

Recent State Case Developments in Welding Rod Litigation

by R. Patrick White and Sean R. Thornton

A number of states stand at the forefront of the burgeoning arena of welding rod litigation. This article will describe and assess recent state case developments in Texas, Maryland, California, Pennsylvania and West Virginia.

Noteworthy developments addressed in this work include: a dispute over expert witness testimony in Texas; consideration of the "total pollution exclusion" by a Maryland court; statewide consolidation involving premises liability actions in California; affirmation of a Workers' Compensation claim and trade association conspiracy complaints in Pennsylvania; and a jurisdictional dispute in West Virginia.

TEXAS DEVELOPMENTS – EXPERT WITNESS ISSUES

Parties to a welding fumes bodily injury case scheduled to go to trial on Nov. 29 have raised a number of issues relating to expert witness qualifications. See *Ronald H. Presler, et ux v. The Lincoln Electric Co., et al.*, No. 23472, Texas Dist., 23rd Dist., Brazoria Co.¹

The defendants have sought the exclusion of a Texas Causation Expert in a Motion filed on Oct. 6.² Defendants Hobart Brothers, The Lincoln Electric Co. and TDY Industries Inc. have stated that Dr. Elan Louis of the Mailman School of Public Health at Columbia University has no reliable scientific basis to conclude that exposure to welding fumes causes a parkinsonism unique to welders. They have further claimed he has no reliable scientific evidence that welding fume causes Parkinson's disease.³ Defendants have argued that in deriving a link between welding fumes and a Parkinson-like condition, Dr. Louis violates his own causation methodology, developed from extensive epidemiological research.⁴

Defendants have referred to 17 Texas appellate divisions that have in recent years excluded opinions from experts who failed to offer reliable scientific data illustrating the correlation between exposure to welding fumes and an increased risk of disease.⁵ Defendants cited *DuPont v. Robinson* 923 S.W.2d 549 (Texas 1995); "opinions formed for the purpose of litigation weigh against the admissibility of expert testimony." They claimed that Dr. Louis' theory of causation runs afoul of the precedent in that Dr. Louis can not point to the scientific or medical research his causation theory is based upon.⁶

The defendants have asked that the plaintiffs satisfy the standards for admission of expert witness testimony as set forth in *Merrell Dow Pharmaceuticals Inc. v. Havner*, 953 S.W.2d 706 (Texas 1996).⁷

Merrell Dow Pharmaceuticals Inc. v. Havner set forth that the following factors must be considered in determining whether an expert's scientific testimony is of some probative value:

- The extent to which theory has been or can be tested;
- The extent to which technique relies upon subjective interpretation of expert;
- Whether theory has been subjected to peer review and publication;
- The technique's potential rate of error;
- Whether underlying theory or technique has been generally accepted as valid by relevant scientific community; and
- Any nonjudicial uses that have been made of theory or technique.⁸

Note that defendants in welding rod litigation have also been able to undermine the element of causation in the plaintiffs' negligence claim through their own expert witness testimony.⁹ Plaintiffs in a majority of welding rod cases have alleged the manganism is a result of manganese poisoning. However, exposure to manganese is not universally accepted as a cause of Parkinson's disease.¹⁰ As there is no proven relationship between manganese exposure and Parkinson's disease, defendants have introduced expert testimony as to the symptoms of Parkinson's disease and as to PET imaging¹¹ in order to distinguish manganism from Parkinson's disease. Defendants are thus able to demonstrate that the plaintiff suffers from idiopathic Parkinson's disease rather than manganese-induced manganism.¹²

This strategy has been frequently employed by defendants, who commonly refute allegations of a manganism affliction in favor of the explanation that the plaintiff is suffering from Parkinson's disease.¹³ Where only one study has recently indicated any relationship between exposure to manganese fumes and Parkinson's disease, numerous studies have demonstrated that welding fumes do not contribute to the onset of Parkinson's disease.¹⁴ Defendants favor evidence that the plaintiff suffers from

Parkinson's disease rather than manganism as there has been no demonstrable connection between the plaintiff's injury and the defendants' actions or products.¹⁵ In *Jones v. Lincoln Elec. Co.*, 188 F.3d 709 (7th Cir. 1999), the defendants were able to show that the plaintiff suffered from Parkinson's disease rather than manganism through the medical testimony of expert witnesses.

MARYLAND DEVELOPMENTS – INSURANCE POLICIES AND THE TOTAL POLLUTION EXCLUSION

An insurer has sought a declaration that it had no duty to defend or indemnify its defendant insureds.¹⁶ In *U.S. Fire Insurance Co. v. Clendenin Brothers Inc.*, No. AMD 03-3308, D. Md., Federal Judge Andre M. Davis of the District of Maryland has dismissed the plaintiff's welding rod coverage action, but has allowed the insurer to amend the complaint to identify specific underlying actions.

The underlying suits had been brought against U.S. Fire Insurance Co. insureds Clendenin Brothers Inc. and Nichols Wire Inc., doing business as Gulf Wire Corp.¹⁷ Plaintiffs had alleged bodily injury stemming from the use of welding rods, accusing the defendants of having failed to act on knowledge of the causal relationship between welding fumes and neurological harm. The plaintiffs claimed that the defendant's lack of safety precautions resulted in pain, mental anguish, disfigurement and physical and mental impairment.¹⁸

U.S. Fire Insurance Co. had claimed the terms of the policies and exclusions, the "total pollution exclusion" in particular, barred coverage for all policyholder defendants. Clendenin argued that U.S. Fire's action should be dismissed or, in the alternative, amended on the basis of its vague and ambiguous allegations. Defendants stated that the complaint failed to identify the underlying welding lawsuits and simply asserted that the underlying claims were precluded by a total pollution exclusion.¹⁹

Judge Davis described U.S. Fire's attempt to apply a total pollution exclusion to all claims and its failure to identify the underlying lawsuits as painting with "too broad a brush."²⁰ Judge Davis described U.S. Fire's strategy as a "reverse-claim-preclusion gambit." The judge allowed U.S. Fire Insurance to prepare an amended complaint that identified the specific lawsuits to which its non-coverage declaration would apply.²¹

"Pollution exclusions" began to appear in the policies of commercial general liability insurers about 30 years ago, in reaction to the rise in toxic tort claims.²² Court decisions in the early 1980s leaned toward a narrow application of these exclusions, limiting their effect to Superfund or CERCLA pollution liabilities. Insurance companies began to place "total" and "absolute" pollution exclusions into their policies as a means of circumventing this trend.²³

New trends have recently emerged in welding rod litigation involving the application of different pollution exclusions by commercial general liability insurers. *National Electrical Manufacturers Association v. Gulf Underwriters Insurance Company*, (1998) 162 F.3d 821 involved a 1998 suit brought by welders against the National Electrical Manufacturer's Association (NEMA) for having promoted dangerous standards for the use of manganese in welding despite knowledge of its dangers.²⁴

NEMA's insurer had refused to defend the association, citing the policy's pollution exclusion. The Fourth Circuit Court of Appeals upheld the insurer's position, applying the pollution exclusion as it appeared on the policy.²⁵

Conversely, in *Air Products Chemicals Inc. v. Hartford Accident and Indemnity Company, the Liberty Mutual Insurance Company and Aetna Casualty and Surety Company et al.*, (1994) 25 F.3d 177, the Third Circuit Court of Appeals stated the insurer owed a duty to defend the claims of welders so exposed. However, this court failed to rule on the question of any duty of the insurer to provide indemnity. The trend for insured defendants of welding rod litigation was not optimistic.

This year, a new trend appears to have started. The highest courts in New York and California found the pollution exclusion did apply to "non-traditional" sources of pollution.²⁶ The New York case involved an action brought against a painting company for injuries relating to inhalation of paint fumes. The lower court's decision was reversed on appeal, the ruling containing a rejection of the insurer's "literal reading of the pollution exclusion in favor of a common-sense construction that the clause applies only where the damages alleged are truly environmental in nature..."²⁷ Similarly, the California Supreme Court held that the pollution exclusion would only be applied to traditional environmental pollution.²⁸

CALIFORNIA DEVELOPMENTS – PREMISES LIABILITY AND CONSOLIDATION

Premises Liability

A California resident has filed a complaint in the Los Angeles County Superior Court alleging premises liability for sites at which he contends he was exposed to manganese fumes. See *Richard Brown, et ux v. The BOC Group Inc., et al.*, No. BC320322, Calif. Super., Los Angeles Co.²⁹

Plaintiff Richard Brown and his wife Jeanette claim that Richard's exposure to welding fumes have caused

him severe neurological damage. They allege negligence, strict products liability, false representation, intentional tort and loss of consortium in addition to premises and contractor liability.³⁰

Brown has alleged his work sites were controlled by Standard Oil, Chevron, Kinder Morgan, Southern California Gas Co., Unocal, Mobil, Continental Can, ARCO and Shell Oil. He has further alleged that these premises defendants provided him with welding consumables.³¹

The plaintiff stated these defendants created hazardous work conditions at these job sites. He has further asserted that the premises defendants owed a duty of care "in the management of such premises in order to avoid exposing workers such as plaintiff to an unreasonable risk of harm and to avoid causing injury." Brown claimed the defendants failed in their duty to warn those on the premises of the dangers of manganese, to eliminate manganese fumes or to provide adequate protection.³²

Premises Liability and Consolidation

A Consolidation Order was filed on Aug. 17 in the Alameda County Superior Court, bringing together four cases from California Superior Courts. The cases consolidated were *Hurley Cogburn, et ux v. BOC Financial Corp. et al.* (No. BC311976, Calif. Super., Los Angeles Co.), *Val King, et ux v. BOC Financial Corp.* (No. 04-429012, Calif. Super., San Francisco Co.), *Edmund Janke, et ux v. BOC Financial Corp.* (No. RGO414328-3, Calif. Super., Alameda Co.) and *Chris Tittle, et ux v. BOC Inc.* (No. RGO415418-5, Calif. Super., Alameda Co.).³³

Each of the plaintiffs whose cases were consolidated had filed claims including contractor/premises liability against the defendants. In assessing whether plaintiffs had satisfied their burden of stating a "hidden condition" premises liability cause of action, California courts apply the rule in *Merrill v. Buck*, 58 Cal.2d 552 (1962), which provides that "a plaintiff must allege that the condition created an unreasonable risk of harm and that the owner/lessee/occupier of the property knew or should have known about it and failed to take reasonable precautions to protect against the risk of harm."³⁴

Prior to having his case consolidated, Edmund Janke had to overcome defendants' claims that he had fraudulently joined his defendants. The defendants had claimed that two of Janke's allegations were of a contradictory nature.³⁵

The first of Janke's allegations attacked was that the *welding defendants* had represented to the public that their manganese-containing welding products were safe for their intended use, and had failed to warn of the dangers of using them. The second allegation was that the *premises defendants* nonetheless knew of those dangers. Defendants claimed that the two allegations were inconsistent.³⁶

U.S. Judge Maxine M. Chesney of the Northern District of California disagreed, stating that "The premises defendants may have learned of the alleged dangers from another source, for example, despite the welding defendants' misrepresentations."³⁷

PENNSYLVANIA DEVELOPMENTS – WORKERS' COMPENSATION CONSPIRACY AND TRADE ASSOCIATIONS

Latest Verdict Against Welding Rod Manufacturers

The latest verdict against welding rod manufacturers was handed down by a Pennsylvania jury earlier this year.³⁸ Former welder Thomas Yenko was awarded \$500,000 in a suit against BOC (Airco) and Lincoln Electric Co. The jury found that the welding companies negligently exposed Yenko to defective asbestos-containing rods, causing his lung cancer. See *Thomas J. Yenko and Reena Yenko v. A.W. Chesterton Inc. et al.*, No. 2003-0884, Pa. Comm. Pls., Philadelphia Co.³⁹

Workers' Compensation

Workers' compensation benefits were unanimously affirmed by a Pennsylvania Commonwealth Court panel for welding fume exposure and neurological injuries on Aug. 5. The court found the claimant's neurology expert's testimony to be scientifically competent. See *Cerro Metal Products Co., et al. v. Workers' Compensation Board* [Francis Plewa], No. 696-2004, Pa. Cmwlth.; 2004 Pa. Commw. LEXIS 581.40

Plewa was an employee of Cerro Metal. On Aug. 11, 2000, he inhaled nickel and chromium fumes in the workplace. He was granted total disability benefits for the injury. Cerro Metals and its insurer, Engle-Hambright, subsequently filed a petition to terminate benefits, alleging that Plewa had fully recovered.⁴¹

The court panel stated that The Workers' Compensation Act placed responsibility for completing the notice of compensation payable upon the employer. The court panel found that in this case the notice of compensation payable described the injury as chemical fume exposure. They further stated, "A fair reading of the description provides coverage for any physical injury caused by chemical fume exposure... moreover, the credited medical testimony indicates a causal link between the neurological symptoms and the chemical fume exposure."⁴²

Conspiracy and Trade Associations

A putative welding fume injury class action before the U.S. District Court for the Eastern District of Pennsylvania, *Lester Davis, et al. v. Lincoln Electric Holding Inc., et al.*, No. 04-320, E.D. Pa., involves issues of defendant conspiracy with trade associations.⁴³

The plaintiffs have not named any trade association as a defendant in their complaint. Plaintiffs claim that "[d]efendants used the trade associations and their com-

mittees as vehicles for their conduct, but it is defendants that are the actors liable for plaintiffs' harm." The plaintiffs have further explained their case was not based merely on the defendants' membership in these associations, "but rather for the fraudulent and deceitful conduct that they carried out while actively participating in the trade associations and their various committees."⁴⁴

The plaintiffs have also attacked the defendants' legal argument, suggesting that the case law submitted by the defendants should be distinguished, as it related to suits against trade associations. The plaintiffs in this case are not suing a trade association. "They are suing industry members for the wrongful conduct that those members committed individually and in conspiracy with others."⁴⁵

Plaintiff pleas of conspiracy are popular in this area, as they allow plaintiffs to sue a variety of trade association members with only tenuous connections to the

commercial production of welding rods.⁴⁶ The most-targeted welding trade associations have been the National Electrical Manufacturer's Association, (NEMA), the American Welding Society (AWS) and the Ferroalloys Association (TFA).⁴⁷

Trade association defendants often contend that as there is no relationship between themselves and the defendants, they have no duty to warn them. They have often claimed that "a duty to a remote product user does not arise from the mere membership in a trade association."⁴⁸

WEST VIRGINIA DEVELOPMENTS

Representatives of a putative class action pending in federal court filed notice on June 23 of their opposition to transferring their case to the consolidated welding rod MDL. This opposition was made on the grounds

that the case should be remanded to state court where jurisdiction is proper. See *Rodolfo Adames, et al. v. AGA Gas Inc., et al.*, No. 04-44, N.D. W.Va.⁴⁹

Plaintiffs have argued that the U.S. District Court for the Northern District of West Virginia should decline to assert supplemental jurisdiction over 2,000 law claims in this matter because it *may* have federal officer jurisdiction over two plaintiffs. Plaintiff Adams stated, "[T]he majority of the plaintiffs filed their case in state court. To deprive them of their choice of forum because of a tenuous federal defense would be a miscarriage of justice."⁵⁰ ▮

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Footnotes

¹ See "Defendants' In Limine Motion Seeks Guidelines To Exclude Alleged Prejudicial Evidence," 1-8 Mealeys Litig Report Welding Rods 3 (2004).

² See "Defendants Seek Exclusion Of Texas Causation Expert Because Of Prejudice Threat," 1-8 Mealey's Litig Report Welding Rods 4 (2004) and "Brazoria, Texas, Trial Rescheduled for Nov. 29; Series Of Trials Through 2005," 1-7 Mealey's Litig Report Welding Rods 1 (2004).

³ Id.

⁴ Id.

⁵ See "Defendants Seek Exclusion Of Texas Causation Expert Because Of Prejudice Threat," 1-8 Mealey's Litig Report Welding Rods 4 (2004).

⁶ Id.

⁷ See Defendants' In Limine Motion, supra note 1.

⁸ See *Merrill Dow Pharmaceuticals Inc. v. Havner*, 953 S.W.2d 706 (Texas 1996) at 714.

⁹ See "Negligence," 3 Toxic Torts Litigation Guide § 32:12 and *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, (7th Cir. 1999) at 718.

¹⁰ Id.

¹¹ PET (Positron Emission Tomography) is a medical procedure based on nuclear science that produces pictures of the body's biological functions. It is a non-invasive diagnostic imaging technique for measuring the metabolic activity of cells in the human body. It is useful clinically in patients with certain conditions affecting the brain and the heart as well as in patients with certain types of cancer. PET distinguishes itself from other diagnostic systems in that it produces images of the body's basic biochemistry or function. Traditional diagnostic techniques such as x-rays, CT scans or MRI produce images of the body's anatomy or structure. See "What is PET Imaging," Huntsman Cancer Institute, at www.huntsmancancer.org/pdf/brochures/pet.pdf. See also "What is PET Imaging," Nassau Radiological Group, at www.lipitescan.com/lipi-pet_imaging.htm.

¹² Id.

¹³ See "No Proximate Cause," 3 Toxic Torts Litigation Guide § 32:21

¹⁴ Id. and see Kim et al., "Positron Emission Tomography (PET) in Differentiating Manganism from Idiopathic Parkinsonism," *Journal of Occupational Health*. 1999; 41:91-94; see also Calne et al., "Manganism and idiopathic parkinsonism: Similarities and differences," *Neurology*. 1994; 44:1583.2.

¹⁵ See Jones, supra note 715.

¹⁶ See "Maryland Court Dismisses Welding Rod Insurance Case; March 8 Amendment Deadline," 1-0 Mealey's Litig Report Welding Rods 12 (2004).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Id.

²³ See Valerie A. McGuire, Esq., HarrisMartin's Litigation Watch: Welding Rods, "The Pollution Exclusion: Will it Allow Insurers to Escape Manganese Fume Liability?," May, 2004, www.harris-martin.com. See also Claudia G. Catalano, J.D., Construction and Application of Absolute or Total Pollution Exclusion Clause in Liability Insurance Policy-Discharge At Or From Sites Other Than Waste Disposal, Treatment Or Salvage Facility, Manufacturing Site, Oil, Gas Or Ore Related-Business Or Similar Sites, 106 A.L.R.5th 1.

²⁴ Id. and see *American States Insurance Company v. Koloms*, (Ill.1997) 687 N.E. 2d 72, at 81.

²⁵ See Valerie A. McGuire, supra note 22

²⁶ Id. and see *National Electrical Manufacturers Association v. Gulf Underwriters Insurance Company*, (1998) 162 F.3d 821 at 826.

²⁷ See Valerie A. McGuire, supra note 22

²⁸ Id. and see *Belt Painting Corp. v. TIG Insurance Company* (July 2003) 100 N.Y. 2d 377; 795 N.E. 2d 15.

²⁹ The study quoted a statement made by insurance company analyst Mindy Pollack, who stated, "The pollution exclusion applies only to conventional environmental pollution. This growing line of rulings may have implications for coverage litigation involving asbestos, lead paint, welding rods and a host of other contaminants..." See *Mackinnon v. Truck Insurance Exchange*, (2003) 31 Cal.4th 635; 3 Cal.Rptr. 228 and See Valerie A. McGuire, supra note 22

³⁰ See "California Plaintiff Alleges Premises Liability For Sites Of His Manganese Exposure", 1-7 Mealey's Litig Report Welding

Rods 11 (2004).

³¹ Id.

³² Id.

³³ See "Consolidated Defendants File Initial CMO Statement; Parties Ordered To Confer," 1-8 Mealey's Litig Report Welding Rods 7 (2004).

³⁴ See "California Judge: Premises Defendants Properly Joined," Mealey's Litig Report Welding Rods (2004).

³⁵ Id. and see "California Federal Judge Upholds Premises Liability, Rejects Joinder Allegation," 1-2 Mealey's Litig Report Welding Rods 3 (2004).

³⁶ Id.

³⁷ See California Judge, supra note 34.

³⁸ See "Pennsylvania Jury Returns Verdict Against Welding Rod," Mealey's Litig Report Welding Rods (2004).

³⁹ Id.

⁴⁰ See "Pennsylvania Appellate Panel Affirms Chemical Fume Injury Workers' Compensation Award," 1-6 Mealey's Litig Report Welding Rods 1 (2004).

⁴¹ Id.

⁴² Id.

⁴³ See "Pennsylvania Defendants Ask Court To Take Note Of MDL 1535 Remand Order," 1-3 Mealey's Litig Report Welding Rods 10 (2004).

⁴⁴ See "Pennsylvania Plaintiffs Oppose Motions To Dismiss By Consumer Defendants," 1-1 Mealey's Litig Report Welding Rods 5 (2004).

⁴⁵ Id.

⁴⁶ See "Civil Conspiracy," 3 Toxic Torts Litigation Guide § 32:17.

⁴⁷ Id.

⁴⁸ See "No Duty To Warn," 3 Toxic Torts Litigation Guide § 32:20.

⁴⁹ Michael G. Nast, Dianne M. Nast, Daniel N. Gallucci and Jennifer S. Snyder of Roda & Nast in Lancaster, Pa., and James J. McHugh and Scott D. Levensten of The Beasley Firm in Philadelphia represent the plaintiffs.