

DATE AUG 31 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CATHY MAY, Individually and as)
Administratrix of the Estate of)
Timothy L. May, Deceased, and)
as Parent and Next of Kin to)
ERIN L. MAY, CAROLINE E. MAY,)
and LUKE J. MAY, Minor Children,)
Individually, and JESSE and)
SHANDA WORSHAM, Husband and Wife,)
Plaintiffs,)

vs.)

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH,)
PENNSYLVANIA, and NATIONWIDE)
MUTUAL INSURANCE COMPANY,)
Defendants.)

FILED

AUG 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-859-B

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant Nationwide's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Nationwide Mutual Insurance Company, and against the Plaintiffs, Cathy May, Erin L. May, Caroline E. May, and Luke J. May. These Plaintiffs shall take nothing of their claim. Costs are assessed against Plaintiffs Cathy May, Erin L. May, Caroline E. May, and Luke J. May, if timely applied for under Local Rule 6. The parties are to pay their own respective attorney's fees.

Dated, this 30th day of August, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

38

DATE AUG 31 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CATHY MAY, Individually and as)
Administratrix of the Estate of)
Timothy L. May, Deceased, and)
as Parent and Next of Kin to)
ERIN L. MAY, CAROLINE E. MAY,)
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Individually, and JESSE and)
SHANDA WORSHAM, Husband and Wife,)

Plaintiffs,)

vs.)

NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH,)
PENNSYLVANIA, and NATIONWIDE)
MUTUAL INSURANCE COMPANY,)

Defendants.)

FILED

AUG 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-859-B

ORDER

Now before the Court for consideration is Defendant Nationwide Insurance Company's Motion for Summary Judgment (Docket #13) filed June 25, 1993, and Plaintiff Cathy May's Cross-Motion for Summary Judgment (Docket #14) filed July 9, 1993.

This action arises from an automobile accident on September 13, 1991, in which Cathy May's husband, Tim May, died. Neither Cathy May ("May") nor any of the minor children she represents in this action was present at the time of the accident or sustained any bodily injuries. At the time of the accident, Plaintiff's husband had a policy of insurance with Nationwide Mutual Insurance Company ("Nationwide"), providing uninsured motorist coverage. Pursuant to this policy, Nationwide paid May \$200,000.00, which it contends is the limit of the policy for accidents in which only one

37

person suffered bodily injury. May asserts that the limit of the policy for this accident is \$600,000.00 and that she is entitled to this amount (less the \$200,000.00 she has already received). The undisputed facts in this matter are as follows:

1. At the time of the collision and Tim May's death, the Mays had in force and effect an automobile insurance policy issued by Nationwide known as the Century II Auto Policy ("the Policy"), inclusive of amendments and endorsements affording protection against losses occasioned by uninsured/underinsured drivers. (Exhibit "A" to Nationwide's Motion for Summary Judgment).

2. The Policy afforded uninsured/underinsured motorist coverage in the amounts of \$100,000 per person and \$300,000 per occurrence for each of the two cars covered by the policy. (Exhibit "B" to Nationwide's Motion for Summary Judgment).

3. The uninsured/underinsured motorist coverage afforded by the policy was contained in Endorsement 1664B to the policy. (Exhibit "C" to Nationwide's Motion for Summary Judgment).

4. Endorsement 1664B under a section entitled "LIMITS OF PAYMENT" provides as follows:

AMOUNTS PAYABLE FOR UNINSURED MOTORISTS LOSSES
Our obligation to pay uninsured motorists losses is limited to amounts per person and per occurrence stated in the attached Declarations. The following conditions apply to these limits:

1. Bodily injury limits shown for any one person, multiplied by the number of premiums shown, are for all legal damages, including care or loss of services, claimed by anyone for bodily injury to one person as a result of one occurrence. Subject to this limit for any

one person, the total limit of our liability shown for each occurrence, multiplied by the number of premiums shown, is for all damages, including care and loss of services, due to **bodily injury** to two or more persons in any one occurrence.

2. The insuring of more than one person or the number of claims made under this policy does not increase our Uninsured Motorists payment limits.

5. Each of the survivors, Cathy, Erin, Caroline and Luke, are named insureds under the policy.

6. Nationwide has paid the Mays \$200,000.00.

7. Plaintiff's decedent was the only insured suffering "bodily injury" as defined in the policy.

8. The claims made by the Mays for their loss of spousal and parental consortium are derivative claims.

The Standard of Fed.R.Civ.P. 56
Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Analysis and Authorities

The parties agree that the Plaintiffs'¹ claims rest solely on the interpretation of the Limit of Payment provision in the subject uninsured motorist policy. The Plaintiffs contend the Policy provides \$400,000 in "per person" coverage and also that each of the plaintiffs is entitled to separate "per person" coverage, limited only by the combined "per occurrence" limits of \$600,000 under the policy. Nationwide argues that a total uninsured motorist limit of \$200,000 is available to compensate Plaintiff and all other claimants for direct and derivative losses suffered as a result of the death of Tim May.

The Oklahoma Supreme Court recently reiterated the standard to be applied in actions contesting the interpretation of insurance contracts:

Insurance contracts are contracts of adhesion.
If susceptible of two constructions, the
contract will be interpreted most favorably to

¹ Although Jesse and Shanda Worsham are also named Plaintiffs in this action, they were not insured under the Nationwide policy and make no claims against Nationwide. For the purposes of this Order, "Plaintiffs" refers to Cathy T. May, individually and in her representative capacity, Erin L. May, Caroline E. May, and Luke J. May.

the insured and against the insurance carrier. If the contractual language is ambiguous as to which limit applies for consortium claims, then the policy must be construed in favor of the insured. However, a policy is ambiguous only if it is susceptible to two interpretations. If the language is unambiguous, it is construed in its "plain and ordinary sense."

Littlefield v. State Farm Fire and Casualty Company, 64 OBAJ 2335, 2337 (July 24, 1993) (citations omitted).

a. Limit Of "Per Person" Coverage

It is undisputed that the Policy provided uninsured/underinsured motorist coverage in the amount of \$100,000 per person and \$300,000 per occurrence for each of the Mays' two cars. Plaintiff contends that the language of the "Limit of Payment" provision provides that the two \$100,000 per person limits (one for each car) should be added together and that this combined amount (\$200,000) should be multiplied by the number of premiums shown (two) to reach the total limit of the per person coverage.

Plaintiff relies on the first sentence of paragraph 1 which states that the "bodily injury limits shown for any one person, multiplied by the number of premiums shown, are for all legal damages...." Plaintiff asserts that the use of the plural "limits" rather than the singular "limit" in this sentence requires that the per person limit on each car be added together prior to multiplying by the number of premiums.

This interpretation of the policy language is simply not reasonable. Oklahoma has adopted the concept of "stacking" uninsured/underinsured motorist coverage based on the number of premiums paid. Richardson v. Allstate Insurance Company, 619 P.2d

594 (Okla. 1980). The "Limits Of Payment" provision clearly incorporates this concept and provides that the per person limits of \$100,000 are to be multiplied by the number of premiums. The resulting amount of \$200,000 is the limit of Nationwide's per person coverage. Plaintiffs' creative interpretation and use of the word "limits" would result in "double stacking" or coverage four times the \$100,000 per person limit, despite the fact only two premiums were paid. The Court concludes the Policy is not ambiguous as to the limit of the per person coverage and that Plaintiffs' double stacking approach cannot be supported by a plain reading of the Policy. For these reasons, the Court concludes the "stacked" per person limit under the Policy is \$200,000.

b. Number Of Persons Entitled to "Per Person" Coverage

Plaintiffs contend the Policy provides separate per person coverage to Cathy May, Erin May, Luke May and Caroline May, up to the combined "per occurrence" limit of \$600,000. Plaintiffs do not assert that they suffered bodily injury as defined by the policy, but instead contend each Plaintiff has a derivative claim and is entitled to a separate \$200,000 "per person" recovery. Alternatively, Plaintiffs argue the policy is ambiguous and such ambiguity should be resolved in their favor.

Nationwide asserts that \$200,000 is the total limit of its liability under the subject Policy for all claims arising from the accident in which Tim May was killed. Nationwide contends all of the Plaintiffs' derivative claims are subject to one per person limit of \$200,000, which has already been paid in settlement to

Cathy May.

The issue for this Court is whether the Nationwide Policy is susceptible to an interpretation which permits multiple "per person" recoveries when only one insured suffered bodily injury in the accident. The Court concludes it is not.

The Court concludes the policy is not ambiguous and that Plaintiffs are only entitled to one per person "stacked" limit of \$200,000. The Policy limits Nationwide's liability based on the number of insureds suffering bodily injury in the accident. Although poorly drafted,² the "Limits of Payment" provision lends itself to only one reasonable interpretation -- i.e., Nationwide's liability is limited to one "per person" limit for each insured suffering bodily injury in the accident, subject to the "per occurrence" cap. The "per person" bodily injury limits are the extent of Nationwide's liability "for all legal damages, including care or loss of services, claimed by anyone" as a result of the bodily injury suffered by that one individual.³ The "per

² Plaintiff correctly points out that the pertinent provisions of the policy could have been made much clearer through any number of minor changes to the language used. However, an "awkward" wording does not necessarily make a provision ambiguous. A policy is only ambiguous if susceptible to two interpretations, and such is not the case here.

³ In Littlefield, the Oklahoma Supreme Court stated:

Where a policy states that "each person" limits apply for *all* damages due to bodily injury, then *all* damages that anyone may have because of that injury are included under that limit. The word "all" is "one of the least ambiguous in the English language [leaving] no room for uncertainty."

occurrence" limits only become applicable when "two or more" insureds suffer bodily injury.

It is undisputed in this case that only one insured, Tim May, suffered bodily injury. Therefore, Nationwide's liability is limited to one "stacked" per person limit of \$200,000 for "all" legal damages claimed by anyone as a result of Tim May's death. It is undisputed that Nationwide has already paid \$200,000 to Cathy May as a result of the accident and therefore has no further liability under the uninsured/underinsured provision of the policy.

For the reasons set forth above, the Court concludes Nationwide's Motion for Summary Judgment (Docket #13) should be and is hereby GRANTED and Plaintiff's Cross Motion for Summary Judgment (Docket #14) should be and is hereby DENIED.

IT IS SO ORDERED THIS 30th DAY OF AUGUST, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Littlefield v. State Farm Fire and Casualty Company, 64 OBAJ 2335, 2337 (July 24, 1993)(citations omitted).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RICKY O'BRIEN,)
Plaintiff,)
vs.) No. 92-C-761-B
GARY MAYNARD, et al.,)
Defendants.)

FILED
AUG 30 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983. Defendants have filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. However, the court finds that Plaintiff's allegations do state a first amendment claim.

In addition, Defendants' motion to dismiss relies in part on matters outside the pleadings. Matters outside the pleadings cannot be considered with a motion to dismiss. For all the above reasons, the court shall deny Defendants' motion to dismiss. Defendants shall have twenty days to file a motion for summary judgment, or motion to dismiss/motion for summary judgment, if they so wish. If Defendants file a motion for summary judgment pursuant to Fed. R. Civ. P. 56, they should address whether an affidavit alleging sincere religious relief, such as the one Plaintiff attached to his complaint, creates a genuine issue of material fact. See Longstreth v. Maynard, 961 F.2d 895, 902 (10th Cir. 1992).

IT IS, THEREFORE, HEREBY ORDERED that:

1. Defendants' motion to dismiss is denied without prejudice;

f

2. Defendants shall have twenty (20) days to file a motion for summary judgment, or motion to dismiss/motion for summary judgment.

DATED this 27 day of Aug, 1993.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE AUG 31 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

| | |
|-------------------------------|---|
| LAYMAN R. BRITTAIN, |) |
| |) |
| Plaintiff(s), |) |
| |) |
| v. |) |
| |) |
| SECRETARY OF HEALTH AND HUMAN |) |
| SERVICES, |) |
| |) |
| Defendant(s). |) |

92-C-0725-B

ORDER

The Secretary of Health and Human Services denied Social Security benefits to Plaintiff Layman R. Brittain and he now appeals. The issue is whether substantial evidence supports the Secretary's decision that Brittain was not disabled because he could perform "light" work. For the reasons discussed below, the Secretary's decision is **affirmed**.

I. Standard of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).¹ The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th

¹ Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

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Cir. 1989).²

II. Summary of Evidence

On July 20, 1989, the 18-wheel truck driven by Plaintiff Brittain veered off a rain-slick highway in South Carolina striking a building. The accident injured Brittain's back which ultimately led to the filing of an application for Social Security benefits on August 1, 1990.³

Following the wreck, Brittain was taken to a South Carolina hospital where he was diagnosed with a "compression fracture of L2". Once released from the hospital, Dr. R.W. Nebergall, a D.O. and one of Brittain's treating physicians, examined Brittain on at least eight occasions.

Dr. Nebergall's first examination took place on August 8, 1989. At that time, Dr. Nebergall noted that X-rays showed a 50 percent compression fracture in Brittain's back. Dr. Nebergall gave Brittain a prescription for "Flexeril" and told him to wear a brace. On September 1, 1989, Brittain complained of pain. On October 3, 1989, Dr. Nebergall noted "tenderness over the lumbar spine" but also wrote that Brittain could "ambulate with minimal limp." On November 7, 1989, Brittain told Dr. Nebergall his pain was "decreasing." On November 28, 1989, Dr. Nebergall reported that Brittain was experiencing "intermittent pain." On February 28, 1990, Dr. Nebergall stated that Brittain was not yet "pain-free" although he had experienced "some relief and resolution of his

² Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

³ The claim was denied initially and on reconsideration. Subsequently, the ALJ issued a denial decision on August 26, 1991. Plaintiff requested a review by the Appeals Council, but that was denied. Then, on August 17, 1992, Plaintiff Brittain filed the instant appeal.

symptomatology. On April 4, 1990, Dr. Nebergall noted that Brittain would not need surgery. Then, on September 14, 1990, Dr. Nebergall wrote:

He reports continued intermittent pain. He feels his treatments with Dr. Sorensen [a physician therapist] have been helpful and would like to see him again. Range of motion of the lumbar spine is flexion 65 degrees, extension 10 degrees, right side bending 8 degrees, left side bending 20 degrees, right rotation 25 degrees, left rotation 15 degrees. I believe that Laymon [Brittain] would benefit from continued treatments with Dr. Sorensen.

On March 26, 1990, Dr. Armen Marouk, D.O., also examined Brittain. Dr. Marouk diagnosed Brittain with an L2 compression fracture, but did not see a need for surgery. In addition, he found that Brittain could "heel and toe without difficulty" and was able to perform a full squat. Dr. Marouk did note that Brittain's forward bending is limited.

On July 10, 1990, Dr. J.M. Bazih, M.D., also examined Brittain. Dr. Bazih diagnosed Brittain with a "healed burst fracture L-2 vertebral body." He also wrote that Brittain had a total impairment of 18 percent, but noted "the only treatment that Mr. Brittain needs...will be intermittent use of a lumbosacral corset or brace [and] occasional use of nonsteroidal anti-inflammatory medications."

On July 31, 1991, Brittain testified at a hearing before the Administrative Law Judge ("ALJ"), asserting that he has constant pain.⁴ He said that he can sit no longer than 30 minutes and has problems lying down "for any length of time." *Id. at 48*. He also testified that he had difficulty standing. *Id.* He also said he can walk a mile a day. *Id. at 52*. Brittain also told the ALJ he quit wearing a back brace. *Id. at 55*.

⁴ Brittain explained his pain: "I guess it starts originally from the back and then it works down into the hips and then sometimes it'll come on up clean in my shoulders and then basically this right arm and hand, but the pain ain't so much in the arms and shoulders as it is back here in my back. I still have numbness. It goes to sleep, my arm and my hand and then the pain will go down into my hip and then when it ain't hurting, why then it goes numb to my knee on my right side." *Id. at 47*.

Following the hearing, the ALJ found that Brittain, despite his back injury, was not disabled. The ALJ first concluded that Brittain could not return to work in his past jobs as truck driver, loader operator or oil field pulling unit operator. The ALJ next wrote that, while Brittain did suffer back pain, he still could perform a "full range of light work." Furthermore, the ALJ found Brittain's testimony "frank and sincere only to the extent that it is reconciled with his ability" to perform light work.

III. Legal Analysis

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;⁵ (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. *20 C.F.R. § 404.1520(b)-(f) (1991)*. Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

In the instant case, the issue is whether substantial evidence supports the ALJ's finding. The ALJ reached step 5 of the foregoing evaluation and found that Brittain was capable of light work. Brittain challenges such a finding. He argues that the medical evidence, coupled with his testimony, "is persuasive that Plaintiff cannot do the full range of light work because of pain and its effects upon his ability to perform the amount of standing and walking required of a person fully able to do light work." *Plaintiff's Brief at*

⁵ Appendix 1 is a listing of impairments for each separate body system. *20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991)*.

page 7.

The first question is whether the ALJ properly applied *Luna v. Bowen*⁶ when examining Brittain's complaints of pain. A court must first determine whether a claimant has established a pain-producing impairment by objective medical evidence. Second, the court must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Luna*, 834 F.2d at 163-164.

In the instant case, the ALJ found that Brittain's back injury established a pain-producing impairment. The ALJ also found a loose nexus between the impairment and Plaintiff's subjective allegations of pain. The question here, however, is whether the ALJ properly followed the next step by examining all evidence. *Huston v. Bowen*, 838 F.2d 1125 (10th Cir. 1988).⁷

The ALJ properly analyzed Brittain's nonmedical and medical evidence. The medical evidence indicated that Brittain certainly had back pain, but that it was "intermittent" and could be adequately treated with physical therapy and a back brace. Doctors saw no need for surgery, and none concluded that Brittain could not work. On the other hand, Brittain's testimony, taken in its most favorable light, is simply that he could not do any work

⁶ 834 F.2d 161 (10th Cir. 1987).

⁷ In *Luna*, the Tenth Circuit set forth the factors to examine pain: (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. These factors, however, are not an exhaustive list. *Id.* at 165. As illustrated on pages 25 to 28 of the *Record*, the ALJ properly made the *Luna* analysis.

because of back pain. The ALJ, as he should do, examined all the evidence, made a credibility determination regarding Brittain's testimony and reached a decision. *See, Record at 25, 26 and 27.*⁸

The next question is whether substantial evidence supports the decision that Brittain could return to a "full range of light work." Light work

involves lifting no more than twenty (20) pounds at a time with frequent lifting or carrying of objects weighing up to ten (10) pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing or pulling or arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time. 20 C.F.R. 404.1567(b).

Substantial evidence does support the ALJ's decision that Brittain could perform light work. First, as the ALJ noted, none of the medical evidence supported Brittain's contention that he could not sit for prolonged period of times. Second, there were no physical restrictions placed on Brittain by any of the doctors examining him. Third, the ALJ also emphasized the residual functional capacity assessment of Brittain to support his finding.

Wrote the ALJ:

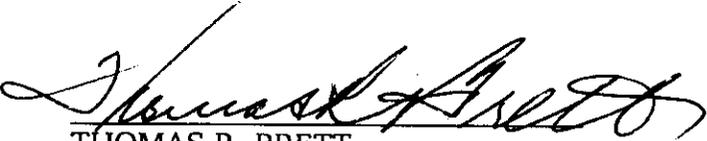
Claimant could...lift 50 pounds and frequently lift and carry up to 25 pounds...Claimant [is] capable of sitting, with normal breaks, for a total of 6 hours in an 8-hour day. They [physicians] further found claimant's ability to push and pull, hand and foot controls, unlimited...The [ALJ] notes that the assessments provided by the staff physician...is compatible with that of a full range of medium exertional activity. The [ALJ], however, giving claimant and his testimony every benefit of the doubt, has assessed claimant's ability to perform work at the full range of light exertional level. *Record at 26.*

⁸ See *Brown v. Bowen*, 801 F.2d 361,363 (10th Cir. 1986) ("The Secretary is entitled to examine the medical record and evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain.")

IV. Conclusion

The gist of Brittain's argument appears to be that, had the ALJ taken all of his testimony as true, disability benefits would have been awarded. Such an argument conflicts with the duty of an ALJ to sift through the evidence, make credibility determinations and evaluate the record then before the Secretary. In this case, the ALJ took into account Brittain's testimony, finding some statements to be not credible. Based in part on that credibility determination, the ALJ found that Brittain's pain was not disabling. Furthermore, the ALJ placed great weight on the medical evidence, which provided little, if any, support for Brittain's claims of disability. For these reasons, the Court **AFFIRMS** the Secretary's decision.

SO ORDERED THIS 30 day of Aug, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 8-31-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE O'BANNON BANKING COMPANY,)
and RMP SERVICE GROUP, INC.,)

Plaintiffs,)

vs.)

ZINKLAHOMA, formerly THE JOHN)
ZINK COMPANY; and KOCH)
ENGINEERING COMPANY, INC.;)

Defendants,)

vs.)

RMP CONSULTING GROUP, INC.,)

Third Party Defendant.)

No. 90-C-987-E

FILED

AUG 31 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

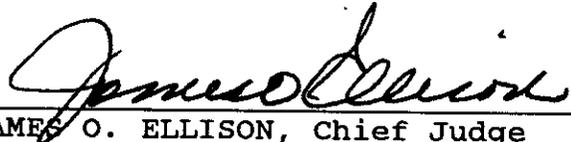
This action came on for trial before the Court, and a jury duly empaneled and sworn, on May 26, 27, 28, June 1 and 2, 1993, the Honorable James O. Ellison presiding. The issues have been duly tried and submitted to the jury for deliberations. The jury returned a verdict in favor of The O'Bannon Banking Company on its claim under its lease and against Zinklahoma and/or Koch Engineering Company, Inc. with the issue of the assumption of the lease obligations by Koch Engineering being reserved as a matter of law for this Court to decide. Subsequent thereto, this Court considered numerous briefs submitted by the parties on certain issues and entered its ruling concerning such issues on August 17, 1993.

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered in favor of The O'Bannon Banking Company and against Koch

250

Engineering Company, Inc. in the principal amount of \$486,450.00, with pre-judgment interest thereon at the rate of Chase-Manhattan prime plus 9% (19% per annum) in the amount of \$260,310.16 through August 30, 1993, for a total amount of \$746,760.16. The judgment shall bear interest at the rate of Chase Manhattan prime plus 9% (19% per annum). The issue of costs and attorney fees, including whether such fees are to be awarded in accordance with the contractual provision of one-third the amount of judgment, is reserved for future determination by the court.

ORDERED this 9/5¹ day of August, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE 8-31-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 31 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma)
corporation,)
)
Plaintiff,)
)
vs.)
)
GEORGE W. CARGILL, et al.,)
)
Defendants.)

No. 91-C-805-E

ADMINISTRATIVE CLOSING ORDER

The Defendant George W. Cargill having filed his petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records as to George W. Cargill, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 31st day of August, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 8-31-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BAILEY PETROLEUM CORPORATION,)
)
Plaintiff,)
)
vs.)
)
SCIENTIFIC DRILLING)
INTERNATIONAL, INC.,)
)
Defendant,)
)
vs.)
)
H-B ENERGY CORPORATION,)
et al.,)
)
Third-Party Defendants.)

No. 91-C-367-E

FILED

AUG 31 1993

Richard M. Lawrence, Clerk
DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

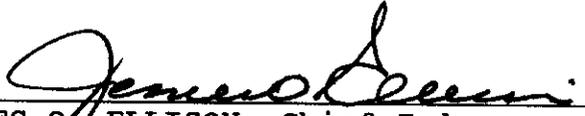
ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled as to all parties, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

41

ORDERED this 31st day of August, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

DATE 8-30-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE O'BANNON BANKING COMPANY,)
)
 Plaintiff,)
)
 v.)
)
 ZINKLAHOMA, INC., formerly)
 JOHN ZINK COMPANY, and)
 THE FIRST NATIONAL BANK IN)
 DOLTON,)
)
 Defendants,)
)
 v.)
)
 RMP CONSULTING GROUP, INC.,)
)
 Third-Party Defendant)
 and Third-Party Plaintiff,)
)
 v.)
)
 RMP SERVICE GROUP, INC., and)
 KOCH ENGINEERING COMPANY, INC.,)
)
 Third-Party Defendants.)

Case No. 90-C-987-E

JUDGMENT ON QUANTUM MERUIT

This action came on for trial before the Court and a jury duly empaneled and sworn on May 26, 27, 28, June 1 and 2, 1993, the Honorable James O. Ellison presiding. After presentation of all evidence by the parties and a motion for directed verdict on behalf of The O'Bannon Banking Company against Koch Engineering Company, Inc., the Court determined as a matter of law that plaintiff, The O'Bannon Banking Company, was entitled to recover on its quantum meruit claim in the amount of \$108,900.00. Subsequent to such

ruling, Koch filed a Motion for New Trial on O'Bannon's Quantum Meruit Claim which was denied by this Court on August 17, 1993.

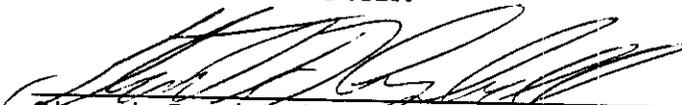
IT IS THEREFORE ORDERED by the Court that The O'Bannon Banking Company have and recover judgment against Koch Engineering Company, Inc. on O'Bannon's Quantum Meruit Claim in the amount of \$108,900.00. Prejudgment interest has been denied by this Court, but such judgment will accrue post-judgment interest at the applicable legal rate. The issue of attorney fees and cost is reserved until application has been filed.

DATED this 30th day of August, 1993.

Richard M. Lawrence, Clerk

CLERK OF THE UNITED STATES
DISTRICT COURT, NORTHERN
DISTRICT OF OKLAHOMA

APPROVED AS TO FORM:

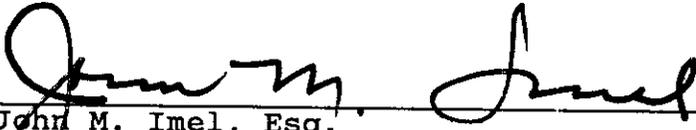

Stuart D. Campbell, OBA #11246
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Tulsa, Oklahoma 74103-4219
918/585-8141

Paul White, Esq.
NEALE, NEWMAN, BRADSHAW & FREEMAN
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1949 East Sunshine, P. O. Box 10327
Springfield, Missouri 65808
417/882-9090

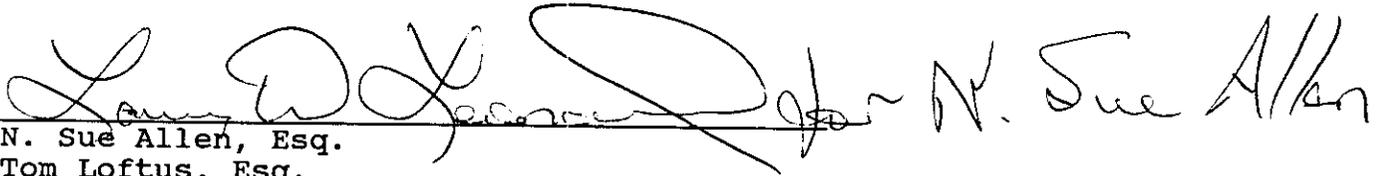
Attorneys for Plaintiff,
The O'Bannon Banking Company

(See attached)

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Jim Menzer, Esq.
Loftis & Menzer, P.C.
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Steven A. Stecher, Esq.
Moyers, Martin, Santee, Imel & Tetrick
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Tom Loftus, Esq.
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Wichita, KS 67201

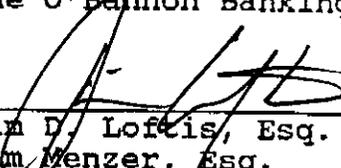
and

Larry D. Leonard, Esq.
Zarbano, Leonard & Scott
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Tulsa, OK 74105

Stuart D. Campbell, Esq.
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417-882-9090

Attorneys for Plaintiff,
The O'Bannon Banking Company



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Attorneys for RMP Consulting Group, Inc.

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Wichita, Kansas 67201

Larry D. Leonard, Esq.
Zarbano, Leonard & Scott
Suite 200
5051 South Lewis Avenue
Tulsa, Oklahoma 74105

Attorneys for Koch Engineering Company, Inc.

c:\...\2inklahoma\Judgment.

ENTERED ON DOCKET

DATE 8-30-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 30 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LOYAL COKER AND GLADYS COKER,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
)
ARKANSAS TRANSIT HOMES, INC., a)
corporation, and CAPITAL BUYERS,)
INC., a corporation)
)
Defendants.)

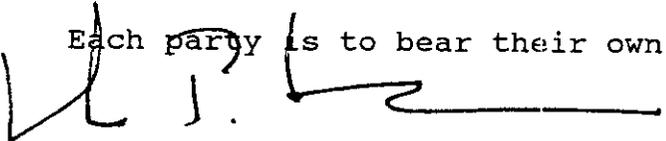
Case No. ~~C-92-340~~

93-C-434-E

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW all parties to this action, pursuant to Fed.R. Civ.
Pro. 41 (a) (1) (ii), and dismiss the above captioned action with
prejudice.

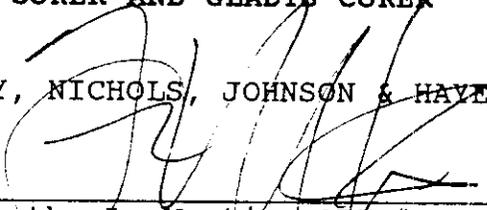
Each party is to bear their own legal fees and costs.



Whit Pate
P.O. Box 785
Poteau, Oklahoma 74953
(918) 647-3200

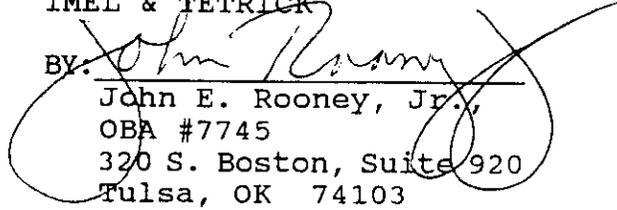
ATTORNEY FOR PLAINTIFFS
LOYAL COKER AND GLADYS COKER

LOONEY, NICHOLS, JOHNSON & HAYES

BY: 
Timothy L. Martin, OBA #10385
528 N.W. 12th Street
Oklahoma City, OK 73103

ATTORNEY FOR DEFENDANT
ARKANSAS TRANSIT HOMES, INC.

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

BY: 
John E. Rooney, Jr.,
OBA #7745
320 S. Boston, Suite 920
Tulsa, OK 74103

ATTORNEY FOR DEFENDANT
CAPITAL BUYERS, INC.

DATE AUG 27 1993

FILED

AUG 26 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ISHFAQ A. KHAN,

Plaintiff,

vs.

DEWEY JOHNSON, INDIVIDUALLY and as
SHERIFF OF ROGERS COUNTY; J.J. GARBER,
INDIVIDUALLY and as DEPUTY SHERIFF OF
ROGERS COUNTY and JOHN DOES ONE
Through TEN, Inclusive, and JANE DOES
ONE Through TEN, Inclusive,

Defendants.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

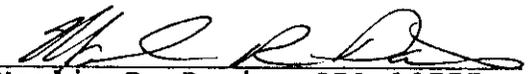
Case No. 93-C 665B

STIPULATION ^{OF} FOR DISMISSAL

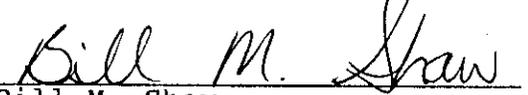
It is hereby stipulated by Plaintiff, Ishfaq A. Khan, and the Defendant, Dewey Johnson, that the above entitled action be dismissed without prejudice as to Defendant Dewey Johnson only, with Plaintiff and Defendant Dewey Johnson to bear their respective attorneys fees and costs of the action.

Dated and Submitted: August 26, 1993.

HERROLD, HERROLD & DAVIS, INC.

By: 
Marilyn R. Davis, OBA 10777
7130 S. Lewis, Suite 520
Tulsa, Oklahoma 74136-5426
(918) 494-4050
ATTORNEYS FOR PLAINTIFF

OFFICE OF THE DISTRICT ATTORNEY

By: 
Bill M. Shaw
Assistant District Attorney
219 S. Missouri, RM 1-111
Claremore, Oklahoma 74017
(918) 341-3164
ATTORNEYS FOR DEFENDANT DEWEY
JOHNSON

DATE 8-27-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RECEIVED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

XETA CORPORATION, an Oklahoma corporation,
Plaintiff,
vs.
ATC, Inc., a Delaware corporation; and AMERICAN TELECOMMUNICATIONS CORP., a Texas corporation,
Defendants.

Case No. 92-C-792 E

FILED

AUG 26 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 28th day of July, 1993, this matter comes on for hearing and for further argument on Plaintiff's Motion for Summary Judgment and Plaintiff's Motion for Joinder of Kerry R. Fox; the Plaintiff appearing by and through its counsel, Robert J. Bartz of the law firm of Barber & Bartz; the Defendant, ATC, Inc., a Delaware corporation, appearing by and through its counsel, J. Thomas Mason of the law firm of Sanders & Carpenter; and the Defendant, American Telecommunications Corp., a Texas corporation, and Kerry R. Fox, appearing by and through their attorneys, D. Grant Seabolt, Jr. of the law firm of Bird & Reneker.

WHEREUPON, the Court, having considered the pleadings, briefs, affidavits, deposition testimony and arguments of counsel, makes the following findings and orders of the Court, to wit:

THE COURT FINDS that on the 26th day of July, 1993, it granted Plaintiff's Motion for Summary Judgment, in part, finding that as a matter of law, the Security Agreement at issue was between Plaintiff and the parent corporation, ATC, Inc.

THE COURT FURTHER FINDS that Judgment should be entered in favor of Plaintiff against ATC, Inc., a Delaware corporation in the sum of \$119,379.42 and that Plaintiff is entitled to further judgment against ATC, Inc. for the sum of \$30,479.72 representing its attorney fees and costs incurred in connection with this matter.

THE COURT FURTHER FINDS that pursuant to the Security Agreement entered into between Plaintiff and ATC, Inc. on the 25th day of July, 1991, that Plaintiff is entitled an Order granting it immediate possession of "all equipment or machinery acquired by ATC from XETA, of any nature or kind whatsoever and wherever located, including, but not limited to, hardware, software and all other equipment or machinery."

THE COURT FURTHER FINDS that the Security Agreement entered into between the Plaintiff and ATC, Inc. on the 25th day of July, 1991, gave Plaintiff a security interest in "all accounts, accounts receivable and other obligations of any kind, now or hereafter existing, arising out of or in connection with the sale or rendering of "1+" or Direct Distance Dial ("DDD") long distance telecommunication services, including, but not limited to, all sums from money due or to become due from hotel properties under such accounts, accounts receivables, contract rights and other such obligations."

THE COURT FURTHER FINDS that the Plaintiff is entitled to an Order directing all account and account receivable debtors of ATC, Inc. to remit to Plaintiff any monies held in their possession which is payable to ATC, Inc. in an amount not exceeding the sum of \$149,859.14.

THE COURT FURTHER FINDS that although the Defendant, American Telecommunications Corp., a Texas corporation, has filed pleadings and answered discovery acknowledging that it entered into the Security Agreement with the Plaintiff and acknowledging the indebtedness owed thereon; the Court finds that it is appropriate to only enter Judgment against the parent corporation, ATC, Inc., and not grant Judgment against the subsidiary, American Telecommunications Corp., a Texas corporation. Accordingly, the Court finds Plaintiff is granted a take nothing judgment against American Telecommunications Corp., a Texas corporation.

THE COURT FURTHER FINDS that American Telecommunications Corp., a Texas corporation, would not be entitled to recover attorney's fees and/or costs against Plaintiff.

THE COURT FURTHER FINDS that the Plaintiff's Motion to Join Kerry R. Fox should be denied.

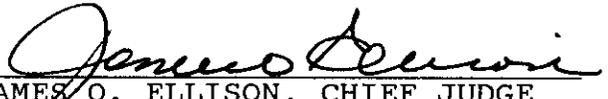
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, XETA Corporation, an Oklahoma corporation, is hereby granted Judgment against ATC, Inc., a Delaware corporation, in the sum of \$119,379.42 and Judgment in the sum of \$30,479.72 for attorney fees and costs, and for all other attorney fees and costs accrued and accruing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff is entitled to the immediate possession of all equipment or machinery acquired by ATC, Inc. from the Plaintiff of any nature or kind whatsoever and wherever located.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that any individual, partnership or corporation holding monies for the benefit of ATC, Inc., a Delaware corporation, arising from an

account, account receivable or other obligation of any kind owed to ATC, Inc. is hereby directed to tender such monies to Plaintiff in an amount not to exceed the sum of \$149,859.14.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff is granted a take nothing judgment against American Telecommunications Corp., a Texas corporation, and that said Defendant is not entitled to recover attorney's fees and/or costs against Plaintiff.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

BARBER & BARTZ
Attorneys for Plaintiff

By 
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One Ten Occidental Place
110 W. 7th St., Suite 200
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SANDERS & CARPENTER
Attorneys for ATC, Inc.

By 
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(918) 582-5181

BIRD & RENEKER

By


D. Grant Seabolt, jr.
1100 Premier Place
5900 North Central Expressway
Dallas, Texas 75206
(214) 373-7070

ATTORNEYS FOR
American Telecommunications Corp.

ENTERED ON DOCKET

DATE 8-27-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RECEIVED

DAVID HOLT, as Personal)
Representative of the Estate)
of James W. Holt and Joan)
Holt, Deceased,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

No. 92-C-601-E

FILED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

This matter is before the Court on Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment (docket #4). On the 26th day of July, 1993, the Court heard oral argument on the motion and the case is now in a posture for resolution. The Court finds Defendant's Rule 12(b)(1) motion, Fed.R.Civ.P., dispositive on the issue of subject matter jurisdiction.

STATEMENT OF THE CASE

James W. Holt and Joan Holt, Deceased, were killed on December 25, 1991, when the car in which they were riding was struck head-on by an on-coming vehicle which went out of control on a sheet of ice and crossed the median line. The accident occurred on Oklahoma State Highway 151 as it crosses Keystone Dam. Keystone Dam was originally authorized for construction in the Flood Control Act of May 17, 1950. It is a "multi-purpose" facility, managed under the auspices of the U.S. Army Corps of Engineers for flood control, water supply, hydroelectric power, navigation and fish and wildlife

preservation. On September 1, 1965 the Secretary of the Army granted the State of Oklahoma a perpetual easement of right-of-way over the Dam which, then, became a segment of State Highway 151. The Oklahoma Department of Transportation is the agency in charge of maintaining the Highway. The Army Corps operates the Dam. On December 25, 1991 (the date of the accident), the Corps released 19,681 cubic feet per second ("c.f.s.") of water from the Dam. David B. Kannady, Supervisory Hydraulic Engineer of the Tulsa District of the United States Army Corps of Engineers stated in his Declaration (on file herein as Exhibit 3 to Defendant's Motion to Dismiss) that:

At 8:00 a.m. on December 25, 1991, the elevation at Keystone was 731.24. Since this elevation is well into the flood control pool, releases in the total amount of 19,681 ... c.f.s. were being made. Releases of 12,217 c.f.s. were being made to generate hydroelectric power and 7,464 c.f.s. were being made through the tainter gates.

Discharges made for generation of hydroelectric power re-enter the Arkansas River downstream of the Dam beneath the surface of the river. Releases made through the tainter gates fall some 75 feet or more until those flood waters hit the surface of the Arkansas River downstream of the Dam. Depending on the size of such releases, wind conditions and downstream river conditions, this may result in spray or misting when the falling waters from the lake hit the surface of the river.

It is undisputed, and the evidence indicates, that it was the mist created from the release of water through the tainter gates which, under the freezing conditions which obtained on December 25, 1991, created the ice slick on Highway 151 as it crosses Keystone Dam.

The ice slick, in turn, led to the tragedy involving Mr. and Mrs. Holt.

Plaintiff now sues on behalf of his parents' estate alleging negligence on the part of the Army Corps in failing to warn the public of the ice slick, failing to inform the Oklahoma Department of Transportation of the icy condition and/or failing to clear the icy hazard. The government contends it is immune from liability under 33 U.S.C. §702c.¹

ISSUE PRESENTED

The issue raised by the pertinent section of Defendant's Motion to Dismiss for want of subject-matter jurisdiction is whether the immunity provision of the Flood Control Act of 1928, codified at 33 U.S.C. §702c, deprives this Court of subject-matter jurisdiction over the case at bar.

DISCUSSION

Because the government's challenge to this Court's jurisdiction requires a factual determination the Court will avail itself of the broad discretion afforded by Rule 12(b)(1) case law to consider evidentiary materials on file herein. See Menchaca v. Chrysler Corp., 613 F.2d 507, 511 (5th Cir. 1980) cited in, Thomas W. Swain v. United States of America, Case no. 90-2203-DES (D.Ks. June 27, 1993). Further, in evaluating the submissions of the parties the Court will be guided by the principles and reasoning enunciated in United States v. James, 106 S.Ct. 3116 (1986);

¹Because the Court finds the immunity issue dispositive, it need not consider Defendant's discretionary function defense pursuant to 28 U.S.C. §2680(a).

Williams v. U.S., 957 F.2d 742 (10th Cir. 1992); Boyd v. W.S. Ex. Rel U.S. Army Corps of Engineers, 881 F.2d 895 (10th Cir. 1989); and Thomas W. Swain (supra).

The immunity provisions of §702c state that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place ..." As the Court said in James, "It is difficult to imagine broader language." Id. at 3121. The James Court reviewed the legislative history of the statute and concluded:

[T]he sweeping language of §702c was no drafting inadvertence ... Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the government from "any" liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago in National Mfg., §702c's language "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language" ... The equally broad and emphatic language found in the legislative history shows that Congress understood what it was saying. We therefore conclude that the legislative history fully supports attributing to the unambiguous words of the statute their ordinary meaning.

Id. at 3122-3123 (citations omitted). In James three water-skiing enthusiasts were pulled through the tainter gates of the Millwood Dam in Arkansas when the gates were opened to discharge water from the Millwood reservoir to control flooding. Id. at 3118. The court rejected claimants' arguments that the federal government was not entitled to immunity because the accident arose from its negligent management of recreational facilities on the reservoir and its negligent failure to warn of the hazard. The court found

that the discharge was so clearly related to flood control that immunity was available with regard to all phases of management of the discharge, including the failure to warn. Id. at 3123. Thus, said the court, the immunity afforded by §702c applies to "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." Id. at 3121.

In Boyd (supra) the Tenth Circuit found that immunity did not attach to the federal government's failure to warn of potential hazards to swimmers in an area of Lake Tenkiller zoned for boats and swimmers. The Boyd Court applied the reasoning found in James and held that even assuming that Tenkiller Lake was created by the federal government for flood control purposes, injuries sustained by Plaintiff's deceased husband when he was struck by a boat while snorkeling in the area, were "wholly unrelated" to the operation of the lake as flood control project.

We believe Congress' concern was to shield the government from liability associated with flood control operations ... not liability associated with operating a recreational facility.

Id. at 900 (citation omitted).

Williams (supra) was another failure to warn case. In Williams, fishermen were drowned downstream of a discharge through tainter gates at the Newt Graham Lock and Dam 18 of the McClellan-Kerr Arkansas River Navigation System. The Tenth Circuit in Williams condensed the reasoning in James and in Boyd to a two-pronged test for establishing governmental immunity under §702c:

1. Was a "flood control project" involved;
2. If the answer to question #1 is yes, then was there a nexus between the injuries or damages sustained and a flood control activity.

In Boyd, the focus of the Circuit's analysis was the second prong of the test. In Williams the court first examined the record to ascertain whether the dam and lock project was a flood control project, the inquiry of the test's first prong. Based upon the affidavit of a Corps hydraulic engineer who stated that the lock and dam had "no flood control capabilities," the Court found that the immunity provision was not triggered and, therefore, did not apply the second "nexus" prong. Id. at 744.

With this finely-tuned test in mind, the Court now turns to the case at bar. First the threshold question: is the Keystone Dam a "flood control project?" It is undisputed that Keystone Dam was constructed pursuant to the Flood Control Act of 1950, that it currently operates as a multi-purpose facility for flood control, water supply, hydroelectric power, navigation and fish and wildlife, and that it is listed in 33 C.F.R. §222.7, App.E, page 269 (1991) as a flood control project. The Williams Court directs us to consider the "character and purpose of the dam or levee involved" to determine whether it is a "flood control project" and then cites favorably to an Eighth Circuit opinion that "relied on the statutory basis for building a dam in finding that '[f]lood control was an essential component of the multiple purpose project.'" Id. at 743-744. On the record before the Court it

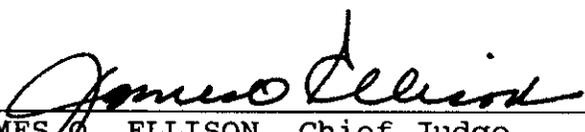
cannot be reasonably disputed that Keystone Dam is a "flood control project."

Turning now to the second prong of the test, can it be said from the evidence on the record that there was a nexus between the Corps' flood control activities on the date in question and the accident which occurred on that date, December 25, 1991? Plaintiff avers that that issue is in dispute and he identifies the affidavit of Stephen Draper; and the deposition of David Kannady, page 69, lines 8-11; page 68, lines 21-25; page 54, lines 10-15; and page 58, lines 5-15 in support of his averment. The question of whether, on December 25, 1991, the discharge of water through the tainter gates at Keystone Dam was, in whole or in part, motivated by flood control policies, is not put at issue by the Draper Affidavit. Rather the affidavit evinces conclusory observations regarding the question based upon various documentary materials. Nor do the questions posed in the cited pages of David B. Kannady's Deposition put at issue the government's contention that the release of 19,681 c.f.s. of water through the tainter gates was for flood control activities. The Court finds that Plaintiff offers no credible or persuasive evidence that the release was not for flood control activities.

It is settled that where, as here, Defendant makes a "factual" challenge to the Court's subject-matter jurisdiction, the Court is free to weigh the evidence submitted in the form of affidavits and depositions in order to assure itself that there is a sufficient basis for subject-matter jurisdiction. And in that regard, it is

beyond dispute that the Plaintiff bears the burden of proof that jurisdiction exists. See e.g., Morris v. U.S. Dept. of Justice, 540 F.Supp. 898 (D.C. Tex. 1982) affirmed 696 F.2d 994 (5th Cir. 1983), cert. denied, 103 S.Ct. 1794. The Court finds that Plaintiff has failed to meet that burden. The Court concludes that the immunity provision of §702c extends to the facts of this case under Williams' two-pronged test, hence Defendant's Motion to Dismiss for Want of Subject-Matter Jurisdiction should be granted. This case is dismissed. Parties to bear their respective costs herein.

So ORDERED this 26th day of August, 1993.



JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 8-27-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

MARIA D. DOLAN,

Plaintiff,

vs.

PIPING COMPANIES, INC.,
formerly known as PIPING
ENGINEERING COMPANY, and
INDUSTRIAL SERVICES
TECHNOLOGIES, INC.,

Defendants.

Case No. 93-C-0211E

RECEIVED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

Now on this 26 day of August, 1993, the Stipulation of Dismissal of the parties came on for consideration. The Court finds that the parties have entered into the a mutual agreement.

Therefore, the Court dismisses the above action with prejudice.

Dated this 26 day of August, 1993.

JAMES O. ELLISON

JUDGE OF THE DISTRICT COURT

ENTERED ON DOCKET

DATE 8-27-93

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RECEIVED

AUG 26 1993

BARBARA J. McGUIRE,)
)
 Plaintiff,)
)
 v.)
)
 SECRETARY OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

92-C-599-E

FILED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Plaintiff Barbara J. McGuire ("Claimant") appeals the Secretary's decision to deny her Social Security benefits. The Secretary found that Claimant was not disabled. Claimant disputes that finding and raises three issues: 1) The Administrative Law Judge ("ALJ") improperly analyzed her pain impairment; 2) The ALJ erred by using the grid regulations in the disability analysis; and 3) The ALJ's hypothetical questions were improper as a matter of law.

I. Procedural History

Claimant was 46 years old at the time of the supplemental hearing. She has a 10th grade education and asserts that she has been unable to work since February 20, 1985 due to a degenerative disc condition.¹

¹ Claimant had a previous request for benefits denied on June 20, 1987. The ALJ found no compelling reason to reopen the prior application and ruled that any benefit awarded would not commence before June 16, 1988 (the claimant's title XVI application protection filing date).

7

Claimant applied for Social Security Disability Benefits and Supplemental Security Income Disability Benefits on June 30, 1988. Following a hearing in October of 1989, an ALJ found Claimant "not disabled" because she could perform jobs identified by a Vocational Expert. On October 19, 1990, the Appeals Council remanded the case to the ALJ for additional testimony from a Vocational Expert. A supplemental hearing was held before the ALJ on February 21, 1991. The ALJ issued a Denial Decision on June 19, 1991. On May 12, 1991 the Appeals Council denied Claimant's request for review.

II. Standard of Review

Judicial review of the Secretary's decision is governed by 42 U.S.C. §405(g). The undersigned's role on review is to determine whether the Secretary's decision is supported by substantial evidence. *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The reviewing court does not weigh the evidence and may not substitute its discretion for that of the agency. *Sorenson v. Bowen*, 888 F.2d 706 (10th Cir. 1989). Substantial evidence is relevant evidence that is more than a scintilla, but less than a preponderance, and such evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

Claimant bears the initial burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984).² Once Claimant makes a prima facie showing that she cannot engage in any substantial gainful activity the burden shifts to the Secretary, who must show that Claimant retains the capacity to perform an

² The statutory definition of the existence of a disability creates three requirements: 1) a medically determined physical or mental impairment which can be expected to result in death or has lasted for a continuous period of at least twelve months; 2) the claimant must be unable to engage in any substantial gainful activity; and 3) the inability to work must result from the impairment. *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir. 1975).

alternative work activity and that this specific type of job exists in the national economy. *Grant v. Schweiker*, 699 F.2d 189, 191 (4th Cir. 1983).

III Legal Analysis

The ALJ must use the following five-step analysis when deciding a claim for disability benefits under the Social Security Act: 1) whether Claimant is currently working; 2) whether Claimant has a severe impairment; 3) whether Claimant has an impairment listed in the relevant regulation;³ 4) whether Claimant can perform his past work; 5) whether Claimant can do any other in the national economy considering her age, education, past work experience, and residual functional capacity.⁴ The review ends if, at any step, the Secretary finds Claimant disabled. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988). Claimant bears the burden of proof for steps one through four, then the burden shifts to the Secretary. In this case, the ALJ found that Claimant could not return to her past work, but she could do other work.

The first issue is whether the ALJ properly evaluated Claimant's pain. To properly evaluate a claimant's subjective complaints of pain, the decision maker must: 1) find, by objective medical evidence, that a pain-producing impairment exists;⁵ 2) establish that there is, at least, a loose nexus between the proven impairment and the alleged pain;⁶ and

³ 20 C.F.R. Pt. 404. Subpt. P, App. 1 (1991).

⁴ 20 C.F.R. §404.1520(b)-(f) (1991).

⁵ "Objective evidence of disabling pain is any evidence that can be discovered and substantiated by external testing. 42 U.S.C.A. §423(d)(5)(A).

⁶ If an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence by Secretary in determining whether claimant is disabled by pain. 42 U.S.C.A. §423(d)(5)(A).

3) consider all of the relevant evidence that could possibly produce pain. This final step requires more than just the ALJ's assessment of Claimant's credibility.

The Tenth Circuit has provided guidance for the proper evaluation of step 3. *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). The factors to consider are: a) Claimant's persistent attempts to find relief for her pain and her willingness to try any treatment prescribed; b) regular use of crutches or a cane; c) regular contact with a doctor; d) claimant's daily activities; e) dosage, effectiveness, and side effects of medication; and f) possible psychological disorders combine with physical problems. These factors are not exhaustive. Instead, the factors should help expand the ALJ's inquiry beyond the objective medical evidence by considering all of the evidence relating to subjective complaints. *Luna v. Bowen*, 834 F.2d at 166.

In the present case, the ALJ considered Claimant's medical history and properly concluded that the objective evidence was consistent with Claimant's pain complaints.⁷ The ALJ next proceeded with an evaluation of Claimant's subjective complaints of pain. Upon review, the undersigned finds that he ALJ properly considered the *Luna* factors in evaluating Claimant's complaints of pain. Claimant was questioned about the location and onset of her pain (lower back pain beginning in February 1985, Tr. p. 22). Claimant revealed that she often did not follow her doctor's prescribed treatment by substituting over-the-counter Tylenol for her prescription pain medication. The ALJ questioned Claimant at length about her daily activities, and it was established that she managed to

⁷ *The claimant's brief implies that the ALJ ignored the treating physician's opinion that the claimant was disabled. However, the record reflects that the ALJ thoroughly developed evidence presented by both the claimant's treating physicians and consulting physician. The Court concludes that the ALJ's conclusion are supported by substantial evidence.*

do her banking, grocery shopping, and household duties despite her back pain. The ALJ noted that Claimant had no regular pattern of treatment with a physician. Claimant does not use crutches or a cane, although she does use a TENS unit and wears a support corset.

The ALJ found that Claimant undoubtedly had some pain, but that her activity level was inconsistent with disabling pain. Disability requires more than mere inability to work without pain. The pain must be so severe, either by itself or in conjunction with other impairments, that it precludes any substantial gainful employment. *Brown v. Bowen*, 801 F.2d 361, 362 (10th Cir. 1986). Such is not the case here, and, as a result, the ALJ properly evaluated Claimant's pain.

The second issue is whether the ALJ misapplied the "grids".⁸ The "grids" are tables that consider a claimant's residual functional capacity⁹ to perform certain exertional levels of work in relation to Claimant's age, education, and work experience. The tables yield presumptive conclusions of disability (or no disability), and they reflect an administrative determination as to whether there are significant numbers of jobs in the national economy that can be performed by a person with that particular combination of characteristics. *Frey v. Brown*, 816 F.2d 508, 512 (10th Cir. 1987).

However, the "grids" may not be exclusively used when Claimant's work restrictions are based on factors other than exertional (strength) limitations such as pain. *Teter v. Heckler*, 775 F.2d 1104, 1105 (10th Cir. 1985). When both exertional and nonexertional

⁸ 20 C.F.R. Pt. 404, Subpt. P, App. 2.

⁹ Considered to be a definitive statement of the maximum degree to which the claimant retains the capacity, restricted by exertional or nonexertional limitations, for sustained performance of work related activities.

limitations exist, full consideration must be given to all the relevant facts in the case.¹⁰

The presence of nonexertional limitations does not prevent the use of the "grids". The "grids" still may provide a framework in determining how nonexertional limitations affect Claimant's work capacity.¹¹ In the instant case, the ALJ did not mechanically employ the "grids". First, the ALJ determined that Claimant was not disabled due to her exertional limitation (back injury). Second, the ALJ used the "grids" only as a framework. Testimony by a Vocational Expert was presented. The Vocational Expert was asked whether jobs existed in the national economy for a person with Claimant's age, sex, work background, and residual functional capacity. The Vocational Expert testified that there were a number of jobs available, consistent with the restrictions given by the ALJ, that could be performed by Claimant. Those jobs are as follows: mail clerk, light cashier, counter clerk, sedentary cashier, and order clerk. The Vocational Expert testified that significant numbers of these jobs exist in both the national and regional economies. (Tr. 126.)

In this case, the ALJ concluded that Claimant could perform the full range of light and sedentary levels of work, despite her pain and asthma. The ALJ found the Vocational Expert's testimony credible and consistent with the medical record. (Tr. 27.) Therefore, Claimant's argument that the Secretary improperly applied the "grids" is not supported by the record.

¹⁰ *In the present case, both exertional and nonexertional limitations are present. Claimant's back injury is an exertional limitation and the pain associated with the injury is a nonexertional limitation.*

¹¹ 20 C.F.R. Pt. 404, Subpt. P, App. 2, §200.00(e)(2).

The third issue raised by Claimant is whether the ALJ improperly posed hypothetical questions to the Vocational Expert. Claimant asserts that the questions failed to accurately address her impairments. However, a review of the record does not support her contention.

Claimant argues that the ALJ's hypothetical questions must relate with precision to all of Claimant's impairments as required by a recent Tenth Circuit decision, *Hargis v. Sullivan*, 945 F.2d 1482 (10th Cir. 1991). However, *Hargis* is distinguishable from the present case. The ALJ, in *Hargis*, failed to present to the Vocational Expert any questions concerning a significant nonexertional mental impairment. The ALJ, in the present case, posed hypothetical questions to the Vocational Expert that were directly related to Claimant's nonexertional limitations. (Tr. pp. 125-128.) Furthermore, the Vocational Expert was present throughout the hearing and had the opportunity to hear Claimant's testimony. (Tr. 118.) This enabled the expert to make an individualized assessment of the alleged impairments when she gave her opinions concerning Claimant's residual functional capacity.

Both sides examined the Vocational Expert. The ALJ used specific and complete hypothetical questions to develop the testimony. The ALJ asked the Vocational Expert to consider Claimant's pain, lifting ability, ability to sit and stand, together with her limitations regarding environmental factors such as smoke, animals, dust, mold, etc.¹² (Tr. 128.) The questions accurately reflected Claimant's particular impairments, limitations, and

¹² ALJ: "... Let's exclude the five pound limitation right now and let's add the further limitation of a prolonged or rapid repeated use of the right hand, arm or shoulder and not work around horses, pollen, mold, dust, or smoke and I'm being a little more specific with regard to environmental."

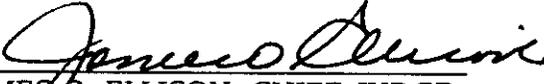
residual functional capacity.

Nevertheless, Claimant takes issue with the ALJ over the content of his questions posed to the Vocational Expert. However, the ALJ must base his questions on all of the evidence. Complaints by Claimant concerning her inability to sit or stand for more than two hours a day were not found credible by the ALJ. An ALJ's decision will not be undermined because the hypothetical questions fail to fully itemize all of the disabilities claimed by Claimant. The questions must only include the impairments that the ALJ found to be true. *Brown v. Bowen*, 801 F.2d at 363. Review of the record indicates that substantial evidence supports the ALJ's determination that Claimant's assertions regarding her inability to sit or stand were not credible.

IV., Conclusion

After a careful examination of the record, the court finds that substantial evidence supports the Secretary's decision that Claimant is not disabled. Therefore, this Court **AFFIRMS** the Secretary's decision.

SO ORDERED THIS 26th day of August, 1993.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATE 8-27-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RECEIVED

AUG 26 1993

REPUBLIC FINANCIAL CORPORATION, et al,)
)
) Plaintiff(s),)
)
) v.)
)
) MARK E. HENDRICKS, et al,)
)
) Defendant(s).)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

92-C-0628-E

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Now before this Court is Trustee R. Dobie Langenkamp's Motion To Dismiss Appeal (docket #4). The issue is whether Mark and Tammy Hendricks's appeal of a bankruptcy decision should be dismissed because it was not timely filed.

The facts are summarized as follows. On April 20, 1992, the Bankruptcy Court for the Northern District of Oklahoma entered a judgment against Appellants for \$9,165.39. Appellants subsequently filed a Motion For New Trial on May 4, 1992 -- 14 days after the judgment was entered. On June 17, 1992, the Bankruptcy Court denied the Motion For New Trial because it was untimely.

A week later, on June 24, 1992, Appellants filed a Motion For Continuance and requested an additional 20 days to file an appeal on the Motion For New Trial. On August 3, 1992, the Bankruptcy Court granted the motion. Then, on July 17, 1992, Appellants filed a Notice of Appeal. On August 11, 1992, Appellees' filed the instant Motion To Dismiss Appeal.

24

Intertwined in the above procedural facts is the behavior of Paul McBride. McBride, an attorney, represented the Appellants and several other persons who had claims against Republic Financial Corporation. McBride's representation of those persons, however, was criticized by his clients. In addition, McBride failed to show up twice at hearing on the instant Motion To Dismiss and was finally brought to Court by the United States Marshal.

Below is an excerpt from an October 9, 1992 Order summarizing McBride's behavior:

Mr. McBride did not appear for the September 25, 1992 hearing...Notwithstanding Mr. McBride's non-appearance, several individual Appellants did appear. They recited, for the record, a story of neglect and failure on Mr. McBride's part, to return telephone calls, answer correspondence, or, generally, to attend to the business of representing their interests. In this regard, Mr. McBride made no response to the Court's July 30, 1992 Minute Order and has failed to respond to Appellee's now-pending Motion To Dismiss...Mr. McBride [when he did appear] related a story replete with inconsistencies and failed responsibility to those who were/are his clients.¹

Following the October 9 Order, McBride's name was stricken from the role of attorneys in this Court. *See, Order, Miscellaneous No. 267.* McBride also resigned from the Oklahoma Bar Association in light of pending disciplinary proceedings, which apparently stemmed from his representation in the Republic Financial Corporation bankruptcy cases.²

I. Legal Analysis

The first issue is whether Appellants filed a timely notice of appeal under Bankruptcy Rule 8002(a). If it was not timely, this Court does not have jurisdiction. *Matter of Colorado Energy Supply, Inc.*, 728 F.2d 1283, 1285 (10th Cir. 1984). Rule 8002(a)

¹ No specific findings of fact were made concerning McBride's handling of the Appellants' case. In addition, Appellants have not made specific allegations as to how McBride hampered their case and/or appeal. Also, at a March 4, 1993 hearing, Appellants' new counsel stated that she "did not know details" of McBride's actions toward Appellants.

² Specific details of the disciplinary proceeding are not in the record.

requires that a notice of appeal "be filed within 10 days of the date of the entry of the judgment. In the instant case, Appellants did not file a Notice of Appeal until July 17, 1992 -- nearly three months after the judgment. Therefore, unless some exception applies, Appellants notice of appeal was not timely.

An exception to the 10-day time limit is discussed in Bankruptcy Rule 8002(b). That rule states that the time limit for appealing will be tolled if a party files a timely Motion For A New Trial under Bankruptcy Rule 9023. A Motion For A New Trial under Bankruptcy Rule 9023 must be made within 10 days of the judgment. *See, Fed.R.Civ.P. 59(b)*. In this case, Appellants filed their Motion For A New Trial on May 4, 1992 -- 14 days after the April 20, 1992 judgment. Therefore, under Bankruptcy Rule 8002(b), Appellants' Motion For A New Trial was not timely, and, as a result, the 10-day time limit of 8002(a) cannot be tolled.

Appellants, in essence, admit that their Motion For A New Trial and Notice of Appeal were untimely under Bankruptcy Rules. However, they assert that their attorney's misconduct constitutes "excusable neglect" under Bankruptcy Rule 8002(c). Part of that rule states:

The bankruptcy court may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of time for filing a notice of appeal may be granted upon a showing of excusable neglect...

In order for this rule to apply, Appellants had to request an extension of time no later than May 20, 1992 (30 days after the April 20, 1992 judgment). But they did not.

Instead, they filed a Motion For Continuance on June 24, 1992 and a Notice of Appeal on July 17, 1992. Therefore, since Appellants failed to file a request for extension of time by May 20, 1992, Rule 8002(c) and its "excusable neglect" exception does not apply.³ Consequently, this Court lacks jurisdiction to consider the merits of Appellants' appeal. *Deyhimy v. Rupp*, 970 F.2d 709, 710 (10th Cir. 1992). Also, see *Langenkamp v. Baker*, Case No. 92-548-E (N.D. Okla. July 30, 1992). Appellee's Motion To Dismiss Appeal is GRANTED.

SO ORDERED THIS 26th day of August, 1993.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

³ Even assuming *arguendo* that the "excusable neglect" exception of Rule 8002(c) applies in the case at bar, a recent United States Supreme Court ruling derails Appellants' argument. In *Pioneer Investment Services v. Brunswick Associates*, 113 S.Ct. 1489, 1499 (1993), the Court stated that "clients must be held accountable for the acts and omissions of their attorneys." Although the attorney's conduct in *Pioneer* was arguable less culpable than McBride's, the Supreme Court did not appear to draw a distinction based upon the severity of the attorney's acts and omissions.

DATE **AUG 26 1993**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 26 1993

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

M. R. TUDOR, INC., an Oklahoma corporation,)

Plaintiff,)

v.)

WORLDLINE, INC., a Florida corporation; DEAN WORLDWIDE, INC., formerly d/b/a MAXXIM INTERNATIONAL; RAM-FORWARDING, INC., a Texas corporation, d/b/a MAXXIM INTERNATIONAL; and ELLIOTT MARINE SERVICES, INC., a Texas corporation.)

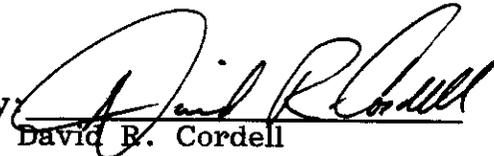
Defendants.)

92-C-889-C

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, M. R. Tudor, Inc. hereby dismisses Defendant Elliott Marine Services, Inc., without prejudice, from this action pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). An order of the Court is not required for Elliott's dismissal because Elliott has not answered or filed a motion for summary judgment herein. Each party shall bear its respective attorneys fees and costs.

DAVID R. CORDELL, OBA 11272
SEAN H. McKEE, OBA 19277

By: 
David R. Cordell

CONNER & WINTERS
2400 First National Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4391
(918) 586-5711

Attorneys for Complainant,
M. R. TUDOR, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1993, I mailed true and correct copies of the above and foregoing instrument to:

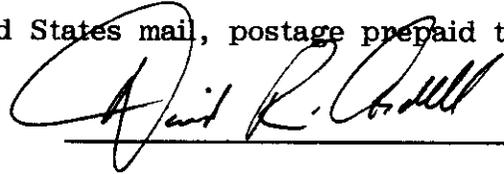
K. L. Krishnan, Esq.
1100 Leeland
Houston, TX 77002

Charles W. Prather, Esq.
201 West Fifth Street #520
Tulsa, OK 74103

Phil R. Richards, Esq.
Nine East Fourth Street
Suite 400
Tulsa, OK 74103-5118

Elliott Marine Services, Inc.
15014 Chetland Place Drive
Houston, Texas 77095

by depositing said copies in the United States mail, postage prepaid thereon.



David R. Bell

ENTERED ON DOCKET
AUG 20 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUANITA BUCHANAN,

Plaintiff,

vs.

Case No. 92-C-985 C

PENNY SHERRILL, individually)
and as Owner of Autex Foods,)
Inc., a Tennessee corporation,)
d/b/a Shoney's Restaurant, and)
AUTEX FOODS, INC., a Tennessee)
corporation, d/b/a Shoney's)
Restaurant, and SHONEY'S, INC.,)
a Tennessee corporation and the)
franchisor of Autex Foods, Inc.,)
a Tennessee corporation, and)
MIKE GORHAM, individually and)
as a manager of Autex Foods,)
Inc., d/b/a Shoney's Restaurant,)
and ED FISHER, individually and)
as a manager of Autex Foods,)
Inc., d/b/a Shoney's Restaurant,)
and TREY GILLETTE, individually)
and as a manager of Autex Foods,)
Inc., d/b/a Shoney's Restaurant,)
and STEVE CREED, individually)
and as the former President of)
Autex Foods, Inc., a Tennessee)
corporation, d/b/a Shoney's)
Restaurant,)

Defendants.

FILED

AUG 25 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

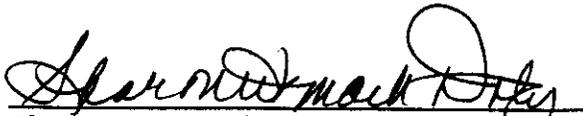
ORDER OF DISMISSAL

COMES ON FOR CONSIDERATION the parties' stipulation pursuant to Federal Rules of Civil Procedure Rule 41(a)(1) for dismissal of plaintiff's cause of action for defamation. The Court having considered the stipulation reached by all counsel as signified by their signatures thereto hereby dismisses, without prejudice, plaintiff's cause of action for defamation.

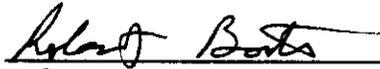
IT IS SO ORDERED THIS 25th day of aug, 1993.

[Signature]
DISTRICT COURT JUDGE

APPROVED AS TO FORM:



Sharon Womack Doty OBA #14462
2021 South Lewis, Suite 470
Tulsa, OK 74104
(918) 744-7440
Attorneys for Plaintiff



Robert W. Boots, Pro Se
6 Royal Dublin Lane
Broken Arrow, OK 74011

FILED
AUG 26 1993
AUG 25 1993
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DORIS KLEY,

Plaintiff,

vs.

MRS. ALLISON'S COOKIE COMPANY,
INCORPORATED,

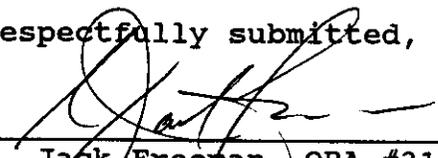
Defendant.

Case No. 92-C-289-B

JOINT STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Doris Kley, by and through her attorney, Jack Freeman, of the Feldman, Hall, Franden, Woodard & Farris law firm, and the Defendant, Mrs. Allison's Cookie Company, Inc., by and through its attorney, Nancy J. Siegel, of the Richards, Paul, Richards & Siegel law firm, and pursuant to Rule 41(a) of the Federal Rules of Civil Procedure stipulate to a dismissal with prejudice of the above action, each party to bear its own costs.

Respectfully submitted,



R. Jack Freeman, OBA #3128
FELDMAN, HALL, FRANDEN,
WOODARD & FARRIS
525 South Main, Suite 1400
Tulsa, Oklahoma 74103-4409
(918) 583-7129

ATTORNEY FOR PLAINTIFF



Nancy J. Siegel, OBA #10611
RICHARDS, PAUL, RICHARDS & SIEGEL
9 East Fourth Street, Suite 400
Tulsa, Oklahoma 74103-5118
(918) 584-2583

ATTORNEY FOR DEFENDANT

DATE 8/26/93
FILED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 Steven Dudley,)
)
 Defendant.)

Civil Action No. 93-C-490-B

DEFAULT JUDGMENT

This matter comes on for consideration this 26 day of Aug., 1993, the Plaintiff appearing by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Kathleen Bliss Adams, Assistant United States Attorney, and the Defendant, Steven Dudley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Steven Dudley, was served with Summons and Complaint on July 9, 1993. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Steven Dudley, for the principal amount of \$4,595.34, plus penalty charges in the amount of \$14.27, plus accrued interest of \$1,672.16, plus interest thereafter at the rate of 9 percent per

annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus costs of this action.

S/ THOMAS R. BRETT

United States District Judge

Submitted By:



KATHLEEN BLISS ADAMS, OBA# 13625
Assistant United States Attorney
3900 United States Courthouse
333 West 4th Street
Tulsa, Oklahoma 74103
(918) 581-7463

DATE 8-26-93

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 40.0 ACRE PARCEL OF)
 REAL PROPERTY IN)
 SECTION 20, TOWNSHIP 27)
 NORTH, RANGE 23 EAST)
 OF THE INDIAN MERIDIAN,)
 OTTAWA COUNTY, OKLAHOMA,)
 WITH ALL BUILDINGS,)
 INCLUDING THE RESIDENCE)
 AND ITS CONTENTS, ALL)
 BARNs AND THEIR CONTENTS,)
 ALL OTHER BUILDINGS,)
 AND THEIR CONTENTS, AND)
 ALL APPURTENANCES AND)
 IMPROVEMENTS THEREON,)
)
 Defendant.)

CIVIL ACTION NO. 92-C-1065-E

FILED

AUG 26 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

This matter coming on for consideration this 25 day of August 1993, before the Honorable James O. Ellison, Chief Judge of the United States District Court for the Northern District of Oklahoma, upon the Motion for Dismissal of the plaintiff, the United States of America, and the Court, being fully advised in the premises, finds that this action should be dismissed, without prejudice and without costs, for the reasons set forth in plaintiff's Motion.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Civil Action No. 92-C-1065-E be, and it is, hereby dismissed, without prejudice and without costs.

ENTERED this 25 day of August 1993.

S/ JAMES O. ELLISON

JAMES O. ELLISON, Chief Judge of the
United States District Court for the
Northern District of Oklahoma

N:\UDD\CHOOK\FC\ARABESQ1\03246

ENTERED ON BOOKET
AUG 25 1993
DATE _____

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

FILED

AUG 25 1993

RICHARD J. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

M. R. TUDOR INC., an Oklahoma Corporation,
Plaintiff,
vs.
WORLDLINE, INC., a Florida corporation,
DEAN WORLDWIDE, INC., formerly d/b/a
MAXXIM INTERNATIONAL, RAM-FORWARDING, INC., a Texas corporation,
d/b/a MAXXIM INTERNATIONAL, and
ELLIOTT MARINE SERVICES, INC., a Texas corporation,
Defendants.

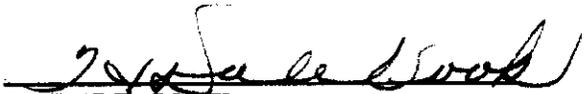
No. 92-C-889-C

JUDGMENT

This matter came on for consideration of the motions for summary judgment of defendant Ram-Forwarding, Inc. The issues having been duly considered and a decision having been duly rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment is hereby entered for defendant Ram-Forwarding, Inc., and against plaintiff.

IT IS SO ORDERED this 25th day of August, 1993.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

9
21

ENTERED ON DOCKET
DATE AUG 25 1993

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

FILED

AUG 25 1993

RICHARD H. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

| | |
|--|---|
| M. R. TUDOR INC., an Oklahoma Corporation, |) |
| |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| WORLDLINE, INC., a Florida corporation, |) |
| DEAN WORLDWIDE, INC., formerly d/b/a |) |
| MAXXIM INTERNATIONAL, RAM- |) |
| FORWARDING, INC., a Texas corporation, |) |
| d/b/a MAXXIM INTERNATIONAL, and |) |
| ELLIOTT MARINE SERVICES, INC., a |) |
| Texas corporation, |) |
| |) |
| Defendants. |) |

No. 92-C-889-C

ORDER

Before the Court is the motion of defendant Ram Forwarding, d/b/a Maxxim International ("Ram"), for summary judgment. Plaintiff has sued, inter alia, Dean Worldwide, Inc., formerly d/b/a Maxxim International ("Dean"), and Ram for claims arising out of plaintiff's attempt to secure ocean freight transportation for certain equipment. Plaintiff contends that "Maxxim", by which plaintiff means Dean and Ram collectively, was guilty of negligence, breach of contract, fraud and breach of fiduciary duty in the failure of the transportation to be properly provided. Ram's motion is straight-forward: it had no involvement in the litigated events, and therefore is not liable.

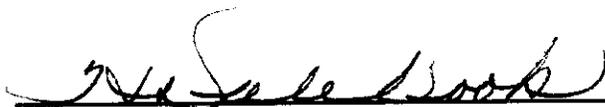
In its statement of undisputed facts, Ram sets forth that the alleged failure of the transportation took place in March, 1991, during which time Dean conducted certain of its ocean freight forwarding business under the tradename of Maxxim. Further, that Dean acquired Ram as a wholly-owned subsidiary in April of 1991, and that before that date,

Dean owned no interest in, and did not control, Ram. Only after April, 1991 did Ram adopt the tradename Maxxim in conjunction with its ocean freight activities. Ram did not act as the freight forwarder which arranged the shipment in question.

In response, plaintiff asserts that "Maxxim never made any distinctions to Tudor as to whether it was Dean or Ram conducting business under the trade name Maxxim at any given point in time." Further, that Ram/Maxxim made a settlement offer to plaintiff on November 12, 1991 and that Ram should therefore be estopped from claiming that it is not liable to plaintiff. The Court disagrees. If Ram is now doing business as Maxxim, of course that is the entity which must make settlement offers. The undisputed fact is that Ram was not acquired by Dean until after the transaction involved in this case was completed. Therefore, it simply cannot be held liable for events which took place prior to that acquisition. Dean still exists as a viable entity, and it must be the focus of plaintiff's claims.

It is the Order of the Court that the motion of the defendant Ram-Forwarding, Inc. for summary judgment is hereby granted.

IT IS SO ORDERED this 25th day of August, 1993.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

AUG 25 1993

IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 25 1993

RICHARD H. LAWRENCE
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OK

RESOLUTION TRUST CORPORATION, as)
 Conservator for Cimarron Federal)
 Savings Association,)
)
 Plaintiff,)
)
 vs.)
)
 ANTHAN D. FULLER and JANICE M.)
 FULLER, husband and wife;)
 VICTOR W. ADERHOLD; ANGELA B.)
 BRAUER; QUINTON R. DODD and)
 VICKIE E. DODD, husband and wife;)
 LAKELAND REAL ESTATE DEVELOPMENT,)
 INC.; JAMES M. HENRY and KAREIN)
 HENRY a/k/a KAREIN L. HENRY,)
 husband and wife,)
)
 Defendants.)

Case No. 89-C-755-C

(Consolidated into and
with Case No. 89-C-753-C:

Case No. 89-C-754-C;

Case No. 89-C-755-C;

Case No. 89-C-756-C;

Case No. 89-C-758-C;

and Case No. 89-C-759-C)

AGREED ORDER GRANTING
APPLICATION FOR ATTORNEY'S FEES

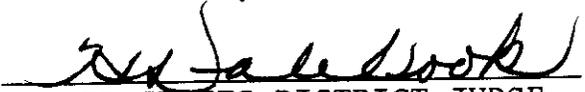
This matter comes before the Court on the Application for Attorney's Fees of Plaintiff Resolution Trust Corporation, as Receiver for Cimarron Federal Savings Association (the "RTC/Receiver"). The RTC/Receiver and counsel for objecting Defendants Anthan D. and Janice M. Fuller have agreed to the entry of this order awarding attorney's fees and expenses to the RTC/Receiver in the amount of \$4,108.12.

As no other defendants have objected to the application for an award of attorney's fees and costs, the Court finds that the RTC/Receiver is entitled to recover from Defendants Anthan D. Fuller, Janice M. Fuller, Victor W. Aderhold and Angela Brauer, and each of them, and from the interest in the Mortgaged Property of Quinton R. Dodd and Vickie E. Dodd, attorney's fees and expenses in

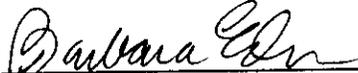
38

the amount of \$4,108.12 and that the same shall be apportioned equally among the Judgment Debtors and added to the judgments entered herein.

IT IS SO ORDERED this 27 day of aug, 1993.


UNITED STATES DISTRICT JUDGE

Approved in form and content:


Gary R. McSpadden, OBA #6093
Dana L. Rasure, OBA #7421
Barbara J. Eden, OBA #14220
BAKER & HOSTER
800 Kennedy Building
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Attorneys for Plaintiff
Resolution Trust Corporation
as Receiver for Cimarron
Federal Savings Association


Gregory G. Meier, OBA #6122
7136 South Yale, Suite 146
Tulsa, Oklahoma 74136
(918) 496-8068
Attorney for Defendants
Anthan D. Fuller and Janice
M. Fuller, husband and wife

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 NATHANIEL MORROW, JR. a/k/a)
 NATHAN MORROW; MARY CROSSLEN)
 f/k/a MARY MORROW f/k/a MARY)
 LOUISE MORROW f/k/a MARY L.)
 MORROW; SAMUEL CROSSLEN; OLD)
 REPUBLIC INSURANCE; STATE OF)
 OKLAHOMA ex rel. DEPARTMENT OF)
 HUMAN SERVICES; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 92-C-661-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24th day
of August, 1993. The Plaintiff appears by F. L. Dunn,
III, United States Attorney for the Northern District of
Oklahoma, through Phil Pinnell, Assistant United States Attorney;
the Defendants, County Treasurer, Tulsa County, Oklahoma, and
Board of County Commissioners, Tulsa County, Oklahoma, appear by
J. Dennis Semler, Assistant District Attorney, Tulsa County,
Oklahoma; the Defendant, State of Oklahoma ex rel. Department of
Human Services, appears by its attorney Ann E. Williams; and the
Defendants, Nathaniel Morrow, Jr. a/k/a Nathan Morrow, Mary
Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L.
Morrow, Samuel Crosslen, and Old Republic Insurance, appear not,
but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Nathaniel Morrow, Jr. a/k/a Nathan Morrow, was served with Summons and Complaint on March 10, 1993; that the Defendant, Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow, acknowledged receipt of Summons and Complaint on August 31, 1992; that the Defendant, Samuel Crosslen, acknowledged receipt of Summons and Complaint on August 31, 1992; that the Defendant, Old Republic Insurance, was served with Summons and Complaint on April 8, 1993; that the Defendant, State of Oklahoma ex rel. Department of Human Services, acknowledged receipt of Summons and Complaint on August 4, 1992; that the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on August 3, 1992; and that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on July 31, 1992.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 24, 1992; that the Defendant, State of Oklahoma ex rel. Department of Human Services, filed its Answer on August 26, 1992; and that the Defendants, Nathaniel Morrow, Jr. a/k/a Nathan Morrow, Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow, Samuel Crosslen, and Old Republic Insurance, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on November 22, 1989, Samuel Crosslen and Mary Crosslen filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-03581-W. On March 7, 1990, a Discharge of Debtor was entered in this case releasing debtors from all dischargeable debts. On July 6, 1992, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action described below.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Ten (10) Block Eighteen (18) Northridge,
an Addition in Tulsa County, State of
Oklahoma, according to the recorded Plat
thereof.

The Court further finds that on August 14, 1973, Nathaniel Morrow, Jr. and Mary Morrow executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$9,500.00, payable in monthly installments, with interest thereon at the rate of 4.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Nathaniel Morrow, Jr. and

Mary Morrow executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated August 14, 1973, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on August 15, 1973, in Book 4083, Page 914, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, Nathaniel Morrow, Jr. a/k/a Nathan Morrow and Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Nathaniel Morrow, Jr. a/k/a Nathan Morrow and Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow, are indebted to the Plaintiff in the principal sum of \$6,291.39, plus interest at the rate of 4.5 percent per annum from July 21, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$62.92 (fees for service of Summons and Complaint).

The Court further finds that the Defendant, State of Oklahoma ex rel. Department of Human Services, has a lien on the property which is the subject matter of this action by virtue of a Judgment in Tulsa County District Court, Case No. JFD-81-1114.

Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the total amount of \$16.00 which became a lien on the property as of 1989 (\$1.00), 1990 (\$1.00), 1991 (\$14.00). Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Samuel Crosslen and Old Republic Insurance, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment against the Defendants, **Nathaniel Morrow, Jr. a/k/a Nathan Morrow in personam and Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow in rem**, in the principal sum of \$6,291.39, plus interest at the rate of 4.5 percent per annum from July 21, 1993 until judgment, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus the costs of this action in the amount of \$62.92 (fees for

service of Summons and Complaint), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Department of Human Services, have and recover judgment by virtue of a Judgment in Tulsa County District Court, Case No. JFD-81-1114.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the total amount of \$16.00 for personal property taxes for the years, 1989 (\$1.00), 1990 (\$1.00), and 1991 (\$14.00), plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Samuel Crosslen, Old Republic Insurance, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Nathaniel Morrow, Jr. a/k/a Nathan Morrow and Mary Crosslen f/k/a Mary Morrow f/k/a Mary Louise Morrow f/k/a Mary L. Morrow, to satisfy the in personam and in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment

the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$16.00, personal property taxes which are currently due and owing;

Fourth:

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma ex rel. Department of Human Services.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

THOMAS E. ELLIOTT

UNITED STATES DISTRICT JUDGE

APPROVED:

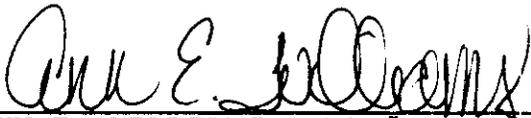
F. L. DUNN, III
United States Attorney



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Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



ANN E. WILLIAMS, OBA #13622
Tulsa District Child Support
Department of Human Services
P.O. Box 3643
Tulsa, OK 74101-3643
(918) 581-2203
Attorney for Defendant,
State of Oklahoma *ex rel.*
Department of Human Services

Judgment of Foreclosure
Civil Action No. 92-C-661-B

PP/css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BIZJET INTERNATIONAL SALES &
SUPPORT, INC., an Oklahoma
corporation,

Plaintiff,

vs.

ZEPHYR AVIATION SERVICES, INC.,
a California corporation, and
INDO-AIR FLEET, INC., a
California corporation,

Defendants.

FILED

AUG 23 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 92-C-926 C

STIPULATION OF
DISMISSAL WITH PREJUDICE

Plaintiff BizJet International Sales & Support, Inc., and
defendants Zephyr Aviation Services, Inc., and Indo-Air Fleet,
Inc. pursuant to Fed. R. Civ. P. 41, hereby stipulate that all
claims raised by plaintiff against defendants and all
counterclaims raised by defendants against plaintiff in the
above-styled action shall be, and hereby are, dismissed with
prejudice, with each party to bear their own costs herein.
Nothing herein shall affect any other claims or defenses that
defendants may have between themselves.

Respectfully submitted,

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

By: 

Terry M. Thomas
320 S. Boston Bldg.
Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281

ATTORNEYS FOR PLAINTIFF
BIZJET INTERNATIONAL SALES
& SUPPORT, INC.

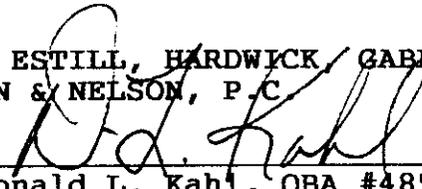
NEWTON & O'CONNOR

By: 

John M. O'Connor
15 West 6th Street
Suite 2900
Tulsa, Oklahoma 74119-5423
(918) 587-0101

ATTORNEYS FOR DEFENDANT
ZEPHYR AVIATION SERVICES, INC.

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By: 

Donald L. Kahl, OBA #4855
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

ENTERED ON DOCKET

DATE 8-24-83

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 24 1993

**Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT**

SONYA M. ELLIOTT, an)
individual,)
)
Plaintiff,)
)
vs.)
)
WALGREEN CO., an Illinois)
corporation,)
)
Defendant.)

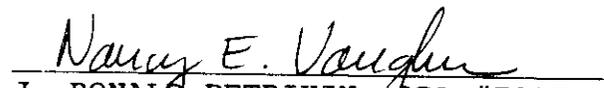
Case No. 93-C-0175 E

OF
JOINT STIPULATION FOR DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Sonya M. Elliott, and the Defendant, Walgreen Co., jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear her or its own costs, attorneys' fees and expenses.


BRADLEY A. JACKSON, OBA #14614
Attorney at Law
1718 South Cheyenne Avenue
Tulsa, Oklahoma 74119-4612
(918) 587-7766

ATTORNEY FOR PLAINTIFF
SONYA M. ELLIOTT


J. RONALD PETRIKIN, OBA #7092
MADALENE A.B. WITTERHOLT, OBA #10528
NANCY E. VAUGHN, OBA #9214

ENTERED ON DOCKET
DATE AUG 24 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

ROSSLEE BY EXCELLORS
FASHION, INC.,

Debtor.

)
)
)
)
)
)

Case No. 92-01663-W
Chapter 11
Appeal No. 93-692-B

ORDER OF DISMISSAL

Upon motion of the United States of America, it is hereby ORDERED that the appeal of the United States effected by the filing of a Notice of Appeal on August 2, 1993, is dismissed.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
UNITED STATES ATTORNEY

PETER BERNHARDT
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, OK 74103
(918) 581-7463

ENTERED ON BOOKS
DATE AUG 24 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD NEWMAN,)
)
 Plaintiff,)
)
 v.)
)
 STAR MOTORCARS, INC., an)
 Oklahoma corporation; ROBERT)
 CLARK; and the UNITED STATES)
 OF AMERICA,)
)
 Defendants.)

Case No. 93-C-2988

FILED

AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CORRECTED ORDER GRANTING PARTIAL SUMMARY JUDGMENT

NOW on this 23rd day of August, 1993, there comes on for hearing Plaintiff's Motion to Correct Court's Order of August 13, 1993, which the Court finds, for good cause shown, should be granted.

The Court finds that through oversight two of the descriptions of automobiles in the Court's Order Granting Partial Summary Judgment of August 13, 1993 are erroneous, and that paragraphs 3.(b) and 3.(c) should be corrected to read as follows:

- 3. (b) 1988 Mercedes-Benz 300E, VIN: WDBEA30D0JA681987
- (c) 1987 Mercedes-Benz 300E, VIN: WDBEA30D9HA558313

In all other respects, the order of August 13, 1993 remains in full force and effect except as corrected.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

THOMAS R. BRETT, UNITED STATES
DISTRICT JUDGE

cc: Mark S. Rains
Dwight L. Smith
Mac D. Finlayson
Carolyn D. Jones

ENTERED
AUG 24 1993
DATE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

VEARL J. OSBORN,)
)
 Plaintiff,)
)
 v.)
)
 SECRETARY OF HEALTH AND HUMAN)
 SERVICES,)
)
 Defendant.)

92-C-491-B

ORDER

The Secretary of Health and Human Services denied disability benefits to Plaintiff Vearl J. Osborn, concluding that she could return to her past relevant work as an office/clerical employee. Ms. Osborn now appeals that decision.

Ms. Osborn was born in 1947. She completed high school and has worked as a secretary, waitress, typist and day care worker. She first filed applications for disability and Supplemental Security Income Disability benefits in 1986 for back injuries and a mental impairment. The Secretary denied that application on July 9, 1987, and Ms. Osborn did not appeal.

Ms. Osborn filed her second application in August of 1988, alleging "back, neck, leg and mental" impairments. That application was also denied. Ms. Osborn filed a third application in June of 1989 alleging "depression, back, neck [and] leg pain," and, that too was denied. Ms. Osborn then requested a hearing before the Administrative Law Judge ("ALJ").

1
2

The medical evidence in the record indicates that Ms. Osborn has suffered from mental and emotional problems. *See, Record, pages 277-289.* In addition, the record shows that she has had problems with her heart, along with back injuries. One doctor, Dr. Gary Davis, M.D., stated that he did not believe Ms. Osborn was employable. *Id. at 674.*¹

At the hearing before the ALJ, Ms. Osborn was not represented by counsel. However, she did testify that she could not work due to her nerves and because of her heart condition. A Vocational Expert also testified at the hearing. The ALJ asked her the following hypothetical question:

ALJ: I have an individual who is 43 years of age and has completed the 12th grade plus one year of college, has the past work history as -- a general office clerk, bookkeeping, data entry person and waitress and can still perform light or sedentary work with these additional restrictions. The primary restriction would be the ones related to the emotional -- condition and let's say that because of the depression and other emotional problems that she has, that she has limitations there and she would, would be limited to -- only to simple repetitive type jobs...with that restriction would there be any jobs in the regional or national economy that such an individual could perform?

The Vocational Expert testified that jobs as file and mail clerks were available. *Id. at 71.* The ALJ asked a few follow-up questions of the vocational expert, but none of them mentioned Ms. Osborn's heart problems. Following the hearing, the ALJ issued a denial decision on May 15, 1991. Below are some of his findings:

-- The medical evidence establishes that the claimant is severely impaired as the result of depression, a personality disorder, a back strain, and coronary artery disease, however she does not have an impairment, or combination of

¹ *Davis examined Osborn on September 13, 1989 and wrote: "This patient is a 41-year-old female with multiple problems. These problems basically consist of chronic low back pain secondary to muscle strain and spasm with possible degenerative joint disease associated with the syndrome, chronic neck pain from the same cause, chronic knee pain, status post surgery with possible degenerative joint disease; psychotic depression with a very short attention span with some suicidal ideation intermittently, and obesity. It is my opinion that this...patient is not employable; however, with specialized skill training, she may be able to hold down some type of a desk job under direct supervision for short periods of time." Id. at 674.*

impairments, listed in, or medically equal to an impairment listed in Appendix 1. Subpart P, Regulations No. 4.

-- The claimant retains the residual physical and mental abilities to return to past relevant work as an office/clerical employee to include jobs such as file clerk and mail clerk. *Id.* at 96-97.

I. Legal Analysis

Two issues raised are problematic.. First, was the ALJ's hypothetical question proper? Second, did the ALJ adequately develop the record for Ms. Osborn, who was not represented by counsel and, according to some of the medical evidence, had mental problems?

The rule governing hypothetical questions was set out in *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991): Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision.

In the case at bar, the ALJ's hypothetical did not "relate with precision" all of Ms. Osborn's impairments. The ALJ's question clearly focused on Ms. Osborn's mental impairments, but did not adequately discuss Ms. Osborn's heart problems. However, when making his findings, the ALJ acknowledged that Ms. Osborn was "severely impaired" as the result of depression, a personality disorder, a back strain, and coronary artery disease." Based on such findings, the undersigned finds that the ALJ should have included Ms. Osborn's coronary heart disease in his hypothetical question.

Intertwined in the "hypothetical question" issue is whether the ALJ adequately developed the record. The ALJ has a basic duty "to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts." *Dixon v. Heckler*, 811

F.2d 506, 510 (10th Cir. 1987), *quoting*, *Heckler v. Campbell*, 461 U.S. 458, 471, n.1 (1983). The duty of inquiry takes on "special urgency" when the claimant has little education and is unrepresented by counsel. *Id.*

In the instant case, Ms. Osborn -- unlike the claimant in *Dixon* -- had a 12th grade education and attended college. But the medical evidence indicates that Ms. Osborn had mental problems. In addition, the record shows that Ms. Osborn was ill-equipped to represent herself at the hearing.² For the most part, she was only a passive observer. Furthermore, given the 804-page record, which included paperwork from all three of Ms. Osborn's applications, the entire proceeding was complex. Given these circumstances, the undersigned, finds that the ALJ failed to adequately develop the record.

A third concern is the ALJ's handling of Dr. Davis' examination. Dr. Davis, who appears to be a treating physician, stated that he believed Ms. Osborn to be "unemployable." Although the ALJ extensively summarized the evidence, he failed to adequately discuss Dr. Davis' findings. Arguably, Dr. Davis' report could still have merit even if it did take place after March 31, 1989 -- the date Ms. Osborn last met the special earnings requirement.³

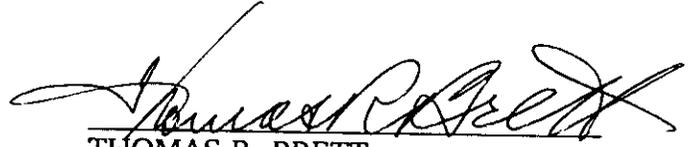
Given the foregoing circumstances, the Court **REMANDS** this case. Since Ms. Osborn is now represented by counsel, the ALJ shall have a supplemental hearing where testimony is taken from a Vocational Expert and a Medical Consultant to determine to what

² Of particular concern to the undersigned is that Osborn seemed unsure as to what to do when the ALJ asked her to question the vocational expert.

³ On page 92 of the Record, the ALJ correctly stated that it must be found that Osborn was disabled prior to March 31, 1989. Dr. Davis' examination took place on September 13, 1989. While arguably such an examination may be discounted because it took place some six months after the March 31 deadline, it is equally as possible that Dr. Davis' finding could have merit. Based on the record, however, this Court is unsure how, or if, the ALJ examined such evidence.

extent, if any, Ms. Osborn's heart condition -- combined with her mental and back problems -- impact her ability to work. In addition, the ALJ should re-examine the evidence submitted by Dr. Davis in a light consistent with this opinion.⁴

SO ORDERED THIS 23rd day of Aug., 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁴ *The ALJ's ruling to apply res judicata to his July 9, 1987 decision is proper.*

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GEORGE W. ANDERSON a/k/a)
 GEORGE WAYNE ANDERSON; EVELYN)
 ANDERSON; LYDELL L. ANDERSON)
 a/k/a LYDELL LAMAR ANDERSON;)
 TERRY ANDERSON a/k/a TERRY M.)
 ANDERSON a/k/a TERRY McDONALD)
 ANDERSON; STATE OF OKLAHOMA)
ex rel. OKLAHOMA TAX)
 COMMISSION; TULSA TEACHERS)
 CREDIT UNION; COUNTY)
 TREASURER, Tulsa County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-69-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day
 of Aug, 1993. The Plaintiff appears by F.L. Dunn,
 III, United States Attorney for the Northern District of
 Oklahoma, through Peter Bernhardt, Assistant United States
 Attorney; the Defendant, County Treasurer, Tulsa County,
 Oklahoma, appears by J. Dennis Semler, Assistant District
 Attorney, Tulsa County, Oklahoma; the Defendant, Board of County
 Commissioners, Tulsa County, Oklahoma, appears not, having
 previously filed an Answer, claiming no right, title or interest
 in the subject property; the Defendant, State of Oklahoma ex rel.
 Oklahoma Tax Commission, appears not, having previously filed its
 Disclaimer; and the Defendants, George W. Anderson a/k/a George
 Wayne Anderson; Evelyn Anderson; Lydell L. Anderson a/k/a Lydell

Lamar Anderson; Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson; and Tulsa Teachers Credit Union, appear not, but make default.

The Court, being fully advised and having examined the court file, finds that the Defendant, George W. Anderson a/k/a George Wayne Anderson, was served with Summons and Complaint on May 5, 1993; the Defendant, Evelyn Anderson, was served with Summons and Complaint on May 5, 1993; the Defendant, Lydell L. Anderson a/k/a Lydell Lamar Anderson, acknowledged receipt of Summons and Complaint on February 6, 1993; the Defendant, Tulsa Teachers Credit Union, acknowledged receipt of Summons and Complaint on January 28, 1993; the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, acknowledged receipt of Summons and Complaint on January 27, 1993; the Defendant, County Treasurer, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 28, 1993; and that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on January 28, 1993.

The Court further finds that the Defendant, Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 27, 1993, and continuing to July 1, 1993, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by

publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, F.L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to his/her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendant, County Treasurer, Tulsa County, Oklahoma, filed his Answer on February 23, 1993; the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, filed its Answer on February 23, 1993, claiming no right, title or interest in the subject property; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Disclaimer on February 26, 1993; and that the Defendants, George W. Anderson a/k/a George Wayne Anderson; Evelyn Anderson; Lydell L. Anderson a/k/a Lydell Lamar Anderson; Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson; and Tulsa Teachers Credit Union, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on December 12, 1990, Terry McDonald Anderson filed a voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 90-3905, was discharged on April 8, 1991, and the case was closed on June 11, 1991.

The Court further finds that on July 17, 1991, Lydell Lamar Anderson filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Texas, Case No. 391-35482-HCA-7, was discharged on November 8, 1991, and the case was closed on December 18, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block Nineteen (19)
VALLEY VIEW ACRES ADDITION to the City of
Tulsa, Tulsa County, Oklahoma, according to
the recorded plat thereof.

The Court further finds that on August 16, 1976, the Defendant, George W. Anderson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, his mortgage note in the amount of \$11,000.00, payable in monthly installments, with interest thereon at the rate of 9 percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, George W. Anderson, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated August 16, 1976, covering the above-described property. Said mortgage was recorded on August 23, 1976, in Book 4228, Page 2070, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, George W. Anderson a/k/a George Wayne Anderson, made default under the terms of the aforesaid note and mortgage by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, George W. Anderson a/k/a George Wayne Anderson, is indebted to the Plaintiff in the principal sum of \$8,947.38, plus interest at the rate of 9 percent per annum from December 1, 1990 until judgment, plus interest thereafter at the legal rate until fully paid, and

the costs of this action in the amount of \$299.54 (\$6.84 fees for service of Summons and Complaint, \$292.70 publication fees).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$19.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendants, George W. Anderson a/k/a George Wayne Anderson; Evelyn Anderson; Lydell L. Anderson a/k/a Lydell Lamar Anderson; Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson; and Tulsa Teachers Credit Union, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, George W. Anderson a/k/a George Wayne Anderson, in the principal sum of \$8,947.38, plus interest at the rate of 9 percent per annum from December 1, 1990 until judgment, plus interest thereafter at the current legal rate of 3.43 percent per annum until paid, plus the costs of this action in the amount of \$299.54 (\$6.84 fees for

service of Summons and Complaint, \$292.70 publication fees), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$19.00 for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, George W. Anderson a/k/a George Wayne Anderson; Evelyn Anderson; Lydell L. Anderson a/k/a Lydell Lamar Anderson; Terry Anderson a/k/a Terry M. Anderson a/k/a Terry McDonald Anderson; Tulsa Teachers Credit Union; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, disclaims any right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, George W. Anderson a/k/a George Wayne Anderson, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or

without appraisalment, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Tulsa County, Oklahoma, in the amount of \$19.00 for personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

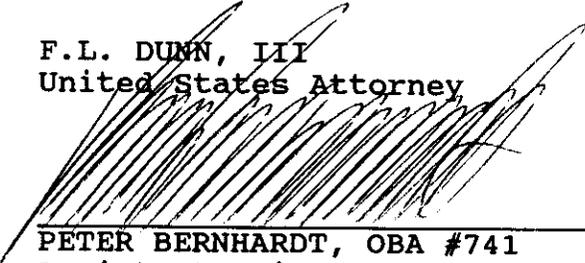
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



J. DENNIS SEMLER, OBA #8076
Assistant District Attorney
Attorney for Defendants,
County Treasurer,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-69-B

PB/esr

CLERK OF COURT
AUG 24 1993
DATE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 -vs.-)
)
 CHARLES R. BAKER;)
 STEPHANIE I. BAKER;)
 THE STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA TAX COMMISSION;)
 COUNTY TREASURER,)
 Tulsa County, Oklahoma; and)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma;)
)
 Defendants.)

93
CASE NO. 92-C-562B

FILED

AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 24 day of Aug, 1993. The plaintiff appears by F. L. Dunn, III, United States Attorney for the Northern District of Oklahoma, through Mikel K. Anderson, Special Assistant United States Attorney; the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission appears by Kim D. Ashley, Assistant General Counsel; the defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by J. Dennis Semler, Assistant District Attorney, Tulsa County, Oklahoma; the defendant, Charles R. Baker, appears not, but makes default; and the defendant, Stephanie I. Baker, appears not, but makes default.

The Court, being fully advised and having examined the file, finds as follows:

1. (a) The defendant, **Charles R. Baker**, acknowledged receipt of summons and complaint on June 21, 1993, but has failed to otherwise appear and is now in default;

(b) the defendant, **Stephanie I. Baker**, acknowledged receipt of summons and complaint on June 21, 1993, but has failed to otherwise appear and is now in default;

(c) All other defendants, namely **The State of Oklahoma, ex rel. Oklahoma Tax Commission; Tulsa County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, have filed timely answers in this action and have approved the form of this judgment as evidenced by their attorney's subscription.

2. This court has jurisdiction according to 28 U.S.C. Section 1345 because the United States is the plaintiff; and venue is proper because this lawsuit is based upon a note which was secured by a mortgage covering land located within the Northern Judicial District of Oklahoma.

3. On March 28, 1988, the defendants, Charles R. Baker and Stephanie I. Baker, husband and wife, executed and delivered to Cross Roads Financial Services, Inc., a mortgage note in the amount of \$31,243.00, payable in monthly installments, with interest thereon at the rate of ten (10%) percent per annum.

4. As security for the payment of the above described mortgage note, the defendants, Charles R. Baker and Stephanie I. Baker, husband and wife, executed and delivered to Cross

Roads Financial Services, Inc., a mortgage dated March 28, 1988, covering the following described property:

The North Half of Lot Eighteen (18), Block Two (2), KINLOCH PARK ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Such tract is referred to below as "the Property." This mortgage was recorded with the Tulsa County Clerk March 29, 1988, in book 5089 at page 1906. The mortgage tax due thereon was paid

5. (a) On March 28, 1988, Cross Roads Financial Services, Inc. assigned the mortgage note and the mortgage securing it to The Florida Group, Inc., its successors and assigns by an instrument recorded with the Tulsa County Clerk April 7, 1988, in book 5092 at page 77.

(b) On April 13, 1988, The Florida Group, Inc., assigned the mortgage note and the mortgage securing it to Countrywide Funding Corporation, its successors and assigns by an instrument recorded with the Tulsa County Clerk May 2, 1988, in book 5096 at page 1175.

(c) On March 14, 1989, Countrywide Funding Corporation assigned the mortgage note and the mortgage securing it to Southmark Mortgage Corporation of America, its successors and assigns by an instrument recorded with the Tulsa County Clerk June 12, 1989, in book 5188 at page 1018. Countrywide Funding Corporation re-recorded this assignment with the Tulsa County Clerk April 4, 1990, in book 5245 at page 1021 to bear the signature of a proper corporate officer.

(d) On January 1, 1991, Fundamental Mortgage Corporation, F/K/A Southmark Mortgage Corporation of America assigned the mortgage note and the mortgage securing it to NCNB Mortgage Corporation, its successors and assigns, by an instrument recorded with the Tulsa County Clerk October 2, 1991, in book 5353 at page 141.

(e) On April 15, 1992, NationsBanc Mortgage Corporation f/k/a NCNB Mortgage Corporation assigned the mortgage note and the mortgage securing it to The Secretary of Housing and Urban Development by an instrument recorded with the Tulsa County Clerk May 5, 1992, in book 5402 at page 1078.

6. On May 1, 1992, the defendants, Charles R. Baker and Stephanie I. Baker, husband and wife, entered into an agreement with the plaintiff lowering the amount of the monthly installments due under the note in exchange for the plaintiff's forbearance of its right to foreclose. This agreement was superseded by a new agreement on September 1, 1992.

7. The defendants, Charles R. Baker and Stephanie I. Baker, have defaulted under the terms of the note, mortgage and forbearance agreement due to their failure to pay installments when due. Because of such default, the defendants, Charles R. Baker and Stephanie I. Baker, are indebted to the plaintiff in the amount of \$36,736,86, plus interest at the rate of ten (10%) percent per annum from May 12, 1993, until the date of this judgment, plus interest

thereafter at the legal rate of 3.43 until fully paid; plus the costs of this action in the amount of \$399.00 for abstracting and \$8.00 for recording the Notice of Lis Pendens.

8. The defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission has a lien on the Property by virtue of tax warrant number ITI92010802--00 dated July 14, 1992 and filed July 20, 1992, in the amount of \$504.09, plus penalties and interest, but such lien is inferior to the lien of the plaintiff.

9. The defendant, County Treasurer, Tulsa County, Oklahoma, and the defendant, Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in or to the Property.

10. Pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED that the plaintiff have and recover judgment against the defendants, Charles R. Baker and Stephanie I. Baker, in the principal sum of \$36,736.86, plus interest at the rate of ten (10%) percent per annum from May 12, 1993, until judgment, plus interest thereafter at the legal rate until paid, plus the costs of this action in the amount of \$407.00, plus any additional sums advanced or to be advanced or expended during this foreclosure action by the

plaintiff for taxes, insurance, abstracting, or sums for the preservation of the Property.

IT IS FURTHER ORDERED that the defendant, State of Oklahoma, ex rel., Oklahoma Tax Commission, have and recover judgment in the amount of \$504.09, plus penalties and interest.

IT IS FURTHER ORDERED that the defendants, County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title, or interest in the real property.

IT IS FURTHER ORDERED that upon the failure of the defendants, Charles R. Baker and Stephanie I. Baker, to satisfy the money judgment of the plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the Property, according to the plaintiff's election with or without appraisalment and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action incurred by the plaintiff, including the costs of sale of the Property;

Second:

In payment of the judgment rendered herein in favor of the plaintiff;

Third:

In payment of the judgment rendered herein in favor of the defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission.

Fourth:

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED that there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED that from and after the sale of the Property, under and by virtue of this judgment and decree, all of the defendants and all persons claiming under them, be forever barred and foreclosed of any right, title, interest or claim in or to the Property or any part thereof.

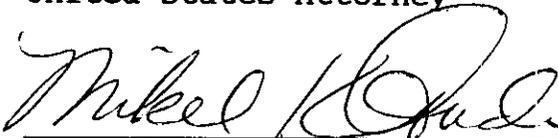
S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Judgment of Foreclosure
USA v. Charles R. Baker, et al.
Civil Action No. 93-C-562B

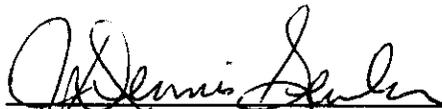
APPROVED:

F. L. DUNN, III
United States Attorney



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(918) 581-7463

Kim D. Ashley
Assistant General Counsel
Attorney for defendant
State of Oklahoma, ex rel.
Oklahoma Tax Commission

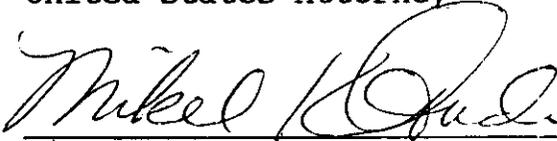


J. Dennis Semler
Assistant District Attorney
Attorney for defendants
Tulsa County Treasurer and
Board of Tulsa County Commissioners

Judgment of Foreclosure
USA v. Charles R. Baker, et al.
Civil Action No. 93-C-562B

APPROVED:

F. L. DUNN, III
United States Attorney



Mikel K. Anderson
Special Assistant United States Attorney
U.S. Dept. of Housing & Urban Development
3900 U.S. Courthouse
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(918) 581-7463



Kim D. Ashley
Assistant General Counsel
Attorney for defendant
State of Oklahoma, ex rel.
Oklahoma Tax Commission

J. Dennis Semler
Assistant District Attorney
Attorney for defendants
Tulsa County Treasurer and
Board of Tulsa County Commissioners

ENTERED ON DOCKET
AUG 24 1993
DATE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK WHATLEY,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF BARTLESVILLE,)
 OKLAHOMA, a Municipal)
 Corporation; THOMAS R.)
 HOLLAND, Chief of Police,)
 City of Bartlesville; ROBERT)
 METZINGER, Bartlesville City)
 Manager; JERRY M. MADDUX,)
 Bartlesville City Attorney;)
 and JANICE LINVILLE,)
 Bartlesville Director of)
 Personnel; CAPTAIN JOHN)
 EVANS, Bartlesville Police)
 Department, and DOES 1-25)
)
 Defendants.)

Case No. 92-C-719-B ✓

FILED
AUG 24 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

On May 13, 1993, this Court denied Plaintiff's Motion To Reconsider And For New Trial As To Order Granting Defendants' Thomas R. Holland, Robert Metzinger, Jerry M. Maddux, Janice Linville, and John Evans' Motion For Summary Judgment. The Court granted these Defendants summary judgment based upon the doctrine of qualified immunity. The Court herewith certifies its Order of May 13, 1993, and finds as follows:

1. Plaintiff's Motion To Reconsider And For New Trial sought to have this Court reconsider and vacate the summary judgment order entered in favor of the individual defendants. The Defendants' summary judgment was based on their entitlement, as found by this

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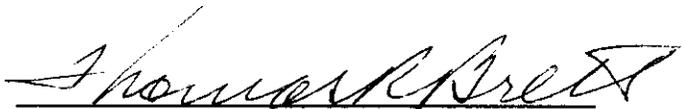
Court, to qualified immunity from suit.

2. Plaintiff's action against the City and against the individuals has been bifurcated in recognition of the important immunity defense available to the individuals and in recognition that the claims against the City are wholly separable from those against the individuals. The summary judgment granted to the individuals is final in nature in that it fully adjudicates and resolves all claims by the Plaintiff against the individuals.

3. There is no just reason for delaying the entry of a final judgment in favor of the individual defendants and against the Plaintiff.

4. Costs are assessed in favor of these Defendants and against the Plaintiff, if timely applied for under Local Rule 6, with each party to bear its, his or her own attorneys fees.

DATED this 24 day of May, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 8-24-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 24 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

| | |
|-------------------------------|---|
| RONALD STEWART, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| SECRETARY OF HEALTH AND HUMAN |) |
| SERVICES, |) |
| |) |
| Defendant. |) |

92-C-751-E

F I L E D

AUG 24 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff Ronald Stewart ("Claimant") appeals the Secretary's decision to deny him Social Security benefits. The Secretary found that Claimant was not disabled. Claimant disputes that finding and contends that the Secretary's decision was not based on substantial evidence.

I. Procedural History

Claimant was 41 years old at the date of the Administrative Law Judge's decision. Claimant alleges that he became disabled on March 1, 1989 due to a back injury (Exhibit 18).

Claimant applied for disability insurance benefits and Supplemental Security Income benefits on November 9, 1990.¹

II. Standard of Review

Judicial review of the Secretary's decision is governed by 42 U.S.C. §405(g). The

¹ The claimant filed a previous disability insurance benefits only application on May 1, 1990, which was denied at the initial level on June 25, 1990, and not pursued. No good cause was found to reopen this previous application. The administrative doctrine of res judicata was invoked preventing the claimant from alleging disability on or before June 25, 1990.

9

undersigned's role on review is to determine whether the Secretary's decision is supported by substantial evidence. *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The reviewing court does not weigh the evidence and may not substitute its discretion for that of the agency. *Sorenson v. Bowen*, 888 F.2d 706 (10th Cir. 1989). Substantial evidence is relevant evidence that is more than a scintilla, but less than a preponderance, and such evidence as a reasonable mind would accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

The claimant bears the initial burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984).² Once the claimant makes a prima facie case that he cannot engage in any substantial gainful activity the burden shifts to the Secretary, who must show that the claimant retains the residual functional capacity to perform alternative work activity, and that this specific type of job exists in the national economy. *Grant v. Schweiker*, 699 F.2d 189, 191 (4th Cir. 1983).

III Legal Analysis:

The Secretary has established a five-step sequential evaluation process for determining disability.³ The Tenth Circuit has previously discussed these steps in detail. *Williams v. Bowen*, 844 F.2d 748, 750-752 (10th Cir. 1988). If at any step in the process the ALJ determines that the claimant is or is not disabled, the evaluation ends. *Talbot v. Heckler*, 814 F.2d 1456, 1460 (10th Cir. 1987).

² The statutory definition of the existence of a disability creates three requirements: 1) a medically determined physical or mental impairment which can be expected to result in death or has lasted for a continuous period of at least twelve months; 2) the claimant must be unable to engage in any substantive gainful activity; and 3) the inability to work must result from the impairment. *Timmerman v. Weinberger*, 510 F.2d 439 (8th Cir. 1975).

³ 20 C.F.R. §§404.1520(a)-(f), 416.920.

The first four steps are not at issue. The ALJ determined that Mr. Stewart's claim was still under evaluation after step four of the five part sequential evaluation process. That is, Mr. Stewart established that he was not currently engaged in substantial gainful activity;⁴ that he has a severe impairment (back injury);⁵ and that he cannot return to his past relevant work;⁶ even though he is not conclusively disabled by the nature of his impairment.⁷

The ALJ denied benefits at step five. At step five, the burden shifts to the Secretary to show that the claimant retains the residual functional capacity ("RFC")⁸ to do other work then existing in the national economy. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). The Secretary meets this burden if the ALJ's decision is supported by substantial evidence. *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987).

How the ALJ should proceed at step five to determine if the claimant is disabled depends on whether the claimant alleges an exertional impairment (strength-related), or a nonexertional impairment (pain), or both. Mr. Stewart established an exertional impairment, his back injury. He also alleges a nonexertional impairment, pain. The ALJ found, however, that the claimant's pain allegations were not credible. (Tr. 16.)

The first issue is whether the ALJ properly evaluated Claimant's complaints of pain.

⁴ Step 1; 20 C.F.R. 404.1520(b).

⁵ Step 2; 20 C.F.R. 404.1520(c).

⁶ Step 4; 20 C.F.R. 404.1520(e).

⁷ Step 3, 20 C.F.R. 404.1520(d).

⁸ RFC is defined as what the claimant can still do despite his or her limitations. 20 C.F.R. §404.1545(a).

To properly evaluate a claimant's subjective complaints of pain, the decision maker must: 1) find by objective medical evidence that a pain-producing impairment exists;⁹ 2) establish that there is at the minimum, a loose nexus between the proven impairment and the alleged pain;¹⁰ and 3) consider all of the relevant evidence that could possibly produce pain. This final step requires more than just the ALJ's assessment of the claimant's credibility.

The Tenth Circuit has provided guidance for the proper evaluation of step 3. *Luna v. Bowen*, 834, F.2d 161 (10th Cir. 1987). Among the factors which may be considered are: a) the claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; b) regular use of crutches or cane; c) regular contact with a doctor; d) claimant's daily activities; e) dosage, effectiveness, and side effects of medication; and f) possible psychological disorders combined with physical problems. These factors are not exhaustive. Instead, the factors should help expand the ALJ's inquiry beyond the objective medical evidence by considering all of the evidence relating to subjective complaints. *Luna*, at 166.

In the present case, the ALJ considered the claimant's medical history and properly concluded that the objective evidence was consistent with the claimant's pain complaints. The range of the ALJ's inquiry was limited to factors listed in Social Security Ruling 88-13. (Tr. 17-18.)

⁹ "Objective" evidence of disabling pain is any evidence that can be discovered and substantiated by external testing. 42 U.S.C.A. §423(d)(5)(A).

¹⁰ IF an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence by the Secretary in determining whether claimant is disabled by pain. 42 U.S.C.A. §423(d)(5)(A).

A review of the ALJ's analysis, however, reveals that his conclusions were not supported by substantial evidence. The ALJ did not accept the assessment of one of the claimant's treating physicians, Dr. Ronald English, who wrote a letter stating that the claimant was "temporarily totally disabled." (Tr. 18.) While the ALJ was correct when he rejected Dr. English's statement because of lack of evidence in the record supporting his medical assessment, he nevertheless ignored other relevant medical evidence in the record. (Tr. 157-166.)

Another treating physician, Dr. Jim Martin M.D., stated that the claimant had sustained a "chronic musculoligamentous injury to the posterior neck and back." Dr. Martin went on to say, "It is well known that these types of injuries may lead to post-traumatic arthritis and/or be exacerbated with increased activities." With regard to pain Dr. Martin observed: "The patient continues to have a great deal of pain and discomfort ... I feel medically we have done everything possible to help him." (Tr. 158.)

Pain, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. *Ray v. Bowen*, 865 F.2d 222, 225 (10th Cir. 1989). Rather than evaluating and rejecting Dr. Martin's reports, the ALJ simply ignored them. If the medical opinions of treating physicians are to be rejected, specific, legitimate reasons for so doing must be set forth. *Turner v. Heckler*, 754 F.2d 326 (10th Cir. 1985). No such reasons were given. Thus, the ALJ failed to adequately develop the record regarding the claimant's subjective pain.

An ALJ's finding regarding the claimant's lack of credibility determination is just a step on the way to the ultimate decision. *Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993). The ALJ must determine whether the claimant has an RFC ("residual functional capacity") level and can perform the full range of work at his RFC level on a daily basis. *Channel v. Heckler*, 747 F.2d at 579. The ALJ just also determine whether the claimant can perform most of the jobs at his RFC level. Then the ALJ must determine how to use the "grids".

The "grids" contain tables of rules which direct a determination of "disabled" or "not disabled" on the basis of a claimant's RFC, age, education, and work experience.¹¹ However, the grids may not be applied conclusively in a case unless the claimant's characteristics precisely match the criteria of a particular rule. *Teter v. Heckler*, 775 F.2d 1104, 1105 (10th Cir. 1985).

The grids should not be applied conclusively in a particular case unless the claimant can perform the full range of work required for that RFC category on a daily basis. Furthermore, claimant must possess the physical capabilities to perform most of the jobs in that range. *Channel v. Heckler*, 747 F.2d at 580. In *Channel*, the Court said that use of the grids is "particularly inappropriate" when evaluating nonexertional limitations such as pain. Therefore, substantial evidence must exist in the record for the ALJ to conclude, despite his impairments, that the claimant could perform a full range of sedentary work and would qualify for most jobs falling within that RFC category. *Ragland v. Shalala*, 992 F.2d 1056 (10th Cir. 1993).

¹¹ 20 CFR Pt. 404, Subpt. P, App 2.

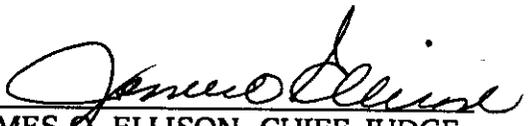
Under the regulations, a sedentary job is defined as one that involves sitting.¹² The Secretary estimates that an eight-hour day of sedentary work involves approximately six hours of sitting. *Social Security Rules 83-10*. The record reflects that the ALJ placed a great deal of emphasis on a statement made by the claimant's physical therapist which described the claimant's daily living as "sedentary." (Tr. Exhibit 39.) However, there is no evidence that the physical therapist knew the *S.S. Rule 83-10* definition of "sedentary" or what, if any, specific meaning he attached to the word. Therefore, the ALJ erred when he found that substantial evidence exists that the claimant could perform the full range of sedentary work, such conclusion being based on the otherwise unexplained testimony of the physical therapist. Finally, since there is a dearth of such evidence in the record, the ALJ must hear testimony from a Vocational Expert to establish the existence of significant work within the claimant's capabilities. *Ragland v. Shalala*, 992 F.2d at 1057.

IV. Conclusion

After a careful examination of the record, the court finds that substantial evidence does not support the Secretary's decision that the claimant is not disabled. Therefore, the ALJ shall hold a supplemental hearing to reconsider the evidence of a vocational expert and a more thorough analysis of the claimant's pain, consistent with this opinion. This case is **REMANDED**.

¹² 20 CFR §404.1567(a).

SO ORDERED THIS 24th day of August, 1993.


JAMES C. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 23 1993

**Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT**

EDWARD A. O'RYAN,

Plaintiff,

vs.

KIMBERLY-CLARK INTEGRATED
SERVICES CORPORATION, a
unit of Kimberly-Clark
Corporation,

Defendant.

§
§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 93-C-272-E

AGREED FINAL JUDGMENT

On this day came on to be heard the Joint Motion For Entry of Agreed Final Judgment filed by Plaintiff Edward A. O'Ryan ("Plaintiff") and Defendant Kimberly-Clark Integrated Services Corporation ("Defendant"), and the Court, after considering the pleadings, is of the opinion that said Motion should be granted in its entirety. It is accordingly,

ORDERED, ADJUDGED and DECREED that all claims and causes of action asserted or which could have been asserted against Defendant Kimberly-Clark Integrated Services Corporation by Plaintiff Edward A. O'Ryan are hereby dismissed with prejudice, and that Plaintiff take nothing on said claims and causes of action against Defendant. It is further

ORDERED, ADJUDGED and DECREED that all costs of court shall be taxed against the party incurring same.

SIGNED this 23 day of Aug, 1993.

ST JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

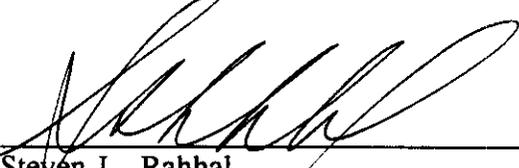
APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:



Kevin R. Kelley, Esq.
16 East 16th Street
Suite 302
Tulsa, Oklahoma 74119-4461
(918) 592-4000
(918) 592-4225 (Fax)

ATTORNEY FOR PLAINTIFF

McFALL & ASSOCIATES



Steven L. Rahhal
Texas Bar No. 16473990
460 Preston Commons
8117 Preston Road
Dallas, Texas 75225
(214) 987-3800
(214) 987-3927 (Fax)

ATTORNEYS FOR DEFENDANT
KIMBERLY-CLARK INTEGRATED
SERVICES CORPORATION

DATE

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 6 1993

**Richard M. Lawrence, Clerk
U.S. DISTRICT COURT**

| | |
|----------------------------------|---|
| _____ |) |
| THRIFTY RENT-A-CAR SYSTEM, INC., |) |
| an Oklahoma Corporation |) |
| |) |
| Plaintiff |) |
| |) |
| v. |) |
| |) |
| GO CAR RENTAL AND SALES, INC., a |) |
| foreign corporation, OKEY M. |) |
| LANDERS, JR. an individual, |) |
| and GEORGE W. CARGILL, an |) |
| an individual, |) |
| |) |
| Defendants. |) |
| _____ |) |

Case No. 91-C-805-E

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED as follows:

1. Go Car Rental and Sales, Inc.'s ("Go Car") and Okey M. Landers, Jr.'s ("Landers") counterclaims against Thrifty Rent-A-Car System, Inc. ("Thrifty") be dismissed with prejudice.
2. Judgment be entered in favor of Thrifty and against Go Car and Landers on Thrifty's complaint in the amount of \$273,679.73 and that the judgment will bear interest at the rate of 10% per annum until paid.
3. The parties waive all requirements of, and rights to, any findings of fact or conclusions of law with respect to the Judgment hereby agreed to be entered.
4. Go Car and Landers waive all rights to appeal from the Judgment hereby agreed to be entered, and further waive

any right to attempt to set aside, or contest the validity of, the Judgment in any proceeding in this or any other action or Court.

5. Each party will bear its own costs.

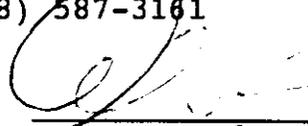
Respectfully submitted,

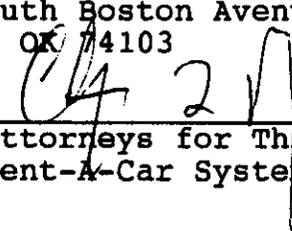
SHERMAN, SILVERSTEIN, KOHL
ROSE & PODOLSKY
ALAN C. MILSTEIN
Fairway Corporate Center
4300 Haddonfield Road
Suite 311
Pennsauken, NJ 08109
(609) 662-0700

PILLSBURY MADISON & SUTRO
DEANNE C. SIEMER
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& TURPEN
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502 West 6th Street
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LIPE, GREEN, PASCHAL, TRUMP
& GOURLEY
RICHARD A. PASCHAL, OBA #6927
MARK E. DREYER, OBA #14998
2100 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103

By: 
Attorneys for
Go Car Rental and
Sales, Inc. and Okey M.
Landers, Jr.

By: 
Attorneys for Thrifty
Rent-A-Car System, Inc.

Dated: 5/20/93

Dated: 8/4/93

FILED

AUG 23 1993

ORDER

**Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT**

Pursuant to the foregoing Stipulation, it is hereby ordered and adjudged that:

1. Go Car and Landers' counterclaims against Thrifty be dismissed with prejudice.

2. Judgment be entered in favor of Thrifty and against Go Car and Landers on Thrifty's complaint in the amount of

\$273,679.73 and that the judgment will bear interest at the rate of 10% per annum until paid.

3. The parties waive all requirements of, and rights to, any findings of fact or conclusions of law with respect to the Judgment hereby agreed to be entered.

4. Go Car and Landers waive all rights to appeal from the Judgment hereby agreed to be entered, and further waive any right to attempt to set aside, or contest the validity of, the Judgment in any proceeding in this or any other action or Court.

5. Each party will bear its own costs.


United States District Judge

EXHIBIT 2

FILED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 23 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.,
an Oklahoma Corporation

Plaintiff

v.

GO CAR RENTAL AND SALES, INC., a
foreign corporation, OKEY M. LANDERS,
JR. an individual, and GEORGE W.
CARGILL, an individual,

Defendants.

Case No. 91-C-805-E

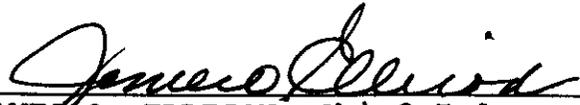
JUDGMENT

The Court has before it the Stipulation and Order of the parties hereto agreeing to the entry of a Judgment pursuant to the terms of a Settlement Agreement entered into between Plaintiff and Defendants as of the ___ day of April __, 1993 (the "Settlement Agreement").

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judgment be, and hereby is, entered in favor of the Plaintiff, Thrifty Rent-A-Car System, Inc., and against Defendants, Go Car Rental and Sales, Inc. and Okey M. Landers, Jr. in the amount of \$273,679.23. This Judgment shall bear interest at the rate of 10% per annum until paid.

JAMES O. ELLISON
United States District Judge

Dated: 8/23/93

A handwritten signature in cursive script, appearing to read "James O. Ellison", written in black ink.

JAMES O. ELLISON, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 8-23-93

FILED

AUG 23 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

| | | |
|--------------------------|---|----------------|
| DENISE WATSON-SCOTT, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | No. 92-C-786-E |
| |) | |
| ALL AMERICAN TV, INC., a |) | |
| California Corporation, |) | |
| |) | |
| Defendant. |) | |

ORDER OF DISMISSAL WITH PREJUDICE

On Parties joint stipulation and advise to this Court that the case has been settled and presentation to this Court of parties agreed to Stipulation of Dismissal With Prejudice filed on the 19th day of August, 1993.

IT IS ORDERED, ADJUDGED, AND DECREED that this action be dismissed with prejudice pursuant to 41 (a) (1) FRCP.

57 JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

WILBURN, MASTERSON & SMILING
EXECUTIVE CENTER II
7134 S. YALE SUITE 560
TULSA OK 74136-6337
(918) 494-0414
FAX: (918) 493-3455

DATE AUG 23 1993
F I L E D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

AUG 18 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANITA A. ROBERTS,

Plaintiff,

v.

Case No. 92-C-919C

**EAGLE-PICHER INDUSTRIES, INC.,
and JIM MAYS,**

Defendants.

ORDER OF DISMISSAL

Pursuant to FRCP 41(a) and the Joint Stipulation of Dismissal filed herein, the Court does hereby dismiss this action with prejudice.

IT IS SO ORDERED.

DATED this 17 day of Aug, 1993.

(Signed) H. Dale Cook

JUDGE OF THE DISTRICT COURT

DATE 8-23-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 23 1993

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

| | | |
|--------------------------|---|------------|
| CHARLES HENDRIX, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | 92-C-408-E |
| |) | |
| LOUIS W. SULLIVAN, M.D., |) | |
| |) | |
| Defendants. |) | |

OPINION AND ORDER

Now before the Court is Plaintiff Charles Hendrix's appeal of the Secretary Louis W. Sullivan's denial of Social Security benefits. Hendrix contends that the Secretary erred in finding that he could return to work as a water and sewer treatment operator. Hendrix also argues that the Secretary improperly analyzed his complaints of pain.

I. Standard of Review

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. § 405(g).¹ The undersigned's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). The court "may not reweigh the evidence or try the issues de novo or substitute its judgment for that of the Secretary." *Pierre v. Sullivan*, 884 F.2d 799, 802 (5th Cir. 1989).²

¹ Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."

² Substantial evidence is "more than a scintilla; it is relevant evidence as a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987). A finding of "no substantial evidence" will be found only where there is a conspicuous absence of credible choices or no contrary medical evidence. *Trimiar v. Sullivan*, No. 90-5249, slip op. at 6 (10th Cir. April

When deciding a claim for benefits under the Social Security Act, the Administrative Law Judge ("ALJ") must use the following five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation;³ (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991).⁴ Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

II. Legal Analysis

The first issue is whether Hendrix can return to work as a water and sewer treatment plant operator. The Administrative Law Judge ("ALJ") concluded that he could return to such a job, stating:

Although the claimant's additional nonexertional limitations do not allow him to perform the full range of sedentary and light work...the vocational expert indicated that the individual of the claimant's age, education, past relevant work, and residual functional capacity could engage in work activity as a water and sewer treatment plant operator, of which there are 450 such jobs in Oklahoma and 26,000 such jobs nationally. Record at 25.

The pertinent evidence is as follows: At the time of the hearing, Hendrix was 57 years old and had an Associates Degree. His past work includes some 20 years in various positions with the City of Sand Springs. In 1988 and 1989, he was Sand Spring's waste

23, 1989).

³ Appendix 1 is a listing of impairments for each separate body system. 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991).

⁴ The claimant bears the burden of proving disability under the Social Security Act. *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). If he shows that his disability precludes returning to his prior employment, the burden of going forward shifts to the Secretary, who must then show that the claimant retains the capacity to perform another job and that this job exists in the national economy. *Id.*

water superintendent.

Hendrix states that he became disabled on September 29, 1989. He testified that he could no longer work because he could not do the lifting or standing or walking required of his job. *Id. at 42-44.* His treating physician, Dr. Timothy L. Huettner, corroborated Hendrix's condition, stating that Hendrix could not return to his job as superintendent. *Id. at 144.* Dr. Huettner has also diagnosed Hendrix with "degenerative joint disease" and stated that his patient has "a great deal of difficulty lifting, walking, driving [and] bending forward." *Id. at 142-143.*⁵

The ALJ found that Hendrix could not return to his past relevant work as a "waste water superintendent." The Vocational Expert, however, testified that Hendrix -- while he did not have the exertional limits to be a superintendent -- could perform as a water and sewage treatment plant operator. *Id. at 67.* Given that testimony, the ALJ found that Hendrix could return to work as an operator. After examining the record, the Court questions that finding.

First, a finding that Hendrix can work as a "water and sewage treatment plant operator", but cannot return to his past relevant work as a "water waste superintendent" is puzzling. In the Directory of Occupational Titles, a Water Treatment Plant Supervisor (954.132-010) is described as "light" work. Part of the job description states:

Supervises and coordinates activities of workers engaged in operating and maintaining equipment in water treatment plant: Directs activities of workers engaged in filtering, chemical treating, pumping and testing fresh and processed water in preparation for human or industrial use. Plans daily work schedule and assigns tasks to workers based on priority or work and experience of individual workers. Inspects equipments...D.O.T. 954.132-010, Fourth Edition, 1991.

⁵ The ALJ noted results of X-rays of March 20, 1991 that were negative on Hendrix's lumbar spine, right knee and right hip.

A Water Treatment Plant Operator also is described as "light" work. The definition of the job is:

Supervises and coordinates activities of workers engaged in operating and maintaining equipment in waste water treatment and disposal facility to control flow and processing of sewage: monitors control panels and adjusts valves and gates manually or by remote control to regulate flow of sewage...starts and stops pumps, engines and generator to control flow of raw sewage...maintains log of operations and records meter and gauge readings...may collect sewage sample samples... D.O.T. 955.362-010, Fourth Edition (1991).

Those two definitions, in essence, are highly similar jobs, bearing the same clarification. Both are defined as "light" work and each has some of the same types of responsibilities. The amount of exertion for both jobs are the same: light. At first blush, it makes little sense that Hendrix has the exertional ability to work as a water treatment operator, but not as a superintendent (who, in essence, oversees the water treatment operator.)

Furthermore, the Vocational Expert's testimony muddles the issue. The Vocational Expert offered few specifics concerning a water treatment "operator's" duties and, in fact, seemed to lack knowledge about the job's requirements. He was unsure whether the position required manual adjustment of valves. He was unsure as to what lifting or bending would be needed, although he stated that the D.O.T. recognized the job as "light" work. *Record at 70*. Such testimony, sketchy at best, is not substantial evidence to support the ALJ's decision. Additional testimony needs to be taken from the Vocational Expert to clarify this matter.⁶

⁶ The vocational expert testified that the only job Hendrix could return to was that of a water treatment operator. How does this job differ from that of "superintendent" when both are classed as "light". And, more to the point, how is one physically unable to be the boss (i.e., superintendent), but still able to be an "operator"?

Finally, the evidence submitted by Dr. Huettnner, the treating physician, and the testimony by Hendrix himself establishes that the claimant suffers from some pain. Pain, even if it is "exaggerated" and is not disabling in itself, should be considered in determining what work Hendrix can do. It appears that the ALJ gave only a cursory examination of Hendrix's pain and mental impairments when deciding whether Hendrix could return to work. His analysis must be more thorough. See, *Huston v. Bowen*, F.2d 1125, 1132 (10th Cir. 1988) ("*Once the claimant has made a prima facie showing of inability to return to past relevant work...the Secretary must shoulder the burden of proof to show that the claimant can perform other work on a sustained basis, given both exertional and nonexertional limitations.*") The case is, therefore, REMANDED for further findings and proceedings consistent with this opinion.

SO ORDERED THIS 13th day of August, 1993.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE AUG 23 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 23 1993
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
v.)
)
AMERICAN AIRLINES, INC., ET AL.)
)
Defendants.)

Consolidated Case)
)
89-C-868-B)
89-C-869-B)
90-C-859-B)

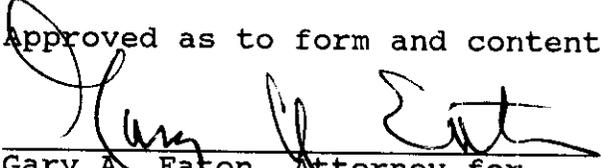
ORDER FOR DISMISSAL WITHOUT PREJUDICE

Now on this 23rd August day of ~~July~~, 1993, upon presentation of the Stipulation for Dismissal Without Prejudice executed by Plaintiff Atlantic Richfield Company and Defendant Production Manufacturing Company, Inc., the Court finds and adjudges that all claims of Atlantic Richfield Company set forth herein against Production Manufacturing Company, Inc. should be and are hereby dismissed without prejudice to any future action upon such claims and that each of these parties shall bear and be responsible for its own costs and expenses incurred herein.

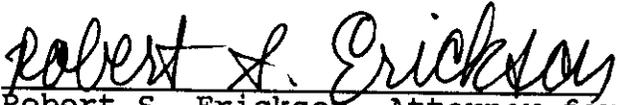
S/ THOMAS R. BRETT

Judge

Approved as to form and content:



Gary A. Eaton, Attorney for
Atlantic Richfield Company



Robert S. Erickson, Attorney for
Production Manufacturing Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 28 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ATLANTIC RICHFIELD COMPANY,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC., et al.,)
)
Defendants.)

Case Nos. 89-C-868 B;
89-C-869 B;
90-C-859 B

AND CONSOLIDATED ACTIONS

ORDER

NOW on this 23rd day of August, 1993, this matter comes on for consideration before the undersigned Judge pursuant to Defendant Sand Springs Home's Motion to Dismiss Cross-claims asserted by the Sand Springs Home ("Home") against all other defendants in this case. The Court being fully advised and informed in the premises finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that all cross-claims asserted by the Home in its Answer, Counterclaims and Cross-Claims filed on or about September 30, 1992 and in the First Amended Cross-claims of Defendant Sand Springs Home filed on or about February 1, 1993, and all cross-claims "deemed filed" by the Home under the Second Amended Case Management Order are hereby dismissed, without prejudice to re-filing, and without attorney fees or costs to any party, pursuant to Fed. R. Civ. Proc. 41(a)(2), (c).



UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
AUG 23 1993
DATE

FILE
AUG 23 1993
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

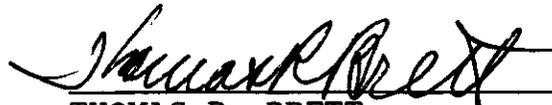
| | | |
|------------------------------|---|---------------------|
| HAMSTEIN MUSIC CO., et. al., |) | |
| |) | |
| Plaintiff, |) | |
| vs. |) | Case No. 93-C-428-B |
| |) | |
| JOE C. COOK, |) | |
| |) | |
| Defendant. |) | |

ADMINISTRATIVE CLOSING ORDER

The Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, with agreement of the parties, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within sixty (60) of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 23 day of August, 1993.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

6

FILED

AUG 23 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GPS TECHNOLOGIES, INC.,

Plaintiff,

vs.

J. WILLIAMS BOOK COMPANY and
JERRY WILLIAMS,

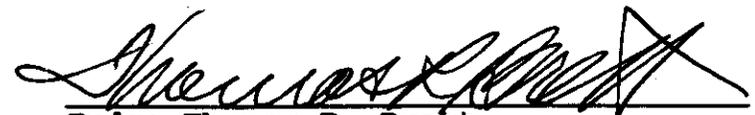
Defendants.

Civil Action No. 93-C-498B

**ORDER DISMISSING DEFENDANTS'
COUNTERCLAIM WITHOUT PREJUDICE**

Upon consideration of Plaintiff's Motion to Dismiss or For More Definite Statement and Brief, and upon consideration of the fact that Defendants have failed to timely respond to such Motion, the Court finds that Plaintiff's Motion to Dismiss should be granted for the reasons that Defendants' Counterclaim is so vaguely worded that Plaintiff cannot determine whether Defendants are alleging a cause of action under federal securities laws, state common law, other state law, or all of these laws, and also for the reason that said Counterclaim fails to state with particularity circumstances constituting fraud as required under Federal Rule of Civil Procedure 9(b).

IT IS THEREFORE ORDERED THAT Defendant's Counterclaim be and hereby is dismissed without prejudice.


Judge Thomas R. Brett

5

ENTERED ON DOCKET

DATE 8-23-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 23 1993

| | |
|-------------------------------|---|
| WALTER E. BURNS |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| SECRETARY OF HEALTH AND HUMAN |) |
| SERVICES, |) |
| |) |
| Defendant. |) |

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

92-C-434-E ✓

ORDER

Plaintiff Walter Burns is appealing the Secretary's decision to deny him Social Security Disability benefits. The Secretary found that Mr. Burns was not disabled and that there were a significant number of jobs in the economy that Mr. Burns was capable of performing. Mr. Burns refutes this finding claiming that he is disabled because of pain.

Mr. Burns filed an initial application for disability benefits on June 26, 1989 which was denied on August 23, 1989. Mr. Burns filed a Request for Reconsideration that was also denied on October 4, 1989. At this point, Mr. Burns did not file a Request for Hearing. On March 23, 1990, Mr. Burns filed a second application for benefits. This current application was denied under the doctrine of administrative res judicata. 20 C.F.R. 404.957 (c)(1) (1990). On November 1, 1990, Mr. Burns filed a Request for Hearing before an Administrative Law Judge ("ALJ"). The ALJ found good cause to reopen Mr. Burns' prior application for adjudication; however, the ALJ found no basis for revising the prior adverse determination.

I. Summary of Evidence

10

At the time of his February 1991 administrative hearing, Mr. Burns was 44 years old and had a high school education. In his application, Mr. Burns stated that he has been unable to work since February 9, 1983 because of a back injury he sustained at work while trying to lift 300 pounds. In addition to his back injury, Mr. Burns stated that he has pain radiating into both legs, severe pain in his upper back and shoulder blade area, problems gripping with his hands, and blindness in his left eye. (Tr. at 50, 51, 65).

Prior to December 31, 1988, Mr. Burns has worked as a construction laborer, highway maintenance worker, and carpentry worker.

When Mr. Burns injured his back, he felt severe pain; however, he did not seek medical attention until several days later. (Tr. at 152, 259.) He was seen initially by a series of physicians including Dr. Shaddock, who admitted Mr. Burns to the hospital and performed a myelogram and CT scan.

Dr. Hawkins, who ultimately became Mr. Burns' treating physician, reviewed the CT scan in February 1984 and found no disc herniation, but felt that Mr. Burns was suffering from classic internal disc disruption. In May 1984, Dr. Hawkins' treatment records reveal that

The patient was found to have classic internal disc disruption, L4-L5 with remaining lumbar discs within normal limits. The patient has been tried on full conservative treatment modalities but has failed to improve and continues to be significantly disabled with chronic low back pain with radiations of pain into both legs, ... His activities are significantly limited and with attempts at increasing his activity, his pain increases significantly. (Tr. at 172).

Due to persistent complaints of pain, Mr. Burns underwent an anterior lumbar interbody fusion at L4-5 in May 1984. (Tr. at 14.) Postoperatively, Mr. Burns continued

to complain of pain, and Dr. Hawkins reported that Mr. Burns had no essential change in his back pain. (Tr. at 236.) In addition, Mr. Burns complained of pain in the left anterior thigh. *Id.*

Dr. Hawkins believed that Mr. Burns had meralgia paresthetica of the left iliac region. (Tr. at 235.) In October 1984, Mr. Burns underwent extensive decompression and neurolysis of the lateral femoral cutaneous nerve, the iliohypogastric nerve, and the ilioinguinal nerve in the left groin. (Tr. at 14.) Mr. Burns was subsequently diagnosed with lumbar sympathetic neuralgia, and underwent epidural steroid injections and a sympathectomy on the left side. (Tr. at 186-192.)

Initially, in October 1984, Dr. Hawkins believed that Mr. Burns had a solid fusion at L4-5. (Tr. at 227.) His progress notes dated January 28, 1986 reveal, however, that Mr. Burns "is now developing a well defined fibrous union and pseudoarthrosis ... The patient still remains very restricted in any of his activities because of increasing pain". (Tr. at 226.)

Because of the failure to obtain a solid bony union, Dr. Hawkins placed Mr. Burns on an electrical bone stimulator in November 1986. (Tr. at 221.) Mr. Burns remained on the stimulator for approximately one year as treatment. In October 1987, two and one-half years after the fusion, Dr. Hawkins reported that Mr. Burns is still doing very poorly. "He also has severe pain in his low back." (Tr. at 216.)

In May 1987, a CT scan showed only a mild narrowing at L4-5 but no nerve root encroachment. (Tr. at 218.) Similarly, an MRI taken February 1988 revealed disc degeneration throughout Mr. Burns' entire lumbar spine, but no herniation. (Tr. at 213.)

Subsequently, Mr. Burns was hospitalized to undergo a redo fusion and laminectomy in March 1988. (Tr. at 212.)

In September 1988, Dr. Hawkins felt that Mr. Burns had reached maximum medical improvement. Additionally, Dr. Hawkins did not feel that any additional treatment would be effective in alleviating Mr. Burns' pain. (Tr. at 207.) As a result, Dr. Hawkins released Mr. Burns from treatment.

In February 1989, Mr. Burns began seeing Dr. Shirley Welden. On a report in June 1989, Dr. Welden diagnosed Mr. Burns as suffering pain syndrome. She also stated that Mr. Burns has trigger points throughout his entire body consistent with fibrositis. (Tr. at 259-61.) Dr. Goldman, the secretary's medical expert, testified that fibromyositis is primarily a clinical diagnosis, and is to demonstrated by any laboratory studies. (Tr. at 45.) Dr. Goldman could find no medical evidence documenting trigger points or any other medical condition prior to December 31, 1988, that would have resulted in Mr. Burns' complaints of arm and hand pain, numbness and cramping. (Tr. at 39-41.)

Mr. William B. Young, a Vocational Expert ("VE"), testified that Mr. Burns could not perform his previous relevant work. (Tr. at 71.) The ALJ asked Mr. Young to enumerate jobs Mr. Burns could perform considering his age, work experience, education, and restrictions of mild to moderate back pain, left thigh pain, and decreased range of motion. *Id.* Mr. Young stated that Mr. Burns would be capable of performing light and sedentary assembly jobs, cashier type jobs, and jobs as a service worker. He also added that jobs requiring a medium exertional level would be "off" because they require a full range of motion. *Id.* at 71-72. Assuming other restrictions, including severe pain and limited ability

to stand and walk, the expert testified that Mr. Burns could not perform any jobs. (Tr. at 72-73.)

II. LEGAL ANALYSIS

Judicial review of the Secretary's decision is limited in scope by 42 U.S.C. §405 (g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decision. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Determining whether substantial evidence supports the Secretary's decision, however,

is not merely a quantitative exercise. Evidence is not substantial 'if it is overwhelmed by other evidence -- particularly certain types of evidence (e.g., that offered by treating physicians) -- of if it really constitutes not evidence but mere conclusion.'"

Gossett v. Bowen, 862 F.2d 802, 805 (10th Cir. 1988) (Quoting *Fulton v. Heckler*, 760 F.2d 1052, 1055 (10th Cir. 1985)).

When deciding a claim for benefits under the Social Security Act, the ALJ must use the following five step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets or equals an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (1991); (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any other work which exists in the national economy. 20 C.F.R. §494,1520 (b) - (f) (1991). If the Secretary finds the claimant disabled at any step, the review ends. *Gossett v. Bowen*, 862 F.2d 802, 805 (10th Cir. 1988).

The relevant period for determining whether Mr. Burns is entitled to disability benefits is from his alleged onset date of February 9, 1983 to December 31, 1988, the date Mr. Burns last met the insured status requirements of the Act.¹ As a result, Mr. Burns must demonstrate that his disability arose before the expiration of his insured status. *Flint v. Sullivan*, 951 F.2d 264 (10th Cir. 1991).

In the case at bar, the ALJ made his determination at the fifth step of the sequential evaluation process. The ALJ found Mr. Burns had, prior to December 31, 1988, the RFC to perform the physical exertional and nonexertional requirements of sedentary, light, and medium work with the exception of occasional lifting of more than 50 pounds at a time, frequent lifting or carrying of objects weighing more than 25 pounds, and repetitive bending or stooping. Having made this determination, the ALJ concluded that Mr. Burns was not disabled under the Social Security Act prior to December 31, 1988.

Mr. Burns now appeals this ruling, and asserts three alleged errors by the ALJ:

1. That the ALJ failed to give substantial weight to the opinions of Mr. Burns' treating physicians;
2. That the ALJ incorrectly evaluated Mr. Burns' pain and found that Mr. Burns could perform sustained work activities;
3. That the ALJ's finding that Mr. Burns could perform sedentary, light or medium work was in conflict with the testimony of the vocational expert.

With regard to the allegations of error asserted by Mr. Burns, the Court has thoroughly reviewed the medical records and testimony and is unclear whether there is

¹ For an individual to be entitled to disability insurance benefits under Title II of the Social Security Act, said individual must have 20 quarters of Social Security Coverage during the 40-quarter period which ends with the quarter in which the individual became disabled. 42 U.S.C.S. §423 (c). Mr. Burns' certified earnings records shows he last met this 20/40 requirement on December 31, 1988. (Tr. at 98-100.)

substantial evidence in the record to support the ALJ's finding that Mr. Burns is not disabled.

Under the Social Security Act, the claimant bears the burden of proving a disability, as defined by the Act, which prevents him from engaging in his prior work activity. *Reyes v. Bowen*, 845 F.2d 242, 243 (10th Cir. 1988). In this case, it is undisputed among the parties that Mr. Burns is disabled to an extent that he is unable to return to this previous work. As a result, the burden shifts to the Secretary, who must show that Mr. Burns retains the capacity to perform another job and that this job exists in the national economy. *Id.*

In reaching a decision that Mr. Burns was able to do sedentary, light, and medium work, the ALJ evidently relied heavily on the opinions of Dr. Goldman and focused selectively on progress notes supplied by Dr. Hawkins. In addition, the ALJ disregarded the opinions of Dr. Welden in so far as they substantiate Mr. Burns' claims that his pain is disabling and his activities are limited.

The well established rule in the Tenth Circuit is that the Secretary must give substantial weight to the testimony of the claimant's treating physician. *Turner v. Heckler*, 754 F.2d 326, 329 (10th Cir. 1985). Specifically, "the reports of physicians who have treated a patient over a period of time or who are consulted for the purposes of treatment are given greater weight than are the reports of physicians employed and paid by the government for the purpose of defending a disability claim". *Id.* (quoting *Broadbent v. Harris*, 698 F.2d 407, 412 (10th Cir. 1983)). In addition, "[i]f the opinion of the claimant's treating physician is to be disregarded, specific, legitimate reasons for this action

must be set forth." *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).

In November 1987, after Mr. Burn's first fusion, Dr. Hawkins stated that the patient "is still going very poorly ... He ... has severe pain in his lower back" and he has pain radiating into both legs. (Tr. at 216.) In March 1988, Dr. Hawkins performed a redo fusion even though he was concerned that Mr. Burns would have little or no improvement. On a follow up exam in June 1988, Dr. Hawkins noted that Mr. Burns appeared to be waling several miles a day and is active in that regard. (Tr. at 210.) He adds, however, that Mr. Burns has most of his severe pain at night for which he has no good explanation other than the fact that Mr. Burns has disc degeneration throughout his spine.² (Tr. at 216.)

In September 1988, six months after the redo fusion and three months prior to the expiration of Mr. Burns' insured status, Dr. Hawkins' progress notes reveal that Mr. Burns had no improvement in his condition. Dr. Hawkins stated that "[i]ncreasing activities increase his pain" and that Mr. Burns' "clinical findings and condition are essentially unchanged". (Tr. at 208) (emphasis added).

Upon releasing Mr. Burns from treatment in September, Dr. Hawkins felt that Mr. Burns had reached maximum medical improvement. Dr. Hawkins listed Mr. Burns as 33% impaired and felt that he would continue to have some pain whether he worked or not. Additionally, Dr. Hawkins restricted Mr. Burns to lifting no more than 50 pounds; he felt that lifting up to 50 pounds would not result in any additional injury to Mr. Burns' spine although he expected him to have some pain with this. (Tr. at 207).

² Dr. Hawkins stated in February 1988 that because of the amount of total disc degeneration throughout the discs of Mr. Burns' back, Mr. Burns would continue to have some amount of pain which cannot be relieved by any form of currently known therapy. (Tr. at 211.)

Referencing Dr. Hawkins' reports in June and September 1988, Dr. Goldman opined that prior to december 31, 1988 Mr. Burns was restricted to lifting no more than 50 pounds frequently, with no frequent bending or stooping. Dr. Goldman also testified that Mr. Burns had no significant restrictions on standing, walking or sitting.³ He assessed that Mr. Burns could sit for 4-6 hours continuously and walk 1 to 2 miles.

Admittedly, Dr. Hawkins' assessment of Mr. Burns' ability to lift up to 50 pounds without further injury seems to indicate that Mr. Burns should be able to perform the activities required to perform sedentary, light and medium work. In fact, the ALJ appears to have given substantial weight to this observation made by Mr. Burns' treating physician. This does not explain, however, the ALJ's failure to acknowledge or give any weight to Dr. Hawkins' repeated statements concerning Mr. Burns severe pain, especially the comment made in September 1988 that Mr. Burns' condition was essentially unchanged. Similarly, the ALJ relied on Dr. Hawkins' observation in June 1988 that Mr. Burns appeared to be walking several miles a day to assess Mr. Burns' other abilities, but fails to note Dr. Hawkins' statements in September 1988, that increasing activities and walking make Mr. Burns' pain worse.

Mr. Burns also argues that the medical evidence offered by Dr. Shirley Welden, another of Mr. Burns' treating physicians, supports his claim for disability benefits. Dr. Welden's diagnoses in June 1989 was that Mr. Burns had trigger points throughout his entire body, consistent with fibrositis, an unstable back, and chronic mayofacial pain syndrome. The ALJ considered and rejected this evidence because it was not substantiated

³ *Mr. Burns testified that he could lift 10 pounds and that he has lifted up to 25, but not without pain. He also stated he could sit for an hour, stand for 20 minutes, and walk for 3/4 of a mile. (Tr. at 51, 66).*

by evidence in the record pertinent to the insured period.⁴

Dr. Welden also adds in July 24, 1989 that

[T]he patient is severely limited. He has a great deal of difficulty with repetitive bending, sitting, twisting, lifting, carrying and walking. He is unable to lift more than ten to fifteen pounds and he may not lift that repetitively without increasing his pain a great deal.

Record at 258. This evidence corroborates both Dr. Hawkins opinions and the statements made by Mr. Burns concerning his pain and limited abilities, and was essentially ignored by the ALJ.

In view of the foregoing discussion, the court finds that the record is unclear whether the ALJ gave the opinions of Mr. Burns' treating physicians the weight they require. The ALJ appears to acknowledge and accept the opinions that favor the Secretary's decision and disregard those that are contrary to it. Furthermore, the ALJ fails to provide specific, legitimate reasons for ignoring some of the opinions of Drs. Hawkins and Welden with respect to Mr. Burns' pain and unchanged condition. In sum, the undersigned is uncertain whether correct legal standards have been applied.

Next, Mr. Burns takes issue with the ALJ's evaluation of his pain and assessment of his credibility. The Court finds MR. Burns' arguments persuasive. It should be noted at the outset that

[D]isability requires more than an inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.

⁴ "[T]he relevant analysis is whether the claimant was actually disabled prior to the expiration of [his] insured status." *Potter v. Secretary of Health and Human Services*, 905 F.2d 1346, 1348 (10th Cir. 1990). The record is actually unclear whether Mr. Burns had fibromyositis prior to December 31, 1988. It is pointed out that Dr. Goldman could not find any evidence prior to December 31, 1988 of trigger points, consistent with fibrositis. (Tr. at 13, 16.) The ALJ's findings, on the other hand, state that prior to December 31, 1988, Mr. Burns had status post lumbar fusion and fibromyositis. *Id.* at 19.

Gossett v. Bowen, 862 F.2d 802 (10th Cir. 1988) (quoting *Brown v. Bowen*, 801, F.2d 361, 362 (10th Cir. 1986)).

The Tenth Circuit has outlined the framework that is to be used in evaluating a disability claim based on pain. *See, Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987).

The first component of the inquiry, the objective impairment prerequisite, is fulfilled without regard to subjective evidence. The second component, a nexus between the impairment and the alleged pain, is examined taking the subjective allegations of pain as true. Upon reaching the third component - - considering all of the evidence presented -- the decision maker considers all medical data presented, any other objective indications of pain, and subjective accounts of the severity of the pain. At this point, the decision maker may assess the claimant's credibility.

Williams v. Bowen, 844 F.2d 748, 753 (10th Cir. 1988).

Because it is undisputed that Mr. Burns' spinal fusion and disc degeneration are impairments capable of producing pain, the Court will focus its attention on the second and third components of the inquiry. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all the relevant evidence." *Luna v. Bowen*, 834 F.2d at 163.

Mr. Burns' treating physician submitted medical reports verifying that Mr. Burns has undergone two surgical procedures to relieve his back pain. Mr. Burns testified that he quit work because the pain was so bad. Mr. Burns produced a list of medications he had taken to relieve his pain -- Tylenol with codeine and muscle relaxers. He also testified that he stayed away from the heavy drugs because he did not like the way they made him feel.

This evidence is more than adequate to establish a reasonable relationship between Mr. Burns' medical diagnosis and his allegations of pain. Therefore, it is necessary to

examine the third component of the pain inquiry -- consideration of all evidence presented. At this stage, the ALJ may assess the claimant's credibility and "decide whether he believes the claimant's assertions of severe pain". *Williams v. Bowen*, 844 F.2d at 754 (quoting *Luna*, 834 F.2d at 163).

In the case at bar, the ALJ found Burns' testimony not sufficiently credible to support a finding of disability due to severe pain. One of the reasons given by the ALJ for doubting Mr. Burns' credibility was Dr. Goldman's opinion that Mr. Burns' pain was "mild" to "moderate". The basis for this opinion was that Mr. Burns was only prescribed Tylenol with codeine, a "mild" narcotic indicative of "moderate" pain.

Citing another reason for discounting Mr. Burns' credibility, the ALJ states

Further, it is generally accepted in the medical profession that severe intractable pain, continuing for an extended period, will also tend to manifest itself in physical changes such as premature aging, weight loss, impaired gait and weakness in the extremities, progressive physical deterioration and atrophy of associated musculature. Changes of this sort, appropriate to the impairment alleged, do not appear to be present to a significant degree, according to the medical record in this case.

(tr. at 17.)

Credibility determinations are the province of the fact finder, which in this case, is the ALJ, *Diaz v. H.H.S.*, 898 F.2d 774, 777 (10th Cir. 1990). In this instance, however, the ALJ has essentially created an artificial standard and then said that Mr. Burns does not meet it. The ALJ's use of this standard in assessing Mr. Burns' pain and credibility is clearly inappropriate.

Lastly, Mr. Burns argues that the ALJ's finding is in conflict with the testimony of the vocational expert. Essentially, the vocational expert testified that if Mr. Burns' complaints of severe pain were credible, the jobs he had enumerated would be eliminated.

(tr. at 72-73.) Because this issue turns on Mr. Burns' credibility and the ALJ's credibility assessment was based on conjecture and assumptions, the court finds it unnecessary to address this issue at this time.

III. Conclusion

Upon a review of the entire record, the court finds that it is unclear whether the Secretary's decision to deny Mr. Burns disability insurance benefits is supported by substantial evidence. Accordingly, the case is REMANDED. A supplemental hearing must take place where Dr. Hawkins testifies on his opinion of Mr. Burns' ability to do sustained work activities and on his assessment of Mr. Burns' pain. In addition, since Mr. Burns only has to prove that his disability arose prior to December 31, 1988, the Secretary must consider all relevant medical evidence. Specifically, the Secretary must give appropriate weight to the treating physician's opinion prior to 1988, not just opinions given during June and September of 1988. Lastly, the issue of whether Mr. Burns had fibromyositis prior to December 1988 must be clarified.

SO ORDERED THIS 23rd day of August, 1993.


JAMES O. ELLISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 8-23-93

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 24 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

TAYLOR INTERNATIONAL, INC.,

Plaintiff,

vs.

F. ANDREW DOWDY, GUARDIAN ENERGY
CONSULTANTS, INC., and
DAVID W. KVACH,

Defendants.

No. 93-C-545-B

ORDER OF DISMISSAL

Pursuant to the Joint Stipulation of Plaintiff Taylor International, Inc. and all Defendants filed herein, the Court finds that this action should be dismissed with prejudice. It is, therefore,

ORDERED that the above-entitled action shall be and is hereby dismissed with prejudice.

Dated this 23rd day of August, 1993.

S/ THOMAS R. BRETT

HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

DATE 8-23-93

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD A. WILLIAMS a/k/a DONALD)
 ALLEN WILLIAMS; MARY L. WILLIAMS;)
 COUNTY TREASURER, Mayes County,)
 Oklahoma; and BOARD OF COUNTY)
 COMMISSIONERS, Mayes County,)
 Oklahoma,)
)
 Defendants.)

FILED

AUG 23 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 93-C-0085-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 23 day
 of August, 1993. The Plaintiff appears by F.L. Dunn,
 III, United States Attorney for the Northern District of
 Oklahoma, through Phil Pinnell, Assistant United States Attorney;
 the Defendants, County Treasurer, Mayes County, Oklahoma, and
 Board of County Commissioners, Mayes County, Oklahoma, appear by
 Bill Shaw, Assistant District Attorney, Mayes County, Oklahoma;
 and the Defendants, Donald A. Williams a/k/a Donald Allen
 Williams and Mary L. Williams, appear not, but make default.

The Court, being fully advised and having examined the
 court file, finds that the Defendant, Donald A. Williams a/k/a
 Donald Allen Williams, acknowledged receipt of Summons and
 Complaint on February 18, 1993; that the Defendant, Mary L.
 Williams, acknowledged receipt of Summons and Complaint on
 February 17, 1993; that the Defendant, County Treasurer, Mayes
 County, Oklahoma, acknowledged receipt of Summons and Complaint
 on February 8, 1993; and that Defendant, Board of County

Commissioners, Mayes County, Oklahoma, acknowledged receipt of Summons and Complaint on February 8, 1993.

It appears that the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Numbered Twenty-four (24), in Block Numbered Five (5), of the Resubdivision of Lot 7, Block 5, and Subdivision of Block 6 and Block 7, of the PIERRE CHOUTEAU ADDITION to the Incorporated Town of Pryor Creek, Mayes County, State of Oklahoma, according to the official Survey and Plat thereof, filed for record in the office of the County Clerk of said County and State.

The Court further finds that on December 14, 1984, the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$36,700.00, payable in monthly installments, with interest thereon at the rate of 12.5 percent (12.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams,

executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a mortgage dated December 14, 1984, covering the above-described property. Said mortgage was recorded on December 14, 1984, in Book 637, Page 243, in the records of Mayes County, Oklahoma.

The Court further finds that the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, are indebted to the Plaintiff in the principal sum of \$33,776.63, plus interest at the rate of 12.5 percent per annum from June 1, 1992 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 for recording the Notice of Lis Pendens.

The Court further finds that the Defendant, County Treasurer, Mayes County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes for 1991 in the amount of \$23.26 which became a lien on the property as of July 1, 1992; and property taxes for 1992 in the amount of \$13.80 which became a lien on the property as of July 1, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Mayes County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, are in default and have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, in the principal sum of \$33,776.63, plus interest at the rate of 12.5 percent per annum from June 1, 1992 until judgment, plus interest thereafter at the current legal rate of 3.58 percent per annum until paid, plus the costs of this action in the amount of \$8.00 for recording the Notice of Lis Pendens, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Mayes County, Oklahoma, have and recover judgment in the amount of \$37.06 for personal property taxes for the years 1991 and 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Donald A. Williams a/k/a Donald Allen Williams, Mary L. Williams, and Board of County Commissioners, Mayes County,

Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Donald A. Williams a/k/a Donald Allen Williams and Mary L. Williams, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell, according to Plaintiff's election with or without appraisal, the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, County Treasurer, Mayes County, Oklahoma, in the amount of \$37.06, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

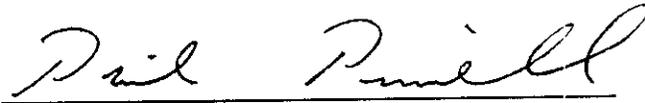
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

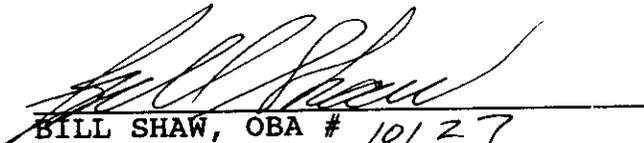
UNITED STATES DISTRICT JUDGE

APPROVED:

F.L. DUNN, III
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



BILL SHAW, OBA # 10127
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Mayes County, Oklahoma

Judgment of Foreclosure
Civil Action No. 93-C-0085-B

PP/esr

ENTERED ON DOCKET

DATE 8-23-93

FILED

AUG 23 1993

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUDY EHLINGER,

Plaintiff,

v.

No. 92-C-300-B

CITY OF BIXBY, ROBIN SPRINGER,
Individually, JANENE MCGUIRE,
Individually, PETE JAMES,
Individually, JIM BENNETT,
Individually,

Defendants.)

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 23 day of Aug., 1993, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

S/ THOMAS R. BRETT

United States District Judge