

WELDING FUME LITIGATION STATUS REPORT
AUGUST 2007

- **Plaintiffs have moved to dismiss more than 3,100 cases in the federal multidistrict litigation (“MDL”) proceeding during the last 18 months.**
- **The total number of cases pending against the welding defendants has dropped by more than 50 percent in the last 18 months.**
- **Mississippi state courts have dismissed hundreds of plaintiffs’ cases over the last several months.**
- **All six welding fume cases tried in 2006 resulted in defense verdicts.**
- **Welding defendants have now prevailed in 16 of the last 17 cases brought to trial.**
- **Plaintiffs were forced to dismiss three MDL trial cases after discovery revealed that one plaintiff faked his symptoms and two others lied about illicit drug use.**

Introduction

Over the last several years, plaintiffs’ attorneys have staged expensive advertising campaigns and screening programs designed to generate large numbers of lawsuits against current and former welding rod manufacturers 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.

In the past 18 months, plaintiffs’ counsel have moved to dismiss more than 3,100 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.) Since January 2006, the number of cases pending against welding defendants has dropped by more than 50 percent.

Moreover, of the nine trial candidates selected by plaintiffs in the MDL proceeding for trials in 2005 and 2006 (plaintiffs selected eight of these from the entire case pool and the ninth from a group of six that defendants nominated for trial), plaintiffs dismissed three cases outright and declined to proceed to trial on three more. The other

three cases were tried to defense verdicts. (Two additional cases are scheduled for trial in late 2007 and early 2008.)

The bottom line is clear: notwithstanding the rhetoric from plaintiffs' counsel, there is no substance to this litigation, which has been an ill-conceived business venture for plaintiffs' counsel. Their accusations simply have not panned out, and the supposed threat to the welding industry 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 is not going well for plaintiffs' counsel is the ongoing and sharp decline in the number of pending lawsuits. Over the last 18 months, plaintiffs have dismissed thousands of cases, and new filings have slowed to a trickle. All told, the number of claims pending against welding defendants has dropped by more than 50 percent in the last 18 months.

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 60 percent since early 2006. Under the MDL Court's 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 CAO caused another wave of dismissals of MDL cases. In all, plaintiffs moved to dismiss more than 1,000 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, the court was to choose groups of 15 cases at a time for even more intensive fact development. Not surprisingly, plaintiffs moved to dismiss 59 of the first 100 cases the court selected. The Court selected replacements for those 59 cases, and plaintiffs promptly dismissed 19 of the replacement cases. In total, plaintiffs have dismissed 78 of the 178 cases that the Court has selected for medical records discovery – nearly 50 percent. Medical records discovery is now complete in 42 of the 100 cases, and the CAO requires plaintiffs to certify that they intend to pursue those claims to trial or move to withdraw as counsel. Defendants believe that continuing discovery into these

100 cases will further reveal that the claims in this litigation lack merit.

The CAO also required the parties to reach an agreement governing the dismissal of so-called “peripheral defendants” from this litigation. That process has begun and is leading to the dismissal of most defendants (including distributors, large welding consumable purchasers, former welding consumable manufacturers, and employers) from virtually all welding fume cases pending in the MDL.

Ohio Judge Grants Summary Judgment in Boyd Case

Another recent development in the welding rod litigation occurred on July 10, 2007, when 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 on September 17, 2007. Boyd sued the welding defendants, claiming numerous causes of action including failure to warn, fraudulent concealment and negligent performance of a voluntary undertaking. At his deposition, however, 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 reconsideration of his ruling on July 23, and the ruling is currently on appeal by the plaintiff.

A Pattern Of Meritless Claims Emerges

Defendants have also seen a continuing pattern of unfounded claims in this litigation. In the last 18 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. 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 on February 6, 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 welding rod manufacturers 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 the next MDL trial slot. Plaintiffs’ key expert diagnosed Landry, like Morgan, 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 trial candidates: 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. Defendants have moved

to dismiss those three cases with prejudice for failure to prosecute.

In addition, over 20 cases scheduled for trial in state court in 2007 have been postponed, dismissed, or otherwise moved off the trial calendar. Many 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 a showing that "the defendant's product was a substantial factor in bringing about the plaintiff's injuries."² That means plaintiffs who sue welding manufacturers in Texas will need to prove that they were exposed to a quantity of welding fume 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.

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 Madison County, Illinois, and Brazoria County, Texas.

- The three cases tried to a jury in the federal MDL proceeding all resulted in defense verdicts.
 - Most recently, on November 30, 2006, a Cleveland jury returned defense verdicts in the *Goforth* and *Quinn* cases – the first multiple-plaintiff trial in the history of the welding litigation. 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.
- Three of the six cases tried to defense verdicts in 2006 occurred in plaintiff-friendly state-court venues in Arkansas, Illinois and Texas.
- Sixteen of the last 17 welding fume cases taken to trial resulted in jury verdicts for the defendants.
- In the *Elam* case, tried in Madison County, Illinois – the only case a plaintiff has won in the last several years – the jury awarded \$1 million in damages. We believe this loss was an aberration, as evidenced by the fact that defendants prevailed in several cases, including the recent *Boren* and *Haskell* cases, in the same court.

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

² *Id.* at *4.

³ *Id.* at *6.

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, manganese, or other, similar movement disorders.

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

For example, researchers sponsored by the European Commission published a multi-center case control study earlier this year 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 sponsored 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 a recent 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

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.

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."

Several other recent epidemiological studies have also found no connection between welding fume exposure and movement disorders. For example, 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 neuroimaging techniques (*e.g.*, SPECT, PET) 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, the Frigerio study⁸, a population-based case-control study 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 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 from 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

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

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 Mn showed consistently negative association with PD after adjusting the confounders such as age, sex, smoking, and education level (OR: 0.42, 95% CI 0.22-0.81)."

Finally, earlier this year, Drs. Warren Olanow and Daniel Perl published an article reviewing pathologic studies of patients with manganism and primates experimentally intoxicated with manganese.¹¹ Their findings do not support plaintiffs' contention that manganese causes Parkinson's disease, but rather show that manganese-induced parkinsonism and Parkinson's disease are distinct and separate diseases.

In short, the large body of reliable scientific evidence finding no connection between exposure to welding fumes and movement disorders continues to grow.

Conclusion

Over the last 18 months, thousands of plaintiffs have abandoned their claims against the welding 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 epidemiological 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.

healthy controls were interviewed. Researchers found no significant association between exposure to manganese and Parkinson's disease.

¹¹ Perl, Daniel P., MD; Olanow, C. Warren, MD, *Neuropathology of Manganese-Induced Parkinsonism*, J. Neuropathology and Experimental Neurology, vol. 66, no. 8:675-682 (2007).