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
ALL ACTIONS	)	

DEFENDANTS' MOTION FOR ENTRY OF THIRD CASE ADMINISTRATION ORDER

Defendants respectfully move the Court for entry of a case administration order: (1) designating for medical records discovery the remaining 275 cases in this MDL proceeding in which the claimant has submitted a Notice of Diagnosis; and (2) establishing a protocol for full trial-preparation discovery in all of the cases that plaintiffs have certified for trial. Alternatively, if the Court chooses to proceed with full discovery in only 15 cases – as contemplated by the Court's August 28, 2006 Order – defendants should be allowed to select those cases from among the ones plaintiffs have certified as trial-worthy.

As set forth below, the prior case administration efforts in this proceeding have successfully winnowed this litigation to a much more manageable case volume. Given that this proceeding is already more than four years old, however, the time has come for the Court to take the next – and final – step of advancing all remaining cases toward trial.

BACKGROUND

A. The Court's Case Administration Orders

On March 31, 2006, the Court entered a Case Administration Order ("CAO") to "streamlin[e] the administration of this Multi-District Litigation." (CAO at 1, Dkt. No. 1724, Mar. 31, 2006.) To further this goal, the CAO set out mechanisms for "prioritiz[ing] the cases in

the MDL" and "bring[ing] these cases to a trial-ready posture." (*Id.*) The CAO was designed to make "any cases this Court later suggests should be remanded to transferor courts [] as trial-ready as possible." (*Id.* ¶ VI.) To that end, the CAO included provisions designed to ensure that: (1) only proper defendants were named in each plaintiff's case; (2) each plaintiff had a confirmed medical diagnosis of an allegedly manganese-related neurological disorder; and (3) each plaintiff had a right to amend and supplement his complaint to assert additional causes of action. (*Id.* ¶¶ I, III.) The CAO also provided that after these steps were complete, the parties would conduct case-specific medical records discovery, starting with an initial group of 100 individual cases. (*Id.* ¶ VI.)

On August 28, 2006, the Court entered an additional Order setting forth "certain instructions regarding the parties' initial discovery obligations" in the 100 cases selected for medical records discovery. (Order at 1, Dkt. No. 1888, Aug. 28, 2006 ("Aug. 28 Order").) Specifically, the Court ordered plaintiffs' counsel to review the medical records of each selected claimant, compare those records with the allegations in the claimant's fact sheet, and conduct an in-person interview of each claimant to verify his claims. (*Id.* at 2-3.) After this review and interview process, each plaintiff's attorney was to either: "(1) submit a letter to defense counsel certifying he has completed this process and believes in good faith that he and his client will pursue the matter to trial; or (2) move to dismiss his case or withdraw his representation." (*Id.* at 3.) The Court stated that the goal of this process was "to put the 100 cases designated [for medical records discovery] . . . into a trial-ready posture as soon as reasonably possible, so that the cases may be set for trial in this Court or the transferor courts for final resolution." (*Id.* at 4.) Faced with this requirement, plaintiffs immediately dismissed over half (59 of 100) of the selected cases. While the Court replenished the case pool several times, so that a total of 179

plaintiffs were proposed for medical records discovery, plaintiffs have thus far certified only 37 cases for trial – approximately 20% of the total. Of the other 142 cases, 135 have been or will be dismissed (or counsel have indicated they will withdraw), and certifications are not yet due in seven others.

On January 7, 2008, the Court entered a Second Case Administration Order in which it partially denied defendants' motion to designate the remaining MDL screening cases for medical records discovery due to the volume of cases (more than 600) pending at that time. (*See* Second Case Admin. Order at 6-7, Dkt. No. 2107, Jan. 7, 2008 ("Second CAO").) Instead, the Court designated 100 additional cases for medical records discovery, finding that "designation of these additional 100 cases will have the effects defendants seek, but will not overwhelm the parties or distract counsel from their other MDL efforts." (*Id.*)

Since the Court entered the Second Case Administration Order, plaintiffs have voluntarily dismissed an additional 276 cases that have not yet been subject to medical records discovery. At this point, the MDL proceeding includes approximately 275 plaintiffs who have submitted Notices of Diagnosis but who have not yet been selected for medical records discovery.

B. The Bellwether Trial Process

The Court first established a process for selecting candidates for bellwether trials in August 2004. (*See* Second Am. Supp'l Case Mgmt. Order ¶ IV.1, Dkt. No. 405, Aug. 31, 2004.) Under the Court's Order, the bellwether trial cases were to be selected "with an eye to providing opportunities for educating the Court and the parties regarding the science and other issues that are likely to recur in litigating individual cases." (*Id.*)

In March 2005, the Court entered a Fourth Case Management Order, establishing a procedure under which plaintiffs would choose the second and fourth bellwether trial cases, and

defendants would propose a list of seven to ten representative candidates from which plaintiffs would choose the third trial candidate.[1] (Fourth Case Management Order ¶¶ I.1-3, Dkt. No. 959, Mar. 24, 2005); *see also Solis v. Lincoln Elec. Co.*, No. 1:05-17363, 2006 U.S. Dist. LEXIS 3869, at *7-8 (N.D. Ohio Feb. 1, 2006).

Plaintiffs' choices for the second and fourth MDL trials dismissed their claims before trial. Plaintiffs' candidate for the third MDL trial, Scott Landry, chose not to proceed to trial. After Landry's case was taken off the trial calendar, plaintiffs chose Ernesto Solis from the remaining candidates on defendants' list.[2]

In March 2006, the Court ordered plaintiffs to select a candidate for the "fifth" MDL trial that was scheduled to begin at the end of October 2006. (*See* CAO ¶ V.) Plaintiffs nominated seven claimants for a proposed consolidated trial. None of those seven claims was pending in the MDL proceeding at the time. Rather, all seven cases were newly filed, specifically for the purpose of proposing them for the October 2006 trial.

Most recently, plaintiffs selected two more individual claimants as MDL trial candidates – Robert Jowers and Jeff Tamraz. Finally, the Court selected Eddie Byers from among the first three cases that plaintiffs certified for trial after medical records discovery as the plaintiff for the next MDL trial.

ARGUMENT

Under 28 U.S.C. § 1407, an MDL court's role is to preside over coordinated or consolidated proceedings, specifically "those that are 'pretrial.'" *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33-34 (1998). MDL courts should engage in active case management and discovery techniques to "best serve the expeditious disposition of the litigation"

[1] Plaintiffs also selected the claimant for the first "bellwether" trial, Charles Ruth.

[2] Plaintiffs have since dismissed four of the other five candidates on defendants' list.

and ensure that "the cases [a]re ready for trial at the time of remand to the transferor districts." MANUAL FOR COMPLEX LITIGATION (FOURTH) §20.133, at 225 (2004).

Over the course of this litigation, the Court has instituted a number of procedures aimed at "bring[ing] these cases to a trial-ready posture (or to determine that they are not amenable to trial) as soon as reasonably possible." (CAO at 1.) Thus far, the Notice of Diagnosis, medical records discovery, and trial certification initiatives have winnowed the number of claims pending in the MDL proceeding. At this point, two steps are necessary to achieve the Court's stated goal of bringing the remaining cases in this proceeding to a trial-ready posture: (1) setting all remaining cases for medical records discovery; and (2) ordering full case-specific discovery in the cases that plaintiffs have certified for trial. As set forth below, both steps will accelerate the conclusion of this MDL proceeding.

First, it is essential that the Court continue to winnow the claims in this MDL proceeding to those that the plaintiffs and their counsel have a good-faith intention of bringing to trial. The medical records discovery initiative originally sought by defendants has proven to be an effective tool for further separating the "wheat from the chaff" in the MDL. Plaintiffs dismissed 134 of the 179 cases in the first group selected for medical records discovery rather than comply with the required discovery and/or certification processes. There is no reason to believe that the result will be any different if all remaining plaintiffs are subject to these same discovery and certification requirements. Indeed, if past experience is any indication, the 275 claims will be cut by 50 percent or more simply by ordering medical records discovery.

Defendants acknowledge that the Court partially denied a motion to order medical records discovery in the nearly 650 cases arising out of plaintiffs' counsel's "screening" process in January of this year. (*See* Second CAO at 6-7.) In its ruling, the Court observed that

"designating over 600 cases for immediate medical records discovery would create a 'pig in a python' problem." (*Id.* at 7.) However, that concern is no longer applicable because plaintiffs have since dismissed another 276 cases from the MDL proceeding. There are now just 275 plaintiffs remaining in the MDL proceeding who have filed Notices of Diagnosis but are not yet subject to medical records discovery.[3] Conducting medical records discovery in this relatively small number of cases would be entirely manageable. In fact, much of the effort involved in completing medical records discovery is borne by third parties (namely the firm charged with collecting medical records and the individual plaintiffs' medical providers), rather than the parties themselves. Moreover, the parties' experience with the process of collecting the records with respect to the first group of 100 will allow them to complete discovery in the remaining cases much more efficiently. Thus, by designating the remaining 275 cases for medical records discovery at this time, the Court will be able to move these actions toward trial quickly without placing an overwhelming burden on either the parties or the Court.

The alternative approach adopted in the Court's Second Case Administration Order – *i.e.*, proceeding in groups of 100 – is no answer. Such an approach would drag the process out for years, prejudicing defendants by insulating from scrutiny scores of "warehoused" cases that plaintiffs have no intention of bringing to trial and that should be dismissed. It would also prejudice any plaintiffs who actually want to try their claims and are forced to sit in limbo because their number has not yet been called to enter the records collection process.

Second, the Court should also move forward with case-specific discovery in all cases that have been certified by plaintiffs as trial-ready so that they can be returned to their transferor courts for trial (or for the ten cases filed directly in this district, set for trial here). The Court's

[3] The parties are continuing jurisdictional discovery in approximately 450 cases that may be subject to federal jurisdiction based on the Court's prior remand orders. In addition, the parties have identified approximately 80 cases subject to remand motions on which a Court ruling is required.

current orders already contemplate that the next step in readying MDL cases for trial is the designation of 15 cases from the pool of cases certified for trial for full case-specific discovery. (Aug. 28 Order at 3-4.) According to the Court, "[f]ull case-specific discovery means, at this juncture, discovery related to: (1) all fact witnesses; (2) the plaintiff's diagnosing doctor; and (3) the doctor who performs the independent medical examination for defendants." (*Id.* at 4 n.4.) The Court has directed the parties to "inform the Court when it appears the time for this designation is ripe." (*Id.* at 4.)

Clearly, that time has now come. Indeed, since plaintiffs have certified just 37 cases as trial-ready, ***all*** of these cases – rather than just 15 – should proceed immediately to full case-specific discovery. Given the amount of time that the welding fume MDL proceeding has been pending – and the importance of moving the litigation to a close – the parties should be expected to make every effort to prepare cases for trial as quickly and efficiently as possible. Thus, it is entirely reasonable for the Court to require the parties to start case-specific discovery on all 37 certified cases at this time.

As with the proposal above to expand medical records discovery, it is likely that requiring full case-specific discovery in a larger group of cases will result in further dismissals. Notably, the 37 certified cases include 11 cases where none of the medical records obtained from the treating doctors show a diagnosis of parkinsonism, let alone allegedly manganese-induced parkinsonism – as well as four cases with no medical records whatsoever. Given that the only diagnosis of parkinsonism for any of these 15 plaintiffs appears to come from the lawyer-sponsored screenings, and given that plaintiffs have consistently avoided selecting cases in this

category in the bellwether trial process, defendants question the likelihood that these cases will be pursued to trial.[4]

As an alternative, if the Court chooses to require full pre-trial workups in only 15 certified cases, defendants should be allowed to choose those cases. As the Court is aware, plaintiffs have chosen the trial candidates for all of the bellwether trials held to date. It is only fair at this point that defendants be given a similar opportunity to decide which of the remaining cases should proceed toward trial. In any event, defendants would be choosing the 15 candidates for full discovery from a pool of cases that plaintiffs themselves have already formally certified as trial-worthy, after a multi-step winnowing process. Since plaintiffs have certified to the Court that they are ready to proceed to trial with any and all of the 37 cases, there is no potential prejudice to them if defendants choose which 15 cases should be worked up for trial first. In addition, allowing defendants to select which cases proceed to full discovery would have the added benefit of ensuring that plaintiffs only certify cases they genuinely intend to take to trial.

CONCLUSION

For the foregoing reasons, the Court should order: (1) medical records discovery in all cases remaining in the MDL proceeding in which a Notice of Diagnosis has been filed; and (2) full discovery in all cases that plaintiffs have certified for trial. Alternatively, if the Court chooses to proceed with full discovery in only 15 cases, defendants should be allowed to select the 15 cases from among those that plaintiffs have certified as trial-worthy.

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[4] The Court has recognized that defendants have been forced on repeated occasions to expend unnecessary resources working up cases that plaintiffs would not have selected as trial candidates with more thorough evaluation – and that it may become appropriate to assess costs against plaintiffs should that occur again. (Order at 3-4, *Peabody v. Airco, Inc.*, No. 1:05-CV-17678, Dkt. No. 26 (N.D. Ohio July 31, 2006) (noting that defendants were "forced twice to incur substantial trial-preparation costs, only to have the plaintiffs seek to avoid an adjudication after discovery was virtually complete" and that "steps must be taken to avoid similar circumstances in the future and [] at some point, sanctions in the form of cost shifting might be appropriately imposed on a plaintiff and/or his counsel . . . .").) Defendants intend to seek such costs if plaintiffs abandon any of the certified cases prior to trial, particularly those identified above.

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Respectfully submitted,

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