

WELDING FUME LITIGATION STATUS REPORT

January 2010

- **Plaintiffs have dismissed thousands of claims in the federal multidistrict litigation (“MDL”) proceeding, and recently dismissed more than two-thirds of the MDL cases they had certified as trial-worthy.**
- **Plaintiffs recently moved to dismiss the *Ray* case, which was slated to be the next trial in the MDL, after the defendants discovered fraud; this was the sixth trial-ready case the plaintiffs have been forced to dismiss due to potential fraud.**
- **Jurors have found for defendants in 23 of the last 28 plaintiffs’ cases tried in this litigation, including consolidated cases that are heavily weighted toward plaintiffs and cases in jurisdictions that are considered plaintiff-friendly.**
- **The most reliable and comprehensive epidemiological studies continue to show no association between welding and neurological disorders.**

Introduction

Over the last several years, plaintiffs’ attorneys have staged expensive advertising campaigns and medico-legal screening programs designed to generate large numbers of lawsuits against current and former manufacturers of welding consumables and other defendants, alleging that exposure to the manganese in welding fumes causes neurological disorders. These attorneys have issued press releases and spoken to financial analysts in an effort to portray the litigation as potentially catastrophic for the defendants. But as the litigation has progressed, it has become abundantly clear that there is no substance to plaintiffs’ claims. Even more troublesome, a number of plaintiffs have misrepresented their symptoms and medical backgrounds.

Since January 2006, thousands of plaintiffs have abandoned their claims. In fact, plaintiffs have dismissed 65% of the cases they had certified as trial-worthy in the federal MDL court. Plaintiffs are now actively pursuing fewer than 750 cases in the MDL proceeding, a reduction of approximately 85 percent from the number of pending MDL cases in 2005.

Moreover, plaintiffs have been forced to dismiss six trial-ready cases due to outright fraud, three of which plaintiffs themselves had selected for early trial in the federal MDL court. The defendants believe these cases, like the vast majority of the cases in this litigation, have no merit and should never have been brought in the first place.

The bottom line is clear: notwithstanding the rhetoric from plaintiffs’ counsel, there is no substance to this purported mass tort, which has been an ill-conceived business venture for plaintiffs’ counsel. Their accusations have not panned out, and the supposed threat to the defendants – responsible companies that have been unfairly targeted with baseless claims – simply is not there.

Dismissals Continue to Mount

The strongest sign that the welding fume litigation has not panned out as plaintiffs' counsel had originally planned is the ongoing and sharp decline in the number of pending lawsuits. Since January 2006, plaintiffs have dismissed thousands of cases, and new filings have slowed to a trickle. All told, the number of pending welding fume claims has dropped by more than 80% in the past four years.

After fraud was revealed in the *Morgan, Landry, and Peabody* cases in the MDL proceeding, the MDL court instituted a new process to ensure that only "trial worthy" cases made it to the later stages of litigation. That procedure, which required medical records collection and a certification by plaintiffs' attorneys that the case was indeed trial-worthy, resulted in plaintiffs dismissing thousands of cases.

In June 2009, the MDL court implemented an extensive re-review of previously certified cases. This process resulted in plaintiffs' counsel dismissing or withdrawing as counsel in 29 of the 43 cases they had previously certified as trial-worthy.

Of course, that number is in addition to the hundreds of cases that have been dismissed, or in which counsel has withdrawn rather than undergo the medical records collection and trial certification process, as well as the thousands of cases that were dismissed earlier in the process.

A Pattern Of Fraudulent And Meritless Claims

Defendants' efforts to press for discovery of plaintiffs' claims are driven by the continuing pattern of unfounded claims in this litigation, as plaintiffs have now been forced to dismiss six cases in the advanced stages of trial preparation due to outright fraud.

In November 2009, plaintiffs moved to dismiss the *Ray* case, which was slated to be tried in the MDL proceeding in January 2010. The motion to dismiss was filed after defendants discovered several discrepancies with respect to Mr. Ray's tax returns as well as a website that featured pictures of Mr. Ray participating in numerous high-speed, competitive boat races over the last two years (when he claimed to be disabled). Mr. Ray's continued participation in such races suggests that his claims of impairment were, at best, grossly overstated.

In March 2008, plaintiffs moved to dismiss the *Lopez* case in Louisiana state court after evidence emerged suggesting that Ms. Lopez had falsely claimed six individuals as dependents on her U.S. income tax returns. Defendants believe that Ms. Lopez's alleged ailments were completely fabricated – similar to numerous other plaintiffs in the litigation – and that her case should never have been brought in the first place.

Similarly, in January 2008, plaintiffs were forced to dismiss the *Smith* case in Mississippi state court, after the plaintiff was caught on videotape engaging in activities he had testified under oath that he was unable to perform. The *Smith* case was scheduled to be tried in Hinds County, Mississippi before Judge Robert DeLaughter. Shortly before the *Smith* dismissal, Judge DeLaughter recused himself from the *Smith* case and several other welding fume cases because he was under investigation for his actions in another case brought by one of Mr. Smith's lawyers.

Earlier in the MDL proceeding, plaintiffs were forced to drop three cases *they* had selected for early trials after defendants learned that the plaintiffs had provided false information

in their sworn discovery responses. Plaintiffs also declined to proceed to trial in three more cases that they had originally nominated for a consolidated trial.

One of these carefully selected “best” plaintiffs, Dewey Morgan, a 56-year-old former welder, was to submit his claims to a jury in a trial scheduled to begin in February 2006. Morgan and his lawyers claimed that he had been so severely disabled by welding that he would require hundreds of thousands of dollars each year for round-the-clock care. Plaintiffs claimed that the defendants were responsible for all of Mr. Morgan’s problems even though he had: a back injury from which he was declared totally disabled in 2003 that caused him “intractable” pain; a decade-long problem with depression; and an extensive family history of essential tremor, a hereditary condition that causes some of the same physical symptoms Morgan alleged were caused by his exposure to welding fumes.

A neurologist retained by the defendants examined Morgan and determined that his tremor was not caused by a physical condition (i.e., that he was purposely faking his alleged symptoms or was experiencing a subconscious psychological condition). In addition, defendants conducted surveillance and videotaped Morgan walking without a cane or walker, getting on his tractor, raking leaves, and carrying groceries – activities that he had claimed under oath that he could not do because of his condition. Following these revelations, plaintiffs moved to dismiss his case with prejudice on December 16, 2005, and it was formally dismissed on March 10, 2006.

Plaintiffs’ counsel chose Scott Landry from a list of seven candidates proposed by defendants for another early MDL trial slot. Plaintiffs’ key expert, Dr. Paul Nausieda, diagnosed Landry at a lawyer-sponsored “screening.” Landry claimed to be suffering from a number of ill-defined symptoms, including increased fatigue, aggressiveness, insomnia, irritability, excessive salivation, sweating, headaches, poor memory, shaking hands, poor balance, and dizziness. But like 70 percent of the federal court plaintiffs who attended plaintiffs’ “medical” screenings, Landry never went to a doctor to complain about these symptoms before the screening and never sought treatment for them after the screening. In addition, Landry reported that he had earned \$100,000 per year working as a welder and welding inspector in 2003 and 2004 – after he was allegedly suffering from manganism – undermining his claims of serious disability.

Defendants’ fact investigation into the *Landry* case quickly revealed that he had a long-standing drug and alcohol problem that could have caused many of his alleged symptoms. Landry had also misrepresented the circumstances surrounding his military discharge (dishonorable for drugs) in his discovery responses. Plaintiffs ultimately moved to dismiss Landry’s claim at the same time as Morgan’s, and dismissal was formally granted on the same day.

In August 2006, plaintiffs’ counsel was forced to seek dismissal with prejudice of yet another of their hand-picked candidates for an early MDL trial: Darwin Peabody. While preparing the case for trial, defendants discovered that Peabody had not disclosed his long and highly relevant history of drug and alcohol abuse. Peabody attributed a variety of alleged symptoms to welding, including memory loss, irritability, and depression, but defendants learned that he had complained of the same symptoms when he was in a drug rehabilitation program nearly 20 years ago – *before* he ever started welding.

Louisiana Court Grants Summary Judgment in the Ratcliff Case

On March 13, 2009, the Civil District Court for the Parish of Orleans in Louisiana granted defendants' motion for summary judgment on former welder David Ratcliff's claims after the defendants demonstrated that Mr. Ratcliff's own treating neurologist ruled out a diagnosis of manganese toxicity. The court found that Mr. Ratcliff has a condition that is caused by inflammation of the spinal cord and has nothing to do with manganese exposure.

MDL Court Grants Defendants' Motion to Strike Six Remaining MDL Class Actions

On August 4, 2008, the MDL court granted defendants' motion to strike the class allegations in the six remaining class action cases in the MDL. The August ruling followed a September 14, 2007 order by the MDL court, in which the court denied class certification in the *Steele* case after concluding that the plaintiffs could not meet the typicality requirement imposed by Fed. R. Civ. P. 23(a)(3)¹. There are now no class actions pending in the welding fume litigation.

Juries Continue to Reject Plaintiffs' Claims at Trial

When counsel have actually taken their cases to trial, juries have continued to reject plaintiffs' claims, both in the MDL proceeding and in such notoriously plaintiff-friendly state court jurisdictions as Orleans Parish, Louisiana, Madison County, Illinois, and Brazoria County, Texas.

- Defense verdicts were returned in the *Belcher* case in West Virginia (August 2009) and the *Thomas* case in California (February 2009). Both verdicts were returned within a matter of hours.
- In November 2008, a unanimous defense verdict was returned in the *Byers* case by a Cleveland, Ohio jury in the MDL court.
- In March 2008, a Louisiana jury returned unanimous defense verdicts in the four-plaintiff *Andre/Barras* trial. Even with the widely acknowledged strategic advantage of having multiple claims presented in a single trial, the plaintiffs could not convince the jury of their claims.
- Jurors have now found for defendants in 23 of the last 28 plaintiffs' cases tried in this litigation.
- While defendants believe, on the merits, that they should win every case, other factors, such as the makeup of individual juries, sympathy for a particular plaintiff, pretrial court rulings, and the jurisdiction can affect a verdict.
- Plaintiffs in the welding fume litigation have won only five of the 15,000 cases they filed in the last decade: the *Cooley* case tried as part of the MDL in Cleveland, Ohio; the *McLemore* case, tried in Copiah County, Mississippi; the *Jowers* and *Tamraz* cases, tried as part of the MDL in Gulfport, Mississippi and Cleveland, Ohio, respectively; and the *Elam* case, tried in Madison County, Illinois, a notoriously pro-plaintiff jurisdiction. The *Jowers* case is currently on appeal to the Fifth Circuit Court of Appeals, the *Tamraz* case is currently on appeal to the Sixth Circuit Court of Appeals, and the *McLemore* case is on

¹ See *In re Welding Fume Prods. Liab. Litig. (Steele)*, 245 F.R.D. 279 (N.D. Ohio 2007).

appeal to the Mississippi Supreme Court. The *Cooley* case is still subject to post-trial motions.

- While defendants would obviously like to win all cases, and believe that their overall success in this litigation will continue, it is unrealistic to believe that they will never lose a case. The defendants are confident they will ultimately prevail in these cases, and will continue to try those cases not dismissed on other grounds.

Scientific Evidence Supporting the Defense Position is Growing

Several recent studies have confirmed that welders are not at increased risk of developing Parkinson's disease, parkinsonism, manganism, or other, similar movement disorders.

Not only has this litigation revealed that many individual plaintiffs' claims are meritless, but there is also a continually-growing body of sound science rejecting those claims.

In September 2009, The Archives of Neurology published results from a Multicenter Case-Control Study, which was designed to evaluate whether working in certain occupations or exposure to specific toxicants was associated with the risk of being diagnosed with Parkinson's disease or other types of parkinsonism.² The study compared lifelong occupational and job task histories for participants who worked in a variety of occupations that had been reported elsewhere to be associated with parkinsonism, including farming, education, health care and welding. Findings from 519 cases and 511 controls showed that those who worked in farming, education, healthcare and welding did not have a greater risk of parkinsonism or Parkinson's disease.

In May 2009, the Journal of Occupational and Environmental Hygiene published a nationwide mortality study of men in the United States assessing whether there is a relationship between welding and mortality from Parkinson's disease, Alzheimer's disease and other neurodegenerative diseases.³ Information was abstracted from death certificates for states that collected data on occupation. The author concluded that the data do not support an association between welding occupations and death from Parkinson's disease or other neurodegenerative diseases. There was also no evidence that welders are at increased odds of dying from Parkinson's disease at a younger age.

In 2007, researchers sponsored by the European Commission published a multi-center case control study evaluating potential associations between environmental exposures and developing parkinsonism or Parkinson's disease.⁴ The authors studied 959 test subjects who were matched with 1989 controls. The study examined potential links to parkinsonism and Parkinson's disease from a wide variety of environmental exposures, including various metals, pesticides, and cigarette smoke. The investigators did not find a significant association between

² Tanner, C., et al., *Occupation and Risk of Parkinsonism: A Multicenter Case-Control Study*. Arch Neurol. 2009;66(9):1106-1113.

³ Stampfer, M., et al., *Welding Occupations and Mortality from Parkinson's Disease and Other Neurodegenerative Diseases Among United States Men. 1985-1999*. Occup. Environ. Med., May 30, 2009.

⁴ Dick, F.D., et al., *Environmental risk factors for Parkinson's disease and parkinsonism: the Geoparkinson study*. Occup. Environ. Med., May 30, 2007.

manganese exposure and development of Parkinson's disease or parkinsonism. Furthermore, the authors noted that this study was "*one of the largest case-control studies to date of genetic, environmental and occupational risk factors for Parkinson's disease or other degenerative parkinsonian syndromes.*"

In addition, some of the welding consumable manufacturers who are defendants in the welding fume litigation funded an epidemiological study in Sweden using a generally accepted study design based on the existence of nationwide health databases.⁵ This Swedish study is a linked-registry cohort study of almost 50,000 welders, followed for an average of 29 years each, and compared to an age- and geographical-matched control group of close to 500,000 non-welders. The investigators compared incidence and mortality experience of the welders for various neurodegenerative disease endpoints, including Parkinson's disease, secondary parkinsonism, other degenerative diseases of the basal ganglia, other extrapyramidal and movement disorders, and manganese poisoning. The investigators found no increased risks among welders for any of these disease endpoints.

Similarly, defendant Caterpillar sponsored an epidemiological study that did not find a statistically significant association between exposure to welding fumes and neurological injury.⁶ Dr. Gary Marsh, a professor of biostatistics at the University of Pittsburgh School of Public Health, conducted a case-control study of the incidence of Parkinson's disease, parkinsonism, and related disorders at three Caterpillar plants in Illinois, specifically looking to determine whether employment as a welder is related to an increased risk of these diseases. The study population consisted of all employees at one or more of the plants between the 1970s and 2004 who had the potential to make a Caterpillar insurance claim between 1998 and 2004. This resulted in a study population of 12,595. Dr. Marsh concluded: "This matched case-control study of employees from three Caterpillar Inc. (Caterpillar) plants revealed no evidence of a statistically significant association between employment as a welder with potential exposure to manganese and the risk of developing idiopathic Parkinson's Disease or a related Parkinsonism disorder."

These studies further supplement substantial epidemiological data showing no connection between exposure to welding fumes and movement disorders.⁷

⁵ Fored, C.M., Fryzek, J.P. et al., *Parkinson's disease and other basal ganglia or movement disorders in a large nationwide cohort of Swedish welders.* 63 *Occup. & Env'tl. Med.* 135 (2006).

⁶ Marsh, G. M. and Gula, M. J. *Employment as a welder and Parkinson's disease among heavy equipment manufacturing workers.* *JOEM.* 2006 Oct; 48(10):1031-1046. Rec #: 27337.

⁷ See also, e.g., Park, J. et al., *A retrospective cohort study of Parkinson's disease in Korean shipbuilders.* *NeuroToxicology*, 2006 May 27 (3):445-9 16483661; Frigerio, R., et al., *Education and occupations preceding Parkinson disease: a population-based case-control study.* 65 *Neurology* 1575 (2005); Park J, et al., *Occupations and Parkinson's disease: a multi-center case-control study in South Korea.* *Neurotoxicology*, 26(1):99-105 (2005); Park, J., et al., *Occupations and Parkinson's disease: a case-control study in South Korea.* *Ind. Health*, 42(3):352-8 (2004).