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

CHARLES KRIK,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiff,	:	
	:	
	:	Transferred from the Northern
v.	:	District of Illinois
	:	(Case No. 10-07435)
	:	
BP AMERICA, INC.	:	
ET AL.,	:	E.D. PA CIVIL ACTION NO.
	:	2:11-63473-ER
Defendants.	:	

O R D E R

AND NOW, this **14th** day of **May, 2012**, it is hereby **ORDERED** that the Motion to Strike of Defendant Owens-Illinois (Doc. No. 244) is **DENIED**; and the Motion for Summary Judgment of Defendant Owens-Illinois (Doc. No. 165) is also **DENIED.**[1]

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[1] This case was transferred in February of 2011 from the United States District Court for the Northern District of Illinois to the United States District Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff Charles Krik ("Plaintiff") worked as a boilerman and boilermaker during his Navy career, from 1954 to 1970. His duties included pipefitting and insulation work. Plaintiff worked on repair ships for about six (6) years of his naval career, including some work in the valve shop when repairing the USS Tutuila. During his civilian career, Plaintiff worked as a boilermaker and pipefitter, including work for two unions in the Chicago area. In 1990, he received training in asbestos removal to recognize what materials were asbestos. Defendant Owens-Illinois, Inc. ("Owens-Illinois") manufactured Kaylo block insulation. Plaintiff has alleged that he was exposed to asbestos from Kaylo manufactured by Defendant during the following periods of his work:

- Work aboard various destroyers - 1954-1961
- Bryce Canyon (Repair ship) - 1958-1961

Plaintiff was diagnosed with lung cancer in November of 2008 and bilateral pleural plaque formations in June of 2011. He was deposed for two (2) days in July and August of 2011.

Plaintiff has brought claims against various defendants. Defendant Owens-Illinois has moved for summary judgment, arguing that there is insufficient product identification evidence to establish causation with respect to its product(s). Defendant contends that maritime law applies to Plaintiff's alleged exposure to its products. Plaintiff contends that Illinois law applies.

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

Defendant Owens-Illinois has asserted that maritime law is applicable with respect to Plaintiff's claims against it.

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 meet the connection test necessary for the application of maritime law. Id. 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.

In instances where there are distinct periods of different types (e.g., sea-based versus land-based) of exposure, the Court may apply two different laws to the different types of exposure. See, e.g., Lewis v. Asbestos Corp., Ltd., No. 10-64625, 2011 WL 5881184, at *1 n.1 (E.D. Pa. Aug. 2, 2011)(Robreno, J.) (applying Alabama state law to period of land-based exposure and maritime law to period of sea-based exposure).

It is undisputed that the alleged exposure pertinent to Owens-Illinois occurred during Plaintiff's work aboard various ships (including the repair ship Bryce Canyon). Although Plaintiff alleges that this work included some work in the valve shop (i.e., on land) when repairing the USS Tutuila, none of the allegations or evidence as to Defendant Owens-Illinois pertain to this work in the valve shop. Therefore, the alleged exposure pertinent to this defendant was during sea-based work. See Conner, 799 F. Supp. 2d 455. Accordingly, maritime law is applicable to Plaintiff's claims against Owens-Illinois. See Conner, 799 F. Supp. 2d at 462-63.

C. 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))).

D. The "Sham Affidavit" Doctrine

The "sham affidavit doctrine" is recognized pursuant to Federal Rule of Civil Procedure 56 as a way of showing that there is no genuine dispute as to any material fact. Given that the "sham affidavit doctrine" is an issue of federal law, the MDL transferee court applies the federal law of the circuit where it sits, which in this case is the law of the United States Court of Appeals for the Third Circuit. In re Asbestos Prods. Liability Litig. (No. VI), 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009) (citing In re Diet Drugs Liability Litig., 294 F. Supp. 2d 667, 672 (E.D. Pa. 2003)).

In Baer v. Chase, the United States Court of Appeals for the Third Circuit described the "sham affidavit" doctrine noting that, "we have held that a party may not create a material issue of fact to defeat summary judgment by filing an affidavit disputing his or her own sworn testimony without demonstrating a plausible explanation for the conflict." Id. at 624 (citing Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991)).

Although the "sham affidavit doctrine" has traditionally been applied to strike affidavits filed after depositions have been taken, it applies with equal force to affidavits filed prior to the taking of a deposition. In re: Citx Corp., 448 F.3d 672, 679 (3d Cir. 2006). The United States Court of Appeals for the Third Circuit noted, [w]e perceive no principle that cabins sham affidavits to a particular sequence." Id. (internal citations omitted). Testimony taken in a deposition, rather than sworn to in an affidavit, is considered more favorable for summary judgment purposes since testimony sworn to in an affidavit is not subject to cross-examination. 448 F.3d at 680 (citing 10B Charles Alan Wright & Mary Kay Kane, Federal Practice and Procedure § 2722 at 373, 379).

II. Defendant Owens-Illinois's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Owens-Illinois argues that there is insufficient product identification evidence to support a finding of causation with respect to its product(s). Specifically, Owens-Illinois argues that it is entitled to summary judgment because it ceased manufacturing Kaylo in April 1958, at which point it sold the Kaylo business to Owens Corning Fiberglas – which was months before Plaintiff testified that he first saw Kaylo (after he boarded the Bryce Canyon in November of 1958).

Motion to Strike Plaintiff's Declaration (Sham Affidavit)

In connection with its reply brief, Owens-Illinois has filed a separate motion to strike requesting that the Court strike Plaintiff's declaration and any corresponding portions of his opposition brief on grounds that Plaintiff's declaration is a "sham affidavit." Specifically, Owens-Illinois contends that

Plaintiff testified at his deposition that he first worked with Kaylo after he boarded the Bryce Canyon in November of 1958, but his affidavit indicates that he worked with Kaylo during his earlier work aboard destroyer ships (dating back as far as 1954). Owens-Illinois contends that the affidavit testimony is therefore contradictory to and inconsistent with Plaintiff's deposition such that it should be stricken under the "sham affidavit doctrine."

B. Plaintiff's Arguments

Product Identification / Causation

Plaintiff argues that there is sufficient product identification evidence regarding Kaylo manufactured by Owens-Illinois. A summary of the evidence relevant to the analysis is as follows:

- Deposition Testimony of Plaintiff
  Plaintiff testified that, when assigned to the Bryce Canyon, he did all the insulation repair. He testified that, as soon as he boarded this ship in November of 1958, he had responsibility for ordering insulation materials. He testified that the standard brand that was used for brickwork in the Navy was Kaylo block insulation. He testified that Kaylo was ordered out of a standard Navy supply catalog and that the Kaylo block insulation was the most prevalent type, which he believed was due to temperature ranges. He testified that Kaylo block insulation would be used on any brickwork insulation used on destroyers. He testified that fireboxes, steam drum, and mud drum were the parts of the boiler that involved Kaylo. He testified that during his time aboard ships that came before his time on the Bryce Canyon, the ordering of insulation was done by others who were more senior than he was.

  (Pl. Ex. 1, Doc. 224-1, Dep. of Charles Krik, July 18, 2011, pages 13-15, 70-74, 132-38, and 146-50.)

- Declaration Testimony of Plaintiff
  Plaintiff provides declaration testimony stating:

3. The brickwork on fireboxes on the Pacific fleet destroyers had to be rebuilt about every 18 months which required removal and replacement of the insulation block. The Kaylo blocks crumbled into pieces when they were removed, typically using a hammer, and the pieces and dust were swept up with a broom.

4. I performed at least 25 boiler firebox brickwork jobs while serving in the Navy before I was stationed on the Bryce Canyon. While serving on the Bryce Canyon, I performed about one firebox job every 2 months. I used about the amount of 6 cases of Kaylo before serving on the Bryce Canyon ship.

5. Before being stationed on the Bryce Canyon, I used Kaylo on about 25 superheater jobs and about 2 steam drum jobs. The amount of kaylo used on these jobs was 20-25 cases.

6. Application of the Kaylo blocks required cutting and sawing. These activities generated dust.

7. The Jenkins, Walker, Taylor, and Sproston are destroyers in the Pacific fleet that I served on between the years of 1954 and October 1958.

(Pl. Ex. 6, Doc. 224-6, Decl. of Charles Krik ¶¶ 3-7 (Jan. 27, 2012).)

- Discovery Responses of Defendant Owens-Illinois

Plaintiff points to 1983 discovery responses of defendant from another action, which state that (1) the Kaylo made by Owens-Illinois contained 13% to 25% asbestos, and (2) Owens-Illinois stopped manufacturing Kaylo on April 30, 1958, when the business was sold to Owens Corning Fiberglas.

(Pl. Ex. 5, Doc. No. 224-5, pp. 1, 7.)

- A "Military Quality Products List" (July 1, 1953)

  Plaintiff cites to a document entitled "Military Quality Products List" that is dated July 1, 1953 and indicates that it is "superseding" a version dated May 15, 1953. The document identifies "Owens-Illinois Glass Co., Kaylo Division" as the manufacturer of Kaylo that was distributed by "Owens-Corning Fiberglas Corp."

  (Pl. Ex. 12, Doc. No. 224-12, pp. 1-2.)

Motion to Strike Plaintiff's Declaration (Sham Affidavit)

In response to Defendant's motion to strike Plaintiff's declaration on grounds that it is a "sham affidavit," Plaintiff argues that nothing in his declaration is in contradiction with or inconsistent with his deposition testimony. Specifically, Plaintiff argues, first, that his declaration contains only additional details pertaining to the testimony given in his deposition. Second, Plaintiff contends that his declaration merely clarifies his deposition testimony by explaining that it was not until his time working aboard the repair ship (Bryce Canyon) that he began ordering the insulation himself such that he learned the name of the manufacturer of the insulation that he had been working with and around for years prior to the time he began ordering it himself (when it was ordered by others). Plaintiff cites to the following deposition testimony:

> Q: So how did Kaylo come into play in that?
> A: That's the first course.
> . . .
> Q: All right. What was your answer again?
> A: That's the first course of brickwork in a boiler, is insulating block.
> Q: And how did you know about this, that it was standard?
> . . .
> A: Because I've been using – I used it on destroyers, too when I – we used to do on our own – a lot of our own brickwork on destroyers, too. You wouldn't wait to until you went alongside of the repair ship. If we had to do it, then we'd order the stuff and do it ourselves.

(Pl. Dep. at pp. 133-34.)

C. Analysis

Motion to Strike Plaintiff's Declaration (Sham Affidavit)

As a preliminary matter, the Court considers Defendant Owens-Illinois's motion to strike Plaintiff's declaration on grounds that it is a sham affidavit. The Court has reviewed the relevant deposition testimony and has compared it with the testimony contained in Plaintiff's declaration.

Plaintiff testified at his deposition that (1) the first time he recalled seeing the product Kaylo was after he boarded the repair ship Bryce Canyon (which occurred in November of 1958), (2) before being on the Bryce Canyon, he would not have been replacing his own insulation, and (3) during his work prior to being on the Bryce Canyon, he would not have known the name of the manufacturer of any of the pipe covering or block insulation because there was no marking or writing on the insulation itself and he would not have known the brand that was on a given ship prior to boarding the ship.

Plaintiff's declaration states that he worked with Kaylo during his work aboard Navy ships prior to boarding the Bryce Canyon. Plaintiff specifies in his declaration that he is providing "a supplemental affidavit to discuss matters which [he] was not asked to explain at the deposition and to provide all parties with a more detailed record of the evidence." (Pl. Dec. ¶ 2.) His opposition to Defendant's motion explains that (1) he worked with insulation aboard ships prior to his time on the Bryce Canyon, but that, at that time, he was neither replacing his own insulation nor ordering insulation, and (2) after he was on the Bryce Canyon, his job duties changed to include placing orders for insulation, at which time he discovered that the "standard" insulation used for a particular application aboard destroyers was Kaylo (which he had not known at the time of his pre-Bryce Canyon work aboard various destroyers), and (3) his deposition testimony pertained to what he knew at the time of his pre-Bryce Canyon work (as opposed to what he learned thereafter), as he understood that to be the subject of the relevant questioning.

Furthermore, Plaintiff identifies deposition testimony in which he was asked how he knew Kaylo was "standard" and he testified that he had used Kaylo on destroyers, thus providing testimony about Kaylo usage prior to his time aboard the Bryce Canyon. Accordingly, although there may have been a discrepancy

between the intent behind Defendant's questioning during the deposition and what Plaintiff understood he was being asked about, the Court finds that there is at the very least a genuine dispute as to what Plaintiff meant in answering questions asked during his deposition. In short, Defendant has not established that Plaintiff's declaration contradicts or is inconsistent with his deposition testimony such that it is a "sham affidavit" that should be stricken. For this reason, the declaration will not be stricken. Having determined that Plaintiff may rely upon his declaration in opposing Defendant's motion for summary judgment, the Court turns next to the merits of that motion.

Product Identification / Causation

Plaintiff alleges that he was exposed to asbestos from Kaylo insulation. There is evidence that Kaylo insulation contains asbestos. There is evidence that Plaintiff worked with Kaylo insulating block during his work on destroyers prior to his work on the repair ship Bryce Canyon. There is evidence that, starting in November 1958, when Plaintiff began working on the Bryce Canyon, he did "all the insulation repair" as part of his work. There is evidence that Kaylo block insulation was used for any brickwork insulation on destroyers. There is evidence that the brickwork on fireboxes on the Pacific fleet destroyers had to be rebuilt about every 18 months, which required removal and replacement of the insulation block. There is evidence that removal of Kaylo blocks typically involved use of a hammer, which caused the Kaylo blocks to crumble into pieces, and that this dust was swept up with a broom. There is evidence that Plaintiff performed at least 25 boiler firebox brickwork jobs while serving in the Navy before he was stationed on the Bryce Canyon, and that, while serving on the Bryce Canyon, he performed about one firebox job every two (2) months. There is evidence that, before being stationed on the Bryce Canyon, Plaintiff used Kaylo on about 25 superheater jobs and about two (2) steam drum jobs. There is evidence that application of Kaylo blocks required cutting and sawing, which generated dust.

Although Plaintiff has failed to state explicitly in his declaration (or deposition testimony) that he inhaled asbestos dust as a result of his (or others') work with Kaylo, he has provided testimony that the work he did directly with and in close proximity to Kaylo generated dust. Therefore, when construing the evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that he was exposed to asbestos from Kaylo insulation such that this exposure 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. Although Defendant contends it cannot be liable for Kaylo manufactured after April 30, 1958, Plaintiff has identified evidence of exposure to Kaylo prior to that date. Furthermore, there is evidence that insulation would remain in place for approximately 18 months, and that "Owens-Illinois Glass Co., Kaylo Division" was the manufacturer of Kaylo that was distributed by "Owens-Corning Fiberglas Corp" as late as July of 1958. However, even assuming that Defendant ceased manufacturing Kaylo in April of 1958, as it contends, it reasonably could be concluded from the evidence that Kaylo manufactured by Defendant was aboard ships until at least late 1959. Therefore, there remains a genuine dispute as to whether Plaintiff was exposed to asbestos from Kaylo manufactured and/or supplied by Defendant. Accordingly, summary judgment in favor of Defendant Owens-Illinois is not warranted. Id.; Anderson, 477 U.S. at 248.