

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

JUDITH E. HENRY :
 :
 v. : C.A. No. 12-212L
 :
 AMERICAN HONDA MOTOR :
 CO., INC., et al. :

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

Pending before the Court is Defendant Warren Pump LLC's ("Warren") Motion for Summary Judgment (Document No. 93) filed pursuant to Fed. R. Civ. P. 56. Plaintiff Judith Henry filed an Objection to the Motion. (Document No. 98). This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); LR Cv 72(a). After reviewing the Memoranda submitted by the parties and the relevant case law, I recommend that Warren's Motion for Summary Judgment be GRANTED.

Statement of Facts¹

Plaintiff, in her capacity as Executrix of the Estate of William Henry, alleges that her late husband "was exposed to various asbestos containing products and/or machinery requiring the use of asbestos and/or asbestos-containing products, working as a machinist in the United States Navy from 1953 to 1956, and performing automotive repairs from approximately 1960 to 2011."

(Document No. 1-1 at p. 3).

¹ Although Defendant did not technically comply with Local Rule Cv 56(a)(1) which requires a party moving for summary judgment to file a "separate Statement of Undisputed Facts that concisely sets forth all facts that the movant contends are undisputed..." Defendant submitted an equivalent recitation of undisputed facts which was embedded in its Memorandum. Plaintiff did not raise the issue of Warren's noncompliance with Local Rule Cv 56(a)(1) in her Objection, and, in fact, addressed the facts in a similar, noncompliant fashion within her Memorandum.

Mr. Henry enlisted in the United States Navy on July 22, 1953 as a “Seaman Recruit.” (Document No. 94 at p. 38). He did not board the U.S.S. William R. Rush until December 27, 1955. His service aboard the U.S.S. Rush ended on April 9, 1957. (See Document No. 98 at p. 2). Mr. Henry’s only contact with Warren pumps was during this approximately sixteen-month period when he served aboard the U.S.S. Rush.

Warren has been in business since 1897. (Document No. 98-6 at p. 6). Warren has admitted that some of its pumps included asbestos insulation encased within a metal jacket in addition to asbestos-containing gaskets and packing. (Document No. 98-7 at p. 4). Warren continued to use asbestos-containing gaskets and packing until the mid-1980s. (Document No. 98-8 at p. 7). Both the forward and after engine rooms on board the U.S.S. Rush contained “dozens” of pumps, and only three of the pumps in each room were manufactured by Warren. (Document No. 94-3 at p. 56). The pumps on the U.S.S. Rush that Warren manufactured were: (1) a main condenser circulating pump; (2) a freshwater pump; and (3) a fire and bilge pump. (Document No. 93-1 at p. 19).

Mr. Henry did not survive to testify in this matter, but his former shipmate Charles Newbold testified about Mr. Henry’s job duties while aboard the U.S.S. Rush. Mr. Newbold served on the U.S.S. Rush from November 1954 to October 1957, and thus was aboard the Ship during the entire time Mr. Henry served on the U.S.S. Rush. (Document No. 94-2 at p. 30). Mr. Newbold described Mr. Henry’s rating as “kind of low on the totem pole” and explained that he would do “routine work, messenger work in the engine room, help with repairs, whatever they...would find him to do.” (Document No. 94-2 at pp. 33-34). Mr. Henry was a Fireman when he reported to the U.S.S. Rush, but was promoted to Machinist Mate on April 16, 1956. (Document No. 94-2 at p. 10).

Mr. Newbold testified that Mr. Henry worked in the forward and after engine rooms on the Ship, that he stood on watch in the engine rooms and that he was also assigned to complete and assist with maintenance repairs in the engine rooms. (Document No. 94-2 at p. 34). According to Mr. Newbold, the engine rooms contained various equipment including, but not limited to main throttle board; evaporators; distilling plants; condensers; flanges; valves; steam traps and booster feed, bilge, main feed and condensate pumps. (Document No. 94-2 at pp. 43-44).

Mr. Newbold specifically recalled that Mr. Henry worked on the Warren reciprocating fire and bilge pump in the after engine room. (Document No. 94-2 at p. 136). This work included replacing packing glands, seals and gaskets on the pump. Id. at pp. 136-137. Mr. Henry completed regular “maintenance packing” and replaced gaskets on bilge pumps installed on the U.S.S. Rush. Id. at p. 137. Warren Plans BS-1195 documents that the bilge pumps contained both asbestos and nonasbestos packing, gaskets and insulation. (Document No. 94-3 at pp. 117-118). Mr. Newbold could not testify as to the frequency of Mr. Henry’s work on the fire and bilge pumps. (Document No. 94-2 at pp. 137-138).

While the U.S.S. Rush was at sea, emergency repair work was performed on the equipment in the engine rooms as needed. (Document No. 94-2 at pp. 44-45). When the Ship was in port, the engine room personnel used the opportunity to do as much repair and maintenance work as they could on the engine room equipment in order to avoid needing to make repairs at sea. This included work on pumps. (Document No. 94-2 at pp. 46-48).

Mr. Newbold testified about general practice aboard the Ship. For example, he stated that when any pump needed to be repaired, the asbestos covering or lagging on the exterior of the pump had to be removed first. (Document No. 94-2 at p. 55). A saw was used to cut the asbestos

insulation, and this cutting generated dust. (Document No. 94-2 at p. 60). The particles of the asbestos flew around such that it “looked like snow.” (Document No. 94-2 at p. 61; Document No. 94-3 at p. 87). Mr. Henry helped to complete this type of work and was also present while his co-workers performed repair work on pumps in the engine rooms. (Document No. 94-2 at p. 61). Once the asbestos lagging was removed, the internal components of the pump could be repaired, which could include work on the governors or bearings, replacing the impellers and changing gaskets. (Document No. 94-2 at pp. 61-62).

In addition, Mr. Newbold testified that Mr. Henry also helped to repack pumps and valves during his service on the U.S.S. Rush and was also in the vicinity when this work was completed by others. (Document No. 94-2 at pp. 63-64). When removing old packing from leaky valves and pumps, Mr. Newbold recalled that the packing was brittle, would come out of the pump in pieces and the particles would get all over his hands. (Document No. 94-2 at p. 63). Moreover, Mr. Henry changed gaskets on pumps and used a chisel to scrape off the gaskets that stuck to the flanges of the pump. Id. at pp. 65-66. Similar to the packing, the gasket material would come off in sections and get all over Mr. Newbold’s hands. Id. After the pump was repaired, the asbestos insulation lagging that had been removed at the beginning of the job would be replaced. Id. at p. 80. The Sailors such as Mr. Newbold and Mr. Henry, mixed an asbestos-containing powder with water to make a mix that would be applied to the equipment. Id. at p. 58. When they poured the powder into a container in order to mix it with water, the powder would “float all around.” Id. at p. 59.

Mr. Newbold recalled that at one point or another, maintenance and repair work was completed on “pretty much all” of the equipment and machinery on the U.S.S. Rush. Id. at p. 85.

Mr. Henry personally helped with this maintenance and repair work and would have been present while it was being completed by other Sailors. Id.

Mr. Henry boarded the U.S.S. Rush nine years after it was commissioned. (Document No. 94-3 at p. 121). Mr. Newbold, as well as Captain Moore, provided testimony that establishes that the maintenance routines for the Warren pumps would have required both the internal and external components to be replaced many times prior to Mr. Henry boarding the U.S.S. Rush. See Document No. 93-1 at pp. 6-7). Although Mr. Newbold did not testify as to any specific machinery on board the U.S.S. Rush, he did testify generally that the packing on a pump was replaced every month or two, (Document No. 94-2 at p. 134), and Captain Moore testified that the packing on the bilge pumps was replaced a couple of times a year. (Document No. 94-3 at p. 102). Warren did not typically supply any aftermarket asbestos components for the pumps. Similarly, the external asbestos components of a pump, such as flange gaskets and external insulation (such as asbestos blankets and “mud”) were never supplied by Warren. (Document No. 93-1 at p. 8).

Plaintiff’s occupational and environmental medicine expert, Arthur Frank, M.D., Ph.D., has opined that Mr. Henry’s exposure to asbestos, including that from Warren’s asbestos-containing pumps, including their gaskets, packing and insulation, was a substantial, contributing factor in causing his mesothelioma. (See generally Document No. 94-3 at pp. 190-195). Dr. Frank testified in his deposition that “[t]he mere presence of asbestos does not mean someone’s being exposed. It has to be manipulated in some way so that fibers are given off that can be inhaled or ingested.” (Document No. 94-3 at p. 183). Dr. Frank also testified that the fiber release from one gasket removal is “extraordinarily unlikely” to cause mesothelioma. (Document No. 94-3 at p. 193). Warren’s expert, Donna Ringo, has opined that individual packing and gasket changes do not

constitute substantial exposures and that they are “significantly below current OSHA regulatory exposure levels.” (Document No. 94-3 at p. 241).

Summary Judgment Standard

Summary Judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that “there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When deciding a motion for summary judgment, the Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party’s favor. Cadle Co. v. Hayes, 116 F.3d 957, 959 (1st Cir. 1997).

Summary judgment involves shifting burdens between the moving and the nonmoving parties. Initially, the burden requires the moving party to aver “an absence of evidence to support the nonmoving party’s case.” Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party meets this burden, the burden falls upon the nonmoving party, who must oppose the motion by presenting facts that show a genuine “trialworthy issue remains.” Cadle, 116 F.3d at 960 (citing Nat’l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)). An issue of fact is “genuine” if it “may reasonably be resolved in favor of either party.” Id. (citing Maldonado-Denis, 23 F.3d at 581).

To oppose the motion successfully, the nonmoving party must present affirmative evidence to rebut the motion. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-257 (1986). “Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences,

[or] unsupported speculation.” Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Moreover, the “evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.” Id. (quoting Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)). Therefore, to defeat a properly supported motion for summary judgment, the nonmoving party must establish a trialworthy issue by presenting “enough competent evidence to enable a finding favorable to the nonmoving party.” Goldman v. First Nat’l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (citing Anderson, 477 U.S. at 249).

Discussion

The first issue presented is whether maritime law applies to this case. Warren argues that this Court must apply maritime law because the test set forth in Grubart v. Great Lakes Dredge & Dock, 513 U.S. 527, 534 (1995) has been satisfied. (Document No. 93-1 at pp. 10-13). In her reply, Plaintiff does not directly address this argument, but appears to concede that maritime law applies.²

Under Grubart, a party seeking to invoke maritime law must satisfy “conditions both of location and of connection with maritime activity.” The location portion of the test looks at whether the tort occurred on navigable water; the connection portion of the test considers the general features of the incident involved, to determine if it is “potentially disruptive” of maritime commerce, and then also considers whether the activity itself “shows a substantial relationship to maritime activity.” 513 U.S. at 534, Document No. 93-1 at pp. 10-11. In the present case, the locality test is satisfied because Mr. Henry alleges to have sustained asbestos-related injuries while working on

² Plaintiff does not directly respond to Defendant’s argument concerning the standard of review, but throughout her Objection, she repeatedly refers to the applicable standard of review as being “under maritime law.” See Document No. 98 at pp. 6-7, 11.

a Navy Ship. (Document No. 1-1 at p. 3). See Conner v. Alfa Laval, Inc., 799 F. Supp. 2d 455, 466 (E.D. Pa. 2011) (“the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters.”).

Additionally, the two-pronged “connection” portion of the test is also satisfied. The first prong of the connection test considers whether the asbestos-exposure claims set forth by Plaintiff have a potentially disruptive impact on maritime commerce. As the Court held in Conner, “exposure to allegedly defective products on or around Navy ships”... “[p]lainly had a potentially disruptive impact on maritime commerce.” 799 F. Supp. 2d at 467. The second prong of the connection test considers whether Defendant’s activity “is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.” Conner, 799 F. Supp. 2d at 469 (citations omitted). Plaintiff alleges that Mr. Henry was exposed to asbestos while working on and with Warren pumps while he served aboard a U.S. Naval Ship. (Document No. 1-1 at p. 3). The pumps were manufactured for – and essential to – the “proper functioning of ships and made for that purpose.” Conner, 799 F. Supp. 2d at 469. Having satisfied the various elements of the test, the Court concludes that substantive maritime law applies to the facts of this case.

In its Motion for Summary Judgment, Warren argues that its equipment was not a “substantial factor” in causing Mr. Henry’s injury, and that the so called “bare-metal” defense shields it from liability. (See Document No. 93-1 at p. 17); (Document No. 98 at p. 8). In her Objection to the Motion for Summary Judgment, Plaintiff identifies several factual issues that she claims are material and preclude entry of summary judgment in Warren’s favor. The Court will discuss each in turn.

A. Whether the Warren Asbestos-Containing Equipment was a “Substantial Factor” in Causing Mr. Henry’s Illness

The first query is whether Plaintiff has sufficient evidence from which a reasonable jury could conclude that Warren’s product was a “substantial factor” in causing Mr. Henry’s mesothelioma. Relying on expert reports and testimony from Mr. Henry’s shipmate, Plaintiff claims she has sufficient evidence to prove that asbestos from Warren’s equipment was a substantial factor in causing his injury. Warren asserts that Plaintiff has not met her burden under maritime law of establishing both that Mr. Henry was exposed to Warren’s product and that the product was a “substantial factor” causing his injury. (Document No. 93-1 p. 17).

In order to prove 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.” Walkup v. Air & Liquid Sys. Corp., CV 12-1635-SLR-SRF, 2014 WL 2514353 (D. Del. June 4, 2014) report and recommendation adopted, CV 12-1635-SLR-SRF, 2014 WL 4447568 (D. Del. Sept. 8, 2014) citing Abbay v. Armstrong Int’l, Inc., MDL No. 875, 2012 WL 975837 at *1 n.1 (E.D. Pa. Feb. 29, 2012). “On the other hand, ‘[m]inimal exposure’ to a defendant’s product is insufficient to establish causation. Likewise, a mere showing that defendant’s product was present somewhere at plaintiff’s place of work is insufficient.” Id. quoting Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488, 492 (6th Cir. 2005). “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 Abbay, 2012 WL 975837, at *1 n.1.

Warren concedes that Mr. Henry’s workspace aboard the U.S.S. Rush from December 1955 through April 1957 contained three Warren pumps. (Document No. 93-1 at p. 19). The three

pumps were a (1) main condenser circulating pump; (2) a freshwater pump; and (3) a fire and bilge pump. Id. Warren notes, however, that the testimony submitted by Plaintiff establishes that Mr. Henry only worked on the fire and bilge pump. (Document No. 93-1 at p. 20). As to this pump, as discussed below, Warren contends that the evidence provided by Plaintiff is insufficient to survive Warren's summary judgment challenge for several reasons. Warren further claims that in light of the lack of evidence concerning the other two Warren pumps, the most Plaintiff can establish is that the main condenser circulating pump and the freshwater pump were present in the workplace. As noted, mere presence is insufficient to satisfy the "substantial factor" test. Lindstrom, 424 F.3d at 492. The Court more thoroughly examines these claims below.

The first task is to examine the evidence set forth by Plaintiff concerning Mr. Henry's work on the fire and bilge pump. Warren takes a two-pronged attack against Plaintiff's claims: First, Warren argues that there is insufficient evidence to establish that Mr. Henry's work on the fire and bilge pump included parts that contained asbestos, and second, Warren asserts that even if the parts Mr. Henry worked on did contain asbestos, the exposure would have been too minimal to meet the "substantial factor" test. (Document No. 93-1 at p. 19).

Because Mr. Henry did not testify in this matter, the critical evidence is the testimony of his shipmate, Charles Newbold. The relevant portions of Mr. Newbold's testimony are set forth in the Facts section of Warren's Motion and establish generally that Mr. Henry worked on the fire and bilge pump and that he was present when others worked on pumps. (Document No. 93-1 at p. 4). Mr. Newbold's testimony also generally described procedures used to cut through asbestos insulation and mix asbestos powder for all pumps. Mr. Newbold's testimony does not indicate the

frequency with which Mr. Henry would have had to repair asbestos parts on a Warren pump, nor does his testimony specifically state that Mr. Henry worked with asbestos parts on Warren pumps.

Warren argues that Mr. Newbold's testimony is too vague and that the Court would have to "improperly speculate" that the gaskets and valves Mr. Henry replaced on the fire and bilge pump contained asbestos. (Document No. 93-1 at p. 20). Plaintiff's Objection does not point the Court to any specific evidence to refute this argument, but simply states in conclusory fashion that "Mr. Henry was exposed to asbestos from working on and around Warren pumps aboard the Rush...[and] Plaintiff's expert, Dr. Arthur Frank, M.D., will opine that Mr. Henry's exposure to asbestos including that from Warren's asbestos-containing pumps, was a substantial contributing factor in causing his mesothelioma." (Document No. 98 at p. 7). Warren accurately notes that there is no testimony or other evidence that documents the frequency with which Mr. Henry changed gaskets and/or packing on the fire and bilge pump, nor is there any testimony or other evidence documenting how often he was present when others did so. Warren points out that its expert, Donna Ringo, opined that "individual packing and gasket changes do not constitute substantial exposures." (emphasis in original). (Document No. 93-1 at p. 22).

Turning to Warren's second argument, Warren asserts that any exposure to asbestos was minimal. (Document No. 93-1 at p. 21). Mr. Newbold's testimony establishes that Mr. Henry performed some gasket and packing work on the fire and bilge pump. Id. Warren accurately points out that Mr. Newbold did not testify that the gaskets or packing were supplied by Warren, nor did he testify that the gaskets or packing were asbestos-containing. Id.

There was also testimony concerning Mr. Henry's work on pumps in the after engine room. (Document Nos. 94-2 at p. 136; 94-3 at p. 57). Mr. Newbold did not testify that Mr. Henry worked

specifically on Warren pumps, and this Court cannot make that assumption, especially in light of Plaintiff's expert Captain Arnold Moore's testimony that there were dozens of pumps in the after engine room and that Warren supplied only three. (Document No. 94-3 at p. 56). Additionally, Mr. Newbold testified that there may have been up to fifty machinist's mates on the U.S.S. Rush who would have repaired equipment. (Document No. 94-2 at p. 144). Warren argues that the testimony is too vague to support the conclusion that Mr. Henry completed work on asbestos components of a Warren pump, and thus there is insufficient evidence upon which a reasonable jury could determine that Warren's pumps were a substantial factor causing Mr. Henry's mesothelioma. (Document No. 93-1 at p. 21). Having reviewed all of the testimony and evidence presented, the undisputed facts do not support a finding that Mr. Henry's exposure to asbestos from Warren pumps was a "substantial factor" in causing Mr. Henry's illness. Moreover, Plaintiff has not identified any facts that establish that a trialworthy issue remains as to whether Warren's pumps were a substantial factor in causing Mr. Henry's illness. Accordingly, the entry of summary judgment in favor of Warren is recommended.

B. Whether Warren is Liable Because it "Knew" Its Pumps Would Require Future Replacement of Asbestos-Containing Components

Next, Warren asserts that it is not liable for any insulation, gaskets and packing that Mr. Henry came in contact with on a Warren pump because Warren did not make, sell or supply those products. (Document No. 93-1 at p. 13). Plaintiff does not directly dispute that the alleged asbestos-containing components were not supplied by Warren, but instead argues that Warren is liable because it "knew" that its pumps contained asbestos-containing gaskets and packing, and required asbestos insulation, and that those parts "would be replaced with similar components in its pumps." (Document No. 98 at p. 8). Plaintiff also argues that Warren did make replacement gaskets

and packing in some circumstances, but did not show that they supplied the ones at issue in this case. (Document No. 93-1 at p. 16).

The “bare metal defense” shields a defendant from liability “for a duty to warn of hazards inherent in asbestos products that a manufacturer did not manufacture or distribute....” (Document Nos. 98 at p. 8. and 93-1 at pp. 13-14). Conner establishes a general rule that there is no duty to warn of hazards inherent in asbestos products absent specific evidence that the company manufactured or distributed the particular asbestos-containing parts to which the Plaintiff was exposed. See Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012).³ Here, because Plaintiff has not identified any evidence that establishes that Mr. Henry was ever specifically exposed to any asbestos-containing parts that were manufactured or distributed by Warren, Warren has no liability. The best Plaintiff does is establish generally that Mr. Henry did some work on a Warren pump and that the Warren pump could have contained asbestos-containing components, but there is no evidence at all that suggests that Warren supplied the particular replacement components that Mr. Henry might have worked on. Because Plaintiff has not identified any competent evidence in this case that would reasonably overcome the bare metal defense, I recommend the District Court enter summary judgment for Defendant.

Conclusion

For these reasons, I recommend that Warren’s Motion for Summary Judgment (Document No. 93) be GRANTED. Any objection to this Report and Recommendation must be specific and

³ Plaintiff also argues that Warren is liable for any products “foreseeably” used with its pumps. However, Plaintiff has failed to cite any maritime law supporting this contention. (Document No. 98 at p. 11). In addition, the MDL-0875 Court in Conner refused to recognize liability on this foreseeability theory and confirmed its holding, as a matter of law, that there is no “duty to warn under maritime law of the hazards posed by products they did not manufacturer or distribute.” 842 F. Supp. 2d at 802.

must be filed with the Clerk of the Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond

LINCOLN D. ALMOND
United States Magistrate Judge
December 2, 2014