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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GAIL ELIZABETH WALASHEK,
individually and as successor-in-
interest to the Estate of MICHAEL
WALASHEK and THE ESTATE
OF CHRISTOPHER LINDEN, et
al.,

Plaintiffs,

v.

AIR & LIQUID SYSTEMS
COPRORATION, et al.

Defendants.

Case No.: 14cv1567 BTM(BGS)

**ORDER GRANTING CLEAVER-
BROOKS, INC.’S MOTION FOR
SUMMARY JUDGMENT**

Defendant Cleaver-Brooks, Inc. (“Cleaver-Brooks”), has filed a Motion for Summary Judgment. For the reasons set forth below, the Court **GRANTS** Cleaver-Brooks’ motion.

I. BACKGROUND

On March 24, 2014, Plaintiffs commenced this wrongful death and survival action in state court. On June 27, 2014, this action was removed to federal court.

The Complaint alleges that Michael Walashek’s exposure to asbestos and

1 asbestos-containing products, in the course of performing his work for various
2 employers from 1967 through 1986, caused him to suffer severe and permanent
3 injury and ultimately death. The Complaint asserts claims of negligence and strict
4 liability.

5 6 **II. STANDARD**

7 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil
8 Procedure if the moving party demonstrates the absence of a genuine issue of
9 material fact and entitlement to judgment as a matter of law. Celotex Corp. v.
10 Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing
11 substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby,
12 Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir.
13 1997). A dispute is genuine if a reasonable jury could return a verdict for the
14 nonmoving party. Anderson, 477 U.S. at 248.

15 A party seeking summary judgment always bears the initial burden of
16 establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at
17 323. The moving party can satisfy this burden in two ways: (1) by presenting
18 evidence that negates an essential element of the nonmoving party's case; or
19 (2) by demonstrating that the nonmoving party failed to establish an essential
20 element of the nonmoving party's case on which the nonmoving party bears the
21 burden of proving at trial. Id. at 322-23. "Disputes over irrelevant or unnecessary
22 facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v.
23 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

24 Once the moving party establishes the absence of genuine issues of material
25 fact, the burden shifts to the nonmoving party to set forth facts showing that a
26 genuine issue of disputed fact remains. Celotex, 477 U.S. at 314. The nonmoving
27 party cannot oppose a properly supported summary judgment motion by "rest[ing]
28 on mere allegations or denials of his pleadings." Anderson, 477 U.S. at 256. When

1 ruling on a summary judgment motion, the court must view all inferences drawn
2 from the underlying facts in the light most favorable to the nonmoving party.
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

4 5 **III. DISCUSSION**

6 Plaintiffs claim that Walashek was exposed to asbestos attributable to
7 Cleaver-Brooks as a result of his work on Cleaver-Brooks boilers. However, as
8 discussed below, the Court finds that Plaintiffs' evidence falls short of creating a
9 triable issue of fact with respect to Walashek's exposure to asbestos attributable
10 to Cleaver-Brooks.

11 12 1. Threshold Exposure

13 In asbestos-related latent injury cases, the plaintiff "must first establish some
14 threshold exposure to the defendant's defective asbestos-containing products."
15 Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953, 982 (1997). The plaintiff bears
16 the burden of proof on the issue of threshold exposure. McGonnell v. Kaiser
17 Gypsum Co., Inc., 98 Cal. App. 4th 1098, 1103 (2002). "If there has been no
18 exposure, there is no causation." Id.

19 "The mere 'possibility' of exposure does not create a triable issue of fact."
20 Andrews v. Foster Wheeler LLC, 138 Cal. App. 4th 96, 108 (2006). "It is not
21 enough to produce just some evidence. The evidence must be of sufficient quality
22 to allow the trier of fact to find the underlying fact in favor of the party opposing the
23 motion for summary judgment." McGonnell, 98 Cal. App. 4th at 1105. "[P]roof
24 that raises mere speculation, suspicion, surmise, guess or conjecture is not
25 enough to sustain [the plaintiff's] burden' of persuasion." Izell v. Union Carbide
26 Corp., 231 Cal. App. 4th 962, 969 (2014) (quoting Ulwelling v. Crown Coach Corp.,
27 206 Cal. App. 2d 96, 104-05 (1962)).

1 2. Cleaver-Brooks Establishes an Absence of Genuine Issue of Material

2 Fact

3
4 In response to an interrogatory asking Plaintiffs to identify and describe all
5 products manufactured, distributed or supplied by Cleaver-Brooks which
6 Walashek worked with or near, Plaintiffs responded: "Plaintiffs contend that
7 Decedent MICHAEL WALASHEK worked with and around materials that were
8 designed, manufactured, and/or distributed by the following entities: CLEAVER
9 BROOKS INC. (for Cleaver Brooks distilling plants and Davis Heaters)." (Def. Ex.
10 C at 4.)

11 In response to an interrogatory asking Plaintiffs to identify the date(s) and
12 location(s) where MICHAEL WALASHEK worked with or around each product,
13 Plaintiffs responded, "Plaintiffs identify the late 1960's and 1970's where decedent
14 worked in around ships and shipyards which contain said equipment." (Id. at 6.)

15 When asked to describe how Walashek was exposed to asbestos from work
16 with or around the product, Plaintiffs responded: "After a reasonable and good
17 faith inquiry, Plaintiff have no further information responsive to this Interrogatory at
18 this time." (Id. at 7.) Plaintiffs gave the same response to an interrogatory asking
19 them for their basis for contending that asbestos-containing materials were
20 manufactured or supplied by Cleaver-Brooks. (Id.)

21 In their Initial Disclosures, Plaintiffs did not indicate that they personally had
22 any information regarding the liability of Cleaver-Brooks. (Def. Ex. B at 2.)
23 Plaintiffs identified Frank Walashek, Ron Gray, and Jim Doud as witnesses who
24 worked with Walashek at various times and had knowledge of products he worked
25 with and around that caused him to be exposed to asbestos. (Id. at 2-3.)

26 Jim Doud testified that he had information regarding work Walashek
27 performed on land-based sites beginning in 1984, when Doud became a field
28 construction superintendent at Fraser Boiler. (Doud Dep. at 37:1-23.) Doud

1 recalled assigning Walashek to perform work on Cleaver-Brooks land-based
2 boilers in Eastern Washington but could not recall specific job sites. (Doud Dep.
3 at 279:3-19.) The only time that Walashek might have worked on the Cleaver-
4 Brooks boilers in Eastern Washington, to Doud's knowledge, was between Easter
5 of 1984 and when Walashek left Fraser in 1986. (Id. at 354:19-355:14.)

6 Doud thought that Walashek might have worked with Cleaver-Brooks DA
7 tanks during the period from 1981-1986. (Id. at 350:6-13.) However, Doud did not
8 personally ever see Walashek working with DA tanks and did not have any reason
9 to believe that any work he did with DA tanks exposed him to asbestos. (Id. at
10 350:14-19.)

11 Doud testified that by the time he was making assignments in 1984, he and
12 Walashek were thoroughly aware that there needed to be special handling for any
13 materials that potentially contained asbestos. (Id. at 28:13-19.) Walashek was
14 always instructed to make sure that he take all necessary precautions to ensure
15 that he was not exposed to asbestos. (Id. at 28:17-23.) According to Doud, by
16 1981, "we had all been made aware and trained in personal protective equipment."
17 (Id. at 228:22-24.) In 1980-1981, Fraser, the union hall, and the industry itself
18 "became very emphatic, told us to start wearing respirators and Tyvek coveralls
19 and to make sure that we never installed an asbestos gasket or asbestos material."
20 (Id. at 145:2-9.)

21 Ron Gray recalled working with Walashek on land-based Cleaver-Brooks
22 boilers in Eastern Washington and Idaho between 1981 and 1985. (Gray Dep. at
23 601:16-602:1.) During his deposition, Gray recalled doing work with Walashek on
24 Cleaver-Brooks boilers at a Boeing plant, an Ore-Ida potato factory, a school in
25 Eastern Washington, and another plant in Eastern Washington. (Id. at 602:12-
26 606:9.) Later in his deposition, Gray testified that might be "guessing" about who
27 manufactured the boiler at the Ore-Ida plant and "cannot tell you that it was a
28 Cleaver-Brooks," did not know if the boiler at the unidentified plant was a Cleaver-

1 Brooks boiler, and was assuming the boiler at Boeing was a Cleaver-Brooks boiler
2 because he generally associated fire tube boilers with Cleaver-Brooks. (Id. at
3 663:12-665:10; 623:1-625:8.)

4 Gray states that he learned of the dangers of asbestos in 1976 or 1977. (Id.
5 at 36:9-13.) He recalls learning that asbestos particles could stick in your lungs
6 and cause cancer. (Id. at 36:21-37:5.) He believes that he heard
7 recommendations to wear respiratory protection when working around potentially
8 asbestos-containing products prior to 1978. (Id. at 38:23-39:5.) He also recalls
9 asbestos-abatement programs starting in the early 1980's. (Id. at 47:21-25.)

10 Gray thought he and Walashek may have worked on Cleaver-Brooks boilers
11 on Coast Guard ships between 1974-1978. (Id. at 612:16-25.) However, Gray
12 admitted that he was not certain that the boilers on the Coast Guard ships were
13 Cleaver-Brooks boilers and was relying on his "vague memory." (Id. at 617:6-11.)
14 Gray confirmed that he had no knowledge that Walashek or anyone in his
15 presence disturbed any asbestos-containing material in the course of working on
16 those ships. (Id. at 613:23-614:2.) Gray also testified that he had no information
17 that Walashek was ever exposed to asbestos that originated with Cleaver-Brooks.
18 (Id. at 619:1-4.)

19 Frank Walashek testified that he did not recall if there was ever an occasion
20 where he and his brother encountered a Cleaver-Brooks boiler. (Frank Walashek
21 Dep. at 273:21-24.) He also testified that he was not aware of his brother ever
22 being exposed to any asbestos that came from Cleaver-Brooks. (Id. at 277:6-22.)

23 Based on Plaintiffs' discovery responses and the deposition testimony
24 discussed above, the Court finds that Cleaver-Brooks has satisfied its initial burden
25 of production on its motion for summary judgment by establishing the absence of
26 a genuine issue of material fact on the issue of threshold exposure. From 1981
27 onwards, it appears that Walashek and other boilermakers were warned of the
28 hazards of working with materials potentially containing asbestos and were

1 instructed to take necessary precautions. As for the period before 1981, there is
2 insufficient evidence that Walashek worked with Cleaver-Brooks boilers or other
3 asbestos-containing Cleaver-Brooks equipment.

4
5 3. Plaintiffs Fail to Create a Genuine Issue of Material Fact

6 Because Cleaver-Brooks has carried its initial burden of production, the
7 burden shifts to Plaintiffs, who must produce enough evidence to create a genuine
8 issue of material fact. See Celotex, 477 U.S. at 322. The Court concludes that
9 Plaintiffs have failed to satisfy their burden.

10 In opposition to the motion for summary judgment, Plaintiffs rely on the
11 deposition testimony of Ron Gray regarding Walashek's work on Cleaver-Brooks
12 boilers in Eastern Washington and Idaho sometime between 1981 and 1985, and
13 his work on Cleaver-Brooks boilers on Coast Guard ships from 1974 to 1978.
14 Plaintiffs also rely on the deposition testimony of Jim Doud regarding assigning
15 Walashek to work on Cleaver-Brooks boilers in Eastern Washington. (Opp. at 3-
16 4.)

17 With respect to any work Walashek performed on Cleaver-Brooks boilers
18 from 1981 on, the evidence shows that asbestos abatement procedures were in
19 place, and employees, including Walashek, were instructed to take necessary
20 precautions, such as wearing respirators and Tyvek coveralls, to ensure that they
21 were not exposed to asbestos. In their Opposition, Plaintiffs do not dispute that
22 from 1981 on, boilermakers were made aware and trained in the hazards of
23 asbestos. (Opp. at 7.) Plaintiffs have not introduced evidence that in fact
24 Walashek was not instructed to wear protective gear and did not do so. Instead,
25 Plaintiffs argue that prior to 1981, boilermakers were not made aware and trained
26 in personal protective equipment. (Id.) Therefore, the Court finds that there is no
27 genuine issue of material fact with respect to exposure to asbestos attributable to
28 Cleaver-Brooks from 1981 forward.

1 The only evidence regarding Walashek working with Cleaver-Brooks boilers
2 before 1981 is testimony of Gray regarding the work on Coast Guard ships
3 between 1974 to 1978. However, as discussed above, Gray could not provide a
4 basis for saying that the boilers on the Coast Guard ships were Cleaver-Brooks
5 boilers and was relying on “vague memory.” Moreover, Gray testified that he had
6 no knowledge that Walashek or anyone in his presence disturbed any asbestos-
7 containing material in the course of working on those ships.

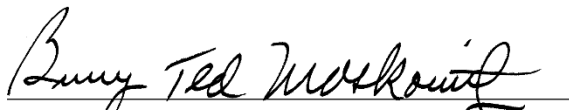
8 Gray’s testimony is not of “sufficient quality to allow the trier of fact to find the
9 underlying fact [of threshold exposure to asbestos attributable to the defendant] in
10 favor” of Plaintiffs. McGonnell, 98 Cal. App. 4th at 1105. Because Plaintiffs have
11 failed to raise a genuine issue of material fact with respect to Walashek’s threshold
12 exposure to asbestos attributable to Cleaver-Brooks, Cleaver-Brooks is entitled to
13 summary judgment on all of Plaintiffs’ claims.

14
15 **IV. CONCLUSION**

16 For the reasons discussed above, Cleaver-Brooks’ Motion for Summary
17 Judgment [Doc. 340] is **GRANTED**. The Court finds that there is no just reason
18 for delay and orders the Clerk to enter final judgment in favor of Cleaver-Brooks.

19 **IT IS SO ORDERED.**

20 Dated: May 24, 2016

21 
22 Barry Ted Moskowitz, Chief Judge
23 United States District Court
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