

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS
LIABILITY LITIGATION

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Case No. 1:03-CV-17000
(MDL Docket No. 1535)

JUDGE O'MALLEY

MEMORANDUM AND ORDER

Earlier, the Court picked the next bellwether case to be tried by the undersigned: *Cooley v. Lincoln Elec. Co.*, case no. 05-CV-17734, trial of which shall commence on March 4, 2009.¹ The Court indicated it would soon also pick the next following bellwether case, to be tried on September 14, 2009.²

Separately, the Court previously indicated it would identify 15 cases for “full case-specific discovery,” following certification by counsel for the plaintiff in each case that he “believes in good faith that he and his client will pursue the matter to trial.”³ The Court further indicated it would choose these 15 “certified cases” itself, with an eye toward picking cases “with a broad variety of diagnoses, plaintiffs’ attorneys, and applicable states’ law.”⁴

The Court now modifies these procedures as follows. Instead of *the Court* picking the bellwether

¹ Order at 1 (master docket no. 2155).

² *Id.*

³ Order at 3 (master docket no. 1888).

⁴ *Id.* at 1 (quoting First Case Administration Order (“CAO-1”), docket no. 1724 at 11-12).

case to be tried on September 14, 2009, *defendants* shall pick this case. The case shall be picked from the subset of certified cases that: (a) were filed directly in this Court, or (b) are cases where the plaintiff has waived objection to venue being proper in this Court (collectively, “NDOH Cases”).⁵ Defendants shall notify the parties and the Court of their pick on or before **October 28, 2008**.

In addition, shortly thereafter, the Court will identify five other certified cases for case-specific discovery. Two of these cases will be from the subset of “NDOH Cases,” and the other three cases will be from the remaining subset of those certified cases that the Court must remand to the transferor courts (“Remand Cases”). The two “NDOH Cases” will ultimately be bellwether cases tried by this Court. When making its picks, the Court will ensure the five cases it picks do not overwhelmingly involve the same applicable state law and same plaintiff’s counsel; otherwise, the picks will be random.

The effect of these procedures will be that the parties will be pursuing discovery in seven separate MDL cases – *Cooley*; defendants’ pick; and the Court’s five picks (two “NDOH Cases” and three “Remand Cases”). To a large extent, this discovery will be simultaneous. With regard to the Court’s five picks, the parties shall commence full case-specific discovery, which “means, at this juncture, discovery related to: (1) all fact witnesses; (2) the plaintiff’s diagnosing doctor[s]; and (3) the doctor who performs the independent medical examination for defendants.”⁶ With regard to *Cooley* and defendants’ pick, the parties shall, **within 21 days of the date of this Order**, confer and submit a proposed case management order (“CMO”) for each case, with appropriate deadlines for fact and expert discovery, briefing, and so

⁵ Plaintiffs were earlier given a deadline of **October 14, 2008** to identify any certified cases where the plaintiff is willing to waive objection to venue being proper in this Court. After this identification is complete, the Court will provide to the parties a list of the possible, appropriate cases from which defendants shall make their bellwether pick.

⁶ Order at 4 n.4 (master docket no. 1888).

on.

In addition to submitting the two proposed CMOs, the parties shall, **within 21 days of the date of this Order**, also confer and submit to the Court a negotiated “Full Case-Specific Discovery Timetable,” containing appropriate deadlines and sequencing of discovery for the five Court picks. By “sequencing of discovery,” the Court means: (1) the sequencing of deadlines for different aspects of discovery, such as (a) written discovery, (b) employer/co-worker deposition discovery, and (c) medical deposition discovery; and also (2) the sequencing of plaintiffs’ and defendants’ witnesses, such as when in the process defendants’ Rule 35 independent medical examiner will be deposed. If the parties cannot agree to a full Timetable, they shall submit proposals, indicating their areas of agreement and disagreement. The deadlines in the Timetable should marry with the deadlines in the two CMOs, so that the parties distribute appropriately their work burden from these seven cases.

The Court recognizes it will require more than just full case-specific discovery to make the Court’s five picks trial-ready; the parties in those cases also need deadlines for disclosure of experts, expert reports, expert discovery, dispositive motions, and so on. The Court reserves this issue for another day.⁷ The Court does make clear here, however, that it fully intends to hold to its bellwether trial schedule. Thus, if either of the next two scheduled bellwether plaintiffs (Cooley or defendants’ pick) forfeit their trial spot for any reason, the Court will immediately replace that plaintiff randomly with one of the two

⁷ The Court intends to meet with the parties to discuss the best procedure for making the three “Remand Cases” ready for remand and trial in the transferor courts.

“NDOH Cases,” so that two MDL plaintiffs *will* have their claims heard by juries on March 4, 2009 and September 14, 2009.

IT IS SO ORDERED.

/s/ Kathleen M. O’Malley
KATHLEEN McDONALD O’MALLEY
UNITED STATES DISTRICT JUDGE

DATED: October 8, 2008