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From: Kanawha County Circuit Clerk's Office

In Re: Baldwin v Lincoln, 03-C-3220

Date: 2/15/08

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Order

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## IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

BEMIS BALDWIN and KATHRYN BALDWIN,

2008 FEB 15 PM 1:53

Plaintiffs,

Civil Action No. 03-C-3220

v.

LINCOLN ELECTRIC COMPANY, et al.,

Defendants.

ORDER

On Wednesday February 13, a hearing was held in this civil action on defendants' motion pursuant to West Virginia Rule of Civil Procedure 35 requesting that the Court order plaintiff Bemis Baldwin to submit to a fluorodopa-PET scan ("FD-PET scan").

Having considered the papers and evidence filed in support of and in opposition to the motion, and having heard oral argument of counsel, the Court hereby enters its findings of fact, conclusions of law and Order as follows:

FINDINGS OF FACT

1. Plaintiffs contend that Mr. Baldwin suffers from a rare neurological disorder known as manganism, which is caused by excessive exposure to manganese.
2. Defendants contend that Mr. Baldwin suffers from idiopathic Parkinson's disease ("PD"), which is not caused by exposure to welding fumes.
3. Defendants requested that Mr. Baldwin undergo an FD-PET scan, which is an objective test that can differentiate cases of PD from cases of manganism. PET scans are an imaging technique used to assess localized abnormalities in brain chemistry in neurological or psychiatric disease.
4. Plaintiffs initially agreed that Mr. Baldwin would submit to a PET scan in connection with his lawsuit. "Given that we are alleging that Mr. Baldwin has manganism,"

plaintiffs wrote, "we have also agreed to a PET Scan for Mr. Baldwin. However, given the limitations due to his health, you have agreed to provide special accommodations to have the PET Scan performed. As soon as we come to an agreeable time and manner of transport, we will make Mr. Baldwin available." (Letter from B. Barr to R. Davies at 1, Jan. 17, 2008.)

5. A few days later, plaintiffs reversed their position and refused to take the test. On January 21, 2008, defense counsel received an e-mail from plaintiffs' counsel indicating that they had reversed their position and would no longer agree to Mr. Baldwin undergoing the PET scan. (See email from B. Barr to R. Davies, Jan. 21, 2008.)

6. Defendants submitted an expert declaration that FD-PET scans have been used safely in the medical community for many years, and several plaintiffs in the welding fume litigation have had PET scans without incident.

7. According to Dr. David Eidelberg, Director of the Movement Disorders Center and Functional Brain Imaging Laboratory at North Shore University Hospital in Manhasset, New York, and one of the country's leading experts in the use of FD-PET and other types of neuroimaging for the assessment of movement disorders, including Parkinson's disease, FD-PET scans are a very reliable tool by which to assess the integrity of the dopamine system in the brain, which is the primary site of damage in Parkinson's disease. See Decl. of David Eidelberg ¶¶ 22, 29, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000 (N.D. Ohio Nov. 14, 2004) ("Eidelberg Decl.") ("It is generally accepted among neurologists that abnormal Fdopa PET imaging findings confirm the clinical diagnosis of PD. . . Accordingly, PET imaging is a highly useful technique for differentiating cases of PD from cases of parkinsonism secondary to elevated manganese exposure.").

8. Fluorodopa-PET quantifies the rate at which <sup>18</sup>F-fluorodopa, a radiolabeled

chemical precursor (or tracer) of dopamine, is taken up by nigral dopamine terminals in the putamen and is converted by a specific enzyme (dopa decarboxylase) into dopamine. (*Id.* ¶ 22.) Fluorodopa uptake on PET reflects the rate of this enzymatic process, which serves as an index of the integrity of the dopamine neurons in the SNc. (*Id.*) Healthy neurons, with intact levels of dopa decarboxylase, readily take up the fluorodopa radiotracer.

9. Patients with Parkinson's disease have *abnormal* FD-PET images, which reflect damage to the dopamine system. (*Id.*) By contrast, patients with manganism have been shown to have *normal* FD-PET images, since damage to the brain in manganism is distinctly different from the brain damage caused by Parkinson's disease. (*Id.* ¶ 26.)

10. Plaintiffs have made no showing that a PET scan presents a risk of harm generally or that it presents a unique risk to Mr. Baldwin in light of his medical condition. In fact, plaintiffs' own expert neurologist, Dr. Paul Nausieda, has testified that "a fluorodopa PET scan isn't going to harm the patient." (Dep. of Paul Nausieda 82:2-3, Jan. 24, 2008.)

11. While PET scans are a common medical procedure, the tracer needed to perform a FD-PET scan is only available at a limited number of medical institutions.

#### CONCLUSIONS OF LAW

1. West Virginia Rule of Civil Procedure 35 provides for the independent physical examination of a party by a physician chosen by the adverse party when "the mental or physical condition of a party . . . is in controversy" and the party seeking the exam demonstrates "good cause shown and upon notice to the person to be examined."

2. Both requirements of Rule 35 have been satisfied here.

3. *First*, West Virginia courts have recognized that plaintiffs in personal injury suits necessarily put their medical condition in controversy by seeking damages related to their

alleged injuries. See *State ex rel. Hess v. Henry*, 183 W. Va. 28, 29 (1990) (noting that “[a]s the plaintiff in a personal-injury action, Mr. Hess put in issue his physical condition. Specifically at issue were neurological problems Mr. Hess had suffered before the automobile accident” from which his claims arose).

4. Mr. Baldwin has put his neurological condition in controversy by the very nature of this lawsuit. The core of plaintiffs’ claims is the contention that “as a direct and proximate result of exposure to welding fumes,” Mr. Baldwin has suffered “permanent neurological and physical damage.” (Amended Compl. ¶ 52.)

5. *Second*, good cause also exists for the Court to grant defendants’ motion. Defendants have established that an FD-PET scan is a reliable, medically accepted tool in diagnosing the type of neurological injury alleged by Mr. Baldwin, and the results of the test will clearly be relevant to a determination of his claims.

6. As the U.S. Court of Appeals for the Eighth Circuit recognized in another case alleging manganese overexposure, FD-PET scans are a reliable tool that can provide additional evidence that a plaintiff has PD. See *Hose v. Chic. Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995). According to the court in *Hose*, “[t]here is...no question that the PET scan is scientifically reliable for measuring brain function.” *Id.* at 973.

7. In sum, defendants have shown that the FD-PET results are highly relevant to the factual issues that are at the crux of Mr. Baldwin’s claims. Moreover, plaintiffs have failed to make any evidentiary showing of risk from conducting such a test.

**WHEREFORE**, the Court overrules plaintiffs’ objection and notes their exception, and hereby orders that Mr. Bemis Baldwin undergo, at defendants’ expense, a FD-PET under the supervision of Dr. David Eidelberg at the North Shore Hospital University Hospital in

Manhasset, New York, at a time to be determined by the parties.

Conclusion

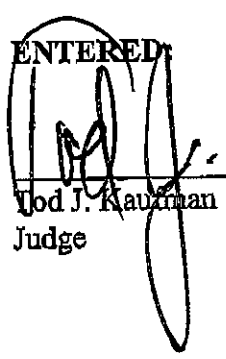
Both sides submitted proposed orders following the hearing. The Court reviewed both proposed orders. The Court hereby adopts the defendants' proposed findings and conclusions.

The defendants are **ORDERED** to produce to plaintiffs, within 72 hours of entry of this Order, a detailed description of the procedures requested, with a full disclosure of all risks associated with the procedures, including the risks for a wheelchair-bound patient who has a deep brain stimulator (DBS) and a feeding tube to travel by airplane to undergo the procedure.

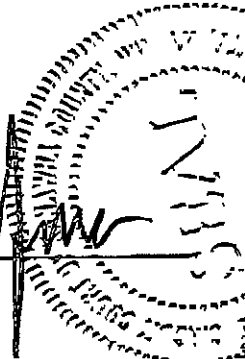
A status conference shall be held on March 14, 2008, as previously stated by the Court, to set a trial date.

Plaintiffs' objections are noted, and their letter of February 14, 2008, to counsel is filed as specific further objections.

ENTERED



Todd J. Kaufman  
Judge



CIRCUIT COURT OF WEST VIRGINIA  
L. CATHY S. GATSON, CLERK OF SAID COURT  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORD OF SAID COURT,  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT, THIS 15th DAY  
OF FEBRUARY 2008.

DATED: February 14, 2008

The Circuit Clerk shall send a certified copy of this Order by facsimile transmission to the following attorneys of record: \*

Edward W. Rugeley, III, Esq.  
Spilman Thomas & Battle PLLC  
PO Box 273  
Charleston WV 25321-0273  
Fax: 304.340.3881

Ralph A. Davies, Esq.  
David E. Lamm, Esq.  
Davies, McFarland & Carroll, PC  
424 Duquesne Dr Fl 10  
1 Gateway Center Fl 10  
Pittsburgh PA 15222-2046  
Fax: 412.261.7251

Harry F. Bell, Jr., Esq.  
Ftemkos (Tim) J. Yiane, Esq.  
Bell & Bands, PLLC  
PO Box 1723  
Charleston WV 25326-1723  
Fax: 304.345.1715

Richard Lewis, II, Esq.  
Steptoe & Johnson, PLLC  
PO Box 1588  
Charleston WV 25326-1588  
Fax: 304.353.8133

James Pizzirusso, Esq.  
Cohen, Milstein, Huasfeld & Toll, PLLC  
West Tower Ste 500  
1100 New York Ave NW  
Washington DC 20005-3964  
Fax: 202.408.4699

Brian H. Barr, Esq.  
Levin Papantonio Thomas Mitchell Echsner & Proctor, P.A.  
316 S Baylen Street Ste 600  
Pensacola FL 32502-5996  
Fax: 850.435.7020

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