



Gordon, who was deposed prior to his death, testified extensively concerning his employment at the refinery. During the first year of his employment, Gordon worked as a Laborer digging ditches and cleaning up.<sup>1</sup> Thereafter, from 1966 until 1971, he continued as a laborer but served as a relief or vacation person, filling in for others in the Furfural Vacuum Unit.<sup>2</sup> During this time, Gordon worked with insulators and was often present when insulation was removed or installed.<sup>3</sup>

In 1971, Gordon was promoted to the position of Operations Foreman of the Coker Unit where he remained until 1981.<sup>4</sup> He then became supervisor of the Boilermakers for four or five years, maintenance supervisor for approximately five years, and maintenance superintendent for the following five years.<sup>5</sup>

Gordon was present and worked around Elliott steam-driven turbines during the ten years he spent as the foreman at the Coker unit. Gordon was able to recall the name Elliott as the manufacturer of at least two of the plant's turbines, as did his co-workers Elmer Moon and Thurman Medsker.<sup>6</sup> Co-worker Loran Beeson

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<sup>1</sup> Melvin C. Gordon Video Dep. Tr., Jan. 12, 2011, at 165: 16-24.

<sup>2</sup> *Id.* at 165: 23 – 167: 12.

<sup>3</sup> *Id.* at 218: 18 – 219: 2 and 222: 24 – 227: 23; *see also* Melvin C. Gordon Discovery Dep., Jan. 13, 2011, at 151: 11 – 153: 7.

<sup>4</sup> Gordon Video Dep. Tr. at 171: 16-22.

<sup>5</sup> *Id.* at 171: 19-21.

<sup>6</sup> Gordon Video Dep. Tr. at 246: 3-7; *see also* Elmer Wayne Moon Dep. Tr., May 4, 2011, at 111: 25 – 112: 1-5 (identifying Elliott as the manufacturer of compressors); Thurman Medsker Dep. Tr., May 4, 2011, at 65: 22-25 and 66: 1-6.

also distinctly recalled the presence of Elliott equipment at the refinery, although he mistakenly associated the name with pumps.<sup>7</sup>

The turbines had to be maintained and repaired, generally on site at the Coker unit, although on some occasions they were repaired in the shop. According to Plaintiff, these turbines had packing similar to asbestos packing in pumps. Gordon associated gaskets, block insulation, and blanket insulation with the turbines in the Coker unit.<sup>8</sup> The Elliott turbines had flanges sealed by asbestos gaskets.<sup>9</sup> Gordon also testified that “without a doubt” the refinery purchased replacement parts for the turbines from the manufacturer because “you didn’t just use off-brand parts on that type of equipment. That’s something that we as a maintenance department did not – I mean, they didn’t want any cut-rate parts.”<sup>10</sup>

In its Objections and Responses to Plaintiffs’ Interrogatories, Elliott admitted that its turbines were supplied with asbestos-containing components such as gaskets, packing, and insulation.<sup>11</sup> The asbestos components Elliott used included compressed asbestos sheet gaskets and packing.<sup>12</sup>

### **Parties’ Contentions**

Defendant Elliott has moved for summary judgment on the basis of a lack of product nexus, claiming that plaintiffs have failed to produce any evidence that

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<sup>7</sup> Loran Beeson Dep. Tr. May 3, 2011, at 47: 6-12.

<sup>8</sup> Gordon Video Dep. Tr. at 245: 7-23 and 246: 1-2.

<sup>9</sup> *Id.* at 246: 1-2.

<sup>10</sup> Gordon Discovery Dep. Tr. at 304: 19-22.

<sup>11</sup> Defendant’s Objections and Responses to Plaintiffs’ Interrogatories.

<sup>12</sup> *Id.*

would satisfy their burden of proof under Kansas law, that is, that Gordon was exposed to asbestos-containing materials attributable to Elliott with some frequency, proximity, and duration, and that the alleged exposure was a substantial factor in causing Gordon's mesothelioma.

In response, Plaintiffs contend that the "frequency, regularity, and proximity" test (also known as "the *Lohrmann* test") should be applied less rigorously in cases of mesothelioma because it is well known in the scientific literature that there is no threshold level of exposure required for the development of mesothelioma, and it can result from even brief or low-level exposures. Plaintiff also points out that the Kansas legislature has actually recognized the difference between mesothelioma and other asbestos-related diseases, although the statute still does require that the four factors be considered in evaluating "substantial factor" causation under section 60.4907. Since Gordon was exposed to Elliott turbines when others were performing repair, and since he spent ten years as the foreman in the Coker unit where the Elliott turbines were located, even without any recollection of specific instances of exposure, Plaintiffs submit that they have presented sufficient evidence to survive summary judgment.

### **Standard of Review**

When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine

whether the moving party is entitled to judgment as a matter of law.<sup>13</sup> Initially, the burden is placed upon the moving party to demonstrate that its legal claims are supported by the undisputed facts.<sup>14</sup> If the proponent properly supports its claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”<sup>15</sup> Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute, or if judgment as a matter of law is not appropriate.<sup>16</sup>

Under Kansas substantive codified law, which the parties agree is applicable to this case, the plaintiff in an asbestos case must establish that the defendant’s product was a substantial factor in causing his disease:

(2) In any civil action under this Act [...] alleging an asbestos claim, the party with the burden of establishing this claim [...] must show that the alleged exposure attributable to a given [...] party was a substantial factor in causing the injury, loss, or damages.<sup>17</sup>

In assessing whether substantial factor causation has been established, the Kansas statute requires the Court to consider, without limitation, all of the following factors:

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<sup>13</sup> Super. Ct. Civ. R. 56(c).

<sup>14</sup> *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

<sup>15</sup> *Id.* at 880.

<sup>16</sup> *Id.* at 879-80.

<sup>17</sup> KAN. STAT. ANN. § 60-4907 (2011).

- (1) The manner in which the plaintiff was exposed.
- (2) The proximity to the plaintiff when the exposure occurred.
- (3) The frequency and length of the plaintiff's exposure; [and]
- (4) Any factors that mitigated or enhanced the plaintiff's exposure.<sup>18</sup>

In essence, then, the statute has codified what is generally known as the *Lohrmann* “frequency, regularity, and proximity” standard.<sup>19</sup>

Upon review of the record, the Court finds that Elliott's liability for Gordon's alleged exposures to its turbines is a triable issue, applying the *Lohrmann* test, even without regard to whether it should be applied less stringently in cases of mesothelioma as opposed to other asbestos-related diseases.<sup>20</sup> The *Lohrmann* standard is intended as a “*de minimis* rule” requiring that a plaintiff prove “more than a casual or minimum contact with the product.”<sup>21</sup> In this case, Gordon spent *ten* years as foreman in the Coker unit where the Elliott turbines were situated and, although he did not personally perform repair work on these pieces of equipment, there is no question that he was a “hands on” supervisor who was directly involved and present in all aspects of the unit's operations. As his co-worker Thurman Medsker testified:

There was [sic] many occasions of us working in there while we would be working on the same equipment. Now he was a foreman, but Melvin was a hands-on foreman. If he walked through the shop, he was going to get involved, he was going to do something.<sup>22</sup>

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<sup>18</sup> KAN. STAT. ANN. §60-4907(a)-(b) (2011).

<sup>19</sup> *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986).

<sup>20</sup> The Court notes that Plaintiff has *belatedly* pointed out that this Court has rejected this argument in *In re Asbestos Litigation (Haas)*, C.A. No. 10C-05-245 (Del. Super. Jun. 9, 2011) (TRANSCRIPT).

<sup>21</sup> *In re Asbestos Litig. (Bowser)*, C.A. No. N10C-05-104 ASB, 2011 WL 2239803, \*3 (Del. Super. Jun. 3, 2011).

<sup>22</sup> Medsker Dep. Tr. at 50: 3-7.

As a foreman, Gordon spent time assisting his maintenance employees in every aspect of their work, including working on pieces of equipment with his hands.<sup>23</sup>

While neither Gordon nor his co-workers could recall specific details of when or where he may have been so involved, there is no question that he was regularly and frequently exposed to these products, and to the dust emanating from them during repairs. Merely by virtue of his ten-year presence in that section of the refinery and his tendency to become involved in the work of those whom he supervised, Gordon's exposure meets the Kansas causation standard. As this Court reasoned in *In re Asbestos Litig. (Bowser)*,<sup>24</sup> the *Lohrmann* test does not "require evidence of specific instances or numbers of exposures, and the absence of such precise evidence is often understandable in mesothelioma cases due to the lengthy latency period of that disease."<sup>25</sup>

Applying the four factors set forth in the Kansas statute, the Court concludes that Gordon was exposed to Elliott turbines by his presence in the area where his maintenance workers performed repairs on them on a daily basis for a lengthy period of time when he served as foreman in the Coker unit. Taken in the context of Gordon's full testimony, as well as that of his co-workers, the presence of Elliott turbines at the jobsite where Gordon spent a decade of his occupational life provides sufficient evidence that Gordon received frequent and regular exposure to

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<sup>23</sup> *Id.* at 50: 8-10.

<sup>24</sup> No. N10C-05-104 ASB, 2011 WL 2239803 (Del. Super. Jun. 3, 2011).

<sup>25</sup> *Id.* at \*4.

asbestos from the packing glands of these turbines to render summary judgment in defendant's favor inappropriate.

Accordingly, Elliott Company's Motion for Summary Judgment is hereby DENIED.

**IT IS SO ORDERED.**

*/s/ Peggy L. Ableman* \_\_\_\_\_  
**Peggy L. Ableman, Judge**

Original to Prothonotary  
cc: All counsel via File & Serve