the following evidence:

- Deposition of Plaintiff
  Plaintiff testified that, during his time in the Navy, he worked with (or around) thousands of valves. He testified that he often had to "open up" the valves. He testified that he and his co-workers would scrape off the gaskets on the valves and replace them with new gaskets. He testified that the gaskets he used as replacement gaskets were pre-formed. He testified that the process of removing gaskets would generate airborne, visible dust, which he would breathe. He testified that he believed the gaskets, packing, and insulation used in connection with the valves contained asbestos.

  (Doc. No. 65-1 and 65-2, pp. 41-42, 96-97, 101-02, 108-111, 119-120, 172-73, 177-80, 182, 234-36.)

- Discovery Responses of Defendant
  Plaintiff points to discovery responses of Defendant, which Plaintiff contends indicate that Defendant was the exclusive seller, under its own name, of an asbestos-containing sheet packing material rebranded as "Cranite" from approximately 1920 to the mid-1980s.

  (Doc. No. 65-4, pp. 5-6.)

- Deposition of Crane Co. 30b6 Witness
  Plaintiff points to deposition testimony from Crane Co. representative Anthony Pantaleoni, who testifies that Cranite packing sold between 1920 and 1972 was comprised of 75-85% asbestos and was never sold in an asbestos-free form.

  (Doc. No. 65-5, pp. 123, 185.)

- Affidavit of Expert Captain William Lowell
Captain Lowell opines that, based on his thirty-one (31) years of experience as a Marine Engineer and Naval Officer, his experience in the shipbuilding industry, and his review of Plaintiff's deposition testimony that:

> [Plaintiff's] work would have required him to regularly com[e] into contact with substantial numbers of valves manufactured by Crane Co. in the course of his duties performing repairs on the submarines in which he worked. . . . During the years Mr. Cardaro served in the United States Navy and during his service aboard the USS L.Y. Spear (AS-36), it is more likely than not that the packing and/or gaskets used in the valves contained asbestos. . . . It is more likely than not that the valves [Plaintiff] worked with and around, including Crane valves, were originally designed, supplied, and installed with asbestos containing packing and gaskets. . . . Based upon all of the documentation referenced above and my own personal experience serving aboard Naval and Merchant ships, [Plaintiff's] testimony, and based upon my own training education and personal observations, [Plaintiff] would have routinely removed and replaced asbestos containing gaskets on valves manufactured by Crane.

Captain Lowell also opines that Plaintiff would have removed asbestos gaskets with scrapers and wire brushes, and that the practice would have generated dust.

(Doc. No. 65-3, pp. 3, 6-7, 22-23, 27-28.)

- Affidavit of Expert John Maddox, M.D.
Dr. Maddox relies upon the deposition testimony of Plaintiff in concluding that Plaintiff's exposure (during his Navy

service) to asbestos from insulation, gaskets, and packing associated with valves, was a significant contributing factor in the development of his mesothelioma.

(Doc. No. 65-10, pp. 3, 6-7, 22-23, 27-28.)

Plaintiff also contends that the evidence presented in connection with Defendant Crane Co.'s motion is essentially the same as evidence deemed sufficient to survive a motion for summary judgment by Crane Co. in Faddish v. Buffalo Pumps, Inc., No. 09-70626, 2010 WL 3324927 (E.D. Pa. Aug. 17, 2010)(Robreno, J.) [ECF Doc. Nos. 159 (report and recommendation ("R&R") of magistrate judge panel) and 194 (order adopting R&R)], as well as a motion for summary judgment by another defendant (Todd Shipyards) in Aikins v. General Electric Co., No. 10-64595, 2011 WL 6415146 (E.D. Pa. Dec. 9, 2011)(Robreno, J.)[ECF Doc. No. 44].

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are, at the very least, genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant could have warned about asbestos hazards associated with its product(s) had it chosen to do so.

To contradict the evidence relied upon by Defendant, Plaintiff cites to, inter alia, (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which (as discussed by expert Captain Arnold Moore) Plaintiff contends indicates that the Navy not only permitted but expressly required warning. Plaintiff also cites to (c) evidence that, in the early 1980s, Crane Co. did include warnings about asbestos hazards with the products it supplied, which Plaintiff contends establishes that Crane Co. could have warned about asbestos at any time.

Plaintiff asserted in his briefing that, in this very case, which was once removed to federal court by Defendant Crane Co., a federal court had, in essence, already rejected the government contractor defense, ruling that there was no federal jurisdiction based on federal officer jurisdiction (as would be created by proper assertion the government contractor defense), and remanding the case to state court. Plaintiff cites to Cardaro v. Aeroject General Corp., 2010 WL 3488207, *6 (E.D. La. Aug. 27, 2010) for its authority that Crane Co. is not entitled to the

government contractor defense. During oral argument, however, Plaintiff agreed with Defendant Crane Co. that the case had later been properly removed by another defendant in this action (Foster Wheeler, which was not added as a defendant to the action until after its initial removal to federal court by Crane Co.) and thereafter transferred to MDL-875. The parties agreed that the case is now properly before this Court and that this Court has jurisdiction over the action.

Plaintiff has also submitted objections to Defendant's evidence pertaining to the government contractor defense.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from gaskets, packing, and insulation used in connection with valves while serving aboard various vessels (primarily submarines and submarine tenders) in the Navy. There is evidence that Plaintiff worked around a large number of valves in the Navy. There is evidence that he worked with asbestos-containing gaskets, packing, and insulation in connection with those valves, and that he was exposed to respirable dust from at least some of those products. Importantly, however, there is no evidence from anyone with personal knowledge as to whether Plaintiff ever worked with or around a Crane Co. valve. Moreover, even if the valves with which he worked with were Crane Co. valves, there is no evidence from anyone with personal knowledge as to whether the gaskets, packing, and/or insulation to which Plaintiff was exposed in connection with those valves were manufactured or supplied by Defendant Crane Co. The Court notes that Captain Lowell's opinion, while based on experience, is yet impermissibly speculative. See Lindstrom, 424 F.3d at 492 (quoting Harbour, 1991 WL 65201, at *4). Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from original gaskets, packing, or insulation manufactured or supplied by Defendant such that it was a "substantial factor" in the development of his illness, because any such finding would be impermissibly conjectural. See Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1.

With respect to asbestos to which Plaintiff may have been exposed in connection with valves, but which was not manufactured or supplied by Defendant, the Court has held that, under maritime law, Defendant cannot be liable. Conner, 2012 WL 288364, at *7. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted. Anderson, 477 U.S. at 248.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

The Court notes that, contrary to Plaintiff's argument, Aiken was distinguishable because there was a basis in the evidence from which a reasonable jury could conclude that the insulation to which the plaintiff had been exposed was the original insulation installed by Todd Shipyards (i.e., insulation for which Todd Shipyards could be liable). In that case, which was decided under California state law, it was undisputed that the original insulation installed aboard the ship at issue had been installed by Defendant Todd Shipyards. It was reasonable for a jury to conclude that the insulation to which the plaintiff had been exposed was the original insulation aboard the ship (as an expert had opined) because Plaintiff alleged that exposure occurred within a very short time of the ship's being built (within approximately one year) - and there was no evidence that the ship had been overhauled or that insulation had been removed within that time - such that it would not be speculative to conclude that the insulation to which the plaintiff had been exposed was, more likely than not, the original insulation. By contrast, in the case at hand, there is no evidence that Plaintiff was exposed to a Crane Co. valve and any such conclusion would be impermissibly speculative.

The evidence presented in Faddish is also distinguishable. In that case, which was decided under Florida law, expert evidence placed Crane Co. valves in a very small space (the engine room) in which the plaintiff worked on a regular basis, such that it would not be impermissibly speculative to conclude that the plaintiff had been exposed to Crane Co. valves. Moreover, that case did not address whether Florida law recognizes the so-called "bare metal defense," and there was no legal ruling made that limited Crane Co.'s potential liability to that for original gaskets and packing supplied by Crane Co. with its valves (or insulation supplied by Crane Co.).

In light of the Court's determination with regard to the sufficiency of Plaintiff's evidence pertaining to exposure/ product identification, the Court need not reach Defendant's argument pertaining to the government contractor defense.