



reevaluate their opinions in light of the new information.

In considering recent events in the *Peabody* case, it is hard to ignore an emerging pattern in this proceeding over the last year – time and again, defendants’ discovery efforts have revealed dispositive weaknesses in the cases selected for early trials. Plaintiffs’ second trial candidate, Mr. Morgan, dismissed his claims after it was discovered that he grossly exaggerated his symptoms. Their third trial candidate, Mr. Landry, lied about his history of drug abuse and dishonorable military discharge. And now their fourth trial candidate, Mr. Peabody, turns out to have a history of depression and memory loss that predates his welding exposure and which he attempted to hide from defendants. Unfortunately, all of these revelations occurred *after* defendants incurred substantial expenses undertaking fact discovery in those cases.

Because Mr. Peabody’s deception has substantially prejudiced defendants and rendered many of the prior depositions in the case meaningless, defendants request a discovery order reopening fact discovery in this matter. Defendants also request that the Court order plaintiffs Darwin and Melinda Peabody to produce any other records regarding Darwin Peabody’s treatment for alcohol and/or drug abuse.<sup>1</sup>

### **FACTUAL BACKGROUND**

In December 2004, plaintiff Darwin Peabody submitted his Court-ordered Fact Sheet to defendants. Question VI.D.7 of the fact sheet asks: “On average, how much alcohol do you/did you drink?” In response, Mr. Peabody checked the line marked “0-3 drinks per week.”

On October 4, 2005, Mr. Peabody served his responses to defendants’ interrogatories and requests for production. Defendants’ Interrogatory 11 asked Mr. Peabody to “identify each physician, psychologist, neuropsychologist, psychiatrist, counselor, nurse, or other healthcare

---

<sup>1</sup> Defendants reserve the right to seek costs incurred in retaking these depositions as a result of plaintiff’s failure to fully disclose his medical history.

provider you have ever seen for treatment, examination, checkup . . . or other reason related to your health.” The interrogatory also asked for contact information for the relevant medical professionals. Mr. Peabody named a number of medical professionals but did not disclose any information about drug and alcohol rehabilitation facilities. Similarly, Interrogatory 12 asked Mr. Peabody to identify “each hospital or clinic at which you have ever been examined, tested or treated.” Once again, Mr. Peabody did not disclose any treatment at any drug and alcohol rehabilitation centers.<sup>2</sup>

Then, on January 18, 2006, Mr. Peabody was asked directly in his deposition whether he had ever used illicit drugs. His answers follow:

**Q.** Have you used any drugs?

**A.** No.

**Q.** Never at any point?

**A.** (shaking head side to side)

\* \* \*

**Q.** Illegal drugs I’m talking about.

**A.** No.

Deposition of Darwin Peabody at 175:23-176:5 (Jan. 18, 2006) (attached as Ex. 2).

Peabody’s mother and sister similarly denied any knowledge of his alcohol abuse and illegal drug use at their depositions. For example, Peabody’s mother was asked if “Darwin ever had a problem with alcohol consumption.” She answered: “no.” (Dep. of Shirley Hobson at 39:12-14 (May 18, 2006) (attached as Ex. 3).) Similarly, Peabody’s sister was asked if “Darwin Peabody, to [her] knowledge [had] ever been involved in alcohol rehabilitation.” She responded:

---

<sup>2</sup> Peabody was enrolled in alcohol and/or drug rehabilitation programs at Havenwood and at the Stepping Stones Unit at Meadville Medical Center. (Meadville Medical Center Face Sheet at 822 (attached as Ex. 1).)

“I don’t recall.” (Dep. of Michelle Watt at 46:18-21) (May 18, 2006) (attached as Ex. 4).<sup>3</sup>

Defendants have now determined that each of these responses was undeniably false. On or about May 5, 2006, less than a month before the scheduled close of fact discovery, defendants interviewed a witness named Robert Darr, who informed them, for the first time, that Mr. Peabody had a history of alcohol and drug abuse. Based on this information, defendants undertook further investigation. Specifically, defendants identified the drug and alcohol rehabilitation clinics in the area where Mr. Peabody lived, and on May 10, defendants sent authorization forms to thirteen of the identified clinics requesting medical records related to Mr. Peabody. On June 12, defendants received records from the Meadville Medical Center that revealed Mr. Peabody’s substantial history of abuse of both alcohol and illicit drugs. These records indicated that Peabody had checked himself into a drug and alcohol rehabilitation facility with “a long history of alcohol and drug problems.” (Meadville Medical Center Discharge Summary at 823 (attached as Ex. 7).) According to the medical records, Peabody described his drinking and drug use as “daily,” noting that he preferred whiskey, “pot,” and “acid,” while also admitting to cocaine use within the previous two years. (Meadville Medical Center, Psychosocial History (“Psych. Hist.”) at 849 (attached as Ex. 8).) On his “Admission Assessment” form, Peabody also admitted to using “speed” and “downers,” including taking the prescription anti-anxiety drug Xanax without a prescription. (Meadville Medical Center Help Unit Admission Assessment at 859 (attached as Ex. 9).)

---

<sup>3</sup> This is in stark contrast to statements by Peabody’s mother in 1989 to the staff at Meadville Medical Center that Peabody had had a problem with alcohol and/or drugs for seven years. When asked “[i]n what quantity does [Darwin Peabody] use alcohol or drugs,” she answered: “in excessive.” [sic] (Meadville Medical Center Help Unit Family and/or Significant Other Questionnaire at 853 (attached as Ex. 5).) Peabody’s sister had also filled out a “Family and/or Significant Other Questionnaire” when he was admitted to Meadville. In her responses, Mrs. Watt indicated that, in her view, Peabody had had a problem with alcohol and/or drugs for “at least three years,” and that he drank “at least a fifth of whiskey and/or a case of beer” “every day.” (Meadville Medical Center Help Unit Family and/or Significant Other Questionnaire at 855 (attached as Ex. 6).)

There is no question that this information is highly relevant to Mr. Peabody's case. For example, one of the chief symptoms Peabody attributes to his exposure to welding fumes is "memory problems." (*See* Plaintiff Fact Sheet of Darwin Peabody at 11 ("Fact Sheet") (attached as Ex. 10).) However, Mr. Peabody's medical records from the Meadville rehabilitation clinic indicate that he "has had blackout spells secondary to drug and alcohol use." (*See* Meadville Medical Center History of Past Illness at 824 (attached as Ex. 11); *see also* Psych. Hist. at 849).) Furthermore, Peabody affirmatively stated on arrival at Meadville in 1989 that he "can't remember things." (Psych. Hist. at 850 (attached as Ex. 12).) These statements obviously cast substantial doubt on Mr. Peabody's current claim that his memory problems were caused by welding fumes.

Peabody also alleges that his exposure to welding fumes has resulted in "irritability" and "depression." (Fact Sheet at 11.) However, the medical records defendants recently obtained show that Peabody complained of both of these problems during his 1989 stay at the Meadville clinic. For example, a July 6, 1989 "Problem Note" states that Peabody discussed his low self-esteem in group discussion on that day. (Progress Note (July 6, 1989) (attached as Ex. 13).) Peabody also indicated during his stay at Meadville that he had experienced "depression" following alcohol or drug use, that he felt depressed "often," and that he had suicidal thoughts. (Psych. Hist. at 850.) Moreover, when Peabody arrived at Meadville, he indicated that he sometimes wished he "was never born" (Meadville Medical Center Incomplete Sentences Test at 858 (attached as Ex. 14)), and the doctors who treated Peabody at Meadville also found him to have significantly elevated levels of anxiety, depression, and hostility during his stay at the rehabilitation clinic. (Meadville Medical Center Multiple Affect Adjective Check at 852 (attached as Ex. 15).) Finally, when he checked into Meadville, Peabody indicated that he had

experienced a “change” within the previous six months in the following: sleep patterns, anger outbursts, violent behavior, loneliness/isolation/withdrawal, suicidal thoughts/plans, depression, and anxiety. (Meadville Medical Center Help Unit Admission Assessment, at 859.) In other words, Mr. Peabody was already claiming to suffer from all of his now-alleged symptoms *over a year before* he started welding.

Mr. Peabody has also concealed information about his abuse of alcohol and illicit drugs in other contexts. For example, Peabody filed a worker’s compensation claim in 2004 for alleged manganese toxicity. (Fact Sheet at 11-12.) On November 17, 2005, Peabody was examined by Dr. Anil Nalluri in connection with this claim. Dr. Nalluri’s report states that “the examinee [Peabody] reported no history of alcohol abuse, illicit psychoactive substance abuse (such as cannabis . . . hallucinogens, etc.). . . . No recreational drug use was reported.” (Report of Dr. Anil Nalluri at 2 ( Nov. 17, 2005) (attached as Ex. 16).) Mr. Peabody also concealed this information from his chief neuropsychologist in this lawsuit, Dr. Robert Heilbronner, whom defendants recently deposed. Dr. Heilbronner admitted at his deposition that when he examined Mr. Peabody, he was not aware of Peabody’s history of drug and alcohol abuse. (Deposition of Dr. Robert Heilbronner at 49:20-50:7; 65:21-67:1) (June 6, 2006) (attached as Ex. 17).<sup>4</sup>

### **ARGUMENT**

Mr. Peabody’s failure to disclose his extensive and highly relevant history of drug and alcohol abuse has forced defendants to expend both considerable sums of money and a tremendous amount of additional time in the discovery phase of this case. Because Mr. Peabody’s incomplete discovery responses and false deposition testimony have made it necessary for defendants to re-depose numerous witnesses, the Court should: (1) issue a

---

<sup>4</sup> Peabody did admit to defense expert Dr. Steven Arnold that he had abused alcohol, but denied illicit drug use. (Report of Dr. Steven Arnold at 3 (Apr. 25, 2006) (attached as Ex. 18).)

discovery order allowing defendants to re-depose all of plaintiff's witnesses (both fact and expert); and (2) require that plaintiffs disclose any records in their possession related to Darwin Peabody's treatment for drug and/or alcohol abuse.

First, this Court should provide defendants with the right to re-depose all of plaintiff's fact and expert witnesses because defendants were never provided with the opportunity to cross-examine witnesses with regard to plaintiff's history of substance abuse and specifically, how that history might have affected his treating physicians' and experts' opinions. They also never had the opportunity to question Mr. Peabody's family and co-workers about his substance abuse and its relation to his current complaints.

Second, the Court should also require that plaintiffs produce any other records regarding Darwin Peabody's treatment for alcohol and/or drug abuse. This will allow defendants to determine additional relevant information regarding Mr. Peabody's history of substance abuse.

### **CONCLUSION**

For the foregoing reasons, defendants request that the Court enter a discovery order: (1) granting defendants the right to re-depose all of plaintiff's witnesses; (2) requiring Darwin and Melinda Peabody to turn over any and all records in their possession related to Darwin Peabody's treatment for drug and/or alcohol abuse; and (3) ordering such other and further relief as the Court may deem appropriate.

Dated: June 19, 2006

Respectfully submitted,

s/ John H. Beisner

John H. Beisner

Charles Read

Stephen J. Harburg

O'MELVENY & MYERS LLP

1625 Eye Street, N.W.

Washington, DC 20006-4001

(202) 383-5300

COUNSEL FOR DEFENDANTS THE BOC  
GROUP, INC. F/K/A AIRCO, INC., THE  
ESAB GROUP, INC., HOBART BROTHERS  
COMPANY AND THE LINCOLN ELECTRIC  
COMPANY