

LOS ANGELES

Daily Journal

Friday, March 25, 2011

VERDICTS & SETTLEMENTS



Defense attorney Ruth D. Kahn



Defense attorney Lawrence P. Riff

RESULT DATE:

Feb. 10, 2011

CASE:

William Head, Laura Hammond, et al. v. Shell Oil Company

TOPIC: Torts

SUB TOPIC: Products Liability

FURTHER DESCRIPTION: Toxic Torts/Benzene

VERDICT: Defense

ATTORNEYS: Plaintiff - Raphael Metzger, Gregory A. Coolidge, Carmen Yates (Metzger Law Group, Long Beach). Defendant - Ruth D. Kahn, Lawrence P. Riff (Steptoe & Johnson LLP, Los Angeles).

MEDICAL EXPERTS: Plaintiff - Robert Gale, M.D., Ph.D., hematology, oncology, Los Angeles; Robert J. Harrison, M.D., occupational medicine, San Francisco; Stephen Petty, CIH, exposure assessment, Dublin, Ohio; Kavita Reddy, Ph.D., cytogenetics, New York, N.Y.. Defendant - John M. Bennett, M.D., hematology, Rochester, N.Y.; Douglas Daugherty, Ph.D., CIH, exposure assessment, San Francisco; David H. Garabrant, M.P.H., M.D., epidemiology and occupational medicine, Ann Arbor, Mich.; John Whysner, M.D., DABT, toxicology, Sleepy Hollow, N.Y.

TECHNICAL EXPERTS: Plaintiff - Noel de Nevers, Ph.D., chemical engineering, Salt Lake City, Utah; Peter Formuzis, Ph.D., economics, Santa Ana. Defendant - James R. Kittrell, Ph.D., chemical engineering, Amherst, Mass.

FACTS: William Head was employed in the 1980s and early 1990s as a salesman and manager for Pemaco Petroleum Inc., a Shell Oil Company ("Shell") chemical product distributor located in Los Angeles County.

In 2006, at age 57, Head contracted acute myelogenous leukemia (AML). Despite aggressive treatment including chemotherapy, he died a few months later at the age of 58.

Plaintiffs brought survival and wrong death claims. Plaintiffs were Head's widow, Laura Hammond, five adult children, and one minor child.

Defendants originally sued were Angeles Chemical Company, Ashland Inc., Bortz Oil Company, ChemCentral Corporation, Chevron U.S.A. Inc., Dow Chemical Company, E.I. duPont De Nemours and Company, Kern Oil Company, Shell Oil Company, Soco West Inc., Union Carbide Corporation, and Univar USA Inc.

All defendants settled prior to trial except Shell. At trial, plaintiffs focused on Head's claimed exposure to 13 hydrocarbon solvent products that Pemaco bought from Shell including mineral spirits, naphtha, toluene, xylene and various blended solvents.

Plaintiffs asserted that Shell's chemical products were defective in multiple particulars.

PLAINTIFFS' CONTENTIONS: Plaintiffs contended that Head's AML was caused by the chemical compound benzene contained in Shell's chemical products to which Head was exposed while on Pemaco's premises and on the premises of Pemaco's customers, mostly print and auto paint shops, which used such products. Benzene is a human carcinogen that is established as capable of causing AML.

Plaintiffs asserted that Shell's chemical products were defective in multiple particulars including for failing to warn that they contained benzene and could cause cancer; for defective design under both the "ordinary user expectation test" and the Barker v. Lull risk-benefit test; and for breach of warranty of merchantability and fitness for a particular purpose.

Plaintiffs also contended that any solvent containing in excess of 1 part per million (ppm) in solution (0.0001 percent) was unsafe; that Shell could feasibly have reduced the benzene content of its solvents to <1 ppm in solution at a reasonable cost; and that Shell consciously disregarded the rights of Head, and others, by failing to do so. In support of this argument, plaintiffs urged that it has been known to science and the chemical industry, including Shell, since at least the early 20th

century that benzene was a bone marrow toxin, resulted in deaths of exposed workers and caused bone marrow-related cancers including AML.

Plaintiffs relied upon a 1948 Toxicological Profile published by the American Petroleum Institute, of which Shell was a member; that “the only absolutely safe level of benzene is zero.” Plaintiffs further urged that Shell had admitted in documents filed with the OSHA in the late 1970s that it did not wish to provide a cancer warning for benzene in solvents of the type at issue here for fear of lost profits.

Plaintiffs claimed that Head had a toxicologically significant exposure to the benzene in Shell’s products, which in fact brought about his AML. Further, they contended that certain chromosomal abnormalities found in Head’s DNA at the time of diagnosis, involving deletions of some or all of chromosomes 5 and 7, were signature biomarkers that his AML was in fact due to benzene.

Plaintiffs urged that Head’s intermittent exposure to the benzene, due to his work in sales, and measured in “peak events,” was clearly sufficient under extant science to have caused his disease. Indeed, they urged that such peak events are more toxic than a constant level of exposure in the workplace.

DEFENDANT’S CONTENTIONS: Shell contended that its hydrocarbon solvents, even with small concentrations of benzene, do not cause cancer, including AML, in humans, and Shell relied upon analyses of authoritative agencies, such as the U.S. National Toxicology Program and the U.S. EPA, in support of this proposition.

Shell also contended that its hydrocarbon solvents as designed were very useful and their designs necessary to achieve product performance in a variety of industrial applications. Shell explained that it did not provide a cancer warning because Shell genuinely believed that its solvents did not cause cancer, and providing a cancer warning would dilute, and distract users from, the very important safety and health warning information Shell did provide.

Shell denied that it hid any material information from Head or others, showing that Shell had provided Head’s employer, Pemaco, with Material Safety Data Sheets and other information that identified the benzene content of its solvents.

Shell further contended that Head’s AML fell into the vast category of the 12,000 new cases of AML diagnosed each year for which no cause is known. As to the chromosomal aberrations, Shell contended that they were not signatures of benzene toxicity, that they appear in persons with no occupational exposure to benzene and, to the extent such abnormalities are shown in benzene-exposed workers, the levels of benzene involved are far higher than any Head experienced.

Ultimately, Shell contended that Head’s cumulative dose of benzene was not toxicologically significant, and was too low to have played any part in bringing about his AML. Shell alleged that the correct metric for evaluation exposure was “ppm-

years” and not “peak events;” Shell’s exposure assessment expert estimated that Head’s cumulative exposure to benzene on the job from all sources was 1.1 ppm-years.

Shell’s medical experts explained that a dose of at least 40-50 ppm-years is required even to entertain the possibility of a benzene-induced AML. Shell also claimed that the time course between putative exposure and diagnosis (“latency”) of >20 years was too long.

Ultimately, Shell contended that Head’s cumulative dose of benzene was not toxicologically significant, and was too low to have played any part in bringing about his acute myelogenous leukemia.

DAMAGES: Plaintiffs asked for unspecified millions in compensatory damages and sought punitive damages from Shell for claimed conscious disregard of workers’ health in light of the alleged 100-year well-documented history of benzene carcinogenicity. Plaintiffs’ counsel asked the jury not to award punitive damages greater than nine times compensatory damages.

SPECIALS IN EVIDENCE: MEDS: \$300,000 LOE: \$504,000

JURY TRIAL: Length, 17 days; Poll, 12-0 (design defect based on the risk/benefit test), 12-0 (design defect based on the consumer expectations test), 9-3 (failure to warn), 12-0 (fraudulent concealment); Deliberations, one day.

SETTLEMENT DISCUSSIONS: A year and a half before trial, the parties participated in a settlement conference with the Hon. Owen L. Kwong of the Los Angeles Superior Court, at which time plaintiffs resolved the case with all the defendants other than Shell.

RESULT: Defense verdict.

OTHER INFORMATION: The Hon. Enrique Romero (ret.), now at ADR Services Inc., conducted a private mediation one month before trial. Prior to the mediation, the eight plaintiffs served Shell with statutory settlement demands totaling \$2,150,000, which demands were increased to \$5 million at the mediation. During trial, plaintiffs raised their collective demand to Shell to \$10 million. Shell served the widow with a statutory offer of judgment 10 days before trial in the amount of \$250,000.

Judgment was entered on March 3, 2011. Shell filed a cost bill in the amount of \$326,992. No post-trial motions have been filed as of the date of this report. [Subsequently, the parties filed a Stipulated, Amended Judgment in favor of Shell in which plaintiffs agreed to pay costs of \$15,000; no appeal was filed.]