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

THOMAS LEWIS, ET AL., Plaintiffs,	:	CONSOLIDATED UNDER MDL 875
v.	:	Transferred from the District of New Jersey (Case No. 10-CV-650)
ASBESTOS CORP., LTD., ET AL., Defendants.	:	E.D. PA CIVIL ACTION NO. 2:10-64625

FILED
AUG - 2 2011
MICHAEL E. KUNZ, Clerk
By__________Dep. Clerk

O R D E R

AND NOW, this **29th** day of **July, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant General Electric Co. (doc. no. 47) is **DENIED**.[1]

[1] Plaintiff filed this action on February 13, 2008 in the New Jersey Superior Court. This case was removed to the United States District Court for the District of New Jersey on or about February 4, 2010. This case was transferred to the United States District Court for the Eastern District of Pennsylvania on or about April 9, 2010 as part of MDL-875. Plaintiff alleges that Mr. Lewis was exposed to asbestos when he worked at Johns-Manville in Manville, New Jersey starting in 1965 until approximately 1967, at Chicago Bridge & Iron in Birmingham, Alabama from 1967 until 1977, and as a boilermaker at various job sites from 1977 until 2000. The alleged exposures relevant to General Electric occurred at various power plants in Alabama. Mr. Lewis was diagnosed with mesothelioma on May 18, 2006 and passed away on June 28, 2008.

I. LEGAL STANDARD

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of 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

For the purposes of this motion, because the parties have agreed, this Court will apply New Jersey law, despite the fact that all relevant exposures occurred in Alabama.

In Coffman v. Keene Corp., the plaintiff claimed that an asbestos manufacturer's failure to place warnings on its asbestos-related products was a proximate cause of the plaintiff's development of asbestosis. 628 A.2d 710, 715 (N.J. 1993). The court recognized that, "[c]ausation is a fundamental requisite for establishing any product-liability action. The plaintiff must demonstrate so-called product-defect causation-that the defect in the product was a proximate cause of the injury." Id. at 716 (citing Michalko v. Cooke Color & Chem. Corp., 451 A.2d 179 (N.J. 1982); Vallillo v. Mushkin Corp., 514 A.2d 528 (N.J. App. Div. 1986)). "When the alleged defect is the failure to provide warnings, a plaintiff is required to prove that the absence of a warning was a proximate cause of his harm." 628 A.2d at 715 (citing Campos v. Firestone Tire & Rubber Co., 485 A.2d 305 (N.J. 1984)). The court adopted a "heeding presumption" in products liability failure to warn cases that the plaintiff "would have followed an adequate warning had one been provided, and that the defendant in order to rebut that presumption must produce evidence that such a warning would not have been heeded." 628 A.2d at 720. Evidence that the plaintiff

was aware of the dangers associated with the defendant's product or that the plaintiff would have disregarded the warnings had they been provided may rebut this heeding presumption. Id. at 721. The court held that "to overcome the heeding presumption in a failure-to-warn case involving a product used in the workplace, the manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning." Id. at 724.

II. MOTION FOR SUMMARY JUDGMENT OF GENERAL ELECTRIC CO.

Defendant asserts that Plaintiffs have failed to establish causation on the failure to warn claim since Randall Lewis, Thomas Lewis' brother, "conclusively testified that even if General Electric had provided warnings about any alleged hazards of asbestos associated with insulation on its turbines that these warnings would have had no impact on the work he and his brother performed or their alleged exposure to any asbestos on the turbines." (Def.'s Mot. Summ. J. at 1.)

Randall Lewis testified that he learned about the dangers of asbestos in 1971 or 1972. (Lewis Dep. at 153.) "[E]verybody said they had outlawed asbestos or were going to outlaw asbestos. . . "[a]nd every bit of that stuff that they could get their hands out, they dumped it on that job. And we dumped in the top of that boiler." (Id.) Randall Lewis was asked about his brother, Thomas Lewis,

Q: Okay. Why would he have exposed himself to asbestos for all the years you've told us about rather than just quit or get protection?
Mr. Kuzmin: Object to form.
A: Because he had three children up there to feed is why, and it paid good.

(Id. at 153-54.) Randall Lewis testified that he did not always get tied off when working on boilers as required by OSHA, but when asked about whether his brother, Thomas Lewis, tied off, Randall Lewis responded, "[n]ow, I don't know about him." (Id. at 162.) Randall Lewis testified that a worker, who had not tied off, died when he fell, but that this did not change the ways guys were doing their jobs "in the least." (Id. at 181.) Randall Lewis was asked,

Q: Did you know that the boilermakers union had actually sponsored seminars regarding the health hazards of asbestos at least two years before your brother ever started in the union?

Mr. Kuzmin: Object to form.
A: No, I didn't. . .
Q: Do you know who would have changed anything about the way your brother worked around asbestos?
Mr. Kuzmin: Object to form.
A: That, I can't say either.

(Id. at 183-84.) Randall Lewis testified that he didn't think that his brother would have quit his job if he had known about the union conference about the dangers of asbestos. (Id. at 185.)

Q: And some of the dangers that they talked about were cancer and asbestosis. Do you remember those dangers being talked about?
A: Yes.
Q: Okay. And when you hard about that in the early '70s, did it change the manner in which any of the workers were working with asbestos, as far as you're aware?
Mr. Kuzmin: Object to form.
A: As far as I'm aware, it never changed nothing, I mean.

(Id. at 182.)

Randall Lewis testified that General Electric technical representatives were present on some of the jobs he worked on, but that he did not know exactly what they did there. (Id. at 189.) He was asked more specifically about General Electric,

Q: Did the GE technical reps have anything - any interaction with the boilermakers?
A: No.
Q: Okay. They never directed you or your brother -
A: No.
Q: - or any of you union telling you how to do the job; is that right?
A: No.
Q: That is correct; right?
A: That's correct.
Q: Okay. And did you or your brother ever consult GE technical manuals on how to do your job?
A: No.
Q: Did you or your brother ever consult or rely upon GE technical drawings or specifications on how to do your job?
A: No.

(Id. at 190-91.) He testified that [w]e had no contact with General Electric." (Id. at 192.)

Q: Okay. And did you ever - did you ever rely upon reading the sides of a GE turbine to allow you to make decisions on how you should work around insulation?
A: No, I didn't.
Q: Okay. Did it matter to you whether GE turbines told you that asbestos was dangerous or not? Would that have anything to do with how you or your brother did your job?
Mr. Kuzmin: Object to form.
A: No, it wasn't.

(Id. at 192-93.)

Plaintiff points to Randall Lewis' testimony that he was almost completely unaware of the dangers of asbestos until he and Thomas Lewis enrolled in an asbestos abatement training class in the late 1980s or early 1990s. (Lewis Dep. at 62-64.) He was asked,

Q: And after having gone to the abatement class in the late '80s or early '90s, did you follow the precautions and procedures that they told you about?
A: To the letter.

(Id. at 64.) Plaintiff asserts that Randall Lewis merely speculates as to whether his brother would have followed warnings and that this does not rebut the heeding presumption applied in failure to warn cases.

In order to rebut the "heeding presumption" that Thomas Lewis would have followed warnings had they been provided, Defendant presents the deposition testimony of Randall Lewis, Thomas Lewis' brother. Randall Lewis testified that Thomas Lewis did not quit his job after learning of the dangers of asbestos because he had to feed his children and the job paid well. This does not establish that Thomas Lewis would not have abided by warnings that he use a face mask or take other precautions to avoid inhalation of asbestos fibers. In fact, Randall Lewis testified that once he (Randall Lewis) learned of abatement procedures, he followed them "to the letter." Randall Lewis' testimony does not establish that Thomas Lewis was aware that General Electric turbines were insulated with asbestos, but only that the workers knew of the dangers of asbestos in 1971 or 1972.

Randall Lewis testified that he did not follow OSHA procedures in that he did not get "tied off" when working on boilers, but Randall Lewis did not know whether his brother got "tied off." Thus, there is no evidence that Thomas Lewis

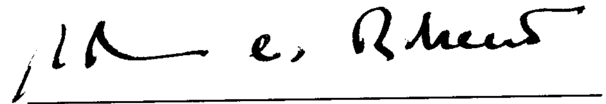
habitually failed to abide by warnings. Randall Lewis "couldn't say" whether Thomas Lewis' practice in handling asbestos would have changed if he had attended seminars sponsored by the boilermakers association.

Randall Lewis did testify that knowledge of the dangers of asbestos did not change the way that the workers handled asbestos. Also, Randall Lewis testified that the workers had no contact with General Electric and that nothing General Electric did would have changed the way that he or his brother performed their jobs. The Coffman court considered the role of the employer in providing manufacturer's warnings to their employees. Here, there is no evidence as to whether Thomas Lewis would have abided by a warning given by his employer or union had General Electric provided a warning to the employer or the union. Randall Lewis merely speculates as to what actions his brother would or would not have taken.

In totality, Defendant has failed to rebut the "heeding presumption" that Thomas Lewis would have followed a warning had it been provided by General Electric and accordingly, Defendant's Motion for Summary Judgment is denied.

E.D. PA NO. 2:10-64625

AND IT IS SO ORDERED.



EDUARDO C. ROBRENO, J.