

NOT FOR PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**LENORE DER WEER as Personal Representative of
the ESTATE OF JOHN DER WEER,**

Plaintiff,

v.

**HESS OIL VIRGIN ISLANDS CORPORATION;
AMERADA HESS CORPORATION; LITWIN
CORPORATION; RARITAN SUPPLY COMPANY,
Individually and as Successor-in-Interest to BRIDGE
SUPPLY COMPANY; MADSEN & HOWELL, INC.;
UNION PUMP COMPANY; GARLOCK, INC.;
FOSTER WHEELER CORPORATION, Individually
and as Successor-in-Interest to FORTY-EIGHT
INSULATIONS, INC.; 3M a/k/a MINNESOTA
MINING & MANUFACTURING COMPANY;
WESTINGHOUSE ELECTRIC CORPORATION;
INGERSOLL RAND CORPORATION; ALLTITE
GASKET COMPANY; UNIVERSAL OIL
PRODUCTS also known as U.O.P.; CBI COMPANY,
LTD., HARBISON-WALKER REFRACTORIES;
FLUOR DANIEL, Individually and as Successor-in-
Interest to FLUOR ENGINEERS &
CONSTRUCTORS, INC.; FLUOR ENGINEERS &
CONSTRUCTORS, INC.; FLUOR
CORPORATION; A.P. GREEN INDUSTRIES, INC.,
Individually and as Successor-in-Interest to A.P.
GREEN REFRACTORIES COMPANY; TUTHILL
CORPORATION, Individually and as Successor-in-
Interest to COPPUS MURRAY GROUP and/or
COPPUS TURBINES; MOBIL OIL CO.; JOHN
CRANE PACKING CO. also known as CRANE
PACKING COMPANY; and RUBBER & GASKET
CO. OF PUERTO RICO,**

Defendants.

LITWIN CORPORATION,

Third-Party
Plaintiff,

v.

**VIRGIN ISLANDS INDUSTRIAL MAINTENANCE
CORPORATION; BIGELOW-LIPTAK; RESAL,
INC.; PORTILLA CORPORATION; PARSONS
INFRASTRUCTURE & TECHNOLOGY GROUP.**

SX-2005-cv-274

**ACTION FOR WRONGFUL
DEATH**

JURY TRIAL DEMANDED

**ACTION FOR
CONTRIBUTION AND
INDEMNIFICATION**

JURY TRIAL DEMANDED

INC.; STUBBS-OVERBECK, INC.; RIGGERS &)
ERECTORS INTERNATIONAL, INC.; KELLOGG)
BROWN & ROOT, Individually and as Successor-in-)
Interest to BROWN & ROOT OVERSEAS, INC.;)
THE LUMMUS COMPANY, JOHN DOE 1, JOHN)
DOE 2, JOHN DOE 3, and JOHN DOE 4,)
)
Third-Party)
Defendants.)
)

MEMORANDUM OPINION

BEFORE THE COURT is a motion filed by Defendant Hess Oil Virgin Islands Corporation (“HOVIC”) for partial summary judgment. Plaintiff Lenore Der Weer, personal representative for the Estate of John Der Weer, filed an opposition to which HOVIC subsequently replied. For the reasons stated below, HOVIC’s motion will be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Lenore Der Weer filed this wrongful death action on May 6, 2005 in her capacity as the personal representative of the estate of her deceased husband, John Der Weer. The Estate seeks damages from multiple defendants, including Defendant Hess Oil Virgin Islands Corporation, for allegedly exposing Der Weer to asbestos during his employment at the oil refinery on St. Croix between 1966 and 2002. Following discovery, HOVIC filed a motion for partial summary, arguing that “[p]artial summary judgment is appropriate because the majority of Plaintiff’s personal injury claims are barred by the exclusivity provision of the Virgin Islands Workers’ Compensation Act.” (Def. Hess Oil V.I. Corp. Partial S.J. Mot. and Mem. of Law 1, filed May 13, 2013 (hereinafter “Def.’s Partial S.J. Mot.”).) In support of its motion, HOVIC provided a copy of the Estate’s First Amended Complaint, which alleges in an attachment that John Der Weer was employed by Litwin Corporation from 1966 to 1970,

by Hess Oil from 1970 to 1989,¹ and by Jacobs IMC from 1999 to 2002. (*See* Def. Hess Oil V.I. Corp.'s Stmt. of Undisputed Facts, Ex. A, filed May 13, 2013 (hereinafter "Def.'s Stmt. of Undisputed Facts")); *accord* Pl's First Am. Compl., Ex. A, filed Aug. 24, 2005.) HOVIC also provided a copy of an itemized statement of earnings from the Social Security Administration for the period January 1966 through December 2000, showing all employers Der Weer worked for during that period of time. (Def.'s Stmt. of Undisputed Facts, Ex. B (hereinafter "Earnings Stmt.")). According to the Earning Statement, Der Weer was employed by Fisher Hess Construction Company, Inc. from 1966 to 1967 and again from 1970 to 1971. (Earnings Stmt. 1.) From 1967 to 1968, Der Weer worked for the Compagnie Industrielle de Travaux (CITRA) and then for Litwin Corporation from 1968 to 1970 with the exception of a few months in 1970 when Der Weer worked for Sud Americana de Electrificacion. (Earnings Stmt. 1-2.) From 1971 to 1997 Der Weer worked for HOVIC until his employer changed to HOVENSA, LLC for whom he worked from 1997 until 2000. (Earnings Stmt. 2-3.) In addition to HOVENSA, Der Weer was also employed by Jacobs Industrial Maintenance Company, LLC in 1999 and 2000. (Earnings Stmt. 3.) No other employment after 2000 is reflected in the Earnings Statement.

Based on this evidence, HOVIC asserts that the Estate's claims are barred by the Workers Compensation Act for both the period when HOVIC employed Der Weer and also for the period of time when Fisher Hess employed him because HOVIC "paid the worker's compensation premiums and was listed on [the] worker's compensation certificate" for Fisher Hess and should be entitled to claim Fisher Hess's immunity as well. (Def.'s Partial S.J. Mot. 1-2.) According to HOVIC, the materials it submitted, namely the First Amended Complaint

¹ In an attachment to the Complaint, the Estate listed "Hess Oil" as John Der Weer's employer from 1970 to 1989—an entity which is neither Amerada Hess nor HOVIC, the two abbreviations the Estate provided in its complaint for Defendant Amerada Hess Corporation and Defendant Hess Oil Virgin Islands Corporation respectively. (*See* First Am. Compl. 1-2 & Ex. A, filed Aug. 24, 2005.) The Court assumes, however, for purposes of this Opinion only that "Hess Oil" refers to Hess Oil Virgin Islands Corporation.

and the Earnings Statement, conclusively show that Fisher Hess and HOVIC employed Der Weer from 1966-67 and from 1970-1998 and that Der Weer's alleged injury "arose out of and in the course of his employment." *Id.* at 4. As a result, the Estate's "sole remedy," HOVIC argues, against Der Weer's employers is the Workers' Compensation Act and not common law tort claims against HOVIC and Fisher Hess. *Id.*

In its Opposition, the Estate concedes that it does not dispute that Der Weer worked for HOVIC, something Der Weer's Social Security earnings records show. (Pl.'s Opp'n to Def. Hess Oil V.I. Corp.'s Partial S.J. Mot. 1, filed May 17, 2013 (hereinafter "Pl.'s Opp'n").) But the Estate does dispute that summary judgment is proper concerning its claims for the time Der Weer was employed by Fisher Hess Construction Company, arguing first that HOVIC "provides no documentary support" to show that it paid workers compensation premiums for Fisher Hess Construction Company and then that "even if there were some contractual arrangement between Fisher Hess and HOVIC providing that HOVIC would pay the workmen's compensation premiums for Fisher Hess, that arrangement would not bestow on HOVIC the status of decedent's employer" for immunity from suit under the Workers' Compensation Act. (Pl.'s Opp'n 2.)

In response, HOVIC explains in its Reply that it "has been unable to locate the necessary documents to support its worker's compensation bar as to Fisher Hess Corporation," but then contends that the Estate nonetheless "concedes that HOVIC is immune from suit for the period of time in which Mr. Der Weer worked directly for HOVIC." (Def. Hess Oil V.I. Corp. Reply to Pl.'s Opp'n to its Partial S.J. Mot. 1, filed June 7, 2013 (hereinafter Def.'s Reply").²) HOVIC then requests that the Court limit any damages the Estate may recover at trial to the period of time in which Der Weer "worked for Litwin

² In a February 21, 2014 Order entered *nunc pro tunc* to May 30, 2013, the Court granted HOVIC's motion for an extension of time to file its reply to the Estate's opposition.

and/or Fisher Hess, provided his employment can be established and provided [the Estate] can prove that any alleged exposure during those brief periods of time in which [Der Weer] was employed by Litwin and/or Fisher Hess caused his alleged injuries.” *Id.*

DISCUSSION

“Because summary judgment is a drastic remedy, it is only appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” *Defoe v. Phillip*, 56 V.I. 109, 117 (2012) (internal quotation marks and citation omitted), *aff’d on other grounds*, 702 F.3d 735 (3d Cir. 2012). The party moving for summary judgment must show—by “citing to particular parts of materials in the record, including depositions, documents . . . admissions, interrogatory answers, or other materials” Fed. R. Civ. P. 56(c)(1)(A)—that there is no “genuine issue of material fact, at which point the burden shifts to the non-moving party to present ‘affirmative evidence’ from which a jury might reasonably return a verdict in his favor.” *Chapman v. Cornwall*, 58 V.I. 431, 436 (2013). In reviewing a summary judgment motion, the Superior Court must view all of the evidence in the light most favorable to the nonmoving party and also draw all reasonable inferences in that party’s favor. *Defoe*, 56 V.I. at 117. “Facts that could alter the outcome are ‘material facts’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993) (citations omitted). “A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff’s case. A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a *prima facie* case under applicable substantive law.” *Id.* (citations omitted). “Therefore, to survive summary judgment, the

nonmoving party's evidence must amount to more than a scintilla, but may amount to less in the evaluation of the court than a preponderance." *Defoe*, 56 V.I. at 117 (internal quotation marks, parentheses, and citation omitted).

HOVIC argues that there is no material dispute as to the Estate's claims against it for the time when it employed Der Weer because any such claims are barred under the Virgin Islands Workers' Compensation Act. The Virgin Islands Workers' Compensation Act is intended to "redress[] injuries received by workers . . . [and] afford expeditious compensation to employees or their dependents without regard to the fault or negligence of employer or employee." 24 V.I.C. § 250(a). The Act "creates a trade-off in legal rights." *Robles v. HOVENSA, LLC*, 49 V.I. 491, 495 (2008). If an employee becomes disabled or dies "from a personal injury or occupational disease arising out of and in the course of his employment," the employer must pay compensation to the employee or the employee's dependents "irrespective of fault as the cause of the injury or death." 24 V.I.C. § 252(a). Part of this "trade-off" means that neither the employee nor the employer has to endure "the burden of civil litigation." *Robles*, 49 V.I. at 495 (internal quotation marks and citations omitted). In fact, the employee's right to compensation under the Act is "the only remedy against the employer" so long as the employer "is insured." 24 V.I.C. § 284(a). In other words, if an employer is insured, the employee may not sue her or his employer to recover money damages for a work-related injury. Being insured under the Workers' Compensation Act "is a mixed question of law and fact" for Virgin Islands courts. *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (2012). The Act requires that the employers pay insurance premiums each year and file annual reports detailing the number of employees, the type of work they do, and the amount of wages paid. 24 V.I.C. §§ 272-73. Once employers pay their premiums, they receive a receipt from the Commissioner of Finance "which shall be prima

facie evidence” that the employer paid for insurance coverage and is therefore an “insured employer.” *Id.* § 273(d). An employer is deemed uninsured, however, if it fails to “comply with all of the statutory provisions” of the Act. *Island Tile & Marble*, 57 V.I. at 624-25.

Because HOVIC has moved for partial summary judgment, it has the burden of proving that no material facts remain in dispute as to the Estate’s claims against it and that the Court should, as a result, summarily enter judgment in its favor. As noted above, the materials HOVIC submitted in support of summary judgment are the First Amended Complaint and the Earnings Statement. Both documents, however, contradict each other regarding who Der Weer worked for and for how long. For example, regarding Der Weer’s employment before 1971, the First Amended Complaint alleges that Der Weer was employed by Litwin Corporation from 1966 through 1970 whereas the Earnings Statement shows that Der Weer was employed by Litwin, Fisher Hess Construction Company, Sud Americana, and CITRA during this same period of time. Similar to his employment before 1971, the materials HOVIC provided are also contradictory regarding Der Weer’s employment after 1971. The First Amended Complaint alleges that Der Weer was employed by Hess Oil from 1970 to 1989 and Jacobs IMC from 1999-2002 with the years between 1989 and 1999 not accounted for. However, the Earnings Statement shows Der Weer working for HOVIC from 1971 through 1997 followed by HOVENSA, LLC from 1997 to 2000. There is clearly a dispute regarding these material facts, namely who Der Weer worked for and for how long.

The documentation HOVIC submitted is also contradictory as when Der Weer first started to work for HOVIC and for how long. The First Amended Complaint has Der Weer starting with HOVIC in 1970 and continuing for nineteen years until 1989 while the Earnings Statement has him starting in 1971 and continuing for twenty-six years until 1997. The Court cannot find based on this evidence that HOVIC has shown that summary judgment is proper,

particularly when the Court must view this evidence, and draw all reasonable inferences from it, in the light most favorable to the Estate. *Defoe*, 56 V.I. at 117.

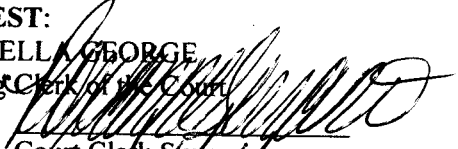
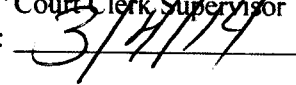
Additionally, HOVIC has not shown that it can claim employer immunity under the Workers Compensation Act for any period, including whatever period of time Der Weer may have worked for Fisher Hess Construction Company. As the Estate correctly notes, the Legislature “has made it crystal clear that only the direct employer of an injured employee obtains the bar against a personal injury suit by its employee.” (Pl.’s Opp’n 2). This clarity was affirmed by the Supreme Court of the Virgin Islands when it held that “the Legislature intended for the common meaning of employer to apply” to the Workers’ Compensation Act and that injured employees may therefore “sue any person other than the party named in the certificate of insurance.” *Defoe*, 56 V.I. at 129 (internal quotation marks omitted). Here, HOVIC has failed to provide anything showing that it paid workers compensation insurance premiums for Fisher Hess Construction Company during any time, including when Der Weer supposedly worked for that company, a point HOVIC concedes in its Reply, arguing instead that any damages the Estate proves “should be limited to the period of time in which he worked for Litwin and/or Fisher Hess.” (Def.’s Reply 1.)

Similarly, HOVIC’s motion for partial summary judgment must also be denied as to the Estate’s claims for the years Der Weer worked for HOVIC. While there is no dispute between the First Amended Complaint and the Earnings Statement that Der Weer was employed by HOVIC at least for the years 1971 through 1989, HOVIC has not provided the Court with any “receipts” forwarded to it by the Commissioner of Finance, *see* 24 V.I.C. § 273(d), or with any copies of “certificates of insurance” issued to it, *see id.* § 284(b), providing prima facie evidence of its status as an insured employer under the Workers’ Compensation Act for any of the years when Der Weer was employed by HOVIC.

In moving for summary judgment HOVIC failed to meet its burden to provide proof showing that no dispute remains regarding HOVIC's immunity from the Estate's claims under the Workers' Compensation Act. HOVIC did not submit any documentation to show its status as an "insured employer" for any of the years it employed Der Weer. Although the Estate concedes in its Opposition that Der Weer was employed by HOVIC, that is immaterial since determining whether an employer is in fact an "insured employer" under the Workers' Compensation Act is a "mixed question of law and fact," *Island Tile & Marble*, 56 V.I. at 612, and the parties cannot stipulate to the law.

CONCLUSION

For the reasons stated above, the Court finds that material facts remain in dispute. The documents HOVIC submitted in support of summary judgment are contradictory regarding who John Der Weer worked for, when he began working for HOVIC, and for how long. Additionally, HOVIC has not submitted any proof showing that was the "insured employer" under the Virgin Islands Workers' Compensation Act that would entitle it to claim immunity from the Estate's claims for any period of time of Der Weer's employment, including any time HOVIC may have covered Fisher Hess Construction Company. Because it is the movant's burden to show that no dispute remains regarding the material fact and because HOVIC has not carried that burden here, its motion for partial summary judgment must be denied.

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court
By: 
Court Clerk Supervisor
Dated: 


DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge

NOT FOR PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

**LENORE DER WEER as Personal Representative of
the ESTATE OF JOHN DER WEER,**

Plaintiff,

v.

**HESS OIL VIRGIN ISLANDS CORPORATION;
AMERADA HESS CORPORATION; LITWIN
CORPORATION; RARITAN SUPPLY COMPANY,
Individually and as Successor-in-Interest to BRIDGE
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LTD., HARBISON-WALKER REFRACTORIES;
FLUOR DANIEL, Individually and as Successor-in-
Interest to FLUOR ENGINEERS &
CONSTRUCTORS, INC.; FLUOR ENGINEERS &
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CORPORATION; A.P. GREEN INDUSTRIES, INC.,
Individually and as Successor-in-Interest to A.P.
GREEN REFRACTORIES COMPANY; TUTHILL
CORPORATION, Individually and as Successor-in-
Interest to COPPUS MURRAY GROUP and/or
COPPUS TURBINES; MOBIL OIL CO.; JOHN
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PACKING COMPANY; and RUBBER & GASKET
CO. OF PUERTO RICO,**

Defendants.

LITWIN CORPORATION,

Third-Party
Plaintiff,

v.

**VIRGIN ISLANDS INDUSTRIAL MAINTENANCE
CORPORATION; BIGELOW-LIPTAK; RESAL,
INC.; PORTILLA CORPORATION; PARSONS
INFRASTRUCTURE & TECHNOLOGY GROUP.**

SX-2005-cv-274

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JURY TRIAL DEMANDED

ORDER

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BROWN & ROOT, Individually and as Successor-in-)
Interest to BROWN & ROOT OVERSEAS, INC.;)
THE LUMMUS COMPANY, JOHN DOE 1, JOHN)
DOE 2, JOHN DOE 3, and JOHN DOE 4,)
Third-Party)
Defendants.)

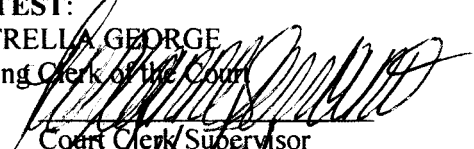
ORDER

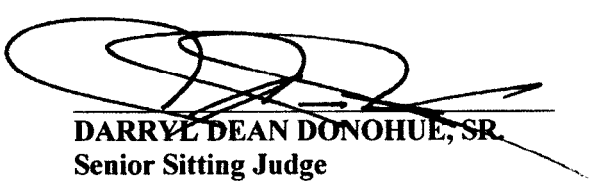
For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant Hess Oil Virgin Islands Corporation's Motion for Partial Summary Judgment, filed May 13, 2013, is **DENIED**. It is further

ORDERED that a copy of this Order and the accompanying Memorandum Opinion be served on all counsel of record.

DONE AND SO ORDERED this 4th day of March, 2014.

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court
By: 
Court Clerk Supervisor
Dated: 3/4/14


DARRYL DEAN DONOHUE, SR.
Senior Sitting Judge