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

GRAMMER, et al.,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiffs,	:	
	:	Transferred from the Central
	:	District of California
v.	:	(Case No. 09-07599)
	FILED	
	OCT 17 2012	
ADVOCATE MINES, LTD., et al.,	:	E.D. PA CIVIL ACTION NO.
	MICHAEL E. KUNZ, Clerk	2:09-92425
Defendants.	By_____ Dep. Clerk	

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. (ECF No. 180) is **GRANTED**.[1]

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[1] This case was filed in California state court on September 14, 2009. It was removed to the United States District Court for the Central District of California on October 20, 2009, and in December, 2009 was transferred to the Eastern District of Pennsylvania as part of MDL 875. Plaintiffs allege that their Decedent, Kenneth H. Grammer, was diagnosed with, and has since died from, mesothelioma as a result of his exposure to Defendant's asbestos-containing products during his service in the U.S. Navy from 1956 to 1963.

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.

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. Motion for Summary Judgment of Defendant Crane Co.

A. Applicable Law

Maritime law governs Plaintiffs' claims, which involve his sea-based Navy work on allegedly defective products that were produced for use on vessels. See Conner v. Alfa Laval, Inc., 2011 WL 3101810 at *8 (E.D. Pa. 2011) (Robreno, J.). Such claims meet the locality and connection tests necessary for maritime law to apply.

B. Product Identification/Causation under Maritime Law

Mr. Robert Grammer (the "witness"), the Decedent's brother and co-worker (for approximately ten months) on the USS Ashtabula, testified that he and Decedent worked on Crane valves aboard the Ashtabula when the ship was underway and while it was being overhauled in Sasebo, Japan. (Grammer Depo. at 84-85, Pl.'s Ex. 1). The witness testified that he and Decedent would know it was a Crane valve they were working on because the name would be

cast into the body of the valve itself. (Id. at 176). Furthermore, in the room where the witness and Decedent worked, there were 16 valves in all. (Id. at 177). The witness saw Decedent work on Crane valves "several times." (Id. at 85). The men would pull the Crane valves out and then "completely rebuild them, new packing, relap the seats, reface the flanges." (Id. at 86). The witness saw Decedent removing gaskets from the flanges on the Crane Co. valves by scraping the gasket material off and pneumatic wire-brushing the "flange boss." (Id. at 87). The witness testified that the removal of the gasket material from the flanges would send very fine particles in the air, which the men would inhale. (Id. at 88-89). Additionally, the witness recalled Decedent standing near others who were working on Crane valves, including scraping the gaskets off of the flanges on valves. (Id. at 91-92).

C. Government Contractor Defense

Defendant has produced evidence regarding the government's involvement in the design and manufacture of products such as valves and sealing materials to be used on Navy ships. For example, Admiral Sargent wrote that the Navy developed specifications used in the contract design package and that thousands of military specifications were developed for various materials, equipment, components, books, manuals and label plates. (See Sargent Aff., Def.'s Ex. C; Sargent Report, Def.'s Ex. D). Admiral Sargent was deposed in this matter, and he said, inter alia, that he had never seen health-related warnings in technical manuals. (See Sargent Dep. at 78-81, Def.'s Ex. H). Additionally, Defendant's corporate witness, Anthony Pantaleoni, confirmed that Crane Co. complied with applicable government specifications in providing products to the government. (See Pantaleoni Aff., Def.'s Ex. E). Defendant further provides examples of Military Specifications, such as Mil-V-22052D, which sets forth the information that manufacturers must include on valve label plates. (Def.'s Br. at 7-8, doc. no. 180).

Plaintiffs have produced evidence that the Navy did not prevent product manufacturers from warning of asbestos hazards; that other manufacturers did warn about their asbestos-containing products; and that there is evidence that the Navy knew of the hazards of asbestos. For example, Plaintiffs present the affidavit of Navy Captain Arnold Moore, who testified that "[t]he Navy relied heavily upon its equipment manufacturers to identify hazards associated with their products. The hazards associated with exposure to asbestos and asbestos containing materials and

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

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equipment were not exempt." (Moore Aff. at ¶ 12, Pl.'s Ex. 3). Additionally, Captain Moore opined that the Navy did not prohibit equipment manufacturers from providing precautions or hazard warnings in their instruction manuals. (Id. at ¶ 15).

Furthermore, Captain Moore discussed the Navy's adoption in 1956 of a Uniform Labeling Program, that included within the definition of a toxic hazard any material that could give off a harmful dust during handling or operations, and that suggested stringent precautionary measures. (Id. at ¶ 24; see also Pl.'s Exs. 21, 23).

Plaintiffs further present the expert report of Navy Captain Francis Burger, who opined that based on his experience as a contractor and Navy engineer, manufacturers of asbestos-containing equipment supplied to the Navy played an active role in developing Military Specifications. (Burger Report at 4, Pl.'s Ex. 8). Plaintiffs also present examples of Military Specifications discussing warnings for various products. (Pl.'s Br. at 31-36, doc. no. 215).

D. Bare Metal Defense under Maritime Law

Plaintiffs allege that Decedent was exposed to asbestos from valves (or other products) manufactured and/or supplied by Defendant Crane Co. There is evidence that Decedent worked on Crane valves aboard the Ashtabula when the ship was underway and while it was being overhauled in Sasebo, Japan. Also, Plaintiffs presented evidence that countered Defendant's evidence regarding the government contractor defense. However, there is no evidence that Decedent was exposed to respirable asbestos from (or used in connection with) a valve (or other product) manufactured or supplied by Crane Co. Moreover, there is no evidence that any asbestos to which he was exposed in connection with any product was from an asbestos-containing component part manufactured or supplied by Crane Co. Therefore, no reasonable jury could conclude from the evidence that Decedent was exposed to asbestos from any product manufactured or 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 Crane Co. is warranted. Anderson, 477 U.S. at 248.