



Case Analysis by
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NewsFlash

VOL 2 ISSUE 9

JULY 20, 2007

Borg-Warner Interpreted Texas Asbestos MDL Judge Issues His First Rulings

“Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease” is the causation standard. *Borg-Warner*, Cause No. 05-0189, 2007 WL 1650574 at *7 (Tex. June 8, 2007).

In *Borg-Warner v. Flores*, the Texas Supreme Court pronounced the above concise causation standard for Texas asbestos claimants. On July 18, 2007, Judge Davidson, the administrative judge presiding over the Texas Multidistrict Litigation pretrial court in the 11th District Court in Harris County, Texas, issued his first opinion interpreting this standard. Judge Davidson’s rulings were issued in three motions for summary judgment involving plaintiffs diagnosed with mesothelioma, who were somewhat representative of the spectrum of exposure and claims which his court may evaluate in the future.

Judge Davidson concluded that *Borg-Warner* applies to all asbestos claimants without regard to the type of disease alleged or the applicability of Chapter 90 of the Texas Civil Practice and Remedies Code. He reasoned that Chapter 90’s medical reports were merely procedural prerequisites for initiating suit, not substantive evidence of causation. Consequently, each plaintiff seeking damages for any type of asbestos-related disease must meet the elevated causation standard established in *Borg-Warner* even though the science shows that there is a distinction in the amount of asbestos necessary to cause a particular type of asbestos-related disease.

Judge Davidson could not find support in any Texas Supreme Court or American precedent for the defendants’ arguments that plaintiffs are required to prove their total lifetime exposure as well as specific exposures from a defendant’s product as part of their prima facie case. However, he advised that defendants are free to show both when arguing their products were not a substantial cause of a plaintiff’s injury or when demonstrating the existence of responsible third parties.

The rulings state that a dose is a numerical representation of the amount of a plaintiff’s asbestos *exposure*, rather than the amount of asbestos a plaintiff actually inhaled (an interpretation urged by several interested observers). Judge Davidson ruled that “defendant specific testimony,” as envisioned by the Supreme Court’s opinion in *Borg-Warner*, is established where the record

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includes: 1) plaintiff testimony as to the type and quantity of product used; and 2) a plaintiff specific expert affidavit, based on plaintiff's deposition and studies of asbestos emissions from various activities, which estimates the plaintiff's exposure level that in a way that meets *Havner's* standard of "equal to or greater than" toxicity levels and the substantial factor test for causation. Because Judge Davidson observed that the epidemiology used to establish causation must be consistent with *Havner*, a defendant should challenge the reliability of the epidemiology or scientific evidence that a plaintiff uses to approximate its exposure level. For now, generic expert testimony detailing the approximate amount of asbestos in visible asbestos dust also can create fact issues that will overcome summary judgment. However, it remains to be seen how long this will be the case.

This article is not intended as legal advice to a specific problem or issue. If you have a question about toxic tort law, please contact the Powers & Frost attorney with whom you work or Lori Wiese, Partner, Head of Product Liability Litigation.

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