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SEPTEMBER 2005

Litigation

Federal MDL Judge Highly Critical of Physicians, Lawyers and Screening Firms Involved in the "Assembly Line" Diagnosis of Fraudulent Silicosis Claims

[T]hese [silicosis] diagnoses were about litigation rather than health care.... [T]hese diagnoses were driven by neither health nor justice: they were manufactured for money. The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants. And if the lawyers turned a blind eye to the mechanics of the scheme, each lawyer had to know that...he or she was filing at least some claims that falsely alleged silicosis. The fact that some claims are likely legitimate, and the fact that the lawyers could not precisely identify which claims were false, cannot absolve them of responsibility for these mass misdiagnoses which they have dumped into the judicial system.¹

Judge Janis Graham Jack recently issued a 249-page opinion in connection with the Federal silica MDL that documented the procedures employed by the plaintiffs' bar, doctors and screening companies in an attempt to manufacture silica-related claims. A grand jury has already been convened in New York to investigate this potentially fraudulent misconduct. It remains to be seen whether Judge Jack's opinion will reach beyond silica claims and have a chilling effect on other toxic tort claims, including asbestos and welding rod litigation.

I. BACKGROUND

For decades, sandblaster, foundry workers and other individuals who were exposed to respirable silica dust have commenced litigation against entities that manufactured, distributed or sold products that contained silica, were designed to protect individuals from silica dust or were designed to permit claimants to work with silica. These claimants have typically alleged that the defendants knew or should have known of the danger to persons exposed to silica products and failed to warn, or inadequately warned, of

this danger and that they contracted chronic, accelerated or acute silicosis as a result of this alleged misconduct. The introduction of technologies designed to reduce a worker's exposure to respirable silica dust has resulted in a dramatic reduction in the number of individuals diagnosed with silica-related injuries and the number of lawsuits filed by those individuals. For example, in 2001, less than one hundred plaintiffs filed silicosis claims in Mississippi. Beginning in 2002, however, there was an exponential increase in the number of silicosis claims filed in that state. 10,642 silicosis claims were filed in 2002. Another 9,837 silicosis claims were filed in Mississippi during 2003 and 2004.

II. CREATION OF THE FEDERAL SILICA MDL

Defendants responded to this flood of silicosis filings by asking that twenty-two actions pending in federal court in Mississippi be consolidated pursuant to 28 U.S.C. § 1407. On September 4, 2003, the Judicial Panel on Multidistrict Litigation granted defendants' request, ordering that those cases be transferred to the United States District Court for the Southern District of

¹ *In re Silica Prods. Liab. Litig.*, Order No. 29, MDL Docket No. 1553 (July 1, 2005) at 150-51.

Texas for coordinated and consolidated pretrial proceedings before Judge Janis Graham Jack.² By June 2005, 111 cases were pending in the MDL. Many of those cases, involving more than 10,000 claimants, were originally filed in Mississippi state court and removed to the MDL by defendants based on allegations of diversity jurisdiction.

Almost from the beginning, Judge Jack expressed concern that the Court lacked subject matter jurisdiction over a number of the claims transferred to the MDL. In order to aid the Court in determining whether subject matter jurisdiction existed, the parties agreed to the form of a sworn fact sheet that was to be submitted by each plaintiff and each defendant. The plaintiffs' fact sheet required a plaintiff to submit information regarding his exposure to silica dust and to provide detailed medical information concerning his silica-related injuries, including the identity of both the diagnosing and treating physicians. Plaintiffs identified over 8,000 treating physicians on the more than 9,000 fact sheets that were submitted to the Court. Those same fact sheets identified only twelve diagnosing physicians.³ In almost every case, the diagnosing physician was not the plaintiffs' treating physician, did not work in the same state as the plaintiff and did not otherwise have any connection with the plaintiff. Defendants sought discovery from nine of these diagnosing physicians, as well as the screening companies that retained the diagnosing physicians.

III. THE MARTINDALE, HILBUN AND COOPER DEPOSITIONS

A. Dr. George Martindale

Dr. George Martindale was a radiologist identified on fact sheets as the physician responsible for diagnosing 3,617 plaintiffs with silicosis. Dr. Martindale testified at his October 28, 2004 deposition that the B-read reports containing a diagnosis of silicosis that he completed for certain

MDL plaintiffs were prepared in forty-eight days at an average rate of seventy-five diagnoses per day. Dr. Martindale admitted that, contrary to language in his reports, he did not intend to diagnose any plaintiff with silicosis and, in fact, did not know the criteria for making such a diagnosis. Dr. Martindale further testified that he did not speak with any plaintiff and that he could not diagnose silicosis based solely on the chest x-ray and the B-readings that he prepared.⁴

B. Dr. Glynn Hilbun and Dr. Kevin Cooper

Defendants also conducted the depositions of two other diagnosing physicians, Dr. Glynn Hilbun and Dr. Kevin Cooper. Both physicians admitted that they conducted abbreviated physical examinations of potential claimants at screening events and signed forms prepared by the screening company which stated that "[o]n the basis of this client's history of occupational exposure to silica and a B-reading of the clients chest x-ray, then within a reasonable degree of medical certainty, [Patient] has silicosis." Despite issuing reports containing a positive diagnosis, both Dr. Hilbun and Dr. Cooper testified at their depositions that they did not review any x-rays, x-ray reports or pulmonary function tests and that they did not intend to diagnose any plaintiff with silicosis.⁵

IV. THE DAUBERT HEARING

At a status conference, Judge Jack expressed concern about the withdrawal of silicosis diagnoses and entered an order directing all of the remaining diagnosing physicians and representatives of the two primary screening companies to attend and testify at a hearing scheduled for February 2005. Subsequently, certain defendants moved for sanctions on the grounds that the plaintiffs' medical diagnoses were fraudulent and filed motions asking the Court to examine the admissibility of the testimony of nine diagnosing physicians that issued ninety-nine percent

² *In re Silica Prods. Liab. Litig.*, 280 F. Supp.2d 1381 (J.P.M.L. 2003).

³ The twelve diagnosing physicians identified in plaintiffs' fact sheets were: Dr. Robert Altmeyer; Dr. James Ballard; Dr. Kevin Cooper; Dr. Todd Coulter; Dr. Andrew Harron; Dr. Ray Harron; Dr. Glynn Hilbun; Dr. Richard Levine; Dr. Barry Levy; Dr. George Martindale; Dr. W. Allen Oaks; and Dr. Jay Segarra.

⁴ *In re: Silica Prods. Liab. Litig.*, Order No. 29, MDL Docket No. 1553 (July 1, 2005) at 32-38.

⁵ *Id.* at 45-49.

of the silicosis diagnoses under the framework created by Federal Rule of Evidence 702 and by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny. Although the testimony elicited at the *Daubert* hearing is discussed in great detail by Judge Jack in her July 1, 2005 order, certain facts critical to the Court's decision are summarized herein.

A. The Screening Companies

Testimony at the *Daubert* hearing established that the screening companies historically worked with certain plaintiffs' firms in connection with asbestos litigation but that, beginning in 2001, these firms began to ask the screening companies to focus on silicosis claims as well. Initially, the firms asked that the screening companies rescreen their existing inventory of asbestos claimants for silicosis. Thereafter, the screening companies began to solicit prospective clients for silicosis screenings conducted at a mobile x-ray unit. Sometimes, a screening company was compensated a flat rate for any individual that was diagnosed with silicosis and retained the firm that was sponsoring the screening session as counsel. Other times, the screening company was simply compensated a flat rate for any positive diagnosis.⁶

One screening company, Netherland & Mason ("N&M"), generated approximately 6,750 of the claims in the MDL. It was revealed at the *Daubert* hearing that more than 4,000 of those claimants also submitted asbestos claims with the Manville Personal Injury Settlement Trust. This was troubling to the Court because the dual occurrence of asbestosis and silicosis is so rare that a medical specialist might go an entire career without encountering a patient with both diseases, and yet N&M allegedly found 4,000 such cases by parking a trailer outside of local hotels and retail establishments.⁷

B. Testimony of Dr. Ray Harron

Beginning in 1995, N&M hired Dr. Ray Harron, a radiologist and certified B-reader, to review x-rays and make diagnoses. Dr. Harron testified at the *Daubert* hearing that his standard diagnosis was qualified by the language "to a reasonable degree of medical certainty" and was not a "real diagnosis." Dr. Harron admitted that he would not prescribe medication or radiation therapy or refer a patient to a surgeon for an invasive procedure based on this limited diagnosis. Dr. Harron further testified that he did not question patients about their exposure history and did not write, read or personally sign the actual report that set forth his diagnosis of silicosis.⁸

On more than one occasion, Dr. Harron diagnosed the same individual with both asbestosis and silicosis. In addition, evidence introduced at the *Daubert* hearing showed that Dr. Harron found opacities consistent with silicosis in 99.69% of the 6,350 B-reads he performed for MDL plaintiffs. Prior to 2001, Dr. Harron performed B-reads on 1,807 of the same MDL plaintiffs and found opacities that were consistent with asbestosis but not silicosis 99.11% of the time.⁹

Dr. Harron's testimony at the *Daubert* hearing ended abruptly after the Court granted him leave to obtain independent counsel.

C. Testimony of Dr. James Ballard

Dr. James Ballard, a radiologist and certified B-reader, performed 1,444 B-reads and diagnosed approximately 120 MDL plaintiffs with silicosis. Like Dr. Harron, Dr. Ballard diagnosed a number of claimants with both asbestosis and silicosis based on his review of the same x-ray film. At the *Daubert* hearing, Dr. Ballard was questioned about the case of plaintiff Angelean Ball. When Dr. Ballard reviewed Ms. Ball's x-ray in the context of asbestos litigation, he found extensive pleural

⁶ *Id.* at 66, 74-75.

⁷ *Id.* at 79-80.

⁸ *Id.* at 80-81, 84.

⁹ *Id.* at 87-90.

thickening. When he reviewed the same x-ray in the context of the subject silica litigation, Dr. Ballard found no pleural thickening whatsoever. When presented with other cases where he had made mutually exclusive asbestosis and silicosis diagnoses, Dr. Ballard admitted that he was sometimes swayed by the expectations of the law firm and/or the screening company.¹⁰

In addition, an analysis of Dr. Ballard's positive B-reads revealed that he issued a profusion rating of 1/0 80% of the time and a profusion rating of 1/1 19% of the time. A former administrator of NIOSH's B-reader program was stunned by the lack of profusion variability and testified that this lack of profusion diversity "defies all statistical logic and all medical and scientific evidence of what happens to the lung when it's exposed to workplace dust" and suggests that the readers "are not being intellectually and scientifically honest in their classification."¹¹

V. JUDGE JACK'S FINDINGS AND CONCLUSIONS

Judge Jack found that the removing Defendants failed to designate evidence supporting their position that federal subject matter jurisdiction existed over the vast majority of the silicosis cases pending in the MDL. As a result, Judge Jack ordered that those cases be remanded to Mississippi state court. Because the Court lacked subject matter jurisdiction, Judge Jack determined that she could not issue a ruling on the admissibility of the testimony relating to the silicosis claims that were to be remanded. Nevertheless, Judge Jack included findings regarding the admissibility of the challenged physicians' testimony in the hopes that the state courts that are assigned the remanded cases will not have to re-hear *Daubert*-type challenges.¹²

A. The *Daubert* Analysis

Based on expert testimony from physicians at the *Daubert* hearing, Judge Jack evaluated whether the methodology employed by the diagnosing

physicians established that: (1) a claimant had adequate exposure to silica dust with an appropriate latency period; (2) radiographic evidence of silicosis existed; and (3) there was an absence of any good reason to believe that the radiographic findings are the result of some other condition.¹³

1. Evidence of Sufficient Silica Exposure

Judge Jack found that exposure histories were routinely taken by people who lacked any medical training but who had financial incentives to identify exposures that would support a diagnosis of silicosis. Judge Jack concluded that, in the absence of an appropriate exposure history, a diagnosing physician could not have known the "potential intensities of respirable silica exposure, the duration of the exposure, information as to dosage, as well as information as to potential alternative causes of the radiographic findings." As a result, the testimony of the challenged physicians was found to be inadmissible because virtually all of the diagnoses failed to satisfy the "minimum, medically-accepted criteria for the diagnosis of silicosis."¹⁴

2. Radiographic Evidence of Silicosis

Judge Jack found that the subject silicosis diagnoses were based on positive B-reads generated by physicians who failed to follow the recommended methodology that calls for the reader to review a film without any knowledge of the patient or the suspected disease. The challenged physicians were "acutely aware of the precise disease" and were instructed by the screening firms to look for silicosis. Even if the challenged physicians had employed the proper methodology, Judge Jack found it difficult to

¹⁰ *Id.* at 92-94.

¹¹ *Id.* at 95-96.

¹² *Id.* at 202.

¹³ *Id.* at 120-121.

¹⁴ *Id.* at 121-128.

conclude that the B-reads submitted in support of the silicosis diagnoses at issue were accurate given that thousands of claimants were diagnosed with both asbestosis and silicosis and given the acute lack of profusion variability.¹⁵

3. Elimination of Alternate Causation

Judge Jack found that, in almost all of the MDL cases, the challenged physicians made no attempt to eliminate other potential causes of the positive radiographic findings. This failure to “exclude other alternative causes of the radiographic findings clearly is not generally accepted in the field of occupational medicine.” Judge Jack was persuaded that, given the wide variety of possible causes for x-ray findings consistent with silicosis, the occupational and medical history must be taken by someone with medical training who is capable of posing questions designed to eliminate other possible causes for the irregularities noted on the patient’s x-ray.¹⁶

B. Plaintiffs’ Assembly Line Process Resulted in Grossly Inflated Number of Silicosis Diagnoses

Judge Jack found that “there is simply no rational medical explanation for the number of alleged diagnoses of silicosis in this MDL” and expressed concern that a “small cadre of non-treating physicians, financially beholden to lawyers and screening companies rather than to patients, managed to notice a disease missed by approximately 8,000 other physicians – most of whom had the significant advantage of speaking to, examining, and treating the Plaintiffs.”¹⁷ She concluded that the assembly line diagnosing process employed by many plaintiffs’ firms divided tasks among a number of individuals, most of whom had no medical training and none of whom

had full knowledge of the entire process, thereby preventing any one person from taking full responsibility for the process, resulting in a grossly inflated number of positive diagnoses.¹⁸

Judge Jack observed that, “[i]f nothing else this MDL illustrates the mess that results when lawyers practice medicine and doctors practice law.” She was critical of the fact that the lawyers determined what disease the physicians would search for and established the criteria that was used for diagnosing that disease. Moreover, the lawyers “controlled what information reached the diagnosing physicians, stymying the physician’s normal ability to ask targeted questions and perform follow-up exams. The lawyers also controlled what information reached the patients, stymying the patient’s normal ability to learn from a medical professional details about their diagnosis, their prognosis, and what, if any, follow-up care they should receive.”¹⁹ Judge Jack noted that the challenged physicians seemed to be under the impression they were practicing law rather than medicine, often including legal qualifiers such as “reasonable degree of medical certainty” in their diagnosis and, even more troubling, utilizing a relaxed standard of diagnosing that they would not have employed if they were diagnosing themselves, their families or their patients.

V. CONCLUSION

Defendants are already attempting to leverage Judge Jack’s opinion in various state court proceedings. Certain defendants have asked the Mississippi Supreme Court to consolidate the silicosis cases that are to be remanded to Mississippi state court so that defendants can pursue a global dismissal of cases that are the product of fraud. Ohio defendants have asked that the silicosis plaintiffs be ordered to produce any

¹⁵ *Id.* at 128-137.

¹⁶ *Id.* at 137-142.

¹⁷ *Id.* at 144.

¹⁸ *Id.* at 146.

¹⁹ *Id.* at 148.

evidence in their possession supporting a silicosis diagnosis that was not generated at a mass screening. It remains to be seen what impact Judge Jack's opinion will have on the landscape of toxic tort litigation.

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