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

MARA LYNNE ABBAY,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	Transferred from the Western District of Washington (Case No. 10-01585)
v.	:	
ARMSTRONG INTERNATIONAL, INC., ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-CV-83248-ER
Defendants.	:	

O R D E R

AND NOW, this **28th** day of **February, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Crane Co. (Doc. No. 74) is **GRANTED in part; DENIED in part.**[1]

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[1] This case was transferred in November of 2010 from the United States District Court for the Western District of Washington to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Mara Lynne Abbay (widow of and personal representative of the estate of decedent George Abbay ("Decedent" or "Mr. Abbay")) has alleged that Decedent was exposed to asbestos while working aboard Navy vessels throughout his period of service in the Navy (1962 to 1966) and also during post-Navy work as a rigger at the Puget Sound Naval Shipyard (1966 to 1993). Defendant Crane Co. ("Crane" or "Crane Co.") manufactured valves, which were supplied for use aboard ships. The alleged exposure pertinent to Defendant Crane occurred during the following periods of Decedent's work:

- Naval Service (1962 to 1966)
- Puget Sound Naval Shipyard (1966 to 1972)

Mr. Abbay was diagnosed with mesothelioma in 2007 and died in October of 2008. He was not deposed in this litigation, but was deposed for eight (8) day in March 2007 in connection with an earlier action filed in 2007.

Plaintiff brought claims against various defendants. Defendant Crane Co. has moved for summary judgment, arguing that it is entitled to the bare metal defense and that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). Crane Co. also seeks summary judgment on grounds of the government contractor defense.

Plaintiff contends that there is sufficient product identification evidence to support a finding of causation with respect to asbestos-containing insulation, gaskets, and/or packing supplied by Crane Co.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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 (Maritime Versus Washington Law)

As a preliminary matter, the Court must determine what law applies in deciding Defendant Crane Co.'s motion. Several

defendants in this action filed motions for summary judgment asserting that maritime law is applicable because of the Decedent's service in the Navy aboard ships and the nature of his post-Navy work as a rigger at the Puget Sound Naval Shipyard ("PSNS"). Plaintiff contends that Washington law is applicable. Crane Co. contends that maritime law applies but asserts that the outcome is the same regardless of whether Washington law or maritime law is applied. Because of the significant differences between the product identification standards applied under Washington law and maritime law, the outcomes of the summary judgment motions pending before the Court in this case are likely to differ based upon what law is applied. Therefore, the Court deems it appropriate to undertake an analysis of the applicability of maritime law, rather than relying upon Defendant's assertion that choice of law is irrelevant.

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 In re Asbestos Prods. Liab. Litig. (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, 497 U.S. 358 (1990). 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), "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. 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 meet the connection test necessary for the application of maritime law. Id. at 467-69. 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.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., No. 10-64625, doc. no. 81 (E.D. Pa. Aug. 2, 2011)(Robreno, J.)(applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

(i) Exposure Arising During Navy Service (1962 to 1966)

It is undisputed that Decedent's alleged exposure during his period of Navy service was aboard ships. Therefore, this exposure was during sea-based work. See Sisson, 497 U.S. 358. Accordingly, maritime law is applicable to Plaintiff's claims arising from exposure alleged to have occurred during his service in the Navy. See Conner, 799 F. Supp. 2d at 462-63.

(ii) Exposure Arising During Work at PSNS (1966 to 1972)

The evidence in the record indicates that Decedent worked as a rigger during his employment at PSNS. The parties agree that the job of a rigger consists primarily of performing

the "heavy lifting" of removing equipment from aboard ships and transporting it to work areas off the ship (including, sometimes, unbolting or disassembling equipment), and moving equipment onto ships (including, sometimes, installing the equipment aboard the ship). In the course of this work, a rigger would be exposed to other types of workers who were working nearby, particularly onboard the ships on which equipment was being placed or removed by the rigger. In the course of his deposition, Decedent discussed alleged exposure to Defendants' products as having been aboard ships. Although it is possible that some exposure to asbestos from a Defendant's product may have occurred during the course of the Decedent's job duties that were not carried out aboard the ship, the record indicates (and the parties appear to agree) that the primary allegations of exposure to Defendant's products pertain to exposure occurring while onboard ships. Thus, the Court concludes that Decedent's alleged exposure at PSNS was during sea-based work, see Sisson, 497 U.S. 358, such that maritime law is applicable to Plaintiff's claims arising from exposure alleged to have occurred during his work there. See Conner, 799 F. Supp. 2d at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has recently adopted the so-called "bare metal defense" under maritime law, holding 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 (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). The Court notes that, in light of its recent holding in Conner, 2012 WL 288364, 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.

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, 539 F. Supp. 2d at 783 (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. 539 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., No. 09-91449 (E.D. Pa. Aug. 29, 2011) (Robreno, J.); Dalton v. 3M Co., No. 10-64604 (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 the 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 issue of material fact as to whether it is entitled to the government contractor defense. Compare Willis v. BW IP International Inc., 2011 WL 3818515 at *1 (E.D. Pa. Aug. 26, 2011) (Robreno, J.) (addressing defendant's burden at the summary judgment stage), with Hagen v. Benjamin Foster Co., 739 F. Supp. 2d 770 (E.D. Pa. 2010) (Robreno, J.) (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 issue of 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.

G. Pleading Requirements for Affirmative Defenses

Rule 8 of the Federal Rules of Civil Procedure requires "a party [to] affirmatively state any avoidance or affirmative defense." Fed. R. Civ. P. 8(c)(1). "[S]o-called 'notice pleading' has always been the hallmark of Rule 8(c), which ultimately function(s) to provide the opponent with notice of the claim or defense pled." Tyco Fire Products LP v. Victaulic Co., 777 F. Supp. 2d 893, 897 (E.D. Pa. 2011)(Robreno, J.)(citing Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)).

Rule 8 of Washington's Superior Court Civil Rules sets forth the same requirement. See CR 8(c). See also Sprague v. Sumitomo Forestry Co., Ltd., 104 Wash.2d 751, 757, 709 P.2d 1200, 1204 (Wash. 1985).

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

A. Defendant's Arguments

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 Defendants for the products at issue, Defendants 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). Although Crane Co. did not assert this defense in its Answer, it argues that it is incorporating the defense as asserted by other defendants in this action.

Product Identification / Causation

Crane Co. asserts the so-called "bare metal defense" and argues that there is insufficient product identification evidence to support a finding of causation with respect to products for which it could potentially be liable. In particular, Crane Co. argues that there is no evidence that Decedent worked with or around any original or replacement asbestos-containing component parts that it manufactured or supplied.

B. Plaintiff's Arguments

Government Contractor Defense

Plaintiff has not provided any evidence to contradict Defendant's evidence pertaining to the government contractor defense. However, Plaintiff argues that Crane Co. should not be permitted to avail itself of this defense at this stage of the litigation because it did not identify this affirmative defense in its answer, never sought leave to amend its answer to include the defense, and unfairly surprised Plaintiff with its assertion of the defense for the first time in its motion for summary judgment. In short, Plaintiff asserts that it will be prejudiced if the Court accepts the defense at this time as it was deprived of notice and the opportunity to obtain the discovery necessary to oppose the defense.

Product Identification / Causation

Plaintiff argues that there is sufficient product identification evidence with respect to asbestos-containing insulation, gaskets, and/or packing that she contends was supplied by Crane Co. and to which she contends Decedent was exposed. In support of this assertion, Plaintiff points to the following evidence:

- Deposition Testimony of Decedent - Decedent testified that he worked with and around Crane Co. valves on various ships during his time in the Navy and in his post-Navy work at PSNS; he specifically recalled Crane as being the brand of valve he worked around most often and testified that the valves had their manufacturers' names cast into the metal. Decedent testified that he worked on new valves, which were often received in a "leaky condition" that required them to be tightened. He testified that he would have to pull the valves out for various reasons and that this would require replacing the packing; he testified that he would clean valve flanges with scrapers and wire brushes. Decedent testified that, during his time at PSNS, the work on valves often involved the removal of large gaskets. Decedent testified that such products were made of asbestos and that such work created dust and debris that he could not help but inhale; he specifically testified that he recalled seeing dust created by the removal of gasket material from Crane Co. valves

- Deposition Testimony of Defendant's 30b6 Witness - Crane Co.'s corporate representative (Anthony Pantaleoni) testified that (1) some of the valves Crane Co. manufactured had asbestos-containing gaskets, packing, or discs enclosed within them, (2) that it also would sell replacement parts sometimes, and (3) that it sometimes sold (though did not manufacture) asbestos-containing insulation

- Discovery Responses of Defendant - Crane Co.'s discovery responses confirm that it designed and manufactured valves that contained asbestos components up until the mid-1980s

- Invoices for Replacement Parts Supplied to PSNS - Defendant has produced documents that reflect multiple sales of Crane Co. replacement parts (specifically gaskets and packing) to PSNS in 1972

- Expert Declaration of Steven Paskal (Industrial Hygienist) - Dr. Paskal provides testimony that "virtually all gaskets of the type described by [Decedent] would have [been] comprised [of] approximately 85% asbestos;" he also provides medical expert testimony about causation

- Expert Declaration of Christoper K. Lane (Navy expert) - Mr. Lane provides opinion testimony that the asbestos gaskets and packing used with Crane Co.'s valves in the Navy and at PSNS would have come from Crane Co. as replacement parts

C. Analysis

Government Contractor Defense

Federal Rule of Civil Procedure 8(c) (and the analogous rule in Washington, which was applicable during at least some portion of the pleading stage in this action) requires that a defendant provide a plaintiff with notice of its affirmative defense by pleading that defense in its Answer. See Tyco Fire Products, 777 F. Supp. 2d at 897 (citing Twombly, 550 U.S. at 555, and explaining that the purpose of Rule 8(c) is to provide fair notice); see also Sprague, 104 Wash.2d at 757. It is undisputed that Defendant Crane Co. did not plead the government

contractor defense in its Answer and never sought leave of Court to amend its Answer during discovery. Although Crane Co. notes that other defendants in this action asserted the government contractor defense, it would defeat the purpose of Rule 8(c) if the Court were to permit Crane Co. to rely on another defendant's asserted defense at the summary judgment stage without the Plaintiff having received notice of Crane Co.'s intention to assert that defense prior to (or perhaps during) the discovery phase of the case. See Id. Therefore, Crane Co. cannot be permitted to avail itself of this newly asserted defense at this late stage of the litigation. Accordingly, Defendant Crane Co.'s motion for summary judgment on grounds of the government contractor defense is denied and this untimely defense is hereby stricken.

Product Identification / Causation

Plaintiff has alleged exposure to asbestos-containing insulation, gaskets, and/or packing used in conjunction with Crane Co. valves. This Court has held that a manufacturer cannot be liable for injuries arising from products that it did not manufacture or supply. Conner, 2012 WL 288364, at *7. However, in this case, Plaintiff alleges that Defendant Crane Co. is liable because it supplied the insulation, gaskets, and packing that were used in connection with its valves and to which Plaintiff alleges Decedent was exposed. The Court will address the evidence as to each type of component part separately.

(i) Insulation

There is evidence that Crane Co. sometimes sold (though did not manufacture) asbestos-containing insulation. However, there is no evidence that Decedent was ever exposed to insulation in connection with Crane Co. valves. Furthermore, there is no evidence that any insulation to which Decedent may have been exposed was supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to insulation manufactured or supplied by Crane Co. such that it was a substantial factor in the development of Decedent's mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted with respect to alleged exposure to asbestos from insulation.

(ii) Gaskets

There is evidence that Decedent was exposed to dust from gaskets used in connection with Crane Co. valves. There is evidence that these gaskets contained asbestos. There is evidence that Crane Co. supplied both original and replacement asbestos-gaskets with (or for use with) its valves. There is evidence that the gaskets used with the Crane Co. valves at issue more likely than not would have contained asbestos. There is evidence from expert Christopher Lane that any asbestos-containing gasket to which Decedent was exposed in connection with the Crane Co. valves at issue would have been supplied by Crane Co. This is sufficient evidence from which a reasonable jury could conclude that Decedent was exposed to asbestos-containing gaskets manufactured or supplied by Crane Co. (whether as original or replacement parts), and that this exposure was a substantial factor in the development of his mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment in favor of Defendant Crane Co. is not warranted with respect to alleged exposure to asbestos from gaskets.

(iii) Packing

There is evidence that Decedent was exposed to packing in connection with Crane Co. valves, while replacing the packing in those valves. There is evidence that Crane Co. supplied original asbestos-containing packing with some of its valves. There is evidence that Crane Co. sometimes supplied replacement packing - and that it supplied replacement packing to PSNS in 1972. There is evidence that any replacement packing to which Decedent was exposed in connection with the Crane Co. valves at issue would have been supplied by Crane Co. However, unlike the evidence pertaining to gaskets, there is no evidence that the original packing to which Decedent was exposed in connection with Crane Co. valves contained asbestos, and there is no evidence that any replacement packing to which he was exposed with Crane Co. valves contained asbestos. Furthermore, there is no evidence that any asbestos-containing packing to which Decedent may have been exposed was manufactured or supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from packing manufactured or supplied by Crane Co. such that it was a substantial factor in the development of Decedent's mesothelioma. See Lindstrom, 424 F.3d at 492; Stark, 21 F.App'x at 376. Accordingly, summary judgment in favor of Defendant Crane Co. is warranted with respect to alleged exposure to asbestos from packing.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

D. Conclusion

Defendant's motion for summary judgment on grounds of the government contractor defense is denied and the defense is stricken. Summary judgment is granted in favor of Defendant Crane Co. with respect to all claims arising from alleged exposure to insulation or packing; however, summary judgment is denied with respect to all claims arising from alleged exposure to gaskets.