

WELDING FUME LITIGATION STATUS REPORT

July 2008

- **Plaintiffs have moved to dismiss more than 4,000 cases in the federal multidistrict litigation (“MDL”) proceeding, upwards of 80% of their claims.**
- **The total number of cases pending against the welding defendants has dropped by over two-thirds.**
- **Plaintiffs have been forced to dismiss five trial-ready cases due to fraud, including three slated for early trials in the MDL.**
- **Jurors have found for defendants in 20 of the last 23 plaintiffs’ cases tried in this litigation, including consolidated cases that are heavily weighted toward plaintiffs and cases in jurisdictions that are considered plaintiff-friendly.**

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, plaintiffs’ counsel have moved to dismiss more than 4,000 claims in the federal MDL proceeding. These dismissals follow plaintiffs’ acknowledgment that 40 percent of their federal court clients were never diagnosed with any neurological condition and 70 percent of these allegedly sick claimants never sought medical treatment. (This information was revealed in fact sheets that plaintiffs were required to submit in the MDL proceeding in federal court.) There are now approximately 80% fewer cases pending in the MDL.

Moreover, plaintiffs have been forced to dismiss five trial-ready cases due to outright fraud, three of which plaintiffs themselves had selected for 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 over two-thirds over the past two-and-a-half years.

Courts in Mississippi – once one of plaintiffs' favored jurisdictions – have seen a particularly sharp drop in the number of pending welding cases. For example, over 450 plaintiffs' claims were dismissed in Mississippi in August 2007 – another sign that the thousands of supposedly injured welders that plaintiffs' counsel touted in the early stages of this supposed mass tort simply do not exist.

In the MDL proceeding, the number of cases has dropped by approximately 80 percent since early 2006. Under the MDL Court's First Case Administration Order ("CAO"), plaintiffs were required to submit a "Notice of Diagnosis" of a relevant neurological condition by December 31, 2006 or face dismissal of their claims for failure to prosecute. Specifically, plaintiffs were required to certify that a physician "examined the plaintiff" and concluded that the plaintiff suffers from a neurological disorder "caused by exposure to manganese."

As defendants expected, the Notice of Diagnosis requirement caused a huge wave of dismissals of MDL cases. Plaintiffs moved to dismiss thousands of cases rather than submit Notices confirming that the claimant actually had a physician diagnosis.

The CAO also required large numbers of individual MDL plaintiffs to lift the curtain on their claims for the first time in this litigation by providing defendants with medical records and other facts underlying their cases. Pursuant to the CAO, the court chose a group of 100 cases for this case-specific discovery. After the initial round of medical records discovery, plaintiffs were to inform defendants and the court which cases they believed in good faith they would pursue to trial. The court would then choose 15 of these "certified" cases at a time for even more intensive fact development. Plaintiffs moved to dismiss 59 of the first 100 cases the court selected before any records were even collected. The Court selected replacements for those 59 cases, and plaintiffs promptly dismissed 19 of the replacement cases. In total, plaintiffs have now dismissed nearly 140 of the 179 cases that the Court has selected for medical records discovery.

A Pattern Of Fraudulent And Meritless Claims

Defendants' efforts to press for discovery of plaintiffs' claims is driven by the continuing pattern of unfounded claims in this litigation, as plaintiffs have been forced to dismiss five cases due to outright fraud.

In March 2008, plaintiffs moved to dismiss a case filed on behalf of a plaintiff in Louisiana state court named Mary Lopez 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' 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 a case filed by a plaintiff in Mississippi state court named Troy Smith after he was caught on videotape engaging in activities

he had testified under oath 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.

In the MDL proceeding, plaintiffs have been 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 have 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 fume.

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 were 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.

Plaintiffs have also declined to proceed to trial in three other cases that they nominated for a proposed consolidated trial in November 2006. Those cases have now been dismissed without prejudice.

In addition, more than 20 cases scheduled for trial in state court in 2007 and the first half of 2008 were postponed, dismissed, or otherwise moved off the trial calendar. Several of those cases were postponed or dismissed in Texas. The Texas Supreme Court's June 2007 decision in *Borg-Warner Corp. v. Flores*¹ will likely lead to further dismissals. In *Borg-Warner*, the Texas Supreme Court held that a plaintiff in a toxic exposure case cannot recover without showing that "the defendant's product was a substantial factor in bringing about the plaintiff's injuries."² That means plaintiffs who sue manufacturers of welding consumables in Texas will need to prove that they were exposed to a quantity of welding fumes from *each defendant's* products sufficient to cause their alleged injuries. The Texas Supreme Court's reasoning in *Borg-Warner* that "proof of mere frequency, regularity, and proximity [of exposure] is necessary but not sufficient"³ to prove causation will apply with equal force in welding fume cases.

Ohio Judge Grants Summary Judgment in Boyd Case

On July 10, 2007, Justice Francis Sweeney of the Cuyahoga County Court of Common Pleas in Cuyahoga County, Ohio, granted defendants' motions for summary judgment on former welder Joseph Boyd's claims. Boyd's case was scheduled for trial in September 2007. But at his deposition, Boyd admitted that he had not read any of the warnings that appeared on the welding rods and other products that he used during his career. In granting defendants' motion for summary judgment, Justice Sweeney ruled that "it is difficult for Plaintiff to make a failure to warn claim citing the inadequacy of the warnings when Plaintiff himself never saw or read the warnings." Thus, the court found, plaintiff's failure to read the warnings that were available to him doomed his failure-to-warn and fraudulent concealment claims. The court also dismissed Boyd's negligent undertaking claims, which were aimed at the activities of welding-related trade associations. According to the court, Boyd "provided no evidence that any of the Defendants were specifically involved in the decision-making by the [trade] organizations to undertake the duty of providing safety information." Justice Sweeney denied plaintiff's motion for

¹ *Borg-Warner Corp. v. Flores*, No. 05-0189, 2007 WL 1650574 (Tex. June 8, 2007).

² *Id.* at *4.

³ *Id.* at *6.

reconsideration of his ruling, and plaintiff has appealed.

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 Parish of Orleans, Louisiana, Madison County, Illinois, and Brazoria County, Texas.

- Most recently 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.
- In November 2006, the first multiple-plaintiff trial in the history of the welding fume litigation – the *Goforth/Quinn* trial in the MDL in Cleveland, Ohio – also resulted in defense verdicts.
- Juries also returned defense verdicts in all six welding fume cases brought to trial in 2006; three of which were returned in plaintiff-friendly state-court venues in Arkansas, Illinois and Texas.
- Jurors have found for defendants in 20 of the last 23 plaintiffs' cases tried in this litigation.
- While the defendants believe, on the merits, that they should win every case, they know that other factors, such as the makeup of individual juries, sympathy for a particular plaintiff, and the jurisdiction can impact a verdict.
- The plaintiffs have won only three of the 15,000 cases they filed in the last decade: the *Jowers* and *Tamraz* cases, tried as part of the MDL proceeding in Gulfport, Mississippi and Cleveland, Ohio, respectively, and the *Elam* case, tried in Madison County, Illinois, a notoriously pro-plaintiff jurisdiction. Post-trial motions are still pending in the *Jowers* and *Tamraz* cases, and defendants believe they have strong grounds to appeal the plaintiff verdicts if those motions are denied.

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.

For example, researchers sponsored by the European Commission published a multi-center case control study in 2007 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 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 manufacturing 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

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

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. & Environ. 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.

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."

While plaintiffs at one time criticized defendants for not funding research into the safety of their products, they have now done an about-face and are complaining that defendants have tried to "buy science" by sponsoring studies about the health effects of welding. The fact is, however, that the results obtained in these studies are fully consistent with the results obtained by other researchers who have not been funded by the industry, such as the previously cited European Commission study. Similarly, in 2006, researchers reported on a cohort study in South Korea intended to clarify the role of occupational exposure, "especially to welding," and Parkinson's disease.⁷ The study used sophisticated neuroimaging techniques for diagnosis and "the validity of the diagnosis was evaluated in all cases." The authors concluded that "this study of shipbuilding workers supports our previous case-control studies suggesting that Mn does not increase the risk of PD."

Likewise, a population-based case-control study by Frigerio⁸ that utilized the Mayo clinic medical records-linkage system identified all incident cases of Parkinson's disease among residents of Olmstead County, MN from 1976 to 1995. Controls were age- and sex-matched residents from Olmstead County. The investigators carried out two analyses: a primary analysis with occupation data obtained from medical records and alternative analyses with occupation obtained from telephone interviews on a total of 196 cases and 196 controls. These investigators found *no association* between ever having been a metal worker (a group that includes welders) and developing Parkinson's disease. Indeed, based upon telephone interviews, the investigators found a statistically significant *inverse association* between PD and having been a metal worker. Frigerio provided no separate analysis for welders, but in his discussion section, he did break out the numbers of welders from the total for metal workers. No Parkinson's disease cases were "welders" on either medical records review or telephone interview, but one control was a "welder" on interview, and three were identified as "welders" from their medical records.

Also in 2005, Korean researchers published another study⁹ seeking "to clarify the role of occupational exposure, and especially manganese (Mn) exposure in the etiology of Parkinson's disease."¹⁰ In that hospital-based case-control study, 367 consecutive outpatients with Parkinson's Disease and 309 controls were interviewed about lifestyle, past history, family history, education level, and occupational history. The authors concluded, "[O]ccupations with a high potential exposure to [manganese] showed consistently negative association with PD after adjusting the confounders such as age, sex, smoking, and education level (OR: 0.42, 95% CI 0.22-

⁷ See Park, J. et al., *A retrospective cohort study of Parkinson's disease in Korean shipbuilders*, *NeuroToxicology*, 2006 May 27 (3):445-9 16483661.

⁸ See, e.g., R. Frigerio, et al., *Education and occupations preceding Parkinson disease: a population-based case-control study*, 65 *Neurology* 1575 (2005).

⁹ Park J, et al., *Occupations and Parkinson's disease: a multi-center case-control study in South Korea*, *Neurotoxicology*, 26(1):99-105 (2005).

¹⁰ The same authors published a similar hospital-based case control study in 2004. Park J, et al., *Occupations and Parkinson's disease: a case-control study in South Korea*, *Ind. Health*, 42(3):352-8 (2004). In that study, 105 outpatients with Parkinson's disease, 129 neurological disease controls, and 101 healthy controls were interviewed. Researchers found no significant association between exposure to manganese and Parkinson's disease.

0.81).”

In short, there is a large body of reliable scientific evidence finding no connection between exposure to welding fumes and movement disorders – and that body of evidence continues to grow.

Conclusion

Over the last two-and-a-half years, thousands of plaintiffs have abandoned their claims against the welding industry defendants, a number of the cases developed for trial were dismissed after discovery revealed that the plaintiffs had provided false information about their condition or medical history, and juries in federal and state courts around the country continued to reject plaintiffs’ claims. At the same time, the body of sound scientific data supporting the defense position has continued to grow. Finally, plaintiffs have chosen to dismiss many more cases rather than provide any factual basis for them, further confirming that the supposed welding fume mass tort is simply a shrinking collection of meritless claims.