

# WELDING FUME LITIGATION STATUS REPORT

## August 2006

- **Defendants win first multidistrict litigation (MDL) trial**
- **Plaintiffs' counsel's next hand-picked MDL case dismissed with prejudice after defendants discover that plaintiff hid history of drug abuse**
- **Pattern of wholly unfounded claims emerging**
- **MDL court dismisses 1600 cases after plaintiffs decline to pursue their claims**
- **Overall number of pending cases down by 40% over prior year**

### Introduction

Over the last several years, plaintiffs' attorneys have staged expensive advertising campaigns and screening programs designed to amass numerous lawsuits against current and former welding rod manufacturers alleging neurological disorders supposedly caused by the manganese in welding fumes. These attorneys have issued many press releases and spoken to financial analysts in an effort to portray the litigation as potentially having substantial adverse consequences for the defendants. But as the litigation has progressed, it has become abundantly clear that there is little real substance to this litigation. Even more troublesome, it has also become clear that a number of plaintiffs have misrepresented their symptoms and medical backgrounds.

In recent months, plaintiffs' counsel have dismissed thousands of their cases and served discovery responses acknowledging that 40% of their federal court clients were never diagnosed with any neurological condition and that 70% of these allegedly sick claimants have never sought medical treatment. Perhaps even more telling is the fact that plaintiffs were forced to drop *three of their first four* hand-picked federal court trial cases after it was revealed that one plaintiff had dramatically exaggerated his symptoms, another had failed to disclose his illegal drug use and dishonorable discharge from the military, and the third had complained about his supposed welding-related symptoms in drug rehabilitation before he ever started welding. And as detailed below, in the fourth case, a federal jury flatly rejected the plaintiff's claims.

Plaintiffs' trial record also provides strong indications that their litigation is in trouble. Eleven of twelve cases tried to juries have resulted in defense verdicts, including the first federal MDL trial. (The one loss was in pro-plaintiff Madison County, Illinois.)

The bottom line is clear: notwithstanding the rhetoric from plaintiffs' counsel, this litigation is fading fast. It has been an ill-conceived business venture for plaintiffs' counsel. Their accusations simply have not panned out, and the supposed threat to the welding rod manufacturers – responsible companies that have been unfairly targeted with meritless claims – simply is not there.

### **Defendants Win First MDL Trial**

On June 27, 2006, a Cleveland jury returned a defense verdict in the *Solis* case, the first trial to be held in the federal multidistrict welding fume litigation proceeding. In finding that the welding rod manufacturers did not distribute a product with a marketing defect, the jury endorsed the warnings provided by the industry and confirmed what these companies have been saying all along – *i.e.*, that they have adequately and responsibly warned welders about the potential hazards of welding. Contrary to plaintiffs' accusations, these defendants have always worked to ensure the safety of welders, and are proud of their history of providing appropriate warnings and safety information with products.

Mr. Solis is highly representative of the larger pool of cases – like the overwhelming majority of plaintiffs, he sued based on a screening diagnosis and never sought treatment for his supposed ailment.

Prior to trial, Mr. Solis was examined by Dr. Anthony Lang, a preeminent Parkinson's disease and movement disorder specialist. After conducting a complete neurological examination, Dr. Lang determined that Mr. Solis's tremors had no physical basis. In other words, Mr. Solis's alleged symptoms were either caused by a psychological condition or were purposely exaggerated. This diagnosis is corroborated by the fact that Mr. Solis visited numerous doctors both before and after the plaintiff-sponsored screening (the only place where he was diagnosed with a movement disorder) and was given annual physicals by the U.S. Navy – yet, ***he never once complained about the symptoms over which he sued to any physician except the one hired by plaintiffs for these lawsuits.***

### **A Pattern of Meritless Claims is Emerging**

Not only do defendants continue to prevail in welding fume trials, but there is an emerging pattern of unfounded claims in these cases. In the last eight months, plaintiffs have been forced to drop three cases ***they*** had selected for early trials in the MDL proceeding after defendants learned that the plaintiffs had provided false responses in their sworn discovery responses.

In one of these carefully selected “best” cases, Dewey Morgan, a 56-year-old former welder, was to submit his claims to a jury in a trial scheduled to begin on February 6, 2006. Morgan was diagnosed with manganism by plaintiffs' chief expert at a lawyer-sponsored “screening.” 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 in round-the-clock care. Plaintiffs' position was that the welding 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 and 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 that Morgan alleged were caused by his exposure to welding fume.

A neurologist retained by the defendants (the same Dr. Lang who examined Solis) examined Morgan and determined that his tremor was *not* caused by a physical condition (*i.e.*, that he was purposely faking it or it was caused by a subconscious psychological condition). In addition, defendants conducted surveillance and were able to videotape Morgan walking without a cane or walker, getting on his tractor, raking leaves, and carrying groceries – activities that he had claimed under oath were foreclosed by 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.

Scott Landry was plaintiffs’ counsel’s choice for the next MDL trial slot, chosen from a list of seven candidates proposed by defendants. Landry, like Morgan, was diagnosed at a lawyer-sponsored “screening” by plaintiffs’ key expert. Landry claimed to be suffering from a number of ill-defined symptoms, including increased fatigue, aggressiveness, insomnia, irritability, excessive salivation and sweating, headaches, poor memory, shakes in hands, poor balance and dizziness. Like 70% of his fellow plaintiffs who attended plaintiffs’ “medical” screenings,<sup>1</sup> however, 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, in 2003 and 2004 – after he was allegedly diagnosed with manganism – Landry reported that he had earned \$100,000 per year working as a welder and a welding inspector, undermining any 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 his alleged symptoms, and that he had 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.

Most recently, plaintiff’s counsel were forced to seek dismissal with prejudice of the *Peabody* case, a case the plaintiffs had handpicked from a three thousand-plus case pool, to try in the MDL. While preparing the *Peabody* case for trial, the defendants discovered that Darwin Peabody, the plaintiff in that case, had failed to disclose his long and highly relevant history of drug and alcohol abuse. The defendants also learned that Mr. Peabody complained of the same symptoms he now attributes to welding, which include memory loss, irritability and depression, when he was in a drug rehabilitation program 17 years ago – *before* he ever started welding.

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<sup>1</sup> These statistics are based on plaintiffs’ mandatory “fact sheet” responses in federal court and do not include cases in state court or cases in which plaintiffs have not yet been required to respond to discovery.

### **The Number Of Claimants Is Dropping Precipitously**

Yet another telling sign that the welding fume litigation is not going well for plaintiffs' counsel is the recent sharp decline in the number of pending lawsuits. There are now 40% fewer cases pending in state and federal court than there were one year ago. Over the last ten months, plaintiffs have dismissed thousands of cases (and new filings have decreased as well), and more claims are being dismissed weekly.

In May, for example, the MDL court dismissed 1,600 cases because, according to plaintiffs' attorneys, "[n]one of the plaintiffs, with the exception of a very few, have indicated any desire to continue to prosecute their claims." The dismissal of those claims resulted in a reduction of more than 25 percent of the remaining claims in the MDL proceeding.

### **The Court's Case Administration Order Likely Will Prompt More Dismissals**

Defendants believe that the *Morgan, Landry and Peabody* cases are just the tip of the iceberg – that the thousands of supposedly sick welders in this litigation do not have welding-related conditions. Thus far, however, plaintiffs' counsel have succeeded in keeping the wraps on their clients' claims – they have fought to avoid having those claims properly scrutinized, all to avoid the kind of fact development that led to the demise of the *Morgan, Landry and Peabody* cases. That is about to change, however, due to recent developments in the federal MDL proceeding that defendants believe will likely lead to further, substantial reduction in the number of plaintiffs in this litigation.

Under the Court's case administration order, MDL plaintiffs are required to submit a "notice of diagnosis" of a relevant neurological condition by December 31, 2006 or face dismissal for failure to prosecute. The "notice of diagnosis" must indicate that a physician has "examined the plaintiff" and concluded that the plaintiff suffers from a neurological disorder "caused by exposure to manganese."

Defendants expect that the "notice of diagnosis" requirement will result in many more suits being dismissed because 40% of the plaintiffs in the MDL proceeding have already stated in their discovery responses that they do not have any diagnosis of a neurological condition. Many of the remaining plaintiffs indicate that they have Parkinson's disease, a debilitating neurological disease – but one that affects individuals from all walks of life, not just welders.

The order also requires plaintiffs in the MDL proceeding for the first time in the litigation to lift the curtain on their claims and provide defendants with medical records and other facts underlying their cases. According to the order, the Court will choose a group of 100 cases for this case-specific discovery and then select 15 cases at a time from those 100 for even more intensive fact development. Defendants believe that once these cases are exposed to scrutiny, they will evaporate, like the *Morgan, Landry and Peabody* cases, further revealing the meritless nature of this litigation.

Finally, the Order required the parties to reach an agreement governing the dismissal of peripheral defendants from these lawsuits. That process has already begun and is leading to the dismissal of most of the defendants (including distributors, large welding consumable purchasers and employers) from thousands of welding fume cases.

### **Defendants Have A Stellar Track Record In Trials**

In the rare instances when counsel have actually taken their cases to trial – rather than dismissing them – juries have overwhelmingly rejected the plaintiffs’ claims, even in such notoriously plaintiff-friendly jurisdictions as Madison County, Illinois, and Brazoria County, Texas.

- Including *Solis*, eleven of the last twelve welding fume trials resulted in jury verdicts for the defendants.
- In the *Elam* case, tried in Madison County, Illinois, the only case the defendants lost, the jury awarded \$1 million in damages. We believe this loss was an aberration, as evidenced by the fact that defendants prevailed in the *Boren* case last year in the same court.

### **Scientific Evidence Supporting the Defense Position is Growing**

***Six 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 the litigation revealed the non-meritorious nature of the individual plaintiffs’ claims, but there is also a rapidly growing body of sound science rejecting their claims.

Two recent peer-reviewed epidemiological studies published in journals of occupational and environmental medicine found that welders were *not* at increased risk for neurological diseases, including Parkinson’s disease, parkinsonism, or manganese poisoning. These studies are particularly reliable because they were undertaken in Denmark and Sweden, countries with some of the world’s most comprehensive and unbiased sources of data for epidemiological research.

The Danish study examined 10,000 welders who were compared with a control group of 16,000 non-welders, and the Swedish study examined almost 50,000 welders, who were compared with a control group of almost 500,000 non-welders. In the Swedish study, the welders’ health histories were examined over a 30-year period. Both studies compared incidence and mortality experience of the welders for various neurodegenerative diseases, including Parkinson’s disease, secondary parkinsonism, and

other movement disorders, including manganese poisoning. In both studies, the investigators found no increased risks for any of these diseases in the welders.

Caterpillar Inc. also sponsored a recent epidemiological study on the incidence of Parkinson's disease, parkinsonism, and related disorders at three Caterpillar plants in Illinois. The study was 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 – a total study population of 12,595. This study also found that employment as a welder did not result in higher risks of the studied diseases.

Similarly, a recent Mayo Clinic study published in the leading journal *Neurology* looked at the relationship between Parkinson's disease and occupations and education. This study utilized the Mayo clinic medical records-linkage system to identify all incident cases of Parkinson's disease among residents of Olmstead County (Rochester, Minnesota, and its surrounding area) from 1976 to 1995, and found no association between ever having been a metal worker and developing Parkinson's disease.

Another study conducted last year, this one by Korean researchers, and published in the journal *Neurotoxicology*, sought “to clarify the role of occupational exposure, and especially manganese exposure, in the etiology of Parkinson's disease.” This hospital-based study of 367 consecutive outpatients with Parkinson's Disease and 309 controls found that “occupations with a high potential exposure to manganese showed **consistently negative association** with PD after adjusting for confounders such as age, sex, smoking, and education level.”

Finally, and most recently, a study of Parkinson's disease among Korean welding shipbuilders published in *Neurotoxicology* found that their relative risk for Parkinson's disease was not significantly elevated compared with the non-exposed control group.

### **Conclusion**

Over the last year, thousands of welding fume litigation plaintiffs have abandoned their claims. Additionally, an astounding percentage of the welding fume cases developed for trial were dismissed after defendants learned that the plaintiffs had provided false information about their condition or medical history. At the same time, the body of epidemiological data rejecting plaintiffs' claims continues to grow. As plaintiffs are required to begin providing factual support for all their federal court cases, defendants expect that many more will disappear, confirming that the supposed welding litigation mass tort is, in fact, a collection of meritless claims.