

THE PRESENT STATUS OF
WELDING ROD LITIGATION

On September 2, 2005, the welding rod case of Ruth v. A.O. Smith, et al settled immediately before trial for in excess of 1.5 million dollars. This was to be the first case to go to trial in the Multi-District Litigation (MDL) in the United States District Court for the Northern District of Ohio before Judge Kathleen O'Malley. The concept of Multi-District Litigation is for efficiency to consolidate all of the pending National Federal welding rod cases with similarities into one Federal District Court to control discovery and pretrial motions. There are approximately 4,500 welding rod cases pending before Judge O'Malley in this MDL. The second case scheduled for trial is Dewey Morgan set for November 14, 2005. A third case is designated for early 2006.

This settlement must be of great concern to all potential respondents faced with welding rod litigation. It has always been the defense's position that the welding process which employs Manganese cannot be proved to a reasonable degree of medical certainty to cause the neurological damage related to Parkinson's Disease (PD). To date, the cases presented in Court have been third-party product liability cases against welding rod manufacturers and distributors presented to a jury. From the 1990's, the

defense position has been generally validated after civil jury trials. The case of Jones v. Lincoln Electric Co., 188 F.3d 709 (7th Cir 1999), is illustrative. (Exhibit A) Jones claimed that various manufacturers and distributors of welding rods were liable for his neurological injuries as a result of Manganese created by fumes from rods when welding. That welding usually occurred in steel mills. Manganese is essential to welding and the process created fumes containing Manganese which Jones allegedly inhaled over 28 years. While the human body requires a certain level of Manganese to function, it is known that an excess of Manganese can be toxic to the brain and nervous system.

The jury returned a verdict in favor of the defendants which established that Jones had idiopathic Parkinson's Disease (PD) without known cause, rather than Manganese-Induced Parkinson's Disease (MIP) or "Manganism." Plaintiffs have previously lost nine of ten such welding rod cases on this same medical failure of proof.

The single exception was the case of Elam v. Airco, et al, Ill. Cir. Ct., 3rd Jud. District 01 L 1213 (2003). Elam was a maintenance worker at Union Electric for thirty years and claimed exposure to welding fumes caused his idiopathic Parkinson's Disease. Elam was awarded \$1,000,000.00 in 2003 by jury verdict now on appeal in the Illinois Appellate Court. It is generally accepted that the Elam plaintiff's verdict initiated the current wave of welding

rod litigation. It is estimated that besides the 4500 cases pending in the Multi-District Litigation, there are an additional 5,000 cases in State courts. It is clear that the focus of these suits at the present time is against the manufacturers and distributors of welding rods in product liability cases rather than against employers in worker's compensation cases.

Clearly, the result of the Multi-District Litigation will greatly influence the volume and direction of all future welding rod litigation. As to the recent settlement, the defendants claim that the facts of the Ruth case were unique. Further, defendants appear to have faced substantial sanctions for failure to comply with discovery orders by allegedly producing thousands of pages of requested documents immediately before this September trial. It is noted that, unlike worker's compensation cases, a civil case is open-ended before a jury and there was the additional risk of a Vioxx-like decision where a Texas jury just rendered a 26.1 million dollar verdict (after the Texas tort reform statute is applied) against Merck.

By pretrial motion and memorandum¹, defense attorneys had sought to force plaintiff Ruth to prove that he had Manganese-Induced Parkinson's Disease (MIP) and argued in a frontal attack that any plaintiff who had been diagnosed with idiopathic Parkinson Disease (PD) should be barred from

¹ Memorandum in Support of Motion to Exclude all Testimony that Exposure to Welding Fumes Causes Parkinson's Disease. (Exhibit B)

proceeding to trial. This defense motion was based upon the previously successful defense that Manganese-Induced Parkinson's Disease (MIP) can be successfully distinguished from Parkinson's Disease (PD) and there is no medical evidence that links welding Manganese exposure to Parkinson's Disease.² This defense memorandum sets forth multiple studies that support the lack of linkage between welding and Parkinson's Disease. Success would have disenfranchised those plaintiffs diagnosed with pure Parkinson's Disease. The defense motion was denied by Judge O'Malley.

Judge O'Malley ruled that the plaintiffs' attorneys had presented sufficient scientific evidence in the form of epidemiological and other studies and expert testimony to support their argument that Manganese – containing welding rods could cause their neurological damage. Judge O'Malley acknowledged that the defense had called “world class” experts to testify that Parkinson's Disease (PD) and Manganese-Induced Parkinson's Disease (MIP) could be differentiated. But it was her belief that, despite the cited studies, the science was not as certain as the defense maintained and there was substantial likelihood of misdiagnosis. As a consequence, plaintiffs' experts would be allowed to testify at trial on the issue of linkage.

“The ultimate question raised by the defendant's

² Defendant's Reply in Support of Excluding PD Evidence. (Exhibit C)

PD motion is: Is the sum of the epidemiological and other evidence proffered by the parties sufficiently reliable to support the assertion that exposure to welding fumes can cause, contribute to or accelerate a parkinsonism syndrome that some doctors will diagnose as PD? The court concludes that at least in the abstract as the question is presented here, the answer is yes”

In this case, the non-epidemiological evidence cited above lends meaningful support to plaintiff’s expert’s arguments that exposure to manganese in welding fumes can cause a Parkinsonism syndrome similar to, and sometimes possibly indistinguishable from, PD and there is at least some epidemiological evidence suggesting the same thing.”

Also on August 5, 2005, Judge O’Malley ruled in an order (Exhibit D) on various motions by the defense to prevent testimony by certain plaintiffs’ experts, under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). This case allows the challenge to the testimony of an expert witness where the proposed testimony is based on “junk science” or outside the witnesses’ qualifications. The experts designated by the MDL parties included the areas of neurology, neuro-pathology, neuro-psychology, neuro-radiology, epidemiology, chemistry, and materials science. Hearings were held over many days with direct expert testimony. Expert depositions in the above areas had been taken. The Trial Judge is to act as a “gatekeeper” to ensure that “any and all scientific testimony or evidence admitted is not only

relevant but reliable.” Daubert, 509 U.S., at 589. Judge O’Malley reviewed each of the challenged experts under the Daubert standard. While the range of some experts was restricted, generally the defense objections to bar certain plaintiffs’ experts were denied. It was Judge O’Malley’s opinion that cross-examination was the proper method of challenge to the plaintiffs’ experts at trial.

In the end, the defendants elected to settle the Ruth case rather than engage in cross-examination of these experts or presenting their own experts. The rulings in the Ruth case will surely be adopted by Judge O’Malley in the next scheduled Dewey Morgan case.

It is important to understand that the defense medical issues set forth in this MDL are viable in every worker’s compensation case. Even with the presumption of causation under the Longshore and Harbor Worker’s Compensation Act, the Claimant must present expert testimony that any alleged neurological damage resulted from Manganese contained in welding fumes. The key to a successful defense is identifying qualified neurological experts and cross-examining plaintiffs’ experts. The potential exposure in welding rod litigation is substantial because 1-3% of Americans over 50 have idiopathic Parkinson’s Disease which represents 500,000 – 1,000,000

individuals with about 50,000 new cases diagnosed each year.³ Individuals such as Michael J. Fox, Janet Reno, and Muhammad Ali are affected. There are an estimated 500,000 current or former welders in the United States. The resultant impairment from Parkinson's Disease is dramatic and irreversible.

It is generally acknowledged that the cause of Parkinson's Disease is unknown. Welding with Manganese became common in the 1920s, long after Parkinson's Disease was first described as "shaking palsy" by James Parkinson in the 1800s. There are associated illnesses under the Parkinson's umbrella including Manganese-Induced Parkinson's Disease (MIP), Huntington's Disease, and Wilson's Disease. MIP is rare, with few reported cases. Approximately 5% of Parkinson's Disease is purely genetic in origin. Irrespective of Judge O'Malley's initial ruling, there are clear distinctions between idiopathic Parkinson's Disease (PD) and Manganese-Induced Parkinson's Disease (MIP).

Idiopathic Parkinson's Disease is a movement disorder described by symptoms of a resting tremor to the hand or arm, limb rigidity, slowness of movement, and impaired balance and coordination. Parkinson's Disease (PD) is the most common form of the associated diseases under the Parkinson's umbrella accounting for about 50-75% of the cases of Parkinsonism.

³ Lozano and Kalia. New Movement in Parkinson's, Scientific American, Vol. 293, Number 1 (July 2005), p.68. (Exhibit E)

It has been the consistent position of defendants that Manganese-Induced Parkinson's Disease (MIP) can be medically distinguished from Parkinson's Disease (PD). In PD, impairment is caused by the death of neurons, especially those producing the neurotransmitter, Dopamine, in the substantia nigra pars compacta area of the basal ganglia. Dopamine replacement has been achieved by the medication Levodopa. Manganese-Induced Parkinson's Disease is not responsive to Levodopa. The loss of Dopamine can be seen on a PET radiology scan. Different PET findings are revealed in Manganese-Induced Parkinson's Disease. Studies show that Manganese-Induced Parkinson's Disease lesions are centered in the globus pallidus, an area near the substantia nigra pars compacta. Autopsies have verified the differing affected areas of the brain.

Further, Manganism and Parkinson's Disease can be clinically distinguished. Parkinson's Disease is characterized by a resting tremor usually asymmetric. In contrast, there is symmetrical tremor on movement in Manganese-Induced Parkinson's Disease. There are also gait differences which distinguish the two conditions.

It is noteworthy that a very recent study⁴ of Danish hospitalizations for neurodegenerative disorders concluded that Danish welders had rates of

⁴ Fryzek et al, A Cohort Study of Parkinson's Disease and Other Neurodegenerative Disorders in Danish Welders. (Exhibit F)

Parkinson's Disease consistent with the rates of the general population. This study supports the defense position on causation. This was a large study involving the hospital records of 6,500 welders. New medical and scientific studies can be expected which will no doubt clarify causation in Parkinson's Disease. It is probable that environmental factors play a role in Parkinson's Disease. There is evidence that pesticides, herbicides, and fungicides used in organic farming can destroy dopaminic producing neurons. Likewise, a compound MPTP can cause Parkinson-like symptoms. For unknown reasons, smoking and coffee drinking have a tendency to protect against the development of Parkinson's Disease.

While the defendants' motion to exclude Parkinson's Disease evidence failed in a full scale attack the defense is still applicable on a case by case basis. Decisions will be made on the specific facts of each case. The adverse decisions by Judge O'Malley on defense motions and the settlement of the Ruth case are a caution for the future. On March 17, 2004, Goldman Sachs had issued a review of the welding rod problem for investors. It's conclusion was that: "...we believe Mass tort litigation (i.e., asbestos) is unlikely to occur in the near term as plaintiff attorneys continue to be challenged to provide medical proof of a causal link between welding fumes and Parkinson's Disease. Nonetheless, the Elam case demonstrates

that plaintiffs can win verdicts, despite limited medical evidence currently available, making welding rod litigation a risk to monitor.⁵ More recently, on July 29, 2005, the Wall Street Journal has tried to assess potential liability in an article entitled: Welding Fumes Suits Raise Specter of Costly Liabilities. The focus of that article, like this presentation, was on the MDL before Judge O'Malley and the difficulty of medical proof. With respect to workers' compensation claimants, it is clear that ultimate exposure of employers is somewhat lessened as some claimants already have asbestos-related claims. Further, employers obtain a credit for all third-party recoveries from manufacturers and distributors.

Ultimately, the results of the Multi-District Litigation will point the direction of employer welding rod litigation which will ultimately either expand or contract based upon these verdicts. The outcome of the pending MDL cases should soon provide a framework to properly evaluate work-related causation and whether to proceed to trial or settlement. It is clear that plaintiffs and defendants will be relying on the expert conclusions and trial results of the Multi-District Litigation before Judge O'Malley in reaching those decisions.

⁵ Koort, Robert, Goldman, Sachs, Global Equity Research. Welding Rod Litigation: Unlikely to be the Next Asbestos, March 12, 2005.