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

BARBARA BEARCE, ET AL.,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiffs,	:	
	:	Transferred from the Northern
	:	District of Texas
v.	:	(Case No. 99-01054)
	:	
	:	
GENERAL DYNAMICS CORP.,	:	E.D. PA CIVIL ACTION NO.
ET AL.,	:	2:07-69238
Defendants.	:	

FILED

JAN 21 2011

MICHAEL E. KUNZ, Clerk
By _____ Dep. Clerk

O R D E R

AND NOW, this **20th** day of **January, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant General Dynamics Corp. (doc. no. 10), filed on November 12, 2010, as to whether Plaintiffs' claims are barred by the Texas' Workmen's Compensation Act, is **DENIED**.¹

¹Plaintiffs, Barbara and Susanne Bearce, filed this action in Texas state court alleging that Glenn Andrew Bearce was exposed to asbestos while working at Air Force Plant No. 4 and that the exposure caused him to contract mesothelioma. (Pl.'s Reply Br. at 1.) This case was removed to the United States District Court for the Northern District of Texas and was subsequently transferred to the Eastern District of Pennsylvania as part of MDL 875 on September 17, 2007. (Transfer Order, doc. no. 1). Subject matter jurisdiction in this case is based on federal enclave jurisdiction. (Pl.'s Reply Br. at 1.)

Decedent Mr. Bearce worked for General Dynamics at Air Force Plant No. 4 in Fort Worth Texas from 1957 until April of 1971. (Pl.'s Rely Br. at 11-12.) Mr. Bearce was entitled to recover workers' compensation from General Dynamics. (Def.'s Response,

doc. no. 14-1 at 1.) Mr. Bearce was diagnosed with mesothelioma in 1997. (Id. at 1.) The issue is whether, under the circumstances of this case, worker's compensation benefits are the exclusive remedy available to Mr. Bearce for any injury caused as a result of asbestos exposure while employed by General Dynamics.

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).

The Texas Labor Code provides that recovery of workers' compensation benefits is the exclusive remedy available to a covered employee against an employer for a work-related injury or death if the employer is a subscriber under the Texas workers' compensation insurance program. TEX. LABOR CODE § 408.001(a)(2006). The only exceptions are actions to recover exemplary damages by the surviving spouse or heirs of a deceased employee whose death was caused by the intentional act or omission or gross negligence of the employer. TEX. LABOR CODE § 408.001(b).

In 1947, asbestosis was added as a covered injury under Texas' Workmen's Compensation Act ("the Act"). TEX. REV. CIV. STAT. ANN. art. 8306, § 20, Tex. S.B. 40, ch. 113, 50th Leg., 1947 Tex. Gen. Laws 176. In 1971, the Act was amended and mesothelioma was added as a covered injury. TEX. REV. CIV. STAT. ANN. art. 8306, § 20.

According to Texas case law, the provision of the Act in effect at the time of the injury determines the right and duties of the parties. Bailey v. Tex. Indemn. Ins. Co., 14 S.W.2d 798, 800-01 (Tex. Comm'n App. 1929); see also Gibson v. Grocers Supply Co., Inc., 866 S.W.2d 757, 759 (Tex. App. 1993); Payne v. Galen Hosp. Corp., 28 S.W.3d 15, 18 n. 1 (Tex. 2000) (applying the version of the Act in effect at the time the plaintiff sustained her injury).

The Texas Supreme Court has not addressed the precise issue that is before this Court. When interpreting the term "bodily injury" as used in insurance policies, Texas courts have declined to adopt the manifestation theory and have ruled that the date of diagnosis is not the relevant date for determining when "bodily injury" occurs. See Guaranty National Ins. Co. v. Azrock Indus., Inc., 211 F.3d 239, 248 (5th Cir. 2000) (overruled on other grounds); see also Zurich Am. Ins. Co. v. Nokia, Inc., 268 S.W.3d 487 (Tex. 2008); Pilgrim Enterprises, Inc. v. Maryland Cas. Co., 24 S.W.3d 488, 497 (Tex. App. 2000). These courts have defined "bodily injury" as the "subclinical tissue damages that occurs on inhalation of asbestos fibers." Zurich, 268 S.W.3d at 493 (citing Azrock, 211 F.3d at 250).

Defendant urges that the date of diagnosis controls and that since Mr. Bearce was diagnosed with mesothelioma in 1997, at which time mesothelioma was a compensable disease under the Act, Plaintiffs' claims, other than claims for intentional acts or gross negligence, are barred by the Act. To the contrary, Plaintiffs aver that since all of Mr. Bearce's alleged exposures occurred prior to 1971 and at a time when mesothelioma was not a compensable injury under the Act, Plaintiffs can bring common law claims and are not barred by the Act.

According to Texas case law, Mr. Bearce's injury occurred upon inhalation of asbestos which resulted in "subclinical tissue damage." Zurich, 268 S.W.3d at 493 (citing Azrock, 211 F.3d at 250). As all of Mr. Bearce's exposures occurred prior to 1971 when mesothelioma was added as a compensable disease under the Act, this Court finds that Plaintiffs' claims are governed by the

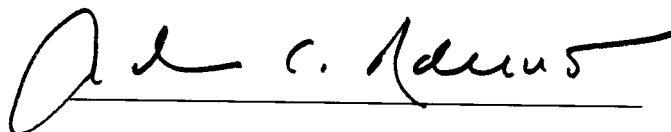
pre-1971 version of the Act. Therefore, because Mr. Bearce's claim arose prior to the time that mesothelioma was compensable under the Act, Plaintiffs' common law claims are not barred by the Act. Finally, Section 408.007 of the Texas Labor Code, which provides that the date of injury for occupational diseases is "the date on which the employee knew or should have known that the disease may be related to the employment," is irrelevant here. That provision addresses the date on which the injury was discovered ("knew or should have known") and not the date on which the injury occurred. See 3 Modern Workers Compensation § 301:4 (noting that Texas Labor Code § 408.007 is a discovery rule which dictates that the statute of limitations for occupational diseases begins to run on the date that the employee knew or should have known that his or her disease was work-related).

In Defendant's Brief in Response to Plaintiffs' Post-Hearing Brief, Defendant cites to Texas Appellate Court cases holding that the Act is the exclusive remedy available to employees covered by the Act. See McAlister v. Medina Electric Cooperative, Inc., 830 S.W.2d 659 (Tex. Ct. App. 1992) (citing Lotspeich v. Chance Vought Aircraft, 369 S.W.2d 705 (Tex. Civ. App. 1963)). Those cases are not on point as the plaintiff in those cases was recovering under the Act and at the same time asserting state law claims. Here, Plaintiffs are bringing only state law claims and have not sought relief under the Act.

Given the disposition of the case, this Court need not address whether applying the 1997 amendment adding mesothelioma as a compensable disease retroactively to pre-1971 exposures, would strip Plaintiffs of a common law right of action and therefore run afoul of certain provisions of the Texas Constitution.

It is further **ORDERED** that Plaintiffs' Cross-Motion for Partial Summary Judgment, filed on December 21, 2010 (doc. no. 12), is **GRANTED** as this Court finds that Plaintiffs' claims are not barred by the Texas Workmen's Compensation Act.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Eduardo C. Robreno", written over a horizontal line.

EDUARDO C. ROBRENO, J.