



FOURTH DISTRICT APPELLATE COURT REAFFIRMS THAT ILLINOIS' "FREQUENCY, REGULARITY AND PROXIMITY" TEST IS MORE THAN LIP SERVICE

BOWLES V. OWENS-ILLINOIS, INC. AND JOHN CRANE, INC.,

2013 IL App (4TH) 121072, OCTOBER 11, 2013

In an opinion filed October 11, 2013, the Fourth District of the Illinois Appellate Court affirmed summary judgment entered in favor of two asbestos-product manufacturers, Owens-Illinois, Inc. and John Crane, Inc., in a case involving alleged Naval exposure.

Jerald Bowles served in the Navy for over twenty years from 1955 to 1976. He served as a radioman on several vessels, including the USS Floyd B. Parks. In 2009, Bowles was diagnosed with lung cancer and died that same year. Plaintiffs subsequently filed suit against Owens-Illinois, John Crane, and others alleging decedent's injuries and death resulted from exposure to their asbestos-containing products. As to Owens-Illinois and John Crane, the allegations centered around decedent's work on the Parks from December 1958 to May 1960.

Plaintiffs presented evidence from four men who served on the Parks from 1955 to 1959. One testified to piping present on the Parks and that dust particles would be dispersed when the ship's guns were fired. He testified that if he had to guess, he would say the pipe insulation was Owens-Illinois' Kaylo. The second serviceman testified that pipes ran through the crew sleeping area and in the galley, and that they called the insulation "KO." Upon questioning from Plaintiffs' counsel, he stated it might have been "Kaylo," although he was not sure. The third serviceman testified to seeing boxes marked Owens-Illinois in the boiler room, where some of the men would go to smoke. He also testified to working with John Crane gaskets and packings on the Parks. A fourth serviceman testified that insulation ran through the sleeping compartments and that it would come off when the guns were fired. Finally, an expert for John Crane testified Owens-Illinois' Kaylo was one of the top three products used on the Parks and that he did not see how decedent could have avoided exposure to Kaylo during the ship's overhaul or when the guns were fired.

Arguing that the above evidence is insufficient under Illinois law to make a submissible case, both Owens-Illinois and John Crane filed motions for summary judgment. They claimed the evidence failed to show decedent worked with or around their particular asbestos-containing products. Plaintiffs countered by arguing they had adequately established asbestos-containing products from both Owen-Illinois and John Crane were on board, making summary judgment improper. The trial court entered summary judgment in favor of both Owens-Illinois and John Crane.

The Fourth District affirmed, holding Illinois' well-settled "frequency, regularity and proximity" test of causation in asbestos cases requires more than just placing the asbestos-containing product on board the ship at the same time as decedent's service. It requires a showing that the defendant's specific asbestos-containing product was put to "frequent" use in "proximity" to where the decedent "regularly" worked.



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As to Owens-Illinois, the court concluded the presence of “Kaylo” was speculative. No serviceman had testified that Kaylo was definitely present on the Parks, and no one identified where Kaylo might have been installed or how frequently decedent might have been in those locations. While John Crane’s expert witness testified Kaylo was one of the top three insulation products used on board during an overhaul in 1959 and 1960, decedent did not actually take part in ripping out that insulation and installing new insulation, making it speculative as to whether he was exposed to Kaylo during the overhaul. The court concluded that even if Kaylo was on the ship and utilized in the repair work, it was not shown where Kaylo was placed, whether decedent worked or slept in areas Kaylo was present, or whether Kaylo asbestos dust fell from pipes when the guns were fired. The “frequency, regularity and proximity” test was not met.

Nor was it met for John Crane. Despite evidence that John Crane gaskets and packings were used on the Parks, there was no evidence to indicate decedent worked with John Crane products or was around people who regularly did so. Although the Plaintiffs presented evidence of studies done on John Crane products showing the gaskets and packings would have released asbestos dust from routine maintenance, the court found the studies were of no probative value because they were done under very different conditions than those present on the Parks.

Thus, despite evidence placing Owens-Illinois’ and John Crane’s asbestos-containing products aboard the Parks, the court held Plaintiffs failed to show decedent himself worked with or around Owens-Illinois or John Crane products with sufficient frequency, regularity, and proximity to create a genuine issue of material fact for determination by the jury. It appears Illinois’ “frequency, regularity and proximity” test is alive and well.

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