FOR OFFICIAL PUBLICATION

SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ALVIN CANAII,[1] as Personal Representative of the ESTATE OF FRANCIS ANTOINE,	)	**CASE NO. SX-2006-CV-751**
Plaintiffs,	)	**COMPLEX LITIGATION DIVISION**
v.	)	
HESS OIL VIRGIN ISLANDS CORPORATION; AMERADA HESS CORPORATION; GARLOCK, INC.; JOHN CRANE PACKING COMPANY; UNION PUMP COMPANY; RARITAN SUPPLY COMPANY; CHICAGO BRIDGE & IRON COMPANY, LTD, A DELAWARE CORPORATION,	)	
Defendants.	)	

Cite as: 2020 VI Super 56

Appearances:

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For Plaintiff

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For Alltite Gasket Co.

[1] The personal representative and case number has changed throughout the course of litigation. For a summary of these changes *see* Superior Court Order, dated March 27, 2019, SX-06-CV-751 (referring to SX-05-CV-508).

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MEMORANDUM OPINION

MOLLOY, *Judge.*

¶1 **BEFORE THE COURT** is a motion to vacate an arbitration award. Plaintiff Alvin Canaii ("Plaintiff") as personal representative for the estate of Francis Antoine, ("Antoine"), filed a motion seeking vacatur of a final arbitration award. Defendants Hess Oil Virgin Islands Corp. ("HOVIC") and Amerada Hess Corporation ("Hess") filed a brief in opposition. The Court held a hearing on the motion to vacate and invited the parties to file supplemental briefs in advance. For the reasons stated below, the Court will confirm the arbitration award and deny the motion to vacate.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶2 This matter arises out of a wrongful death action filed in the Superior Court in 2006 by the estate of Antoine, alleging exposure to asbestos while he was worked at the HOVIC, and later HOVENSA, refinery on St. Croix. Antoine began working at the refinery in 1993 as a millwright employed by Jacobs-Industrial Maintenance Corporation. He continued to work at the refinery from 1993 to 2002, for a period of nine years. (Pl.'s Mot. to Vacate 3.) A millwright works on installing, removing, and maintaining pumps. *See id.* Plaintiff alleges that Antoine's asbestos exposure occurred "continuously" between September 1993 and October 1998. (*See* Pl's. First Am. Compl. ¶11.) But Antoine also worked in refineries and shipyards for 33 years prior to his employment with HOVIC. (*See* Pl's. Mot. to Vacate, Ex. 3, *Stipulation of Facts*, at 4.) Plaintiff died on September 25, 2005, at the age of 62, allegedly from progressive mesothelioma.[2] *See id.* at 3.

¶3 On September 18, 2012, Hess and HOVIC filed motions to compel arbitration based on two

[2] Progressive mesothelioma is referred to as end-stage, or malignant, mesothelioma. *See Mayo Clinic Online, Stages of Mesothelioma,* found at https://www.mayoclinic.org/diseases-conditions/mesothelioma/symptoms-causes/syc-20375022 (last visited May 10, 2019).

employment agreements signed by Antoine,[3] in which he agreed to arbitrate all claims arising out of or related to his presence at the HOVENSA refinery, and extended to disputes or claims against "any of their related or affiliated companies, entities, employees or individuals (as intended third-party beneficiaries to this agreement)."[4] (*See* Defs' Mot. to Compel Arbitration, filed September 18, 2012, at 2-3.) Hess & HOVIC argued that they were third-party beneficiaries to the agreement to arbitrate. Subsequently, Plaintiff agreed to arbitrate. It is undisputed by the parties that: (1) the parties agreed to arbitrate, (2) confidentially, (3) without a record of the proceedings, (3) the arbitrator had jurisdiction, (4) the arbitrator's decision would be binding, (5) parties would use Employment Arbitration and Mediation Procedures of the American Arbitration Association; and (6) that the Federal Rules of Procedure and Federal Rules of Evidence would govern the proceedings. (*See* Pl.'s Mot. to Vacate Ex.3, *Stipulation of Facts*, at 1-4.)

¶4 At the conclusion of arbitration, the record was held open for closing statements and post-arbitration submissions. (*See* Arbitrator's Award ("Award"), 1.[5]) On December 23, 2014, the arbitrator issued a written decision which concluded that Plaintiff did not prove by a preponderance of evidence that Antoine's asbestos exposure occurred at the refinery, as opposed to exposures from his past employment, and that if any exposure occurred, Plaintiff failed to prove it was the direct or proximate cause of Antoine's mesothelioma. *See id.* at 2.

¶5 On March 18, 2015, Plaintiff filed a Motion to Vacate Arbitrator's Award. (*See* Pl's. Mot. to Vacate 1-2.) On November 30, 2015, Hess and HOVIC replied in opposition. (*See* Defs' Opp. To Pl's. Mot. to Vacate ("Opp'n").) On September 27, 2018, the Presiding Judge of the Superior Court designated this case as complex and transferred to the Complex Litigation Division. The Court subsequently heard argument on the motion to vacate the arbitrator's award and took it under advisement.

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[3] Although the Plaintiff worked for JIMC, for reasons that are unclear from the record, Exhibits A and B of the motion to compel arbitration are agreements between Triangle Construction and Maintenance, Inc. and Francis Antoine.

[4] The agreements "extend[] to disputes with or claims against Triangle, HOVENSA, L.L.C., or other contractors, subcontractors employed at HOVENSA refinery and any of their related or affiliated companies, entities, employees or individuals (as intended third party beneficiaries to this agreement)." Mot. to Compel Arbitration and Stay Pending Arbitration, 2-3. Neither party disputed that the contracts were with Triangle Construction or asserted that this affects the application of the agreement to Plaintiff's employment with JIMC.

[5] The Arbitrator refers to Plaintiff and Defendant as Claimant and Respondent, respectively, within the decision. *See* Award, 1-17. For the sake of clarity and consistency, the Court will refer to the parties as Plaintiff and Defendant.

II. DISCUSSION

¶6 During oral argument, counsel for Plaintiff represented that the Federal Arbitration Act ("FAA"), specifically section 10, was the sole basis under which Plaintiff was proceeding in moving to vacate the award. Thus, the Court cites Virgin Islands precedent regarding section 10. *Cf. Gov't of the V.I., Dep't of Ed. v. St. Thomas/St. John Educ. Adm'rs Ass'n, Local 101*, 67 V.I. 623, 632 (2017) (noting that "parties may not contract for the provisions in section 10 to govern the judicial review of an arbitrator's award."). Under section 10 of the FAA, trial courts play "'only a limited role' when reviewing an arbitration award, . . . [and] 'are not authorized to reconsider the merits . . . even though the parties may allege the award rests on errors of fact or on misinterpretation of the contract . . . .'" *Id.* at 629 (citation omitted). And "[c]ourts in this jurisdiction have historically given deference to the arbitrator's decision." *Id.* at 633.

¶7 While Plaintiff's brief contains numerous arguments in support of vacating the award,[6] during oral argument Plaintiff stated that he would proceed on only one basis—manifest disregard for the law. "A court may vacate an award 'if the arbitrator manifestly disregards the law.' An arbitrator manifestly disregards the law when 'knowing the law and recognizing that the law required a particular result, simply disregarded the law.'" *V.I. Port Auth. v. United Steelworkers (USW), AFL-CIO-CLC, Local Union 9489*, 2019 VI Super 131, ¶ 38 (citation omitted); *accord Mustafa v. Amore St. John*, 58 V.I. 74, 79 n.10 (Super Ct. 2013) ("Manifest disregard is found where the record indicates that an arbitrator recognized [the] applicable law and consciously chose to ignore it." (quoting *Envtl. Indus. Servs. Corp. v. Souders*, 304 F. Supp. 2d 599, 601 (D. Del. 2004))). But manifest disregard should not be confused with clear error or abuse of discretion. Cf. *United Steelworkers*, 2019 VI Super 131 ¶ 38 (""Manifest disregard of the law means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be clear from the record that the arbitrators recognized the applicable law and then ignored it.'" (citation omitted)). To establish manifest disregard for the law a party must demonstrate that "the arbitrator:

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[6] Plaintiff's brief in support of the motion for vacatur argued that the arbitrator incorrectly weighed the circumstantial and contradictory evidence, improperly limited Plaintiff's expert testimony, error, substantial injustice, disregarded that Arbitration Agreement, arrived at the final award based on errors of law, exceeded his authority, demonstrated partiality and refused to hear pertinent evidence. Pl.'s Mot. to Vacate 4-11. However, the Court does not reach these arguments because the Plaintiff specifically waived these arguments and chose to proceed solely under the basis of a manifest disregard for the law. *See* Hrg., May 8, 2019.

(1) knew of the relevant legal principle, (2) appreciated that this principle controlled the outcome of the disputed issues, and (3) nonetheless willfully flouted governing law by refusing to apply it.'" *Mustafa*, 58 V.I. at 80 (citation omitted).

¶8 Plaintiff argues that the arbitrator demonstrated manifest disregard by using the wrong burden of proof: clear and convincing evidence rather than preponderance of evidence. The arbitrator may have *used* the word preponderance, Plaintiff concedes, but he nonetheless *applied* a clear and convincing standard. While the parties agreed that the arbitrator must use the Federal Rules of Evidence, their agreement did not address the burden of proof. But even assuming that preponderance of the evidence would have been the required standard, *cf.* 5 V.I.C. 740(5), Plaintiff has not shown manifest disregard. Preponderance of evidence refers to the "greater weight of the evidence . . . that has the most convincing force, . . . while not sufficient to free the mind wholly from all reasonable doubt, it is still sufficient to incline a fair and impartial mind to one side or the other." Black's Law Dictionary 1373 (10th ed. 2014). A review of the Arbitrator's decision finds no reference to "clear and convincing." Rather, the arbitrator referred to the preponderance of the evidence in concluding that Plaintiff did not sufficiently prove "by a preponderance of evidence" if asbestos exposure occurred at the refinery and, alternatively, that such exposure was not the direct or proximate cause of Antoine's mesothelioma. In other words, the arbitrator concluded that Plaintiff did not carry his burden of proof. But more importantly, even if the arbitrator did apply the wrong burden of proof, that is not a basis for vacating the award under the FAA. *Cf. Pacheco v. Bev. Works NY, Inc.*, No. 14-CV-5763 (DLI)(MDG), 2016 U.S. Dist. LEXIS 139195, at *19 (E.D.N.Y. Sep. 30, 2016) ("Here, the Arbitrator applied the law and found that Plaintiffs had not met their burden of proof. Even if the Court disagrees with how the Arbitrator analyzed and weighed the evidence, by entering into the CBA, 'the parties bargained for a decision by the arbitrator, not necessarily a good one, and that is what they received.' The manifest disregard of the law doctrine cannot save Plaintiffs from the implications of their decision." (citations omitted); *Swenson v. Bushman Inv. Props.*, 870 F. Supp. 2d 1049, 1060 (D. Idaho 2012) ("Just because the arbitrator observed that the DBSI companies had failed to observe corporate formalities within that discussion does not mean that he inverted the burden of proof. There was no such error, much less a manifest disregard of the law." (footnote omitted)); *see also Kiernan v. Piper Jaffray Cos.*, Inc., 137 F.3d 588, 594 (8th Cir.

1998); *Int'l Thunderbird Gaming Corp. v. United Mexican States*, 255 F. App'x 531, 532 (D.C. Cir. 2007). *Accord* Country-Wide Ins. Co. v. TC Acupuncture, P.C., 33 N.Y.S.3d 713, 713 (App. Div. 2016) ("Even assuming, without deciding, that the master arbitrator applied the wrong burden of proof, the award is not subject to vacatur on that ground." (citing *N.Y State Corr. Officers & Police Benevolent Assn. v State*, 726 N.E. 2d 462 (N.Y. 1999)); *U.S. Turnkey Expl., Inc. v. PSI, Inc.*, 577 So. 2d 1131, 1134 (La. Ct. App. 1991) ("Furthermore, the assertion that the panel must have imposed the wrong burden of proof because it stated that the evidence was 'inconclusive' is merely speculation. The weight and sufficiency of the evidence are matters which are within the power of the arbitrators to decide, and we are without authority to substitute our conclusions for those of the arbitrators.").

¶9 The arbitrator discussed and applied the elements that must be proven in a negligence action: "that there was a duty, that duty was breached, the breach was the cause of the injury, and there were damages due to that injury. The mere fact that an accident occurred, without additional evidence, is not enough to prove negligence." Award, 2-3 (citations omitted). The arbitrator then commented on uncontroverted evidence that Antoine had worked in the Merchant Marine as an Engineer Class II in naval shipyards for five years, from age 29 to 34, and later at Brown and Root of Texas in the 1980's. *See id.* Dr. James Crapo ("Crapo"), Chief of Pulmonology and Critical Care at Duke University Medical Center, opined that Antoine was likely exposed to asbestos in the Merchant Marine, while at Brown and Root, and later when he returned to shipbuilding from age 47 to 50. *See id.* This was corroborated by Defendants' expert in marine engineering, Alan Colletti, who concluded that Antoine was likely exposed to high levels of asbestos early in his career while working in engine rooms at naval shipyards. *See id.* 7. Next, the arbitrator discussed Plaintiff's witnesses' testimony and whether it contradicted the Defendants' witnesses. Largely, Plaintiff's witnesses offered equivocal testimony and admitted that they could not confirm whether or not Antoine worked inside areas with asbestos, much less on a regular basis.

¶10 Thus, the arbitrator weighed the credibility of the witnesses, the content of their testimony, and whether they had any personal knowledge of the events. Despite some issues with the foundation of some of the witnesses' personal knowledge of events, the record suggests that the arbitrator took their testimony into account. Furthermore, the arbitrator discussed the weight and credibility of the expert witnesses. Award 4-8. Importantly, the arbitrator stated that Plaintiff's

medical expert witness, Dr. Preston H. Dalglish, M.D. ("Daglish"), a medical oncologist, familiar with the treatment of patients with mesothelioma that had developed during shipyard work, testified that the mesothelioma affecting Antoine typically has a "latency period of twenty to thirty years." *Id.* 5. Additionally, Daglish could not rule out that Antoine's mesothelioma was the result of military shipyard work. *Id.* On the other hand, Crapo opined that "exposure to asbestos with a latency period of fewer than fifteen years was not a contributing factor for the development of mesothelioma . . . [and] mesothelioma after less than ten years of exposure had occurred in "0% of documented cases." *Id.* at 6.

¶11 Finally, the arbitrator questioned the "reasonable degree of medical certainty" of the experts' conclusions. Defendants' expert cited research about the mean-latency period and exposure to disease timeline. Daglish agreed with Crapo regarding the latency period in that the amount of exposure would be an important thing to know when formulating his conclusions. Daglish admitted that he did not know the daily, monthly or annual exposure Antoine was subject to at the refinery. *See id.* at 11 (citing Daglish Dep., 213-14). Daglish agreed that prior exposure could have been the cause of the mesothelioma. Meanwhile, Crapo testified to a reasonable degree of certainty that the interval work at the refinery did not contribute to a risk of developing mesothelioma. *See id.* (citing Crapo Dep., 39). The arbitrator found Defendants expert more compelling and commented that "[i]n such a close and difficult matter, such a distinction was significant." *Id.* at 15. This is not manifest disregard, even if the wrong burden of proof was applied, which the Court does not find.

III. CONCLUSION

¶12 For the reasons set forth above, the Court does not find manifest disregard the law. Arbitration is primarily a contract, and if the bargained for agreement was delivered, it shall not be vacated. *Cf. Educ. Adm'rs Ass'n.*, 67 V.I. at 638-39. Thus, Plaintiff's motion to vacate award must be denied. An appropriate order follows.

Date: April 26, 2020

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
TAMARA CHARLES
Clerk of the Court
By: _____
Court Clerk
Dated: 4/26/2020