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

ALAN H. DONN, ET AL.,	:	CONSOLIDATED UNDER MDL 875
Plaintiffs,	:	Transferred from the Southern District of New York (Case No. 10-00311)
v.	:	
A.W. CHESTERTON CO., INC. ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:10-62071-ER
Defendants.	:	

O R D E R

AND NOW, this **9th** day of **May, 2013**, after review of the Objections of Defendant Crane Co. (Doc. No. 100) to the Report and Recommendation of the Magistrate Judge (Doc. No. 99) regarding Defendant Crane Co.'s Motion for Summary Judgment of Defendant (Doc. No. 53), it is hereby **ORDERED** that the objects are **SUSTAINED**, and the Motion for Summary Judgment (Doc. No. 53) is **GRANTED**.[1]

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[1] This case was transferred in March of 2010 from the United States District Court for the Southern District of New York to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that Decedent Alan Donn ("Decedent" or "Mr. Donn") was exposed to asbestos while serving in the Navy during the period 1957 to 1981. Plaintiff alleges that Defendant Crane Co. ("Crane Co.") manufactured valves. The alleged exposure pertinent to Crane Co. occurred during Decedent's work aboard various submarines.

Plaintiff brought claims against various defendants to recover damages for Decedent's asbestos-related illness and death. Defendant Crane Co. moved for summary judgment (the

"Motion"), arguing that (1) there is insufficient product identification evidence to establish causation with respect to its products, (2) it is entitled to summary judgment on grounds of the bare metal defense, and (3) it is immune from liability by way of the government contractor defense. Defendant asserted that maritime law applies, while Plaintiff asserted that New York law applies.

By order dated June 24, 2011 and signed by the Honorable Eduardo C. Robreno, this Court referred the motion for summary judgment of Defendant Crane Co. to U.S. Magistrate Judge Hey for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B)-(C). (Doc. No. 97.) On July 27, 2011, Judge Hey issued a report and recommendation regarding the Motion ("R&R"), (1) recommending that, with respect to Defendant's argument regarding insufficient product identification evidence, the motion be denied, and (2) reserving for Judge Robreno the issues of (a) the so-called "bare metal defense" under maritime law, and (b) the government contractor defense. (Doc. No. 99.) On August 8, 2011, Defendant Crane Co. filed objections to Judge Hey's report and recommendation (the "Objections"). (Doc. No. 100.)

On February 1, 2012, this Court issued a decision clarifying the standard for product identification under maritime law, and recognizing with clarity for the first time the so-called "bare metal defense" under maritime law. See Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012)(Robreno, J.). With the benefit of this more recent clarification of maritime law, the Court now considers Defendant Crane Co.'s objections to the report and recommendation regarding its motion for summary judgment, and addresses the issues reserved by Judge Hey for decision by Judge Robreno.

I. Legal Standard

A. Report and Recommendation (and Review Upon Objections)

The Court may refer motions for judgment on the pleadings to a magistrate judge for a report and recommendation. See 28 U.S.C. § 636(b)(1)(B)-(C). A party may file written objections to the report and recommendation. Id. § 636(b)(1). The Court conducts a de novo review of those portions of the report and recommendation to which a party objects and may, if appropriate, "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." See id.

B. 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.

C. The Applicable Law

Defendant contended that maritime law applies, while Plaintiff contended that New York 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.

The alleged exposure pertinent to Defendant occurred aboard ships. Therefore, these exposures were during sea-based work. See Conner, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at *1 n.1. Accordingly, maritime law is applicable to Plaintiff's claims against Foster Wheeler. See id. at 462-63.

D. 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., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012)(Robreno, J.).

E. 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., 842 F. Supp. 2d 791, 801 (E.D. Pa. 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))).

II. Defendant Crane Co.'s Motion for Summary Judgment and Objections to Report and Recommendation

A. Defendant's Arguments

In the Motion, Crane Co. contended that Plaintiff's evidence was insufficient to establish that any product for which it is responsible caused Decedent's asbestos-related injury. Crane Co. also asserted the so-called "bare metal defense," arguing that it had no duty to warn about (and cannot be liable for) injury arising from any product or component part that it did not manufacture, supply, or install. (Defendant also asserted the government contractor defense.)

With its Objections, Crane Co. contends that it is entitled to summary judgment on grounds of the bare metal defense (and insufficient evidence of product identification/causation) because Plaintiff has failed to identify sufficient evidence to establish that any product manufactured or supplied by Crane Co. caused his asbestos illness (or even exposed him to respirable asbestos dust).

B. Plaintiff's Arguments

In its opposition to the Motion (see Doc. Nos. 74-75), Plaintiff contended that Defendant had a duty to warn of all foreseeable uses of its product, and that she had identified sufficient evidence to establish that Defendant's products

contained asbestos and/or were used with asbestos in a foreseeable manner. In support of Plaintiff's assertion that she had identified sufficient product identification/causation evidence to survive summary judgment, Plaintiff cited to the following evidence:

- Deposition of Mr. Donn
  Plaintiff contends that Mr. Donn testified that, while working aboard submarines, he worked around Crane Co. valves on hundreds of occasions, and was exposed (during maintenance and repair) to dust from asbestos insulation, asbestos gaskets, and packing used with Crane Co. valves.

- Documents and Discovery Responses
  Plaintiff points to various documents and discovery responses of Crane Co., which indicate that Crane Co. valves were supplied with asbestos-containing gaskets and packing, that Crane Co. supplied some asbestos-containing replacement parts for use with its valves, and that Crane Co. specified that asbestos-containing insulation should be used with its valves.

- Deposition Testimony of Crane Co. Corporate Representative (William McLean)
  Mr. McLean testified that Crane Co. supplied valves with asbestos-containing gaskets and packing, could foresee (and even knew) that its valves would need component parts replaced, and called for or required the use of asbestos-containing components with its valves.

C. Analysis

Plaintiff alleges that Decedent was exposed to asbestos dust from gaskets, packing, and insulation used in connection with Crane Co. valves. There is evidence that Decedent worked around gaskets, packing, and insulation used with Crane Co. valves on numerous occasions, on various submarines, and that the

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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gaskets, packing, and insulation were disturbed in his presence, such that respirable dust was generated.

Importantly, however, there is no evidence that any of the gaskets, packing, or insulation to which Decedent was exposed (in connection with Crane Co. valves or any other product) were manufactured or supplied by Crane Co. Therefore, even when construing the evidence in the light most favorable to Plaintiff, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from gaskets, packing, or insulation (or any other product) manufactured or supplied by Defendant such that it was a "substantial factor" in the development of his illness. 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-containing products (or component parts) to which Plaintiff may have been exposed in connection with Crane Co. valves, but which were 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.

In light of this determination, the Court need not reach Defendant's argument regarding the government contractor defense.

D. Conclusion

Defendant's Objections to the R&R issued on Defendant's Motion are sustained, and summary judgment in favor of Defendant Crane Co. is granted on grounds of the so-called "bare metal defense," as recognized under maritime law.