

filed Motions for Summary Judgment. Plaintiffs filed their Answers on April 11, 2008. On April 16, 2008, Airco and Soo Line filed Replies, and on April 21, 2008, Westinghouse filed a Reply. On April 24, 2008, Plaintiffs filed Counter Replies to Airco and Soo Line's Replies. On April 28, 2008, Plaintiffs filed a Counter Reply to Westinghouse's Reply. On April 25, 2008, Airco filed a Reply. On April 29, 2008, Westinghouse filed its Sur-Reply. Airco and Westinghouse asserted lack of sufficient product identification as required by *Ekenrod v. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988) and its progeny. Soo Line asserted that the Federal Employers' Liability Act ("FELA"), bars recovery for claims of strict liability.

After careful review of the motions, responses, replies, and sur-reply, this Court granted summary judgment in favor of each Defendant and dismissed with prejudice Plaintiffs' claims.¹ On June 4, 2008, Plaintiffs timely filed a Notice of Appeal of the Orders granting summary judgment to these Defendants. On July 1, 2008, in response to this Court's order, Plaintiffs filed their Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. §1925(b), which alleged that the summary judgment motions were improperly granted in light of the facts set forth by the non-moving party. *See* Plaintiffs' Concise Statement of Errors Complained of on Appeal, 7/1/08.

II. DISCUSSION – *Ekenrod and its progeny*

Plaintiffs argues that this Court erred by granting summary judgment to Defendants. The available record in the instant matter, however, failed to establish that Decedent inhaled asbestos fibers from products sold, manufactured, or supplied by the moving Defendants. Thus, summary judgment was appropriate.

¹ This Court granted summary judgment for Airco on May 13, 2008; Soo Line on May 9, 2008; and Westinghouse on May 31, 2008.

“In determining whether to grant a motion for summary judgment, the trial court must view the record in the light most favorable to the non-moving party and resolve any doubts as to the existence of a genuine issue of material fact against the moving party.” *Gilbert v. Monsey Prods. Co.*, 861 A.2d 275, 276 (Pa. Super. 2004). In reviewing a grant of summary judgment, an appellate court’s scope of review is plenary and will reverse only upon finding that the trial court abused its discretion or erred as a matter of law. *Harahan v. AC & S, Inc.*, 816 A.2d 296 (Pa. Super. 2003).

Our Superior Court, in *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988), set forth the elements necessary to prove a *prima facie* case of asbestos liability:

In order for liability to attach in a products liability action, Plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer’s product. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product’s use. Summary judgment is proper when the plaintiff has failed to establish that the defendants’ products were the cause of the plaintiff’s injury.

Id. at 52 (internal citations omitted).

Further, our Supreme Court in *Gregg v. VJ Auto Parts, Co.*, 943 A.2d 216 (Pa. 2007), recently reiterated the duty of a lower court when reviewing an asbestos motion for summary based on product identification:

. . . [W]e believe that it is appropriate for courts, at the summary judgment stage, to make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of plaintiff’s/decendent’s asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between the defendant’s product and the asserted injury.

Id. at 227.

In light of this binding precedent, we review the record herein. Decedent was deposed on August 22, 2007. His son, George Corson, was deposed on February 6, 2008, and his son, Terry Corson, was deposed on March 3, 2008. Their deposition testimony fails to establish that Decedent was exposed to asbestos fibers or asbestos dust shed from working with Defendants' products with the frequency, regularity, and proximity required under Pennsylvania law.²

Airco

Airco argued that the testimony of Decedent and his sons failed to establish that Decedent was exposed to a respirable, asbestos-containing product supplied by Airco.

Decedent's son, George, testified that he worked with his father on the railroad from 1964-1968 or 1969 in Lewistown, Montana. During this time, he believes that they used Airco welding rods, torches, gauges, and gloves. *See* Deposition of George Marion Corson, 2/6/08, pp. 79-80. He further testified that, of all the duties associated with this job, he and his father probably only welded with Airco products about 5% of the time. *See id.*, at p. 83. When they were finished welding, Decedent's son testified that they would throw the welding rod stubs on the floor and then throw them away after they swept the floor, but any dust from the floor was preexisting:

Q: Now, when you and your dad would finish welding, what would you do with the stubs that you had when you were done?

A: Throw them down.

Q: Throw them on the floor or somewhere else?

A: Probably on the ground or on the floor. And then throw them in the garbage after we swept the floor.

Q: Was the floor swept at the end of your shift?

² The terms "dust" and "fibers" are used interchangeably as they are microscopic and cannot generally be seen with the naked eye.

A: Yes.

Q: Is that something that you and your dad did or someone else?

A: Him and I.

Q: Now, in the process of sweeping the floor of the welding rods, did that create any dust?

A: Yes, there was dust **on the floor**.

See id., at 96 (emphasis added).

When asked about the actual use of the alleged Airco products, Decedent's son testified that at no time did the products actually create respirable dust:

Q: How about the actual process of welding? Was that a dusty process?

A: Not that I'm aware of. It had smoke.

Q: How about when you would use the gauges? Was that a dusty process?

A: No.

Q: And the same question for the torches. Was any dust created?

A: No.

See id., at 96-97.

Decedent's other son, Terry Corson, testified that he worked with his father from 1971-1975, also on the railroad in Lewistown, Montana. *See* Deposition of Terry Corson, 3/3/08 p. 15. During this time, Decedent used Airco welding rods and welding consisted of about 10-15% of the time they worked in together in this location. *See id.* at 120. At no time in his deposition did he adduce that the welding done with Decedent, that is, the only work which he testified involved Airco products, created a respirable asbestos dust.

Finally, Decedent himself testified that he did not remember the name of the company which manufactured the welding rods used during this time, namely Airco. *See* Deposition of George Corson, 8/22/07 p. 74 (Q: "Does the name Airco ring a bell?" A: "No.>").

Plaintiffs, faced with the possibility of this Court granting summary judgment, attempted to persuade this court to adopt an "every exposure" theory, stating that when it

was impossible to parse out which Defendants caused which dust, all Defendants would be liable. They state “*Gregg* does not overrule the prior opinion in *Martin* that all exposures combine to cause the disease.” (Plaintiffs’ Counter-Reply, 4/24/08 ¶ 5). Plaintiff’s argument that “every exposure is enough” and “all exposures combine” are different standards, is invalid as a matter of law, as the *Gregg* decision makes clear:

We do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every ‘direct-evidence’ case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm. *Gregg v. VJ Auto Parts, Co.*, 943 A.2d 216, 226-227 (Pa. 2007).

Thus, considering that there is no evidence that Decedent inhaled respirable asbestos fibers from a product produced by Airco, and Plaintiffs’ attempt to invoke an “every exposure” theory is legally invalid, summary judgment was proper.

Westinghouse

Defendant Westinghouse argued that the testimony of the Decedent and his sons failed to establish that Decedent was exposed to a respirable, asbestos-containing product supplied by Westinghouse. Decedent himself did not testify as to any products manufactured by Westinghouse. Decedent’s sons, George and Terry, testified that the only times their father worked with Westinghouse products, was in the removal of rubber gaskets.

Decedent’s son George testified, after several leading questions, that his father removed a gasket from a Westinghouse air brake compressor “about once.” *See*

Deposition of George Marion Corson 2/6/08 pp. 132-133. Neither of them, however, needed to take the compressor apart. *See id.*, at 92.

Decedent's son Terry testified about Westinghouse products, specifically brake valves. He stated that he did not associate asbestos-containing products with this work:

Q: As you sit here today, do you associate any asbestos-containing components with the Westinghouse brake valves?

A: On the gaskets to the brake valves they were rubber gaskets. I can only assume that they didn't have asbestos.

See Deposition of Terry Corson 3/3/08 p. 72.

Plaintiffs responded to Westinghouse's motion by stating that Railroad Friction Product Corporation ("RFPC") created and sold Cobra brake shoes, an asbestos-containing product. *See* Plaintiffs' Answer to Defendant Westinghouse Air Brake's Motion for Summary Judgment, 4/11/08. What Plaintiffs fail to properly address is the fact that RFPC is a joint venture by Westinghouse and Johns-Manville, and have not cited any law which states that one company should bear responsibility for the corporate acts of another. Even if they did, however, there is no evidence available which establishes that Westinghouse was the company which sold or distributed the Cobra brake shoes in this case.

Thus, considering that there was only one Westinghouse product actually identified, and it was a rubber and not asbestos gasket, Plaintiffs have failed to establish that Decedent was exposed to any respirable asbestos fibers manufactured by the Defendant, and summary judgment was proper.

III. DISCUSSION – Federal Employers' Liability Act

Defendant Soo Line argued that, unlike other Defendants in this action, it is entitled to summary judgment because Plaintiff is unable to establish that Soo Line was

strictly liable under the Federal Employers' Liability Act ("FELA"), 45 USCA §51 (2008). FELA covers the liability of common carriers by railroad and states the following:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 USCA §51 (2008).

Additionally, FELA is the sole remedy against negligent employers for on-the-job physical injuries sustained by such an employee. *Reidelbach v. Burlington Northern & Santa Fe Ry Co.*, 60 P3d 418 (2002). Therefore, unless Soo Line is at fault for common law negligence or violation of FELA for safety of its employees, no liability attaches. *O'Dea v. Byram*, 176 Minn. 67 (1928).

"To recover under the FELA for personal injuries, the Plaintiff must prove: 1) Defendants are common carriers by railroad engaged in interstate commerce; 2) that he was employed by the Defendant with duties furthering such commerce; 3) that the injuries were sustained while he was so employed; and 4) that the injuries were the result of negligence of Defendant Company." *Betoney v. Union P.R. Co.*, 701 P2d 62 (1984).

In the case *sub judice*, Plaintiffs are unable to prove Soo Line's negligence, in

fact, they offer no support whatsoever for their contention. They have not even suggested that Soo Line's negligence caused Decedent to suffer from mesothelioma. Further, there is not sufficient information that Soo Line had information sufficient to show that it knew of the dangers of asbestos exposure at the time that Decedent was working for them, beginning in 1949. There is simply no evidence to the contrary.

In its Answer, Plaintiffs allude to the Boiler Inspection Act, *49 USCS §20701 (2008), et seq.*, which gives rise to strict liability claims for railroad workers. As both parties point out, current case law only permits these claims for injuries sustained while on the railroad, but not while in the shops. Plaintiffs suggest that this Court construct a ruling which would widen the scope of the Boiler Inspection Act to include injuries sustained while working in the shops. This Court declines to engage in such legislative activities.

Thus, considering that Plaintiffs have failed to make out a case of negligence and Plaintiffs are unable to pursue a strict liability theory, summary judgment was proper.

III. CONCLUSION

For the foregoing reasons, this Court's Orders granting Summary Judgment in favor of Defendants Airco and Westinghouse for insufficient product identification and Defendant Soo Line for failure to support a claim of negligence, should be **AFFIRMED**.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.