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Diesel-Exposure Claims Find a Legal Path Ruling in Favor of Plaintiff in Workers' Compensation Court Could Spur Similar Cases

By
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A recent finding by a workers' compensation judge that a bus mechanic's exposure to diesel exhaust contributed to his death from lung cancer has rattled lawyers who defend big employers.



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Dorota Nigro won a judgment for the death of her husband, Anthony. *Jason Andrew for The Wall Street Journal*

They expect the ruling to spur similar claims even as diesel-related litigation has been hamstrung in U.S. civil courts. It comes at a time when public-health and workplace-safety experts are stepping up warnings about inhaling diesel fumes.

"Everyone wants to walk on a path that's already been blazed," said Michael Salveson, a workers' compensation defense attorney with Littler Mendelson in Tysons Corner, Va.

Roughly 12 million U.S. workers are exposed to diesel exhaust in the nation's mines, ports, construction sites, farms and other places where heavy equipment is used, a 2005 study in

the American Journal of Industrial Medicine found. Last year, the federal Occupational Safety and Health Administration said in an alert that short-term exposure to diesel fumes on the job could cause dizziness and respiratory irritation and that prolonged exposure could raise the risk of cardiovascular disease and lung cancer.

Still, mines are the only workplaces where the federal government limits how much diesel particulate matter workers can breathe. The Environmental Protection Agency considers diesel exhaust a likely, rather than a known, human carcinogen.

An analysis published in February in *Environmental Health Perspectives*, a journal that receives funding from the National Institutes of Health, examined three studies on miners and truck drivers and estimated that 6% of lung-cancer deaths annually were due to diesel-exhaust exposure both in the workplace and the environment.

"It's very hard to distinguish causation when it comes to these particulates," said Glen Kedzie, energy and environmental counsel for the American Trucking Associations. He said diesel engines have become cleaner in the past decade and there are many ways a worker could be exposed to exhaust, from railroads and trucks to lawn mowers.

In June 2012, the World Health Organization designated diesel exhaust carcinogenic to humans, placing it on a list that includes radon and asbestos. Lawyers expected a flood of diesel-related litigation in U.S. civil courts, but several factors have limited such lawsuits.

In July 2012, a Court of Appeals, in a case brought by New York transit workers against General Motors and other makers of diesel engines, barred personal-injury claims against manufacturers. In that case, New York transit workers argued the companies were liable for diesel-related injuries because they allegedly failed to warn about the hazards from inhaling fumes and allowed engines to be built with devices that could circumvent emissions standards once buses were in service.

The court found the manufacturers are protected under a provision of the federal Clean Air Act because they made engines that met EPA emissions standards.

Defense attorneys point to other complications with such civil suits, such as tracking down who made diesel engines that people were exposed to.

"Those hurdles may push these claims into the workers' compensation system," said Jennifer Quinn-Barabanov, an attorney with Steptoe & Johnson in Washington, D.C., which has defended against diesel-exhaust claims.

Workers' compensation courts are typically the only place employees can seek claims against employers for work-related injuries. Bringing a claim there is less appealing because the potential damages are far lower than in lawsuits against manufacturers. Yet the burden of proving injury is also lower in workers' compensation cases.

In New York, Dorota Nigro joined the civil suit against the engine makers after her husband Anthony, a bus mechanic with the Metropolitan Transportation Authority for 28 years, died in 2012. When the appeal court dismissed the case, she turned to the workers'

compensation system. "I got angry," she said. "I thought, 'I have nothing to lose.' The class action has fallen apart. Now it's just the money and principle."

A workers' compensation judge ruled in August that Mr. Nigro's death from cancer resulted from his inhaling diesel fumes. Mrs. Nigro was awarded \$773 a week until her death or remarriage, including nearly \$100,000 in payments retroactive to his death at age 57.

A pulmonary specialist serving as an expert for the agency noted that the mechanic had a history of smoking and said the link between his cancer and diesel exposure was speculative.

The MTA didn't appeal the decision. Agency spokesman Adam Lisberg declined to comment on the case. He said the MTA, which employs more than 2,200 bus mechanics, uses ultra-low-sulfur fuel in diesel equipment and said buses are attached to ventilation systems during maintenance.

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