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

HAPPEL,	:	
	:	Consolidated Under
Plaintiff,	:	MDL DOCKET NO 875
	:	
v.	:	Civil Action
	:	No. 09-70113
ANCHOR PACKING CO., ET AL.	:	
	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this **13th** day of **October 2010** it is hereby **ORDERED** that Defendant Yarway Corp.'s Motion for Summary Judgment (doc. no. 59), filed on August 30, 2010, is **DENIED.**[1]

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[1] Plaintiff, Janice Happel, Individually and as Executrix of the Estate of Ernest Happel commenced this action in February 2009 in the Superior Court of the State of Delaware in New Castle County, against numerous defendants, alleging injury to Mr. Happel due to exposure to asbestos. (Def. Foster Wheeler's Mot. Summ. J, doc. no. 43, at 3). Plaintiff alleges that Mr. Happel developed lung cancer as a result of occupational exposure to asbestos while serving as a machinist mate in the United States Navy on the USS Hugh Purvis from 1950-1954, and subsequently from performing maintenance work on personal automobiles. (Id.). Mr. Happel passed away from asbestos-related cancer on December 20, 2007. (Pl.'s Resp., doc. no. 76 at 2).

When evaluating a motion for summary judgment, Federal Rule of Civil Procedure 56 provides that the Court must grant judgment in favor of the moving party when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact . . . ." Fed. R. Civ. P. 56(c)(2). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is

sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence the court should draw all reasonable inferences against the moving party." El v. SEPTA, 479 F.3d 232, 238 (3d Cir. 2007).

"Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by showing - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof." Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004) (quoting Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001)). Once the moving party has discharged its burden the nonmoving party "may not rely merely on allegations or denials in its own pleading; rather, its response must - by affidavits or as otherwise provided in [Rule 56] - set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

Under Delaware law, a plaintiff asserting a claim for asbestos-related injuries must introduce evidence showing a product nexus between defendant's product and plaintiff's asbestos-related injuries. Delaware courts have not followed the "frequency, proximity, and regularity" test, first set forth in Lohrmann, which has been adopted as the test in numerous jurisdictions. Delaware courts simply require that a plaintiff show that he was in proximity to the product at the time it was being used. Nutt v. A.C. & S. Co., 517 A.2d 690 (Del. Super. Ct. 1986). Plaintiff must show "that the asbestos product was used in an area where the plaintiff frequented, walked by, or worked adjacent to, with the result that fibers emanating from the use of the product would have been present in the area where the plaintiff worked." Cain v. Green Tweed & Co., Inc., 832 A.2d 737, 741 (Del. 2003). "Implicit within this product nexus standard is the requirement that the particular defendant's product to which the plaintiff alleges exposure must be susceptible to releasing fibers which are capable of ingestion or respiration into the plaintiff's body." In re Asbestos Litigation, 2007 Del. Super. LEXIS 155 *65 (Del. Super. Ct. 2007), aff'd, 945 A.2d 593 (Del. 2008) (quoting Merganthaler v. Asbestos Corp. of America, 1988 WL 116405 at *1-2 (Del. Super. Ct. 1988)).

To meet this "product nexus" standard, Plaintiff must establish a connection in space and time to Defendant's product. 2007 Del. Super. LEXIS at *65-66. Also, Defendant's product must be capable of releasing friable asbestos fibers. Id. Delaware courts have held that a plaintiff can survive summary judgment if there is testimony that asbestos-containing products were used at a worksite during the time plaintiff was employed there. Farrall v. A.C.&S. Co., 1988 Del. Super. LEXIS 176 at *6 (Del. Super. Ct. 1988). However, it is insufficient to overcome summary judgment if the "time and place" testimony is based on speculation or conjecture. Id. (citing In re: Asbestos Litigation, 509 A.2d 1116 at 1117-18 (Del. Super. Ct. 1986)).

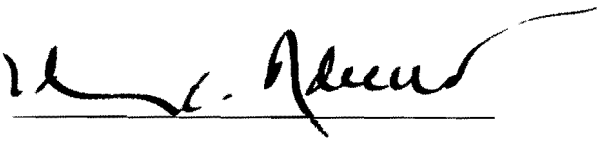
Defendant claims that there is no evidence that Mr. Happel was actually exposed to Yarway products and that even if Mr. Happel was exposed, there is no evidence that these products contained asbestos. Plaintiff presents the testimony of Mr. Lempges. Mr. Lempges held a position similar to Mr. Happel on the USS Hugh Purvis, and remembered Mr. Happel. Mr. Lempges testified that he and Mr. Happel were primarily assigned to the same boiler room, the After Engine Room (room 2) although they both also worked in the Forward Engine room (room one) on the USS Hugh Purvis. (Lempges Depo., doc. no. 76-1, pp. 27-28, July 19, 2010). Mr. Lempges testified about Yarway Corp. traps.

Q: Do you recall seeing Yarway thermostatic steam traps on this ship, on the Purvis?
A: Specifically, if it was, there were very few of them in our area, not a lot of them.
Q: In our area, do you mean the engine room?
A: The engine room, yes.
Q. Do you recall Mr. Happel doing any work on the Yarway thermostatic steam trap?
A. I don't remember him specifically doing any maintenance or operation on the steam traps.
Q. Do you recall Mr. Happel being around anyone doing any work on the Yarway thermostatic steam trap?
A. Well, in the close proximity of equipment, in the equipment room, we were all close in the proximate area.
Q. Sir, my question is, as you sit here today, do you recall seeing Mr. Happel around anyone when they were working on a Yarway thermostatic steam trap?
A. To the best of my knowledge, I can't remember him specifically being there, no. I'm not saying that he wasn't, but I wasn't with him all of the time.

(Lempges Depo. at 169-70). Plaintiff presents naval records establishing that Yarway Steamtraps were installed on the USS Hugh Purvis. (Pl.'s Reply Br., doc. no. 75 at 4). Mr. Lempges testified that Yarway Steamtraps were installed in the area where Mr. Happel worked, but could not aver that Mr. Happel actually worked on these traps. Under Delaware law, Plaintiff has raised a genuine issue of material fact showing a nexus between Defendant's product and the area where Plaintiff worked. Plaintiff has presented enough evidence to meet the product nexus standard by showing that Mr. Lempges, who held a similar position to Mr. Happel and also worked in an engine room on the USS Hugh Purvis, was exposed to Yarway Steamtraps. Mr. Lempges' testimony and the naval records establish that Yarway Steamtraps were installed in the area where Mr. Happel worked.

Plaintiff must also show that Defendant's product was capable of releasing friable asbestos fibers. Mr. Lempges testified that the pipes attached to the traps contained asbestos, but did not testify as to whether the traps themselves contained asbestos. (Lempges Depo. at 171). Defendant's interrogatory answers indicate that their products contained asbestos sealing components which were necessary for the product to function. (Id.) While there is evidence that component parts to the pump contained asbestos, there is no evidence that the pump itself contained asbestos. The Delaware Supreme Court has not yet addressed whether it would impose a duty to warn on manufacturers whose products are incorporated with asbestos-containing component parts. This case should be remanded to the transferor court to determine whether it imposes a duty to warn on manufacturers who know that asbestos-containing component parts will be incorporated into their products.

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO

Therefore, Yarway Corp.'s Motion for Summary Judgment is denied.