UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	)	Case No. 1:03-CV-17000 (MDL Docket No. 1535)
THIS DOCUMENT RELATES TO:	)	JUDGE O'MALLEY
Beheler v. Lincoln Elec. Co., et al., 1:06-CV-17204 *Carriker v. Lincoln Elec. Co., et al.*, 1:06-CV-17205 *Steelman v. Lincoln Elec. Co., et al.*, 1:06-CV-17206	)	

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE

Pursuant to Fed. R. Civ. P. 41(b), defendants respectfully move to dismiss the claims of the remaining "Duke Power" plaintiffs – Wayne Beheler, Wilbert Carriker, and Jerry Steelman – ***with prejudice*** for failure to prosecute.

BACKGROUND

On April 12 and 13, 2006, plaintiffs filed seven separate individual actions: *Beheler v. Lincoln Electric Co.*, 1:06-CV-17204; *Carriker v. Lincoln Electric Co.*, 1:06-CV-17205; *Goforth v. Lincoln Electric Co.*, 1:06-CV-17217; *Pitts v. Lincoln Electric Co.*, 1:06-CV-17216; *Quinn v. Lincoln Electric Co.*, 1:06-CV-17218; *Ray v. Lincoln Electric Co.*, 1:06-CV-17215; and *Steelman v. Lincoln Electric Co.*, 1:061-CV-7206. Just days later, on April 17, 2006 (before the complaints were even served on defendants), plaintiffs filed a motion to consolidate those cases for the fifth MDL trial, set to begin on October 30, 2006, asserting in their motion that "there are common questions of law and fact at issue in each of these cases." (*See* Pls.' Mot. to Consolidate and Mem. in Supp. at 2, Apr. 17, 2006 (MDL Dkt. No. 1748).) Shortly thereafter,

plaintiffs dropped two of the seven cases, claiming that doing so would "make[] for a more similar group of plaintiffs" and a "more manageable" trial by "reducing the number of employers and jobsites where there was significant welding fume exposure." (Letter from J. Thompson to S. Harburg, Apr. 28, 2006 (attached as Ex. A to Defs.' Supp'l Opp'n to Pls.' Mot. to Consolidate).

The parties immediately began preparing all five remaining cases for the October 30 trial date. After significant fact and expert discovery had been undertaken with regard to all five plaintiffs, the Court held a hearing on plaintiffs' motion to consolidate the cases for trial. At the hearing, the Court instructed the parties to continue working up all of the proposed trial candidates, pending a final decision on the motion. *See* Tr. 73:7-8, Sept. 7, 2006 ("At this point you all should continue with [trial preparation for] everybody."). In so doing, the Court explained:

> Anybody that I carve out of these proceedings will be available for the plaintiffs to bring to trial at the very next opportunity, if that's what the plaintiffs choose to do, so in other words, we could move immediately to Mr. Carriker, for instance, the wintertime slot, or we could move to whoever I carve out, if I do, from the other four in the next time slot, so I understand that you have already put a lot of time and effort into these plaintiffs, and I will make sure they get their day in Court as quickly as possible.

(Tr. 73:13-22, Sept. 7, 2006.) On October 5, 2006, the Court issued its order consolidating plaintiff Quinn's and plaintiff Goforth's cases for trial. (*See* Mem. and Order at 1, Oct. 5, 2006 (MDL Dkt. No. 1921).)

Defendants spent a tremendous amount of money and devoted considerable time to trial preparation in the *Beheler*, *Carriker*, and *Steelman* cases prior to the Court's consolidation ruling. Specifically, defendants:

- Collected and analyzed medical records;

- Retained experts;
- Conducted independent medical exams (by Drs. Parran, Wilson and Kirshberg);
- Issued expert reports;
- Deposed plaintiffs;
- Deposed plaintiffs' experts Swash, Harris, and Nausieda on all five proposed trial candidates;
- Interviewed numerous plaintiffs' witnesses in North and South Carolina (*e.g.*, co-workers, family members, welding instructors)
- Issued subpoenas and interviewed employers; and
- Prepared and filed summary judgment motions.

Despite these efforts to prepare *Beheler*, *Carriker*, and *Steelman* for trial, plaintiffs have shown no interest in actually trying these remaining Duke Power cases. Plaintiffs have now twice passed over these cases and selected two other MDL trial candidates – Robert Jowers and Jeff Tamraz – instead. Those cases are at the very beginning of trial preparation and will require great expense to reach the same trial readiness as the three Duke Power cases. This approach to trial preparation and selection is grossly unfair to defendants. Given plaintiffs' refusal to try any of these three cases in the next two available trial slots, the Court should dismiss them with prejudice.

ARGUMENT

The Court may dismiss claims under Fed. R. Civ. P. 41(b) "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." Unless the Court specifies otherwise in its dismissal order, dismissal under Rule 41(b) "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). As this Court has previously recognized, dismissal with

prejudice is appropriate when, as here, plaintiffs have nominated a trial candidate or candidates and refused to proceed to trial after significant affirmative discovery has taken place. *See* Memorandum and Order, *Peabody v. Lincoln Elec. Co.*, Case No. 05-17678, July 31, 2006 ("*Peabody* Order"), at 3. Plaintiffs here – as in *Peabody* – have simply chosen not to pursue the *Beheler*, *Carriker*, and/or *Steelman* cases. Plaintiffs have offered no basis for why they did not select one of the remaining Duke Power claims for either the November 2007 or February 2008 trial slots. As defendants have previously argued, the Court should not permit plaintiffs to force defendants to incur the expense of working cases up for trial, only to have them disappear back into the pool when the time comes for a trial. Accordingly, as in *Peabody*, these plaintiffs' claims should be dismissed with prejudice.

Further, as the parties and the Court well know, this is not the first time plaintiffs have run from one of their own hand-picked trial candidates after defendants invested substantial money preparing the case for trial. Defendants have now worked up nine cases in this MDL proceeding and only three have been tried.[1] Over the last year, defendants have repeatedly urged that the Court impose some limitation on plaintiffs' pattern of abandoning cases after defendants have been forced to incur the cost of preparing them for trial. In its *Peabody* order, the Court recognized that defendants should not be forced to continually spend money and waste time developing cases that plaintiffs nominate for trials that never happen. *See Peabody* Order at 4.

The time has come to implement the cost-shifting approach that the Court contemplated in that order – *i.e.*, to require "sanctions in the form of cost shifting" for future cases that are dismissed before trial. *Peabody* Order at 4. In particular, as requested in defendants' Motion for Expedited Entry of Bellwether Trial Selection Order, the Court should establish the following

[1] Defendants have undertaken substantial pretrial workup in nine cases other than *Ruth*: *Morgan*, *Landry*, *Peabody*, *Solis*, *Beheler*, *Carriker*, *Goforth*, *Quinn*, and *Steelman*. Thus far, plaintiffs have been willing to proceed to trial with only three of those nine cases: *Solis*, *Goforth*, and *Quinn*.

procedure for any future trial case dismissals:

- First, the Court should give plaintiffs twenty days after the Court selects a case for trial (beginning with the recently selected *Tamraz* case) to decide if they want to proceed with work-up of the case for trial. If plaintiffs decide not to proceed with a case during that twenty-day period, a new case should be selected.
- Second, if plaintiffs decide to proceed with a case but change their minds after the twenty-day period, they should be required to reimburse defendants' costs in preparing the case for trial.

CONCLUSION

Plaintiffs have now formally withdrawn three trial candidates and declined to proceed with three more – Mr. Beheler, Mr. Carriker, and Mr. Steelman. By contrast, only three plaintiffs' claims have been tried in the MDL. This ratio is clearly unacceptable. Plaintiffs' counsel must be held accountable for continually nominating candidates for trials in this Court, only to withdraw those candidates after extensive trial preparation.

For the foregoing reasons, defendants respectfully request that the Court: (1) dismiss the remaining Duke Power cases with prejudice; and (2) issue an order requiring plaintiffs to pay defendants' trial preparation costs for any designated trial candidates that plaintiffs decide not to pursue after an initial twenty-day refusal period.

Dated: June 22, 2007

Respectfully submitted,

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