Personal Injury Litigation Against Welding Rod Manufacturers

One of the latest toxic tort issues focuses on the possible link between Parkinson’s disease and welders’ exposure to manganese in welding rod fumes. Manganese is a metallic element used in strengthening steel. Although no scientific studies confirm a causative link, exposure to manganese in mining industries has been associated with a neurological disorder called manganism. Symptoms of manganism resemble those of Parkinson’s disease and include muscle stiffness and soreness, fatigue and weakness, loss of coordination, abnormal walk, and tremors. Both Parkinson’s disease and manganism are forms of parkinsonism—a term that refers to the symptoms commonly associated with Parkinson’s disease but that sometimes stem from other causes.
Certain occupations involve relatively high levels of manganese exposure, including welders, iron and steel workers, railroad workers, workers at dry-cell battery plants, manganese miners and those exposed to certain pesticides. Welding rod claims have been around for over 10 years, but not as a part of class action or plaintiff attorney marketing. The latest and largest wave of welding rod litigation includes class actions and strong plaintiff bar efforts to reach workers about filing injury claims. Here we review the current status of science, litigation and liability findings in this area. While litigation against manufacturers of welding rods is only now beginning to mount, insurers should at least be aware of the potential liabilities and review their book of business for past and future exposures.

Health Issues and Studies
Chemicals contained in welding rod fumes vary depending upon the type of metal welded, type of welding rod, and any coatings present on the metal. Aside from manganese, welding fumes can contain cadmium, beryllium, mercury, lead and other hazardous substances. In the past, welding rods also contained asbestos. Many of the earlier welding rod cases involved actions against asbestos manufacturers, and several are still pending in the courts.

Parkinson’s disease afflicts approximately 1 to 2% of the population over age 50. In the great majority of Parkinson’s cases, the cause of the disease is unknown. In contrast, manganism is linked to an overexposure to manganese, and displays many of the same symptoms as Parkinson’s disease. Some of the symptoms are atypical and found only in patients with one affliction or the other. As might be expected, litigation may focus on whether the plaintiff’s Parkinson’s disease is the result of manganese exposure or is “idiopathic” (i.e., cause unknown).

As noted earlier, there has not yet been a definitive causative link established between manganese exposure and Parkinson’s disease in the welding rod context, as there has been for exposed miners. However, studies have shown that welders have a 30% higher incidence of lung cancer than the general public. Recent epidemiological studies have also suggested an association between elevated manganese exposure and Parkinson’s. In one small study of welders at Washington University School of Medicine, researchers found that an occupational group contracted the disease 15 years earlier than the general public. Another recent animal study, by researchers at the University of California, Santa Cruz, concluded that low levels of manganese exposure affects the brain in a way that exacerbates the effects of Parkinson’s disease. Other illnesses associated with long-term exposure to welding rod fumes include cancer of the lungs, stomach, brain, nasal sinus and pancreas as well as leukemia. Respiratory disease, fatigue, weight loss and liver and kidney damage have also been associated with excessive exposure to welding fumes.

Potential Liability Costs
The most recent study garnering public attention relates to the potential liability or cost of welding rod claims, rather than any health link. The investment bank HSBC studied welding rod claims and issued a research report on the potential scope of liability. In its 2003 report, HSBC reports that there are some 200,000 retired welders and 500,000 active welders in the U.S., making for a large potential plaintiffs’ pool. HSBC states that there are already at least 25 U.S. law firms pursuing class actions against welding rod manufacturers. HSBC reports that one plaintiffs’ attorney firm has screened some 10,000 welders among which medical doctors found that 5 to 10% showed various signs of neurological disorders. The analysis extrapolates that this could lead to an immediate nationwide plaintiffs’ pool of 35,000 to 70,000 current and former welders.
In tabulating the possible cost of these numerous claims, the bank looked to average asbestos settlements for a gauge of the Parkinson’s disease claims. According to the report, the average mesothelioma settlement in 2001 was $6 million per claimant, while the average settlement for all asbestos-related claims was $1.8 million per claimant. HSBC states that “We see no reason why the average Parkinson’s settlement should be materially less than the average asbestos settlement”—however, to be conservative in their estimation of the potential total liability, HSBC uses an average of $1 million per claimant for those with Parkinson’s. The report concludes that under a worst-case scenario, liability arising from Parkinson’s/welding rod litigation could total $35 billion to $70 billion. HSBC also contemplates that under a scenario where 20% of 700,000 welders ultimately experience neurological disorders, such as Parkinson’s, the potential total liability could increase to $140 billion. Should only 1% of welders succeed in obtaining a $1 million settlement, this would still equal $7 billion of liability. Although this study set off a stock drop in several U.S. and U.K. companies involved in the litigation, it does not seem to have received widespread attention in the legal or scientific news. It might be easy to dismiss the study on liability where causation is still in question, but we also know that the existence or absence of a proven health risk does not always create or stop injury claims. There are also questions as to whether these claims should be addressed through workers’ compensation rather than through the civil tort system, and whether comparison to asbestos is appropriate given the many perceived differences in fault, causation and injury. Still, the HSBC study does raise concern and awareness of the welding rod/Parkinson’s disease issue, and for that alone it is worth serious consideration.

Welding Rod Claims and Litigation

The plaintiffs’ bar has begun to turn its attention to representing those allegedly injured by exposure to manganese fumes from welding rods. Litigation has been filed on behalf of current and former welders alleging that such exposure has caused their neurological disorders (primarily Parkinson’s disease). Most recently, in February 2003, a class-action suit was filed in the U.S. on behalf of plaintiffs who reside or work in five southern states, seeking compensatory and punitive damages for illnesses allegedly caused by exposure to manganese in welding products. The defendant, Lincoln Electric Holdings, manufactures arc welding products, robotic welding systems and plasma and oxyfuel welding equipment. Current and former welders diagnosed with ailments other than neurological disorders, such as those discussed earlier, can add to the potential size of the plaintiffs’ pool-making litigation.

Prior litigation against welding rod makers has not been particularly successful. One U.S. manufacturer reports that companies have won all the recent welding rod cases. We found only one verdict in Lexis/Nexis since 2000 where defendants were successful. In particular, they alleged adequate warning labels and a lack of causation. The three manufacturers had offered $100,000; the plaintiff demanded $10 million plus punitive damages; and the case went to trial and ended with a defense verdict, which is now on appeal. However, in at least one lawsuit going
back to 1995, the plaintiffs won an award of $1.2 million in damages. The U.S. Court of Appeals for the Eighth Circuit upheld the award, rejecting the defense contention that there was inadequate proof that welding rod fumes caused the plaintiff’s manganese encephalopathy. The award also reflects a 10% reduction for contributory negligence (ignoring warnings from product and employer).

Many more welding rod cases are currently pending in historically plaintiff-friendly jurisdictions, most notably Texas and Mississippi (filed before the state enacted its punitive damages cap in 2002). When Lincoln Electric announced the welding rod class action against it, the company also reported that previously it was named in 17 such suits involving 454 plaintiffs, in addition to the thousands of asbestos suits the company was also facing.

Overcoming the evidentiary requirements of the Daubert and Frye decisions and proving causation will likely still be hurdles for the plaintiffs’ bar. The results could vary by jurisdiction and will certainly be influenced by additional scientific or health studies. The plaintiffs’ bar will likely press for class actions of large groups of allegedly injured welders rather than file separate suits for each plaintiff. If the class actions are not certified by various courts, attorneys can still file individual personal injury/product liability suits as a fall-back position.

The Asbestos Connection

According to the HSBC analysis, although “asbestos has not been present in welding rods since 1978,” welding rod manufacturers are facing some 11,000 claimants alleging that asbestos in welding rod fumes caused their asbestos-related diseases. Welding rod makers have generally succeeded in settling these cases out of court for relatively modest payments or getting the cases dismissed. Ongoing litigation may determine whether there is enough evidence to support a causal link between asbestos in welding rod fumes and asbestos-related diseases, including the increased incidence of lung cancer among welders. In a lawsuit before the New York County Supreme Court, the judge ordered a hearing to determine whether there is “sufficient scientific agreement” regarding a link between exposure to welding rod fumes and asbestos-related disease before considering motions for summary judgment. Included as defendants in this case are Lincoln Electric Co. and Hobart Brothers Co. Should the court deem there is sufficient evidence of a causal relationship between welding rods and asbestos-related disease, this ruling could increase the litigation facing manufacturers as well as settlement costs.

Coverage Issues

Insurers that currently provide or provided general liability coverage to welding rod manufacturers and/or importers, as well as distributors and retailers, will likely incur defense expenses, and possibly indemnity payments, should these suits prove successful. If the settlement/award severity is anywhere close to what HSBC estimates, then carriers providing excess general liability and/or commercial umbrella coverage, as well as reinsurers, will also be impacted. We note that causation—the health link—will play a large role in whether welding rod claims move into the mass tort arena and excess insurance coverages. However, the effect is largely one way. If stronger evidence of a health link emerges, suits will rise; if the linkage does not get further scientific support,
we should still expect claim activity, albeit at a lower level and success rate. While a total asbestos exclusion should bar claims arising from those alleging asbestos-related diseases, claims alleging illnesses from other causes may be more problematic. Claims for injuries caused by hazardous “fumes” are specifically excluded by the absolute pollution exclusion which was attached to policies in 1986. However, courts have generally found that product claims are not barred by the exclusion. Some jurisdictions have also held that the exclusion doesn’t apply to “non-environmental” claims either.

We did find two cases involving welding rod claims in the Fourth Circuit and California Court of Appeals, where the courts did apply a pollution exclusion to bar coverage of welding rod fume claims. The federal appellate court, applying D.C. law, refused to read in the policyholders’ expectations, and simply interpreted the pollution exclusion—with the term “fumes”—as written. The California appellate ruling followed a similar reading of the exclusion and rejected policyholder arguments that negligent exposures were covered. The court noted that the policy excluded injury from the discharge of hazardous fumes, and it did not matter what theory of liability was asserted for that injury. While a total pollution exclusion may bar these claims where that exclusion has been upheld, insurers should still check to ensure that it was in fact incorporated into policies issued to such manufacturers and contractors at the time.

Given that many of the plaintiffs are alleging that their illnesses were caused by years of exposure to welding fumes, insurers may encounter arguments to stack limits in many jurisdictions, particularly those that follow the exposure trigger or continuous trigger of coverage. We found one case where the insurer had provided occurrence and then claims made policies to a welding rod manufacturer. Where both policies applied to an injury or claim, the manufacturer was allowed to “pick and choose” which policy to tap for coverage. For companies with past exposures, the emphasis is on the claims front. But for insurers with any ongoing risks involving manganese and welding rods, it might be a good idea to review the forms and underwriting files in light of these claims. Even if the HSBC study is far off the mark—as the manufacturers responded after the study was released—the numbers can still be substantial.

Insurers providing general liability coverage to manufacturers, importers, distributors, and retailers, as well as workers’ compensation to employers whose employees use the rods in the workplace, could all be affected.

As with any mass tort, directors and officers (D&O) insurers may also want to review their portfolio for insureds with welding rod exposures. When the HSBC report was publicized, major manufacturers were faced with many questions about exposure. In general they downplayed the number of claims and the size of their potential liability. History tells us that mass torts have a way of seeping into the D&O sector.

Whether there is any mass in this tort should be clearer in the next few years. In the meantime, it is not too early to look for welding rod exposures in all current books of business.
Sources
1. www.sciencedaily.com/releases/2001/01/0101230749344.htm
2. www.methodisthealth.com
4. UC Toxics News: Spring 2001, a University of California—Santa Cruz press release
5. HSBC, “BOC Group—Litigation a real risk,” 1/20/03
7. www.thomasregister.com
10. HSBC, “BOC Group—Litigation a real risk,” 1/20/03
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