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

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	:	CONSOLIDATED UNDER MDL 875
VARIOUS PLAINTIFFS	:	
v.	:	Cases transferred from the Southern District of Georgia listed in Exhibit "A," attached
VARIOUS DEFENDANTS	:	

FILED
APR 18 2011
MICHAEL E. KUNZ, Clerk
By_____ Dep. Clerk

O R D E R

AND NOW, this **14th** day of **April 2011**, it is hereby **ORDERED** that Defendant CSX Transportation, Inc.'s Objections to Magistrate Judge M. Faith Angell's Report and Recommendation, listed in Exhibit "A," attached are **SUSTAINED**.[1]

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[1] Before the Court are Defendant CSX Transportation, Inc.'s Objections to four separate Report and Recommendations issued by Magistrate Judge M. Faith Angell. The evidence produced, Judge Angell's Report and Recommendation, and the Defendant's Objections are identical in all four cases, and the Court will therefore address them together. Citations to the record are from the case Vickers v. CSX Transportation Inc., 09-74209.

Pursuant to 28 U.S.C. § 636(a)(1)(c), "a judge of the Court shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made. A judge of the Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

In the cases listed in Exhibit "A," attached, Plaintiffs rely on four pieces of evidence to establish that Defendant CSX Transportation, Inc. ("CSX") negligently caused decedents to be exposed to asbestos. First, decedents' answers to interrogatories, setting forth their respective work histories with CSX. The final three pieces of evidence are affidavits and

depositions from unrelated matters establishing that asbestos was present at CSX Transportation's Waycross, Georgia Shop facility ("Waycross") and that workers at the Waycross would have been exposed to asbestos dust. (See Aff. of Robert L. Rollins, Jr., doc. no. 16-2, ¶ 6)("It is my opinion that anyone who worked in the CSX Waycross, Georgia Shop facility during the[] years [1960-1993] would have been exposed to this visible [asbestos] dust on a regular basis."); (William Edwin Mims Dep., doc. no. 16-3 at 11 (asbestos containing products were used at the Waycross facility); (Mark Badders Dep. I, doc. no. 16-4 at 18-19)(discussing the education of workers at the Waycross facility about asbestos); (Mark Badders Dep. II, doc. no. 16-5)(discussing the present of asbestos at the Waycross facility).

In her Report and Recommendation ("R&R"), Magistrate Judge Angell determined that Plaintiffs had raised a genuine issue of material fact as to whether decedents' asbestos-related injuries were caused by CSX. She correctly noted that defendant bears the heavy burden of foreclosing a genuine issue of material fact as to at least one of the required elements for negligence in order to prevail on summary judgment in Federal Employers Liability Act ("FELA") cases. (R&R at 5); McCain v. CSX Transportation, Inc., 708 F.Supp. 2d 494, 497-98 (E.D. Pa. 2010)(Robreno, J.). The elements for establishing negligence in FELA cases are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; (4) the employer's negligence played some part in causing the injury for which compensation is sought. 45 U.S.C. §§ 51 et. seq. Summary judgment in favor of defendant in FELA cases will be granted "only in those extremely rare instances where there is zero probability of employer negligence or that any such negligence contributed to the injury of an employee." McCain, 708 F.Supp. 2d at 497 (quoting Hines v. Conrail, 926 F.2d 262, 268 (3d Cir. 1991).

Defendant argues that it has met its burden in the instant cases, because the only evidence that Plaintiffs actually worked at Waycross, and were injured "within the scope of his or her employment" are Plaintiffs' own answers to interrogatories, which will not be admissible at trial. (Def.'s Objects., doc. no. 21, at 3.) Under Federal Rule of Civil Procedure 56(c)(2), "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Defendants correctly note that Plaintiffs' answers to

interrogatories cannot be reduced to an admissible form because Plaintiffs have passed away, and therefore cannot be cross-examined on the statements regarding their respective work histories at Waycross.

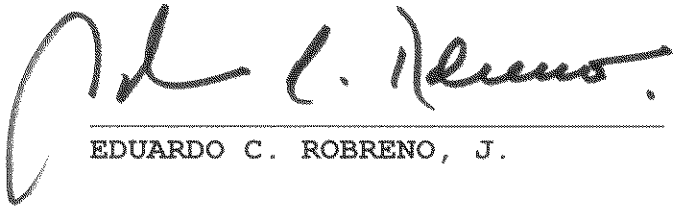
The Third Circuit Court of Appeals has squarely held that answers to interrogatories regarding the cause of Plaintiff's asbestos-related injury are not admissible "without the opportunity for cross-examination." Kirk v. Raymark Industries, Inc., 61 F.3d 147, 167 (3d Cir. 1995). In Kirk, defendant Owens-Corning sought to introduce settled defendant Garlock's answers to interrogatories, which stated that its asbestos-containing products were present at plaintiff's worksite. Id. at 166. Plaintiff, in response, used Garlock's answers to show that its products were encapsulated and did not cause plaintiff's injuries. Id. The only possible way for either party to introduce the hearsay statement was to show that it fell under Rule 803(24) of the Federal Rules of Evidence, the "catch-all" or "residual" hearsay exception. Plaintiffs argued that because the responses were signed and sworn under penalty of perjury, they met the trustworthiness requirement of Rule 803(24). However the Third Circuit found that the answers were inadmissible because of their self-serving nature; the response of a party "seeking to avoid liability lacks the 'circumstantial guarantees of trustworthiness' that are contemplated by Rule 803(24) of the Federal Rules of Evidence." Id. at 167.

Similarly, here, Plaintiffs' answers to their own interrogatories are self-serving and are offered in order to establish liability, and lack the "circumstantial guarantees of trustworthiness" required under Rule 803(24). Moreover, Plaintiffs have made no attempt to show that the answers relied upon meet the requirements of Rule 803(24), and have made no attempt to distinguish their cases from Kirk, which is factually similar to the instant cases. Plaintiffs simply state that "[Mr. Rollins's] [a]ffidavit along with the Plaintiff's interrogatories provide sufficient evidence to deny Defendant's Summary Judgment." (Pl.'s Resp. Mot. Summ. J., doc. no. 16, at 4.)

Having determined that Plaintiffs' answers to interrogatories are inadmissible, the question remains whether the other evidence on record is sufficient to raise a genuine issue of material fact in the instant cases. The only other evidence on record are Mr. Rollins's affidavit, William Edwin Mims's deposition, and Mark Badders's depositions. However, these are not specific to the instant cases, and do not discuss

It is further **ORDERED** that Defendant CSX Transportation, Inc.'s Motions for Summary Judgment Motions for Lack of Exposure Evidence, listed in Exhibit "A," attached are **GRANTED**.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.

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these individual Plaintiffs' work history at Waycross. Rather, they constitute general testimony, taken in unrelated matters, establishing the presence of asbestos at Waycross. Even assuming that this general testimony is admissible, it fails to place these Plaintiffs at the worksite, or in the vicinity of any asbestos-containing products.

While it is true that summary judgment in favor of employers in FELA cases is to be granted only in situations "where there is zero probability . . . [that employer] negligence contributed to the injury of an employee," these cases fall into that category, based on the lack of any admissible evidence of work history with respect to these four individuals. McCain, 708 F.Supp. 2d at 497. Even under the liberal FELA standards for establishing negligence, Plaintiffs must still raise a genuine issue of fact as to whether their injuries were caused by their employer's negligence. Plaintiffs did not respond to Defendant's argument regarding the admissibility of their answers to interrogatories with either (1) an argument regarding admissibility or (2) an alternative source to establish work history in these cases. Notably, Plaintiffs also did not file a response to Defendant's objections to the Report and Recommendations. Under these circumstances, where Plaintiffs have made no attempt to produce admissible evidence placing Plaintiffs at the worksite at issue, Defendant is entitled to judgment as a matter of law.

Exhibit A

Allen	09-74175	doc. no. 7
Vickers	09-74209	doc. no. 14
Tyson	09-74302	doc. no. 13
Mullis	09-74344	doc. no. 8