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

OLIVER BROWN,	:	CONSOLIDATED UNDER MDL 875
Plaintiff,	:	
	:	Transferred from the Northern District of California (Case No. 09-4618)
v.	:	
ASBESTOS DEFENDANTS, et al.,	:	E.D. PA CIVIL ACTION NO. 2:10-60090-ER
Defendants.	:	

O R D E R

AND NOW, this **16th** day of **October, 2012**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant **Crane Co.** (Doc. No. 77) is **DENIED.**[1]

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

Plaintiff Oliver Brown alleges that he was exposed to asbestos while working as a marine machinist and marine machinist's helper at Mare Island Naval Shipyard during the period 1961 through 1969. Defendant Crane Co. ("Crane Co.") manufactured valves. The alleged exposure pertinent to Defendant Crane Co. occurred during Plaintiff's work in the reactor room, reactor tunnel, and auxiliary machine spaces aboard numerous submarines.

Plaintiff was diagnosed with an asbestos-related illness and 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. Defendant contends that maritime law applies, while Plaintiff asserts that California 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

The parties disagree as to what law applies. Where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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.). Where a case sounds in admiralty, application of a state's law (including a choice of law analysis under its choice of law rules) would be inappropriate. Gibbs ex rel. Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 131-32 (3d Cir. 2002). This is because, where a case sounds in admiralty, whether maritime law applies is not an issue of choice-of-law but is, instead, a jurisdictional issue. See id. Therefore, if the Court determines that maritime law is applicable, the analysis ends there and the Court is to apply maritime law. See id.

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 meet the connection test necessary for the application of maritime law. Conner, 799 F. Supp. 2d 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.

It is undisputed that the alleged exposure pertinent to Defendant Crane Co. occurred during Plaintiff's work aboard submarines. 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 Defendant. See id. at 462-63.

C. Bare Metal Defense Under Maritime Law

This Court has 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

Defendant Crane Co. contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused his illness. It asserts that it cannot be liable for any product it did not manufacture or supply.

Governmentor 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, Defendant 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 on the affidavits and reports of Dr. Samuel Forman, Admiral David Sargent, and Anthony Pantaleoni (a company witness).

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

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

- Declaration of Plaintiff
  Plaintiff's declaration provides testimony that, during the period 1961 to 1968 or 1969, he worked on the new construction of numerous submarines. He states that he worked on new Crane valves (including high temperature and high pressure valves), which included disturbing and removing the original gaskets and packing supplied with the valves. He states that he also had to repack these valves and that he did so with asbestos gaskets and packing, including "Crane" packing. He states that this work took hours

at a time (per valve) and created visible dust.

(Pl. Ex. A, Doc. No. 103-1.)

- Declaration of Expert Kenneth Cohen
  Mr. Cohen (a certified industrial hygienist) has provided expert testimony opining that Plaintiff was exposed hazardous levels of asbestos from Crane Co. valves (including from gaskets and packing original to the valves).

  (Pl. Ex. B, Doc. No. 103-1.)

- Declaration of Expert Herman Bruch, M.D.
  Dr. Bruch provides expert evidence regarding medical causation.

  (Pl. Ex. C, Doc. No. 103-1.)

- Deposition Testimony of Corporate Representative William N. McLean
  Plaintiff points to deposition testimony of "Crane" corporate representative William McLean, which was taken in another action in 1995. Mr. McLean provides the following testimony:

  Q: [not included]
  A: My own specific activity related to the design of valves, and one of the things we specified in the design of valves were asbestos packing, asbestos gaskets, and these are materials that were used for many, many decades prior to my even appearing on the scene.

  . . .

  Q: The question was, did there come a time when Crane ceased including asbestos-containing products in its valves?
  A: Yes. Starting - well, I'm not certain of

dates. You'll have to excuse my inaccurate memory on specific dates. But probably in the late 70's we began to substitute other materials for packing and gaskets where we could. And that was carried on through probably the late 80's, by which time Crane ceased using asbestos-containing products in the form of gaskets and packing.

. . .

Q: Are you aware of valves that have not required service, including repacking, for many years?

A: Yes. Valves can go for a long period of time without repacking because many valves are put in service and they're either opened or they're closed and they stay in that position for years and years and years and they're virtually unattended, nothing is done to the valves.

(Pl. Ex. D, Doc. No. 103-1.)

- Deposition Testimony of Corporate Representative Anthony D. Pantaleoni
  Plaintiff points to deposition testimony from corporate representative, which indicates that Crane high temperature and/or high pressure valves could not be used with non-asbestos gaskets and packing until at least 1981 and that not all valves were transitioned to be "non-asbestos" at the same time.

  (Pl. Ex. E, Doc. No. 103-2.)

- Industrial Review (November 1936)
  Plaintiff points to the Industrial Review, which he contends was published by the Illinois Manufacturers' Association in November 1936. Plaintiff contends that it indicates that Crane was a member of the

newly organized Workmen's Compensation Health and Safety Committee by 1936 and that, at this time, there was information published about silicosis and asbestosis.

(Pl. Ex. F, Doc. No. 103-2.)

Governmentor Contractor Defense

Plaintiff argues that summary judgment in favor of Defendants on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff contends that Defendant has (1) not produced its contract with the government or otherwise proven that it was a government contractor, (2) not demonstrated that the product at issue was "military equipment," and (3) not demonstrated a genuine significant conflict between state tort law and fulfilling its contractual federal obligations (i.e., that its contractual duties were "precisely contrary" to its duties under state tort law). Furthermore, Plaintiff asserts that the government contractor defense is not warranted because (4) SEANAV Instruction 6260.005 makes clear that the Navy encouraged Defendant to warn, (5) military specifications merely "rubber stamped" whatever warnings Defendant elected to use (or not use) and do not reflect a considered judgment by the Navy, (6) there is no military specification that precluded warning about asbestos hazards, and (7) Defendant cannot demonstrate what the Navy knew about the hazards of asbestos relative to the knowledge of Defendant, nor that the Navy knew more than it did at the time of the alleged exposure.

To contradict the evidence relied upon by Defendant, Plaintiff cites to (a) MIL-M-15071D, and (b) SEANAV Instruction 6260.005, each of which Plaintiff contends indicates that the Navy not only permitted but expressly required warning.

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

C. Analysis

Product Identification / Causation

Plaintiff alleges that he was exposed to asbestos from gaskets and packing supplied by Crane Co. in valves manufactured and supplied by Defendant Crane Co. He also alleges that he was

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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exposed to asbestos from "Crane" packing he used to repack these valves. There is evidence that Plaintiff was exposed to respirable asbestos from original gaskets and packing supplied by Crane Co. as well as replacement packing supplied by "Crane." There is evidence that these exposures lasted for a few hours at a time (per valve) and occurred with many different valves. As such, a reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from gaskets and/or packing supplied by Crane Co. such that it was a "substantial factor" in the development of his illness. See Conner, 2012 WL 288364, at *7; Lindstrom, 424 F.3d at 492; Stark, 21 F. App'x at 376; Abbay, 2012 WL 975837, at *1 n.1. Accordingly, summary judgment in favor of Defendant Crane Co. is not warranted. Anderson, 477 U.S. at 248.

The Court notes that it has reached this determination without considering the testimony of expert Kenneth Cohen (or the admissibility of that testimony).

Governmentor Contractor Defense

Plaintiff has pointed to evidence that contradicts (or at least appears to be inconsistent with) Crane Co.'s evidence as to whether the Navy did or did not reflect considered judgment over whether warnings could be included with Foster Wheeler's products. Specifically, Plaintiff has pointed to MIL-M-15071D, and SEANAV Instruction 6260.005, which Plaintiff contends demonstrate that the Navy would have permitted Crane Co. to include warnings with its products. This is sufficient to raise genuine disputes of material fact as to whether the first and second prongs of the Boyle test are satisfied with respect to Crane Co. See Willis, 811 F. Supp. 2d 1146. Accordingly, summary judgment on grounds of the government contractor defense is not warranted.