

A Balanced Perspective
The Welding Fume Litigation
By Ralph A. Davies

The article, *More Signs of Concern: Exposure to Welding Fumes* (“Concern”), which appeared in the June 2007 issue of this publication, presented a one-sided view of the welding fume mass tort litigation currently pending in U.S. federal and state courts. To present an alternative and, we feel, more accurate perspective, we would point out that, contrary to the authors’ assertions in that article:

- The defendants’ trial record is one of unprecedented success in the world of mass torts, with 16 defense victories in the last 17 trials;
- There has been an alarming number of instances of fraud by claimants in welding fume cases, raising troubling questions about the mass screening process through which the vast majority of plaintiffs were identified and assembled;
- The number of cases pending against the welding defendants in both state and federal court has shrunk dramatically over the last two years; and
- The overwhelming body of reliable science has not found a connection between exposure to welding fumes and neurological injury.

The welding fume cases involve allegations that the manganese in welding fumes causes neurological disorders. While there have been case reports in which individuals—typically non-welders—who were severely over-exposed to manganese have contracted a rare neurological disorder known as manganism (characterized by a particular pattern of clinical symptoms, diagnostic test results, and non-responsiveness to the medication used

to treat patients with Parkinson’s disease), the ailments alleged in the cases pending against the welding industry defendants are far more ambiguous, ranging from muscle weakness to insomnia to poor handwriting to sexual dysfunction. Almost all of the plaintiffs were diagnosed at mass screenings in which plaintiff-hired personnel conducted cursory examinations and then diagnosed thousands of welders with this rare disorder. In fact, more than 70 percent of the plaintiffs in the federal welding fume MDL proceeding who have been diagnosed with this condition were diagnosed by the *same* doctor. (That doctor plays a unique role in this litigation—he is the sole medical examiner of thousands of the claimants in this litigation. He conducted the majority of medical-legal screenings in this litigation, spending as little as five minutes with each participant and seeing up to 120 participants per day. Based on these cursory examinations, he diagnosed 60 percent of the welders he saw with parkinsonism. For these efforts, plaintiffs’ counsel paid him \$10,000 a day.)

As discussed in more detail below, in recent years, all but one of the welding fume trials in state and federal court have resulted in defense verdicts (the one exception was in notoriously pro-plaintiff Madison County, Illinois); defendants’ discovery efforts have revealed numerous fraudulent claims; and federal district judge Kathleen O’Malley, who is presiding over the federal multidistrict litigation proceeding, *In re Welding Fume Products Liability Litigation*, in Cleveland entered a case administration order that has forced plaintiffs to dismiss thousands of claims. In short, recent developments have revealed that there is simply no “mass” in this supposed mass tort.

The Trial Record in the Welding Fume Litigation

The authors of the *Concern* article point to years-old rulings and the lone settlement in the MDL to suggest that the welding fume litigation defendants are somehow on the ropes. We offer the following to support a contrary position. Over the last several years, there have been 17 welding fume trials held in state and federal courts across the country. Sixteen have resulted in defense verdicts. See *Welding Fume Litigation Status Report*, http://www.weldinginfonetwork.com/litigation/Welding_Fume_Litigation_Status_Report_02_07.pdf. In 2006, defendants won all five of the cases that went to trial. Most recently, in the federal MDL proceeding, a Cleveland jury returned defense verdicts in the *Goforth* and *Quinn* cases—the first multiple-plaintiff trial in the history of the welding litigation. See *Goforth v. Lincoln Elec. Co.*, No. 1:06-CV-17218 (N.D. Ohio 2006); *Quinn v. Lincoln Elec. Co.*, No. 1:06-CV-17217 (N.D. Ohio 2006). The plaintiffs moved to consolidate seven individual claimants' cases for trial in the hope of gaining the well-established tactical benefits of multi-plaintiff cases. Judge O'Malley denied their request, but agreed to consolidate the claims of two plaintiffs who had worked for a portion of their careers for the same employer. See Order, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2006 Dist. LEXIS 72669 (N.D. Ohio Oct. 5, 2006) (permitting consolidation of the *Goforth* and *Quinn* cases for trial).

Only five months before that, another Cleveland jury returned a defense verdict in *Solis*, the first case to go to trial in the MDL proceeding. See *Solis v. Lincoln Elec. Co.*, No. 1:04-CV-17363, 2006 WL 2873800 (N.D. Ohio June 27, 2006). That jury found that the welding rod manufacturers did not distribute a product with a marketing defect,

rejecting the plaintiff's arguments that the manufacturers had not adequately warned welders about the potential hazards of welding. The jury never even reached the question of whether Mr. Solis was ill—let alone ill from his welding.

These three cases are the most recent in a long line of defense verdicts in welding fume cases, many of which have taken place in such traditionally plaintiff-friendly jurisdictions as Madison County, Illinois, and Brazoria County, Texas. *See Welding Fume Litigation Status Report*, http://www.weldinginfonet.com/litigation/Welding_Fume_Litigation_Status_Report_02_07.pdf. Notably, three of the five defense verdicts in 2006 occurred in plaintiff-friendly state court venues in Arkansas, Illinois and Texas. *See Calloway v. Lincoln Elec. Co.*, No. CV04-0473-6 (Union County, Ark.); *Haskell v. ESAB Group, Inc.*, No. 04 L 1152 (Madison County, Ill.); *Godwin v. Lincoln Elec. Co.*, No. 03CV0801-A (Galveston County, Tex.). 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. Defendants believe this loss over three years ago was an aberration, and since then, defendants have prevailed in two other cases tried in Madison County: the recent *Boren* and *Haskell* cases. *Boren v. A.O. Smith Corp.*, No. 00-L-886 (Madison County, Ill.) (The trial court in the *Boren* case granted plaintiff's motion for a new trial. The trial court's order is currently on appeal to the Fifth District Appellate Court of Illinois.).

Despite this exemplary trial record, the authors of the *Concern* article chose to focus on rulings and a settlement in the MDL proceeding that are years old and appellate decisions in cases that are not even part of (or related to) the broader welding fume litigation.

The authors point to Judge O'Malley's denial of several *Daubert* motions made by the defendants in the MDL proceeding, her finding that there was an issue of material fact as to whether the manufacturers had adequately warned the plaintiffs, and her finding that individual plaintiff's failure-to-warn claims were not precluded *en masse* by OSHA as signs of trouble in the litigation. (Notably, an Ohio state court recently granted the manufacturer defendants' motion for summary judgment on all counts of plaintiff Joseph Boyd's complaint, including his failure-to-warn claims after Boyd admitted that he had never bothered to read the warnings on the welding consumables he used. *See Order, June 26, 2007, Boyd v. Lincoln Elec. Co., Case No. 545413, Ct. of Common Pls., Cuyahoga County, Ohio.*) But, other events have largely overtaken those rulings, minimizing their impact on the overall litigation. As discussed above, defendants have prevailed in all the trials that have taken place in the MDL court since those rulings. And as discussed in more detail below, those rulings have not prevented thousands of plaintiffs from dismissing their claims. In short, the authors' focus on these rulings misses the point. For example, the issue of whether plaintiffs "were, and will be, allowed to present their chosen experts on neurology, neuropathology, neuropsychology . . ." has been largely mooted by the fact that juries have not found plaintiffs' experts believable. *Concern* at 18.

Next, the authors of the *Concern* article assert that the settlement of the *Ruth* case means that "potential welding fume plaintiffs certainly have solid evidence to bolster arguments concerning the validity and viability of the . . . suits pending in the MDL." *Id.* But, the *Ruth* case is the *only case* that the manufacturing defendants have settled since the current large-scale welding fume litigation began. And, both sides acknowledged at

the time of settlement that Mr. Ruth presented a unique medical case. Plaintiffs have not been able to produce even *one other claimant* from their pool of thousands with a medical profile matching—or even approximating—Mr. Ruth’s. Moreover, since the *Ruth* settlement was reached, plaintiffs have either lost or abandoned claims on behalf of the next six MDL plaintiffs. As such, the authors’ talk of “recent large settlements” distorts the reality of the litigation. *Id.* at 16. Other than *Ruth*, the welding manufacturer defendants have not been settling claims.

Finally, the *Concern* article authors cite three cases that are not even related to the welding fume MDL proceeding or to the overwhelming majority of the welding fume litigation in state courts for the proposition that “other state courts have handed down opinions in relation to the potential dangers of welding fume exposure.” *Id.* at 82. But, the three cases that the authors cite—*Heat Transfer & Equip. v. Cauthon*, 100 P.3d 722 (Okla. 2004); *Village of Huntsville v. Ind. Comm’n of Ohio*, 2004 WL 2829029 (Ohio Ct. App. 2004); and *Baptiste v. Workers’ Comp. Appeal Bd.*, 889 A.2d 641 (Pa. Commonw. Ct. 2006)—are unrelated to the ongoing welding fume litigation.

As discussed above, the welding fume MDL proceeding and the vast majority of ongoing state court litigation are based on allegations that exposure to welding fumes causes neurological injury. But, the three cases cited in *Concern* are not about neurological injury or manganism. Instead, all three are workers’ compensation claims based on alleged respiratory illnesses. *Heat Transfer* involved a claim for “respiratory problems” based on the claimant’s exposure to “fumes, dust, and smoke.” *Heat Transfer*, 100 P.3d at 724. Similarly, *Baptiste* involved a claim that a worker had developed “mixed dust pneumoconiosis as a result of his total and cumulative exposure to coal dust,

welding fumes, asbestos, silica and other pollutants.” *Baptiste*, 889 A.2d at 643. Finally, *Village of Huntsville* involved two workers’ compensation claims—one based on the claimant’s alleged exposure to welding fumes and one based on his exposure to smoke and other chemicals during his employment as a volunteer firefighter. Both claims alleged that the claimant had contracted pulmonary fibrosis. *Village of Huntsville*, 2004 WL 2829029 at *4. Thus, none of those claims is part of the welding fume mass tort controversy.

A Continuing Pattern of Meritless Claims

A more balanced view of the welding fume litigation over the last several years shows that it is plaintiffs’ counsel who are in trouble—not the industry. In the past year-and-a-half, plaintiffs have dismissed three cases they had selected for early trials in the MDL proceeding after the defendants learned that the plaintiffs had provided false information in their discovery responses.

One of these plaintiffs, Dewey Morgan, a 56-year-old former welder, 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. But, 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 either feigning his symptoms or was experiencing a subconscious psychological condition). Defendants also conducted surveillance and videotaped Morgan engaging in a wide variety of activities that he had claimed under oath he could not do because of his alleged condition. Following these revelations, the court allowed the plaintiffs to dismiss his case with prejudice. *Morgan v. Lincoln Elec.*

Co., No. 1:04-CV-17251 (N.D. Ohio 2006). And, Morgan was not the only plaintiff selected for an early MDL trial to dismiss his case in similar circumstances.

Another trial candidate whose claim was dismissed after discovery is Scott Landry. Landry was also diagnosed at a plaintiff screening, but like 70 percent of the federal court plaintiffs who attended plaintiffs’ “medical” screenings, he never sought treatment for his alleged symptoms from his own doctors either before or after his screening. Landry’s admission 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—further undermined his claims of serious disability. The defendants’ fact investigation into the *Landry* case revealed that he had also provided false information in his discovery responses about his history of substance abuse and his military record. The plaintiffs ultimately moved to dismiss Landry’s claim at the same time as Morgan’s, and dismissal was formally granted on the same day. *Landry v. Nichols Wire, Inc.*, No. 1:03-CV-17016 (N.D. Ohio 2006).

In August 2006, plaintiffs’ counsel were forced to seek dismissal with prejudice of yet another of their hand-picked trial candidates: Darwin Peabody. *Peabody v. Airco, Inc.*, No. 1:05-CV-17678 (N.D. Ohio 2006). While preparing the case for trial, the defendants discovered that Peabody had not disclosed his long and highly relevant history of drug and alcohol abuse. *See Order, Peabody v. Airco., Inc.*, July 31, 2006. In addition, the defendants learned that while Peabody attributed a variety of alleged symptoms to welding, including memory loss, irritability and depression, he had complained of those same symptoms when he was in a drug rehabilitation program nearly 20 years ago – *before* he ever started welding. *See Welding Fume Litigation Status*

Report, http://www.weldinginfonetwork.com/litigation/Welding_Fume_Litigation_Status_Report_02_07.pdf.

In its order dismissing the *Peabody* claims, the MDL court warned:

The Court does recognize that defendants have now been forced twice to incur substantial trial-preparation costs, only to have the plaintiff seek to avoid an adjudication after discovery was virtually complete . . . the Court agrees that some steps must be taken to avoid similar circumstances in the future, and that, at some point, sanctions in the form of cost shifting might be appropriately imposed on a plaintiff or his counsel.

See Order at 3-4, *Peabody v. Airco, Inc.* (July 31, 2006).

The Number of Claimants Continues to Drop Precipitously

Despite the predictions in the *Concern* article about the course of the MDL proceeding, the number of pending lawsuits against the welding defendants has been declining sharply, in large part due to the March 2006 Case Administration Order (CAO) that Judge O'Malley entered in the MDL proceeding.

The CAO required the plaintiffs 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. See Order, *In re Welding Fume*, Mar. 31, 2006. Specifically, the plaintiffs were required to certify that a physician "examined the plaintiff" and conclude that the plaintiff suffers from a neurological disorder "caused by exposure to manganese." *Id.* Since the CAO was entered, the plaintiffs have moved to dismiss more than 1,000 cases rather than submit notices confirming that a physician actually diagnosed the claimant with a welding-related injury. The court-approved form also included the following question: "Was the medical conclusion by the above-named doctor made at a screening?"

To date, approximately 700 plaintiffs have submitted Notices of Diagnosis. Ninety-six percent of those plaintiffs indicated that they were diagnosed at plaintiff-sponsored screenings, with 70 percent of those diagnosed by one physician—Dr. Nausieda. Notably, although screening-based cases constitute the overwhelming majority of cases left in the MDL proceeding, the plaintiffs have steadfastly refused to put any of those cases before a jury, suggesting that many more of those are likely meritless.

The CAO also contemplates a procedure for case-specific discovery. Under this procedure, the court selected 100 cases for medical records discovery. *Id.* Then, 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. *Id.* But, the court faced a problem—most plaintiffs selected for more intense discovery simply dismissed their cases rather than submit their medical records to the defendants. Of the first 100 cases chosen, the plaintiffs moved to dismiss 59. *See Welding Fume Litigation Status Report*, http://www.weldinginfonetwork.com/litigation/Welding_Fume_Litigation_Status_Report_02_07.pdf.

Finally, the CAO required the parties to reach an agreement governing the dismissal of so-called “peripheral defendants” from the welding fume litigation. *See Order, In re Welding Fume*, Mar. 31, 2006. That process has led 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.

The authors of *Concern*, however, assert that there is a “deluge of cases pending before the MDL” and that “the day is ripe for the entire industry to take defensive

measures.” *Concern* at 16, 17. The numbers suggest the contrary. There are approximately 60 percent fewer cases pending in the MDL proceeding and 35 percent fewer cases pending in state courts today than there were a year ago, and plaintiffs continue to dismiss large numbers of welding fume claims. The authors’ forecast is thus contrary to the record in the litigation.

The Science of the Welding Fume Litigation

The authors, further, did not address the fact that the overwhelming majority of epidemiological evidence has shown no statistically significant connection between exposure to welding fumes and neurological disease. For example, 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. Fore, 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). 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 geographically-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 another recent epidemiological study

that did not find a statistically significant association between exposure to welding fumes and neurological injury. 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. 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. These parameters 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."

Moreover, several recent epidemiological studies unrelated to the welding fume litigation have also found no connection between welding fume exposure and movement disorders. See, e.g., R. Frigerio, et al., *Education and occupations preceding Parkinson disease: a population-based case-control study*, 65 Neurology 1575 (2005). For example, the Frigerio study, 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 Parkinson's disease 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.

In 2005, Korean researchers published another independent study, seeking "to clarify the role of occupational exposure, and especially manganese (Mn) exposure in the etiology of Parkinson's disease." Park J, et al., *Occupations and Parkinson's disease: a multi-center case-control study in South Korea*, *Neurotoxicology*, 26(1):99-105 (2005). (A similar hospital-based case control study was published by the same authors 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.). 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 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).”

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

Finally, researchers sponsored by the European Commission recently published a multi-center case control study evaluating potential associations between environmental exposures and developing parkinsonism or Parkinson’s disease. *See* Dick, FD, et al., *Environmental risk factors for Parkinson's disease and parkinsonism: the Geoparkinson study*, *Occup. Envtl. Med.*, May 30, 2007. 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. Once again, the investigators did not find a significant association between manganese exposure and development of Parkinson’s disease or parkinsonism. 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.”

The *Concern* authors point to a *single* recent study of a tiny group of welders

conducted primarily by plaintiffs' expert witness Rosemarie Bowler as evidence that "a dose-effect relationship can be established between manganese exposure and neurological, neuropsychological and pulmonary disorders resulting from inhaling welding fumes." See Rosemarie M. Bowler, et al., *Dose-effect Relationships between Manganese Exposure and Neurological, Neuropsychological, and Pulmonary Function in Confined Space Bridge Welders*, J. of Occupational and Env'tl. Med. 167 (2007); see also *Concern* at 17. This claim is not supported by the evidence. The study is nothing but a case report of 49 individuals seeking workers' compensation awards who were not compared to a matched control group. Because of the severe methodological weaknesses in the study, no conclusions about the health effects of welding fume can be drawn from it. Interestingly, the plaintiffs in the MDL proceeding chose to drop Dr. Bowler as a core expert because she was unwilling to provide the defendants with access to the data from her study.

In short, reliable, consistent, epidemiological evidence has found no association between exposure to welding fumes within recommended occupational limits and neurological disease.

Conclusion

Contrary to the gloomy view expressed by the *Concern* article, the welding fume litigation has become an example of how defendants can fight back when they are targeted with meritless claims. In the last year alone, thousands of plaintiffs have abandoned their claims against the welding defendants, a number of the cases developed for trial were dismissed after discovery revealed fatal weaknesses in the plaintiffs'

claims, and juries in federal and state courts around the country uniformly rejected plaintiffs' claims.

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