

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

HELEN MARIE VARNER, JERRY VARNER and
MID-AMERICA STOCKYARDS, INC.,

Plaintiffs,

vs.

SUN COMPANY, INC. (R&M), TEXACO INC., a
Delaware corporation, and RHODES,
HIERONYMUS, JONES, TUCKER & GABLE,
INCORPORATED,

Defendants.

FILED ON DOCKET
DATE SEP 10 1996

No. 95 C 713-~~K~~ ✓

F I L E D

SEP 09 1996

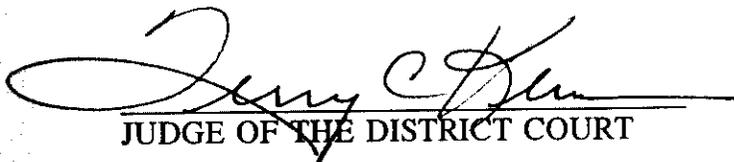
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Upon Stipulation of the Parties and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Parties' Stipulation of Dismissal With Prejudice of Defendants, Sun Company, Inc. (R & M), Texaco Inc., and Rhodes, Hieronymus, Jones, Tucker & Gable is granted and Sun Company, Inc. (R & M), Texaco Inc., and Rhodes, Hieronymus, Jones, Tucker & Gable are dismissed with prejudice.

Dated this 6 day of ^{September}~~July~~, 1996.


JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
DATE SEP 10 1996

MARIA M. SEIDLER,)
)
 Plaintiff,)
 vs.)
)
 AMERICAN CENTRAL GAS COMPANIES,)
 INC., AMERICAN LAND 71ST)
 STREET COMPANY, STEVEN E.)
 JACKSON, ROD STELL, and)
 an unknown number of)
 JOHN DOES,)
)
 Defendants.)

Case No. 96-C-658-BU ✓

FILED

SEP 9 - 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court upon Plaintiff, Maria M. Seidler's Motion to Dismiss filed on September 6, 1996, wherein Plaintiff seeks to dismiss the Complaint against Defendants, American Land 71st Street Company, Steven E. Jackson, Rod Stell and an unknown number of John Does. From a review of the court file, it appears that these Defendants have not yet answered the Complaint. Upon due consideration of the motion and pursuant to Rule 41(a)(2), Fed. R. Civ. P., the Court finds that the Complaint should be dismissed without prejudice against these Defendants.

Accordingly, Plaintiff, Maria M. Seidler's Motion to Dismiss (Docket Entry #6) is **GRANTED**. The Complaint against Defendants, American Land 71st Street Company, Steven E. Jackson, Rod Stell and an unknown number of John Does, is **DISMISSED WITHOUT PREJUDICE**.

Entered this 9th day of September, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

1

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JAMES R. HARDGROVE aka James)
Randolph Hardgrove; CHERYL ANN)
HARDGROVE; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 10 1996

FILED

SEP 09 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 479K /

ORDER

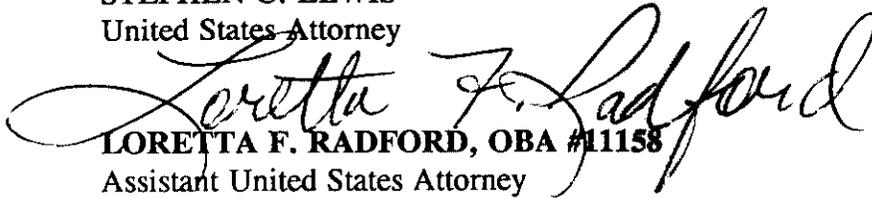
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that the Entry of Default By Court Clerk filed on the 8th day of July, 1996 and the Judgment of Foreclosure entered herein on the 15th day of July, 1996, are vacated and the action is dismissed without prejudice.

Dated this 6 day of September, 1996.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Loretta F. Radford". The signature is written in black ink and is positioned over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, OK 74103

(918) 581-7463

LFR:flv

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

FILED

SEP 09 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUN COMPANY, INC., (R&M), a
Delaware corporation, and
TEXACO, INC., a Delaware
corporation,

Plaintiff,

vs.

BROWNING-FERRIS, INC., a
Delaware corporation, et al.,

Defendant.

Case No. 94-C-820-K

ENTERED ON DOCKET
DATE SEP 10 1996

ORDER

Now before the Court is the motion of Defendant Amron, Inc., for dismissal pursuant to Rule 4(m) of the Federal Rules of Civil Procedure (Docket #298). The request is hereby GRANTED and Defendant Amron, Inc. is hereby DISMISSED without prejudice.

IT IS SO ORDERED THIS 9 DAY OF SEPTEMBER, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
SEP 09 1996

WORLDCOM NETWORK SERVICES, INC.,)
f/k/a WilTel, Inc., a Delaware)
corporation,)

Plaintiff,)

v.)

GLOBAL TELEMEDIA INTERNATIONAL,)
INC., f/k/a PHOENIX ADVANCED)
TECHNOLOGIES, INC.,)
a Florida corporation,)

Defendant.)

FILED

SEP 6 1996

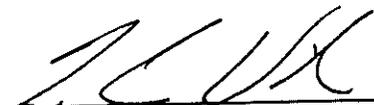
Fed. District Court
U.S. District Court

Case No. 96C 392K

NOTICE OF DISMISSAL

Plaintiff, WorldCom Network Services, Inc., f/k/a WilTel, Inc., pursuant to Fed. R. Civ. P. 41, hereby voluntarily dismisses all claims asserted in the above-referenced action. This action is hereby dismissed without prejudice.

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

By: 
Donald L. Kahl, OBA #4855
T. Lane Wilson, OBA #16343
320 South Boston Avenue
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR PLAINTIFF
WORLDCOM NETWORK SERVICES, INC.

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 6th day of September, 1996, a true and correct copy of the above and foregoing NOTICE OF DISMISSAL was forwarded by U.S. Mail, with proper postage thereon fully prepaid, to the following counsel of record:

Theodore Q. Eliot, Esq.
Gable Gotwals Mock Schwabe
2000 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447



T. Lane Wilson

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1992 PORSCHE 968,)
 VIN WPOCA2969NS840450;)
)
 and)
)
 ONE 1993 CHRYSLER LeBARON,)
 VIN 1C3XU4533PF525515;)
)
 and)
)
 ONE 1993 CHEVROLET)
 SUBURBAN,)
 VIN 1GNFK16KOPJ353482;)
)
 and)
)
 350 SHARES OF COMMON)
 STOCK IN PRECISION)
 SECURITY, INC., CERTIFICATE)
 NO. 7 HELD IN THE NAME OF)
 PAT S. STINNETT;)
)
 and)
)
 CONTENTS OF REAL PROPERTY)
 LOCATED AT 3509 SOUTH)
 FLORENCE, TULSA, OKLAHOMA;)
)
 and)
)
 OFFICE FURNITURE LOCATED)
 AT NINE EAST FOURTH STREET,)
 TULSA, OKLAHOMA;)
)
 Defendants.)

CIVIL ACTION NO. 94-C-329-K

FILED

SEP 06 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

SEP 09 1996

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the
plaintiff's Motion for Judgment of Forfeiture against the defendant

NOTE: THIS ORDER IS TO BE MAILED
BY DEPOSIT TO THE CLERK AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

properties, and all entities and/or persons interested in the defendant properties, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 5th day of April 1994, alleging that the defendant properties, to-wit:

- a) ONE 1992 PORSCHE 968,
VIN WPOCA2969NS840450;
- b) ONE 1993 CHRYSLER LeBARON,
VIN 1C3XU4533PF525515;
- c) ONE 1993 CHEVROLET SUBURBAN,
VIN 1GNFK16KOPJ353482;
- d) 350 SHARES OF COMMON STOCK IN
PRECISION SECURITY, INC.,
CERTIFICATE NO. 7 HELD IN THE NAME OF
PAT S. STINNETT;
- e) CONTENTS OF REAL PROPERTY
LOCATED AT 3509 SOUTH
FLORENCE, TULSA, OKLAHOMA;
More Particularly Described
As Follows:
 - 1) One Royal Quest Picture;
 - 2) Two Lady Hunts Pictures;
 - 3) One Beige Floral Print Chair;
 - 4) Two End Tables;
 - 5) One Beige Floral Print Ottoman;
 - 6) One Coffee Table;
 - 7) Three Blue Wagon Wheel Barstools;
 - 8) Two Blue Kitchen Wagon Wheel
Chairs;
 - 9) One Blue Kitchen Corner Table;
 - 10) One Green Wing Back Chair;

- 11) One Maroon and Green Sofa;
- 12) Two Maroon and Green Chairs;
- 13) One Lamp Table;
- 14) Two Ball and Claw End Tables;
- 15) One Ball and Claw Coffee Table;
- 16) Two Maroon and Green Ottomans;
- 17) Two Blue and Green Arm Chairs;
- 18) One Beige Floral Loveseat;
- 19) One Wood and Mirror Grandfather Clock;
- 20) One Oldhouser Eclipse Pool Table, (Crated);
- 21) One Juke Box, Antique Apparatus;
- 22) One Executive Desk w/Left Hand Return;
- 23) One Complete Bedroom Wall Unit (Includes: Headboard, Lightboard, Two Cabinets, Triple Mirrors);
- 24) One Complete Wicker Bedroom Set (Includes: Headboard, Two Nightstands; TV Stand, Six Drawer Armoire, Chaise Lounge and Cushion, Two Shelves, Mirror, Four Drawer Dresser);
- 25) All Glass Inserts to End Tables and Coffee Tables;
- 26) Mechanism and Glass Doors for Grandfather Clock;
- 27) Pool Balls and Pool Sticks with Stand;
- 28) Model 70 Winchester Rifle, Serial No. G20348.

f) OFFICE FURNITURE LOCATED
AT OFFICE OF NOEL SMITH AT
NINE EAST FOURTH STREET,
TULSA, OKLAHOMA,
More Particularly Described
As Follows:

- 1) Judge's Highback Chair;
- 2) Three, 4-Drawer Filing Cabinets;
- 3) Four Raspberry Colored Arm
Executive Office Chairs;
- 4) Six Raspberry Colored Arm Chairs;
- 5) Two Brown Leather Wing Back Chairs;
- 6) Two Brown Leather Arm Chairs,

are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A), because there is probable cause to believe they are properties involved in transactions or attempted transactions in violation of 18 U.S.C. §§ 1956 or 1957, or proceeds traceable thereto, and pursuant to 18 U.S.C. § 981(a)(1)(C), because they constitute proceeds or are derived from proceeds traceable to a violation of 18 U.S.C. § 1343, in violation of Title 18 United States Code.

Warrants of Arrest and Seizure was issued by the Clerk of this Court on the 15th day of April, 1994, providing that the United States Marshal for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending, and that the United States Marshal for the District of Colorado publish Notice of Arrest and Seizure once a week for three

consecutive weeks in The Denver Post, Denver, Arapahoe County, Colorado, the district in which some of the known potential claimants were believed to be residing.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrants of Arrest and Notices In Rem on the defendant properties and all known potential individuals or entities with standing to file a claim to the defendant properties, as follows:

- a) One 1982 Porsche 968,
VIN WPOCA2969NS840450, Served:
April 21, 1994
- b) One 1993 Chrysler LeBaron,
VIN1C3XU4533PF525515 Served:
April 21, 1994
- c) One 1993 Chevrolet Suburban,
VIN 1GBFJ155JIOH353472 Served:
April 21, 1994
- d) 350 Shares of Common Stock Served:
in Precision Security, Inc., Served April 21, 1994
held in the name of Pat S. Stinnett.
- e) Contents of Real Property Served:
Located at 3509 South April 21, 1994
Florence, Tulsa, Oklahoma,
Exhibit "A" Attached.
- f) Office Furniture Located at Served:
Office of Noel Smith at April 21, 1994
Nine East Fourth Street,
Tulsa, Oklahoma.
- g) Noel W. Smith, a/k/a Served:
Wayne Smith, N. W. Smith, April 22, 1994
and N. W. Culpepper, by
serving Stanley D. Monroe,
his attorney, (who was
authorized to accept service).

- h) Pat S. Smith, a/k/a Pat S. Stinnett, by serving Stanley D. Monroe, her attorney, (who is authorized to accept service) Served: April 22, 1994
- i) Julie Ann Benson, by serving Steven Vincent, her attorney Served: April 22, 1994

USMS 285s reflecting the service upon the defendant properties and upon Noel Wayne Smith, a/k/a Wayne Smith, N. W. Smith, and N. W. Culpepper, by serving Stanley D. Monroe, his attorney, (who was authorized to accept service) upon Pat S. Smith, a/k/a Pat S. Stinnett, by serving Stanley D. Monroe, her attorney, (who was authorized to accept service), and on Julie Ann Benson, by serving Steven Vincent, her attorney, the only individuals or entities known to have standing to file a claim to the defendant properties, are on file herein.

All persons or entities interested in the defendant properties were required to file their claims herein within ten (10) days after service upon them of the Warrants of Arrest and Notices In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed on June 23, 30, and July 7, 1994, and in The Denver Post, Arapahoe County, Colorado, the county in which some of the potential claimants may reside, on May 25, June 1 and June 8, 1994. Proof of Publication was filed on August 12, 1994.

No claims in respect to the defendant properties have been filed with the Clerk of the Court, and no persons or entities have plead or otherwise defended in this suit as to the defendant properties, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the defendant properties, and all persons and/or entities interested therein.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant properties:

- a) ONE 1992 PORSCHE 968,
VIN WPOCA2969NS840450;
- b) ONE 1993 CHRYSLER LeBARON,
VIN 1C3XU4533PF525515;
- c) ONE 1993 CHEVROLET SUBURBAN,
VIN 1GNFK16KOPJ353482;
- d) 350 SHARES OF COMMON STOCK IN
PRECISION SECURITY, INC.,
CERTIFICATE NO. 7 HELD IN THE NAME OF
PAT S. STINNETT;

e)

**CONTENTS OF REAL PROPERTY
LOCATED AT 3509 SOUTH
FLORENCE, TULSA, OKLAHOMA;
More Particularly Described
As Follows:**

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- 2) Two Lady Hunts Pictures;
- 3) One Beige Floral Print Chair;
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- 7) Three Blue Wagon Wheel Barstools;
- 8) Two Blue Kitchen Wagon Wheel Chairs;
- 9) One Blue Kitchen Corner Table;
- 10) One Green Wing Back Chair;
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- 12) Two Maroon and Green Chairs;
- 13) One Lamp Table;
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f) OFFICE FURNITURE LOCATED AT OFFICE OF NOEL SMITH AT NINE EAST FOURTH STREET, TULSA, OKLAHOMA, More Particularly Described As Follows:

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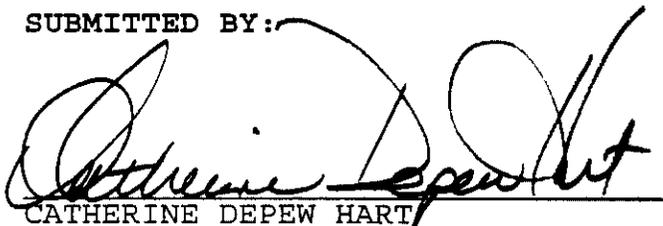
and that the defendant properties above described be, and they are,

hereby forfeited to the United States of America for disposition according to law.

s/ TERRY C. KERN

TERRY C. KERN
Judge of the United States District
Court for the Northern District of
Oklahoma

SUBMITTED BY:

A handwritten signature in cursive script, appearing to read "Catherine Depew Hart", written over a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\LEADEN\FCSMITH.N\0006

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D
IN OPEN COURT

SEP - 4 1996 *W*

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

NANCY BUTTERS, individually, and)
as Parent and Next friend of)
DEREK REUST, a Minor,)
)
Plaintiff,)

vs.)

Case No. 95-C-745C ✓

H. B. MANAGEMENT, INC. an Oklahoma)
corporation, and COMMERCIAL)
UNION INSURANCE COMPANY, a foreign)
insurance company,)
)
Defendants,)

and)

ENTERED ON DOCKET

COMMERCIAL UNION INSURANCE COMPANY,)
)
Defendant/Third)
Party Plaintiff,)

DATE SEP 09 1996

vs.)

ST. ANTHONY HOSPITAL, OKLAHOMA CITY,)
OKLAHOMA,)
)
Third party)
Defendant.)

STIPULATION OF DISMISSAL RESERVING THIRD PARTY CLAIM

COME NOW the Plaintiff, NANCY BUTTERS, individually and as parent and next friend of DEREK REUST, a minor, ("Butters") by and through her attorney of record, Joseph R. Farris; Defendants H.B. Management Inc, ("H.B. Management") and Commercial Union Insurance Companies ("Commercial Union") by and through their attorneys of record, PRAY, WALKER, JACKMAN, WILLIAMSON & MARLAR, and hereby stipulate, pursuant to Rule

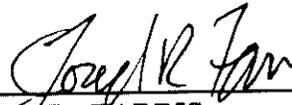
41 (a)(1)(ii), that the Plaintiff's individual claims, and those claims asserted by her as parent and next friend of the minor, Derek Reust, against H.B. Management and Commercial Union may be dismissed, with prejudice to refiling, for the reason and upon the grounds that the claims have been settled. It is further stipulated and agreed to between the parties that Commercial Union is expressly reserving any and all claims asserted herein against Third-Party Defendant, St. Anthony Hospital.

It is further stipulated by Butters, H.B. Management, and Commercial Union that each shall bear their own respective costs, including attorney fees.

DATED this 4th day of ~~August~~ ^{Sept}, 1996.



WM. GREGORY JAMES OBA #4620
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONEOK Plaza
Tulsa, Oklahoma 74103
(918) 581-5500
(918) 581-5599 (Fax)
ATTORNEYS FOR H.B. MANAGEMENT,
INC. and COMMERCIAL UNION
INSURANCE COMPANIES



JOSEPH R. FARRIS
Feldman, Hall, Franden,
Woodard & Farris
525 South Main, Suite 1400
Tulsa, Oklahoma 74103
ATTORNEYS FOR PLAINTIFF

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

FILED
IN OPEN COURT
SEP - 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDERICK M. HARTLEY,)
)
Plaintiff,)
)
vs.)
)
F. M. HOEL,)
)
Defendant.)

Case No. 96-CV-749-B

ENTERED ON DOCKET
DATE **SEP 9 1996**

PRELIMINARY INJUNCTION

Now before the Court for its consideration is the Application of the Plaintiff, Frederick M. Hartley, for the entry of a Preliminary Injunction against the Defendant, F.M. Hoel. The Plaintiff appears in person and by his attorneys, Nancy Nesbitt Blevins and Paul E. Blevins. The Defendant appeared not but had been served by private process server advising him of this hearing. The Court has jurisdiction of the parties and subject matter pursuant to 28 U.S.C. § 1332.

Having heard the evidence and argument presented by the parties, the Court finds as follows:

1. On July 17, 1996, Plaintiff, Frederick M. Hartley received by certified mail from defendant, F.M. Hoel, a document dated July 15, 1996, and entitled Grievance Complaint.
2. This document purports to represent a nonjudicial proceeding commenced by Defendant against Plaintiff for illegal conversion of personal property.

NOTED AND ORDERED BY THE COURT
SEP 11 1996
CLERK OF COURT

3. In said document Defendant **threatens** to file liens against certain real property described therein and any personal property owed by Plaintiff if Plaintiff does not do one of the following within thirty (30) days:

- a. Refute the charges made therein with a "counter affidavit of truth;"
- b. Pay to Defendant \$25,000,000.00 in "gold, silver or the equivalent in U.S. currency;"
- c. Adjudicate the lien in a court of competent jurisdiction.

4. There is no basis for this "proceeding" in the laws of any state or the United States.

5. There is no basis for this "proceeding" in fact. The rights of the parties were fully adjudicated by the District Court of Rogers County, State of Oklahoma as is set forth in the Journal Entry of Judgment and Decree Terminating Lease entered on September 23, 1988, in the case of Coal Corporation Reserve Company of America, Inc., et al., v. F.M. Hoel, et al., Case No. C-84-481.

6. Defendant's purpose in initiating this "proceeding" against Plaintiff is to intimidate and coerce the payment of money from Plaintiff to Defendant, to cause injury to Plaintiff's property rights, and to cause Plaintiff to suffer mental distress.

7. If Defendant is not restrained and enjoined from taking the actions threatened in the subject document, Plaintiff will suffer immediate and irreparable injury, loss and damage for which there is no adequate remedy at law.

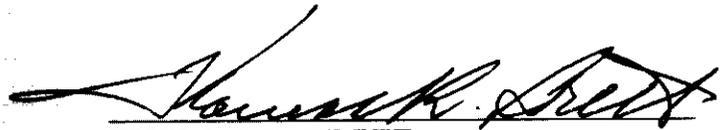
8. It is probable the Plaintiff will prevail on the merits herein. If the preliminary

injunction is not entered, Plaintiff will **suffer** greater harm than Defendant. Public policy favors the granting of the preliminary **injunction** herein to prevent the unlawful acts of the Defendant.

IT IS THEREFORE ORDERED, **ADJUDGED** AND **DECREED** that the Defendant, F. M. Hoel, is hereby enjoined and **restrained** during the pendency of this action from filing any lien or encumbrance against any **real or personal** property owned in whole or in part by Plaintiff, Frederick M. Hartley, or any **corporation** or entity in which he has an interest, including but not limited to Kelly Properties, Ltd.

Defendant, F.M. Hoel, is further **enjoined** and restrained during the pendency of this action from taking any further action to **injure**, coerce, intimidate, harass, or annoy the Plaintiff, Frederick M. Hartley or any **corporation** or entity in which he has an interest, including but not limited to Kelly Properties, Inc.

DATED this 5th day of **September**, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

SEP - 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

OSAGE NATION TAX COMMISSION,)
a governmental agency of the)
Osage Nation,)

Plaintiff,)

vs.)

UNITED STATES OF AMERICA,)
BRUCE BABBIT, Secretary of the)
Department of Interior;)

ADA DEER, Asst. Secretary of the)
Department of Interior for Indian)
Affairs; DENNIS SPRINGWATER,)

Acting Area Director of the Bureau)
of Indian Affairs for the Muskogee Area;)

GORDON JACKSON, Agency Superintendent,)
Osage Agency Bureau of Indian Affairs;)

MARK CHAMBERLAIN, Policeman,)
Osage Agency, Bureau of Indian Affairs;)

PAUL MAYS, JR. and JESSE DAVIS,)

Defendants.)

Case No. 95-C-1190-B ✓

ENTERED ON DOCKET

DATE SEP 9 1996 ✓

ORDER

On August 26, 1996, the Motion for Temporary Injunction Pursuant to Fed.R.Civ.P. 65 of the Defendants Paul Mays, Jr. ("Mays") and Jesse Davis ("Davis") came on for hearing. The Plaintiffs were present through their attorney, Chadwick Smith. The United States of America was present by their attorney, Phil Pinnell. Paul Mays, Jr. was present by his attorney, Kristy McLaughlin, and Jesse Davis was present by his attorney, M. Allen

5

Core. The parties announced ready to proceed with the hearing regarding Defendants Mays' and Davis' request for a preliminary injunction against the Plaintiff to refrain from enforcing its tobacco tax laws against said moving Defendants.

Following introduction of evidence, arguments of counsel and consideration of the pleadings and issues, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Osage Nation Tax Commission is a political subdivision of the Osage Nation, a federally recognized tribe.
2. The Osage Nation Tax Commission has regulatory and taxation authority over sales of tobacco products on Indian country within the Osage Nation which is reflected by the boundaries of Osage County, Oklahoma.
3. The Osage Tribal Council enacted a Tobacco Tax Code, effective August 21, 1991, which created a tax commission and the laws to assess and collect a tobacco tax.
4. On February 17, 1993, the Osage Nation entered into the Tribal/State Tobacco Tax Exempt Compact with the State of Oklahoma for the collection of cigarette taxes from sales on Indian country within the Osage Nation.
5. The Osage Nation enacted the Osage Nation General Revenue and Taxation Act of 1994, effective September 2, 1994, which provided supplementary tax laws.
6. Davis failed to pay the Osage Nation tobacco tax, with the exception of a few months, for all other periods that the tax has been administered beginning in August 1991

to present.

7. Mays has failed to pay most of the Osage Nation tobacco taxes due and has failed to pay according to the prescribed process by Osage law since July 1, 1995.

8. On August 31, 1995, Mays sued the Tax Commission and applied for an injunction regarding his Osage Nation tobacco license against the Osage Nation Tax Commission in Osage Nation District Court in Case No. C-95-007, Paul Mays vs. Osage Nation Tax Commission. On September 27, 1995, District Court Judge Stephen Gray held a hearing on Mays' request for injunctive relief. Judge Gray, after hearing, denied Mays' request for an injunction and Mays did not appeal the denial. This case was appealed by the Tax Commission on different grounds and it is pending before the Osage Nation Supreme Court.

9. On September 1, 1995, in Case No. ONTC 95-01 IN RE: Paul Mays, Jr. d/b/a Osage Trading Post before the Osage Nation Tax Commission, a hearing on the revocation of the license of Paul Mays and GEMS Wholesale was held. Mays did not appear but his attorney, Allen Core, appeared. The Osage Nation Tax Commission revoked the retail license of Paul Mays, Jr. for five (5) retail tobacco shops and the wholesale license of GEMS Wholesale of Wichita, also doing business as Wichita Tobacco and Candy.

10. Mays advised George Stevens, the principal of GEMS Wholesale, in June 1995 not to stamp his purchases of cigarettes with Osage Nation or Oklahoma Native American stamps. Stevens complied and had been shipping substantial quantities of cigarettes weekly since July 1, 1995 without the Osage Nation tax paid. Neither Mays nor GEMS Wholesale

appealed the decision to revoke their respective licenses.

11. The smoke shops involved in the license revocations of Davis and Mays are:

1. Strike Axe - Jesse Davis, Pawhuska
2. Osage Trading Post - Paul Mays, Jr., Hominy
3. Strike Axe - (closed) Jesse Davis, Skiatook
4. Strike Axe - Jesse Davis, Bartlesville
5. Strike Axe - Paul Mays, Jr., Sand Springs
6. Osage Trading Post - Paul Mays, Jr., Pawhuska
7. Osage Trading Post - Paul Mays, Jr., Ponca City
8. Osage Trading Post - Paul Mays, Jr., Skiatook

12. On September 15, 1995, in Case No. ONTC 95-02 IN RE: Jesse Davis d/b/a Strike Axe Trading Post before the Osage Nation Tax Commission, the tobacco license of Davis was revoked and he did not appeal. Davis did not appear but his attorney, Allen Core, did appear.

13. On September 21, 1995, the Osage Nation Tax Commission filed the following tax enforcement cases in the Osage Nation District Court and was granted an order to seize all contraband cigarettes from the subject smoke shops owned and operated by Defendants Mays and Davis:

Case No. 95-008

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF OSAGE TRADING POST SMOKE SHOP, Skiatook, Oklahoma PAUL MAYS, JR., Licensee. This case is pending.

Case No. 95-009

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF OSAGE TRADING POST SMOKE SHOP, Ponca City, Oklahoma, and PAUL MAYS, JR., Licensee. This case is pending.

Case No. 95-010

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF OSAGE TRADING POST SMOKE SHOP, Pawhuska, Oklahoma, and PAUL MAYS, JR., Licensee. This case is pending.

Case No. 95-011

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF OSAGE TRADING POST SMOKE SHOP, Pawhuska, Oklahoma and JESSE DAVIS, Licensee. This case is pending.

Case No. 95-012

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF OSAGE TRADING POST SMOKE SHOP, Hominy, Oklahoma, and PAUL MAYS, JR., Licensee. This case is pending.

Case No. 95-013

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF STRIKE AXE SMOKE SHOP, Bartlesville, Oklahoma, and JESSE DAVIS, Licensee. In this case, a seizure of contraband cigarettes was conducted and the cigarettes were forfeited. This case was not appealed.

Case No. 95-014

OSAGE NATION ex rel. OSAGE NATION TAX COMMISSION vs. ALL UNSTAMPED CIGARETTES AND TOBACCO LOCATED ON THE PREMISES OF STRIKE AXE SMOKE SHOP, Sand Springs, Oklahoma, and PAUL MAYS, Jr., Licensee. This case is pending.

14. On November 6, 1995, The Osage Nation Tax Administrator filed, according to the tax code, Section 21-2-14 of the Tobacco Tax Code, 1991, substitute monthly tax returns for Paul Mays, Jr. because Mays failed to file tax returns. Tobacco taxes were assessed and notice was given to Paul Mays, Jr. and his attorney, Allen Core. Paul Mays,

Jr. did not appeal the assessment to the Tax Commission according to the tax code. The total assessment was \$393,543. \$308,000 was assessed under the 1991 Code and \$85,543 was assessed under the 1994 code.

15. On May 16, 1996, in Case No. ONTC 96-01 IN RE: Paul Mays, Jr. d/b/a Osage Trading Post before the Osage Nation Tax Commission. Paul Mays, Jr.'s Application for License for a retail tobacco shop was denied. The Tax Commission denied a tobacco license for Paul Mays, Jr. based on past violations of the Osage Nation tax codes.

16. The collection of tobacco and cigarette excise taxes by the Osage Nation Tax Commission is governed by two tribal statutes, two tribal sets of rules and regulations and a Tribal/State Tobacco Tax Compact. The first statute is the Osage Nation Tobacco Tax Act of 1991, which was modeled after Oklahoma Statute Title 68 Section 401 et seq. In 1994, a General Taxation and Revenue Act was passed by the Osage Nation which included tobacco and cigarette excise tax, sales tax and an excise tax on automobiles. Section 4 of the 1994 General Revenue and Taxation Act provided for a continuum of law and process.

17. Under the 1991 Tobacco Tax Code, the Osage Nation Tax Commission had the authority to adopt rules and regulations. Those rules and regulations were approved by the Osage Tribal Council on September 8, 1992. Under the 1994 General Revenue and Taxation Act, Section 112 provided that rules and regulations promulgated by the Osage Nation Tax Commission were required to be submitted to the National Council and filed in the Court Clerk's office before being effective.

18. In February 1993, the Osage Nation entered into a Tribal/State Tobacco Tax

Compact to resolve conflicts between the State of Oklahoma and the various Oklahoma tribes. The Tribal/State Compact provided for tribal licensing of tobacco wholesalers and retailers doing business in Indian country and for sharing revenue from tobacco sales in Indian country. Tribes remained free to impose any tax rate they wanted and to require evidence of payment of the tribal tax by indicia or stamp under the Compact. The State of Oklahoma would receive 25% of the state tobacco tax rate as a payment in lieu of taxes for all cigarette sales on Indian country. Payment of the state payment in lieu of taxes was collected by state licensed tobacco wholesalers purchasing a "Native American" stamp or indicia.

19. Payment of the Osage Nation cigarette tax is collected by the tobacco wholesaler. The Osage Nation licensed tobacco wholesaler must pay for Osage Nation stamps or indicia from the Osage Nation Tax Commission and affix those stamps to cigarettes sold on Indian country within the Osage Nation.

20. The Osage Nation Tax Commission may not sell stamps to tobacco wholesalers not licensed with the Osage Nation Tax Commission. Licensed wholesalers may only sell to licensed retailers.

21. In the instant case, no wholesaler has paid for Osage Nation Tax Commission stamps or indicia for the benefit of Paul Mays, Jr. or Jesse Davis since July 1, 1995.

22. According to the records of the Osage Nation Tax Commission, Paul Mays, Jr. was assessed taxes in November, 1995 in the amount of \$393,000. As of August, 1996, the Osage Nation Tax Commission estimates he owes cigarette and tobacco taxes in the

approximate amount of \$600,000. (Assessment of \$393,000 plus approximately \$20,000 per month since November, 1995).

23. In the instant case, Defendants Mays and Davis voluntarily pursued a retail tobacco license from the Osage Nation, actively operated businesses on Indian country in the Osage Nation and actually sought relief from the Osage Nation District Courts and Tax Commission, which was denied.

CONCLUSIONS OF LAW

1. The Court has both venue and jurisdiction in this matter. 28 U.S.C. §1331.
2. The Osage Nation enjoys all the rights of tribal sovereignty as other federally recognized tribes in the United States including the right of taxation. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980)).
3. The taxation of retail tobacco sales in Indian country within the Osage Nation is an internal affair of the Osage Nation in which it has primary authority.
4. The General Revenue and Taxation Act of 1994 is cumulative to the Tobacco Tax Code of 1991, and the Tobacco Tax Code remains valid except where the General Revenue and Taxation law repeals, explicitly or by implication, the Tobacco Tax Code of 1991.
5. Due process for taxation of tobacco products on Indian country in the Osage Nation by the Osage Nation Tax Commission is determined by the Constitution and laws of

the Osage Nation. Talton v. Mayes, 163 U.S. 376 (1896).

6. The factors the court may consider in granting a preliminary injunction include: (1) the movant's likelihood of success on the merits, (2) irreparable injury to movant if the injunction is not granted, (3) the threatened injury to the movant is greater than the injury to the nonmoving party, and (4) the public interest. Defendants Mays and Davis fail to meet any of the foregoing criteria for a preliminary injunction.

7. The ability of a tribe to impose cigarette taxes has been recognized by the United States Supreme Court in Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976), and Washington v. Confederated Indian Reservation, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

8. There is no federal prohibition from the Osage Nation imposing excise taxes on sale of cigarettes occurring on Indian country within the Osage Nation. Kerr-McGee Corporation v. Navajo Tribe of Indians, 471 U.S. 195, 85 L.Ed. 200, 105 S.Ct. 1900 (1985).

9. Persons doing business on Indian country within the Osage Nation, without regard to tribal membership, including members of the Iowa Tribe of Kansas and Nebraska, are subject to the civil jurisdiction of the tribal court of the Osage Nation. Mackey v. Cox, 18 How. 100 (1855). Also see, Mehlin v. Ice, 56 F. 12 (8th Cir. 1893); Standley v. Roberts, 59 F. 836 (8th Cir. 1894); Cornells v. Shannon, 63 F. 305 (8th Cir. 1894); National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 85 L.Ed. 818, 105 S.Ct. 2447, and Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 94 L.Ed. 10, 107 S.Ct. 971 (1987).

10. It does not appear the Defendants Mays and/or Davis will likely prevail on the

merits. The threatened injury to Plaintiff is greater than that to the movants.

11. Sound public policy requires that the Osage Nation resolve in the first instance any conflicts regarding taxation of persons who have voluntarily associated themselves with the Osage Nation, and have profited from their association with the Osage Nation. Santa Clara Pueblo vs. Martinez, 436 U.S. 49, 56 L.Ed.2d 106, 98 S.Ct. 1670 (1978).

12. The issues brought by Defendants Mays and Davis regarding the application of the Osage Nation tax law to them has been decided by the Osage Nation District Court in C-95-007, and the decisions of that court is entitled to full faith and credit and serves as *res judicata*, collateral estoppel or issue preclusion. Marshall v. Amos, 442 F.2d 500, 504 (Okla. 1968); Kickapoo Tribe of Oklahoma v. Rader, 822 F.2d 1493, 1501 (10th Cir. 1897); and Sil-Flo, Inc. v. SFHC, 917 F.2d 1507 (10th Cir. 1990).

13. Issues raised by Defendants Mays and Davis regarding taxation of retail tobacco products on Indian country within the Osage Nation must be resolved in tribal forums and are precluded from seeking relief from the federal courts before they exhaust their tribal remedies. National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 85 L.Ed. 818, 105 S.Ct. 2447, and Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 94 L.Ed. 10, 107 S.Ct. 971 (1987).

14. The Motion for Preliminary Injunction pursuant to Fed.R.Civ.P. 65 by Defendants Mays and Davis is denied.

15. Plaintiff's Motion to Dismiss the Cross-Petition filed herein by Defendants Mays and Davis is sustained.

16. The Cross-Petition of Defendants Mays and Davis is hereby dismissed.

17. The parties are to follow the previous trial scheduling order which provides for a nonjury trial on October 21, 1996.

DATED this 4th day of September, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 9/9/96

UNITED STATES DISTRICT COURT FOR THE **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

SEP 6 1996 SA

LIBBIE GRIFFIN,)
(SSN: 442-38-0106))
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-1113-J ✓

ORDER^{1/}

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying Plaintiff Disability Insurance Benefits. The Administrative Law Judge ("ALJ"), Stephen C. Calvarese, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform a limited range of medium work, and (2) the Vocational Expert ("VE") identified significant jobs in the national economy which Plaintiff could still perform despite her limitations.

Plaintiff argues that (1) the ALJ erred by finding that Plaintiff's impairments did not meet or equal Listing 3.03, (2) The ALJ erred by finding that Plaintiff retained the RFC to perform medium work, and (3) the VE's testimony does not support the ALJ's conclusion that significant jobs are available in the national economy which Plaintiff can perform despite her limitations. The Court finds that the ALJ's determination that Plaintiff's limitations do not meet or equal Listing 3.03 is supported by substantial

^{1/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed November 30, 1995.

evidence. The ALJ's conclusions regarding Plaintiff's RFC are also supported by substantial evidence. The Court also finds that the VE's testimony supports the ALJ's decision. Consequently, the Commissioner's denial of benefits is **AFFIRMED**.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{2/}

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987); and *Williams v. Bowen*, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. MEDICAL EVIDENCE

At the time of the hearing below, Plaintiff was a 57 year old female with a 12th grade education. Plaintiff has received some vocational training as a nurse's aide. Plaintiff's past relevant work was that of a nurse's aide from 1964 to January 15, 1981. Plaintiff's past relevant work was in the "medium" exertional category. *R. at 65-66*. See 20 C.F.R. § 404.1567(c); Dictionary of Occupational Titles § 355.674-014 (4th ed. 1991). Plaintiff quit working as a nurse's aide due to breathing problems associated with asthma, which were aggravated by the smell of chemicals in the hospital where she worked. *R. at 66 & 123-30*.

A. Relevant Period August 13, 1983 to June 30, 1986

Plaintiff has filed a previous application for disability insurance benefits. This prior application was denied August 12, 1983, and Plaintiff did not appeal the denial. The August 12, 1983 decision is, therefore, a final determination that as of August 12, 1983 Plaintiff was not disabled. See 20 C.F.R. §§ 404.987 and 404.988.^{3/} Under Title II of the Social Security Act, Plaintiff's date of last insurance was June 30, 1986. In order to receive disability insurance benefits, Plaintiff must establish

^{3/} Section 404.987(a) states that a decision which is not appealed is a final decision. Section 404.988 defines the circumstances under which a final decision will be reopened. Section 404.988 defines two categories of conditions, each with a separate time limit -- 12 months and four years respectively. Plaintiff's current application was filed July 6, 1993 (i.e., almost 10 years after her first application was denied). *R. at 102-104*. Thus, Plaintiff cannot meet § 404.988's time limitations for reopening the Commissioner's prior determination. At the hearing, Plaintiff's counsel agreed that this was true. *R. at 64*.

that she was actually disabled prior to the expiration of her insured status. Potter v. HHS, 905 F.2d 1346, 1348-49 (10th Cir. 1990). Thus, the relevant period for disability determination purposes is August 13, 1983 to June 30, 1986. Plaintiff's counsel agreed with this on the record. *R. at 64.*

B. Medical Evidence Prior to the Relevant Period

Plaintiff has been diagnosed as having acute bronchial asthma. *R. at 239, 243, 260, 284 & 298.* On November 11, 1973, Plaintiff was hospitalized at Hillcrest Medical Center in Tulsa, Oklahoma ("Hillcrest") for five days due to her asthma. This was the first time Plaintiff had been hospitalized for her asthma. *R. at 224-239.* Plaintiff was hospitalized in March, May and July of 1974 -- twice for nine days and once for 11 days. *R. at 240-289.* Plaintiff was hospitalized once in May 1975 at Hillcrest for three days. *R. at 297-300.* Plaintiff was not hospitalized from May 1975 to March 1982, when she went to the emergency room, was treated and released. *R. at 499.*

Plaintiff also began seeing Manuel Brown, M.D., an allergist, for her breathing problems in 1974. *R. at 201-222.* Dr. Brown authored a report on June 13, 1983, which contained the following findings and history. Plaintiff reports that her asthma began in 1965 and her condition became gradually worse through 1974 when she began to see Dr. Brown. Dr. Brown states that "[o]n many occasions [Plaintiff's breathing] difficulty is precipitated by exposure to odors in her job at the hospital." *R. at 220.* Plaintiff reported to Dr. Brown that she had tried to return to work since

quitting in 1981, but that she could not because the odors in the hospital bring on asthma attacks that cannot be controlled with her normal medication. Id.

Dr. Brown reports that Plaintiff uses a bronchodilator by mouth and steroids by inhalation on a regular basis to control her asthma. Dr. Brown also notes that Plaintiff often requires steroid injections to control her asthma. *R. at 220.* For example, from July 1982 to July 1983, Plaintiff had six asthmatic episodes which required short bursts of steroid injections to control. *R. at 219.*

C. Medical Evidence During the Relevant Period

Plaintiff was not seen in the hospital during 1983. In 1984, Plaintiff went to the Emergency room in February. She was treated and released. She was not admitted to the hospital. *R. at 144-47, 321-27.* The record also indicates that the Tulsa Fire Department responded to an inhaler call at Plaintiff's residence on July 15, 1984. The Fire Department transported Plaintiff to the hospital, where she was hospitalized for approximately two days. *R. at 146-47, 321-27, 504.* In 1985, Plaintiff was hospitalized at Hillcrest for four days. *R. at 157-161.*

During most of the relevant period, Plaintiff did not see her treating allergist, Dr. Brown. *R. at 210, 218.* When Plaintiff saw Dr. Brown at the beginning and end of the relevant period, Dr. Brown noted only mild to moderate wheezing. *R. at 210-11.*

D. Medical Evidence After the Relevant Period

Plaintiff was not hospitalized in 1986 or 1987. Plaintiff did see Ned Harney, M.D., an internist in December 1987 at which time he noted that Plaintiff had a shortness of breath, congestion and an intractable cough. *R. at 195*. In 1988, Plaintiff was hospitalized in February for four days. *R. at 169-170*. In 1989, Plaintiff went the emergency room in July. She was treated and released. She was not admitted to the hospital. *R. at 431*. In March and May of 1991, Dr. Harney indicates that Plaintiff's lungs are relatively clear. *R. at 178 & 183*. Richard Doss, M.D., an internist, reported in April 1993 that with her normal medications, Plaintiff's asthma was stable and her lungs were clear except for some wheezing. *R. at 483 & 486*. In August of 1993, Dr. Brown drafted a letter containing the following findings and conclusions: (1) Plaintiff's ability to work depends at any given time on the degree of control over her asthma at that time; (2) Plaintiff's pulmonary function is significantly reduced and becomes further reduced when she is exposed to inhalant antigens that precipitate an asthma attack. *R. at 205*.

E. Hospitalizations

Each of the hospitalizations mentioned above followed a similar pattern. Plaintiff would begin having difficulty breathing, which she could not correct with her normal medications. Plaintiff would go to the emergency room ("ER") and the ER staff would observe that Plaintiff was in acute respiratory distress and was exerting great effort to breathe. The ER staff would treat Plaintiff with various drugs and admit her to the hospital for an average stay of five to six days. Plaintiff would respond well

to the treatment in the hospital and she would be released to continue her normal medication routine. Marked rales^{4/} were normally noted as well as bronchospasm, wheezing, congestion and coughing. *R. at 144-147, 157-170, 224-300, 321-327, 433-35 & 499-501.* When discharged, the final diagnosis was normally "acute bronchitis"^{5/} with acute/chronic bronchial asthma. *R. at 158, 239, 243, 260, 284 & 298.* The X-rays of Plaintiff's lungs often showed the following: (1) an over distention, consistent with asthma; (2) infiltrates, sometimes in the left and sometimes in the right lung; or (3) atelectasis.^{6/} *R. at 158, 169, 195, 231, 243 & 389.*

III. DISCUSSION

A. Listing 3.03

Plaintiff argues that the ALJ erred when he concluded that Plaintiff's asthma did not meet or equal the severity of Listing 3.03. Listing 3.03 provides as follows:

3.03 *Asthma.* With:

A. Chronic asthmatic bronchitis. Evaluate under the criteria for chronic obstructive pulmonary disease in 3.02A; or

^{4/} A "rale" is an "abnormal sound heard on auscultation of the chest, produced by passage of air through bronchi that contain secretion or exudate or that are constricted by spasm or a thickening of their walls." Taber's Cyclopedic Medical Dictionary 1669 (17th ed. 1993).

^{5/} "Bronchitis" is defined as an "[i]nflammation of mucous membrane in the bronchial tubes." "Acute bronchitis" is defined as "bronchitis with a short, severe course." Taber's Cyclopedic Medical dictionary 272 (17th ed. 1993).

^{6/} "Atelectasis" is the "collapsed or airless condition of the lung. May be caused by obstruction by foreign bodies, . . . mucous plugs or excessive secretions . . ." Taber's Cyclopedic Medical Dictionary 167 (17th ed. 1993).

- B. Attacks (as defined in 3.00C), in spite of prescribed treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year. Each in-patient hospitalization for longer than 24 hours for control of asthma counts as two attacks, and an evaluation period of at least 12 consecutive months must be used to determine the frequency of attacks.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.03.

1. Chronic Asthmatic Bronchitis -- 3.03(A)

Subpart A of Listing 3.03 directs the ALJ to evaluate whether a claimant has chronic asthmatic bronchitis by using the criteria set out in subpart A of Listing 3.02.

Listing 3.02(A) provides as follows:

3.02 *Chronic pulmonary insufficiency.*

- A. Chronic obstructive pulmonary disease, due to any cause, with the FEV₁ equal to or less than the values specified in table I corresponding to the person's height without shoes.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.02(A). Plaintiff is 66-67 inches tall.^{7/} Thus, the relevant FEV₁^{8/} value in Table I for Plaintiff is 1.35.

No spirometric tests were conducted during the relevant period. There is, therefore, no medical evidence establishing what Plaintiff's FEV₁ was during the relevant period. Instead, Plaintiff points to three spirometric tests, none of which occurred during the relevant period. The first was conducted prior to the relevant

^{7/} The record indicates that Plaintiff is 66.5 inches tall. *R. at 214 & 491*. The record does not indicate, however, whether this measurement was taken with or without shoes, as required by Listings 3.02(A) and 3.03(A). The Court will assume, as Plaintiff does in her brief, that Plaintiff falls within the 66-67 inch range of Table I.

^{8/} The "FEV₁" measurement represent the forced expiratory volume in one second. The Merck Manual, 608, Tbl. 30-1 (16th ed. 1992). This value is obtained during a spirometric test, which measures the air capacity of one's lungs. Taber's Cyclopedic Medical Dictionary 1849 (17th ed. 1993).

period. *R. at 219*. The second was conducted in May of 1988, two years after the relevant period. *R. at 214*. The third was conducted in April of 1993, seven years after the relevant period. *R. at 491-92*.

The results of the first (pre-relevant period) spirometric test are not in the record. In a July 5, 1983 report, Dr. Brown refers to the test and summarizes the test results. Dr. Brown's report does not, however, refer to the FEV₁ value measured during the test. Dr. Brown simply reports that the FEV₁ was 50% of the predicted value. The Court notes, however, that in the two other (post-relevant period) spirometric tests, the predicted FEV₁ value for Plaintiff was 2.75. *R. at 214 & 492*. Fifty percent of 2.75 is 1.38. This is above the 1.35 figure in Table I of Listing 3.02(A). It appears, therefore, that the first spirometric test would not support Plaintiff's argument that she met Listing 3.03(A).

The last spirometric test taken in 1993 also does not support Plaintiff's argument that she meets Listing 3.03(A). That test shows an FEV₁ of 1.7, which is significantly above the 1.35 value in Table I of Listing 3.02(A). The Court also notes that this FEV₁ value was taken prior to bronchodilation.

Bronchodilation is required when the pre-bronchodilation FEV₁ is less than 70% of the predicted value. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00(E). In the last spirometric test, Plaintiff's FEV₁ was 62% of the predicted value. *R. at 492*. Bronchodilation was, therefore, indicated. Post-bronchodilation measurements are usually higher than the pre-bronchodilation measurement. Thus, had the test been

administered correctly, the FEV₁ of 1.7 probably would have been higher. In any event, the regulations relating to pulmonary function testing state that

[p]ulmonary function studies performed to assess airflow obstruction without testing after bronchodilators [if indicated] cannot be used to assess levels of impairment in the range that prevents any gainful work activity, unless the use of bronchodilators is contraindicated.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00(E). There is no evidence in the record that bronchodilators were contraindicated at the time of the last test. Thus, the last test cannot be relied upon.^{9/}

The second spirometric test is the only test which could on its face support Plaintiff's argument that she meets Listing 3.03(A). That test shows an FEV₁ of .9, which is significantly lower than the 1.35 value in Table I of Listing 3.02(A). As with the last test, significant problems prevent the second test from being used. Each FEV₁ measurement, pre- and post-bronchodilation, should "represent the largest of at least three satisfactory forced expiratory maneuvers." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00(E). The second spirometric test contains the results of only two total "forced expiratory maneuvers." The test does not even indicate, whether these two maneuvers were pre- or post-bronchodilation. In any event, the FEV₁ reflected, whether pre- or post-bronchodilation, does not represent the best of three forced expiratory maneuvers. Thus, the second test cannot be used to support Plaintiff's

^{9/} The first spirometric test may also be inadequate for the same reason. The Court is, however, unable to evaluate the adequacy of that test because as mentioned earlier, the actual test results are not in the record.

claim that she meets a pulmonary function listing. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.00(E).

The second test was also conducted almost two years after the relevant period in this case. Plaintiff apparently wants the Court to extrapolate backwards from the second test and conclude that because Plaintiff had a FEV₁ of .9 two years after the relevant period, she must have had an FEV₁ during the relevant period which would have met Listing 3.03(A). The Court refuses to engage in such speculation. The Court also believes that such a conclusion, even if it were inclined to speculate, is not supported by the record. The record demonstrates the following: (1) Shortly prior to the relevant period, Plaintiff had an FEV₁ which was above listing level severity, *r. at 219*; and (2) During most of the relevant period, Plaintiff quit seeing the doctor who was treating her breathing problem, *r. at 210-11, 218*. Based on the record before it, the Court finds that Plaintiff has failed to meet her burden of establishing that the severity of her impairments equaled or met the severity required by Listing 3.03(A).

2. Asthma Attacks -- 3.03(B)

To meet the requirements of subpart B of Listing 3.03, Plaintiff must establish the following:

1. Asthma attacks which are defined as "prolonged symptomatic episodes lasting one or more days and requiring intensive treatment, such as intravenous bronchodilator or antibiotic administration or prolonged inhalational bronchodilator therapy in a hospital, emergency room or equivalent setting",^{10/}

^{10/} 20 C.F.R. Pt. 404, Subpt. P., App. 1, §§ 3.00(C).

2. The asthma attacks must occur in spite of prescribed treatment;
3. The asthma attacks must require physician intervention; and
4. The asthma attacks must occur at least once every two months or at least six times per year. (Each in-patient hospitalization for more than 24 hours counts as two asthma attacks.)

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 3.03(B).

During the relevant period, the medical record establishes that Plaintiff did experience asthma attacks which meet the first three requirements listed above. Plaintiff's attacks did not, however, meet the frequency requirement of paragraph four above. Plaintiff had no asthma attacks, as defined above, in 1983 or 1986. Based on her hospital records, Plaintiff had three "asthma attacks" in 1984 and two attacks in 1985.^{11/} The attacks Plaintiff did have occurred more than two months apart, and Plaintiff did not have six attacks per year as required by Listing 3.03(B).

Plaintiff argues in her brief that she was having asthma attacks, as defined by Listing 3.00(C), but she was going to see her treating physician instead of going to the hospital. Plaintiff argues that these treatments must also be taken into consideration under Listing 3.03(B). The Court agrees. However, the record demonstrates that Plaintiff quit seeing the doctor treating her breathing problems

^{11/} In 1984, Plaintiff went to the emergency room on February 12th. She was treated and released. *R. at 144.* This counts as one asthma attack. In July of 1984, Plaintiff called the fire department and was transported to the emergency room. Plaintiff was admitted to the emergency room at 10:33 p.m. on July 15, 1984 and was later admitted to the hospital at 1:20 p.m. on July 16, 1984. Plaintiff was discharged at noon on July 17, 1984. It appears, therefore, that Plaintiff was admitted to the hospital for more than 24 hours. The July attack would, therefore, count as two asthma attacks. *R. at 145, 149, 324, 326, 504.*

In 1985, Plaintiff was hospitalized for five to six days. *R. at 157-168, 333-369.* This counts as two asthma attacks.

during most of the relevant period. *R. at 210-11, 218.* When Plaintiff did see her treating physician during the relevant period, he noted only mild to moderate wheezing in Plaintiff's lungs. *R. at 210-11.* The records reflect that Plaintiff's visits to her treating physician during this time were routine checkups at which the physician was monitoring Plaintiff's allergies. *Id.* There is nothing in the record which indicates that Plaintiff had an "asthma attack" which is not reflected in the hospital records. Based on the record before it, the Court finds that Plaintiff has failed to meet her burden of establishing that the severity of her impairments equaled or met the severity required by Listing 3.03(B).

B. Plaintiff's RFC

1. Limitation on Plaintiff's Ability to Perform Full Range of Medium Work

With regard to the ALJ's determination of Plaintiff's RFC, Plaintiff argues that the ALJ erred on the face of his opinion. Plaintiff points out that in ¶ 4 of his opinion, the ALJ finds that Plaintiff can perform the full range of medium work. Plaintiff then points out that in ¶ 5 of his opinion, the ALJ limits Plaintiff's ability to perform the full range of medium work. Plaintiff argues that this is error because the ALJ must establish that Plaintiff can perform all of the exertional and non-exertional requirements of a particular level of work. Plaintiff's argument is, however, specious.

A claimant is not automatically disabled merely because she cannot perform the full range of work in a particular exertional category. When an ALJ determines that a claimant's impairments limit her ability to perform the full range of work in a particular exertional category, the ALJ will call a vocational expert. The ALJ presents

the claimant's impairments to the vocational expert and then asks the vocational expert to determine to what extent the claimant's impairments erode the occupational base for a particular exertional category. The vocational expert may be able to identify a significant number of jobs in the national economy, despite the claimant's impairments. Testimony from a vocational expert that significant jobs exist, despite the fact that claimant's impairments erode the occupational base to some degree, is sufficient to sustain the Commissioner's burden of proof at step five of the sequential evaluation process. See Kelley v. Chater, 62 F.3d 335 (10th Cir. 1995); and Channel v. Heckler, 747 F.2d 577, 583 (10th Cir. 1984).

2. The ALJ's Determination That Plaintiff Can Perform a Limited Range of Medium Work is Supported by Substantial Evidence.

The ALJ determined that Plaintiff had no exertional limitations which would reduce her ability to perform the full range of medium work.¹²⁾ This finding is supported by the record. All of the relevant medical evidence deals with Plaintiff's asthma and breathing problems, which are non-exertional impairments. 20 C.F.R. § 404.1569a. There is nothing in the record which indicates that Plaintiff has anything wrong with her upper or lower extremities or her back. Thus, Plaintiff's RFC is not limited by exertional factors. Plaintiff also admits that she had no mental impairments or pain-related impairments during the relevant period. *R. at 76-77 & 83.*

^{12/} Medium work required "lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work." 20 C.F.R. § 404.1567(c).

The record is clear, however, that Plaintiff's RFC is limited by non-exertional factors (i.e., shortness of breath and fatigue caused by asthma). The ALJ accounted for this limitation by finding that Plaintiff must work in a pollutant-free environment, and the ALJ presented such a limitation to the vocational expert.^{13/} The ALJ appears to conclude that during the relevant period Plaintiff's asthma was controlled by medication and only became severe (i.e., necessitating an emergency room visit) when Plaintiff was exposed to various airborne antigens. The ALJ concluded, therefore, that Plaintiff could work as long as she was in an environment that did not exacerbate her asthma and cause a severe attack. This conclusion is supported by the record.

The medical record indicates that during the relevant period Plaintiff took normal medications to control her asthma. During most of the relevant period, Plaintiff did not see her treating physician. This would indicate that Plaintiff was not having a severe problem during most of the relevant period. When Plaintiff did see her treating physician, he indicated that she had only mild to moderate wheezing in her lungs. Plaintiff went to the hospital three times during the relevant period. Each time she was successfully treated and released immediately or released after a short stay in the hospital. This is consistent with a finding that Plaintiff could control her asthma with medication most of the time, except when it flared up due to something

^{13/} The vocational expert's testimony will be discussed below.

in her environment.^{14/} Plaintiff also indicated that she quit her job as a nurses' aide at a hospital primarily because she was allergic to the smells and chemical odors at the hospital. *R. at 123-30.* A limitation which would remove Plaintiff from such a malodorous place as a hospital and place her in a pollutant-free environment would also seem to alleviate the primary cause of Plaintiff's inability to work.

Plaintiff testified that during the relevant period, she could dress and bathe herself, unless she was having an asthma attack.. *R. at 68.* Plaintiff also indicated that she would, on occasion, shop, cook, wash dishes, wash clothes, vacuum, mop and clean the house, with intermittent rest periods. Plaintiff stated, however, that her adult, live-in daughter did most of the housework. *R. at 68-71.* Plaintiff's daughter worked nights and Plaintiff took care of her young granddaughter some during the day. If Plaintiff had a problem with the granddaughter, she would call a girlfriend to come help. *R. at 79.* Plaintiff testified further that she drove occasionally and that she drove herself to church once a week, unless she was having an attack. *R. at 74-75.* Plaintiff also stated that she could sit without any limitations, except she needed to slope forward on occasion to help her breathing. *R. at 81.* These statements tend to support the ALJ's conclusion that Plaintiff could perform the demands of medium work as long as Plaintiff was able to work in a pollutant-free environment.

^{14/} When Plaintiff sought treatment at the hospital in 1985, she reported that she had been following her medication regimen, adding Prednisone occasionally when she felt symptomatic. Plaintiff also reported that her symptoms had become noticeable only 48 hours before she visited the hospital and then worsened to the point she felt she needed to go to the hospital. *R. at 160, 334.*

Plaintiff testified that at some point after she quit working, she could not even walk from one room in her house to another, without having to stop and catch her breath for about an hour. *R. at 73-74.* Plaintiff also stated that the congestion in her chest prevented her from sleeping and this made her fatigued. *R. at 76-77 & 85.* Plaintiff also stated that some of her medication made her shake on occasion. *R. at 77.* These subjective complaints are inconsistent with the ALJ's conclusion that Plaintiff could perform medium work. The ALJ concluded, however, that Plaintiff's subjective complaints were not as severe as she stated, at least during the relevant period. The Court finds that this conclusion is properly supported by the record. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992) (an ALJ's credibility determinations are given great deference).

During most of the relevant period, Plaintiff stopped seeing the doctor who was primarily treating Plaintiff's breathing problems. The hospital records also indicate that Plaintiff's was following her normal medication regimen, which appeared to be working, except for those three occasions when Plaintiff had to go to the emergency room. Even when she was hospitalized, Plaintiff recovered rapidly and was released to continue her normal regimen. It is doubtful that Plaintiff would have been released each time to continue her normal medication regimen if, taking her normal medication, Plaintiff could not walk from one room to another. There is also no indication during the relevant period that Plaintiff reported her fatigue or tremors.^{15/}

^{15/} Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) requires the ALJ to consider the levels of
(continued...)

C. Vocational Expert's Testimony

The ALJ gave a hypothetical to the VE. In response to the ALJ's hypothetical, the VE identified a substantial number of jobs in the national economy, which the hypothetical person could perform. Plaintiff's lawyer modified the ALJ's hypothetical, and in response to this modification the VE stated that there were no jobs which the hypothetical person could perform. *R. at 92-97*. The ALJ relied on the VE's response to his hypothetical and not the response to Plaintiff's modified hypothetical. Plaintiff argues that this was error.

The hypothetical person presented by the ALJ had the following relevant limitations: (1) the person has two severe asthma attacks per year, which respond to treatment and clear up fast; (2) the person is moderately to severely allergic to chemicals, dust, fumes, smoke, perfume and anything outside and these allergies require the person to work in an air conditioned, pollutant-free environment. With these limitations, the VE identified several jobs in the national economy. *R. at 93-94*.

Plaintiff's lawyer asked the VE to assume that the hypothetical person had a limitation which completely precluded that person from working in an environment where perfume might be present. *R. at 96*. With this hypothetical limitation in place, the VE testified that there would be no jobs available because all jobs would involve possible exposure to perfume. *Id.* Plaintiff argues that the ALJ was required to

^{15/} (...continued)

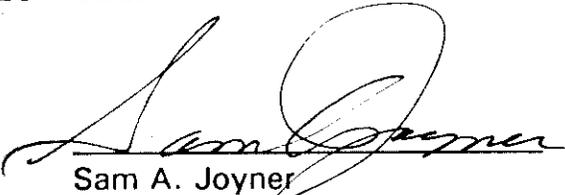
medication and their effectiveness, the extensiveness of the attempts to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, and the consistency or compatibility of nonmedical testimony with objective medical evidence. The ALJ did so in this case.

accept this conclusion from the VE. An ALJ is, however, only required to pose to the VE those restrictions which are supported by the record. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). The record in this case does not support a limitation which would require Plaintiff to be completely restricted from exposure to perfume. Other than Plaintiff's subjective complaints about perfume, there is no medical evidence to support such a restriction. The ALJ was justified in relying on the VE's response to the ALJ's original hypothetical.

The Commissioner's disability determination is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

Dated this 6 day of September 1996.


Sam A. Joyner
United States Magistrate Judge

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

F I L E D

SEP 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WRIGHT TREE SERVICE, INC., as the
Plan Administrator for the
Wright Service Corp. 401 (k)
Profit Sharing Plan and Trust,

Plaintiff,

vs.

JOHN GORRELL, DEANNE STEINMETZ,
and BRENDA LEE GORRELL,

Defendants.

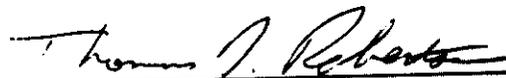
Case No. 96-C-330-H

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties to this proceeding, through their attorneys of record, hereby stipulate that pursuant to the terms of Federal Rule of Civil Procedure 41(a)(1)(ii) this case should be, and hereby is, dismissed with prejudice. Each party is to bear his or its own attorneys fees and costs.

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

MAHAFFEY & GORE, P.C.



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ATTORNEYS FOR DEFENDANT
BRENDA LEE GORRELL

IN THE UNITED STATES DISTRICT COURT **F I L E D**
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SEP 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DONALD L. SMIDDY,

Plaintiff,

vs.

PRYOR FOUNDRY, INC.,

Defendant.

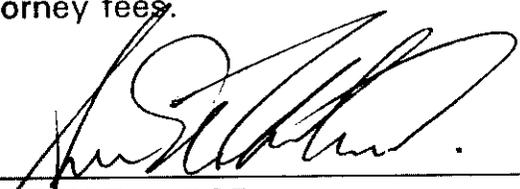
Case No. 94-C-306-K ✓

ENTERED ON DOCKET
--- 9-6-96

ORDER OF DISMISSAL WITH PREJUDICE

THIS matter came on before the Court this 5TH day of ~~May~~ ^{SEPTEMBER}, 1996, upon the parties' Joint Stipulation of **Dismissal** with Prejudice, and for good cause shown, it is therefore,

ORDERED, ADJUDGED AND DECREED, that Plaintiff's cause of action against Defendant, Pryor Foundry, Inc., is hereby dismissed with prejudice with each party to bear its own costs and attorney fees.



DISTRICT JUDGE

92

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 4 1996



Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRIS COWAN

Plaintiff

vs

No.96-C-291-E

DARLENE CRUTCHFIELD

Defendants

ENTERED ON DOCKET

DATE SEP 05 1996

ORDER OF DISMISSAL

It having been shown to the court the parties have compromised and settled this action, the court finds this matter should be and the same dismissed with prejudice.

Date: Sept. 3, 1996

IT IS SO ORDERED.

James D. Allen
Judge, United States District Court
for the Northern District of Oklahoma

(11)

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

F I L E D

KERRY K. ICE, a minor by and through)
her next friend, JERRY ICE,)
)
Plaintiff,)

SEP 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 95-C-812E

HYUNDAI CORPORATION, an alien)
corporation, HYUNDAI MOTOR)
CORPORATION, an alien corporation,)
and HYUNDAI MOTOR AMERICA, a)
California corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE SEP 05 1996

JUDGMENT ON VERDICT

On the 29th day of July, 1996, **this case** came on for jury trial pursuant to the regular jury docket setting. The plaintiff, Kerry K. Ice by and through her next friend, Jerry Ice, appeared in person and by her attorneys Anthony Laizure and John Thetford. The defendants, Hyundai Corporation, Hyundai Motor Company, and Hyundai Motor America, (collectively "Hyundai") appeared by and through their attorneys James A. Jennings, III, Thomas N. Vanderford and Carrie Palmer Hoisington. All parties announced **they** were ready to proceed with trial. A jury of seven men and women were selected and sworn to **try** the case. Evidence was presented to the jury. At the conclusion of plaintiff's evidence, **Hyundai** interposed a motion for directed verdict, which was denied and exceptions allowed.

Thereafter, the jury trial upon **the merits** continued, with the defendants presenting their evidence. After all parties had rested, **defendants** renewed their motion for directed verdict on all issues presented to the Court and jury. **The** motions were again denied and exceptions allowed. Following closing arguments by both **parties**, **the** Court instructed the jury and all parties were given

an opportunity, and did in fact, make a record on the instructions presented to the jury.

Following its deliberations, the jury returned with the following verdict:

Do you find that the roof of the 1991 Hyundai Scoupe was defectively designed?

Answer: Yes or No (Circle only one)

8-7-96 /s/ Benjamin S. Bankston
Date Jury Foreperson

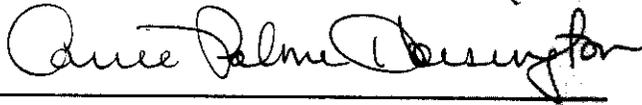
Plaintiff declined to individually poll the jury upon its reading of the verdict. The Court reviewed the verdict and after concluding that it was in proper form, directed that it be filed of record in the case.

Based upon the aforesaid verdict, it is ORDERED, ADJUDGED and DECREED that the defendants Hyundai Corporation, Hyundai Motor Company, and Hyundai Motor America, are granted judgment against the plaintiff, Kerry K. Ice, by and through her next friend, Jerry Ice. It is further ORDERED that the defendants Hyundai Corporation, Hyundai Motor Company, and Hyundai Motor America, upon proper presentation, have and recover appropriate costs expended in this action from the plaintiff.

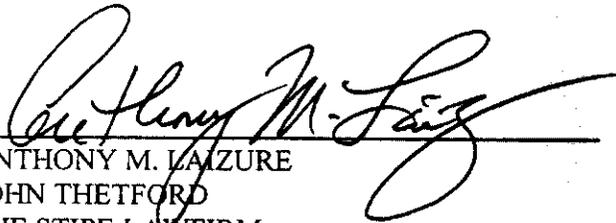
S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:



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Tulsa, Oklahoma 74170-1110
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RONALD DUWAYNE MARTIN; LINDA)
MARIE MARTIN; HENRY JAMES)
WILLIAMS, JR.; aka HENRY J.)
WILLIAMS; LINDA M. WILLIAMS aka)
LINDA MARIE WILLIAMS;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

F I L E D

SEP 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 05 1996

Civil Case No. 96CV 147E

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day of Sept,

1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board Of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Ronald Duwayne Martin, Linda Marie Martin aka Linda M. Williams aka Linda Marie Williams and Henry James Williams, Jr. aka Henry J. Williams, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Ronald Duwayne Martin, signed a Waiver of Summons on March 28, 1996; that the Defendant, Linda Marie Martin aka Linda M. Williams aka Linda Marie Williams,

signed a Waiver of Summons on March 28, 1996; that the Defendant, **Henry James Williams, Jr. aka Henry J. Williams**, was served a copy of Summons and Complaint on May 10, 1996, by Certified Mail.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, filed their Answer on March 18, 1996; and that the Defendants, **Ronald Duwayne Martin, Linda Marie Martin aka Linda M. Williams aka Linda Marie Williams and Henry James Williams, Jr. aka Henry J. Williams**, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, **Linda Marie Martin**, is one and the same person as **Linda M. Williams and Linda Marie Williams**. The Defendants, **Ronald Duwayne Martin and Linda Marie Martin**, are husband and wife.

The Court further finds that on June 6, 1980, **Henry J. Williams and Linda M. Williams**, executed and delivered to **FIRST CONTINENTAL MORTGAGE CO.**, their mortgage note in the amount of \$23,550.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum. A copy of this note is attached as Exhibit "A" and incorporated.

The Court further finds that as security for the payment of the above-described note, **Henry J. Williams and Linda M. Williams**, husband and wife, executed and delivered to **FIRST CONTINENTAL MORTGAGE CO.**, a real estate mortgage dated June 6, 1980, covering the following described property, situated in the State of Oklahoma, Tulsa County:

**LOT ONE (1), BLOCK TEN (10), SUBURBAN ACRES
THIRD ADDITION TO THE CITY OF TULSA, TULSA
COUNTY, STATE OF OKLAHOMA, ACCORDING
TO THE RECORDED PLAT THEREOF.**

This mortgage was recorded on June 11, 1980, in Book 4479, Page 646, in the records of Tulsa County, Oklahoma. A copy is attached as Exhibit "B" and incorporated.

The Court further finds that on February 10, 1987, COMMONWEALTH SAVINGS ASSOCIATION successor by merger to FIRST CONTINENTAL MORTGAGE CO. assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA. This Assignment of Mortgage was recorded on June 22, 1987, in Book 5033, Page 290, in the records of Tulsa County, Oklahoma.

The Court further finds on June 18, 1991, COMMONWEALTH MORTGAGE COMPANY OF AMERICA assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on July 8, 1991, in Book 5333, Page 1588, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, **Ronald Duwayne Martin and Linda Marie Martin**, are the current title owners of the property by virtue of a General Warranty Deed dated June 10, 1988, and recorded on June 14, 1988 in Book 5107, Page 483, in the records of Tulsa County, Oklahoma. The Defendants, **Ronald Duwayne Martin and Linda Marie Martin**, are the current assumptors of the subject indebtedness.

The Court further finds that on June 13, 1991, the Defendant, **Ronald Duwayne Martin**, 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.

The Court further finds that the Defendant, **Ronald Duwayne Martin**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, **Ronald Duwayne Martin**, is indebted to the Plaintiff in the principal sum of \$34,191.64, plus interest at the rate of 11.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

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 \$4.00 which became a lien on the property as of July 5, 1989, a lien in the amount of \$19.00 which became a lien on the property as of June 26, 1992 a lien in the amount of \$9.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, **Ronald Duwayne Martin, Linda Marie Martin and Henry James Williams, Jr.**, are in default, and have no right, title or interest in the subject real property.

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 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, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, **Ronald Duwayne Martin**, in the principal sum of \$34,191.64, plus interest at the rate of 11.5 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, 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 \$32.00, plus costs and interest, for personal property taxes for the years 1988, 1991, 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, **Ronald Duwayne Martin, Linda Marie Martin, Henry James Williams, Jr. 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 Defendant, **Ronald Duwayne Martin**, to satisfy the 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, Tulsa County, Oklahoma, in the amount of \$32.00, 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 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.

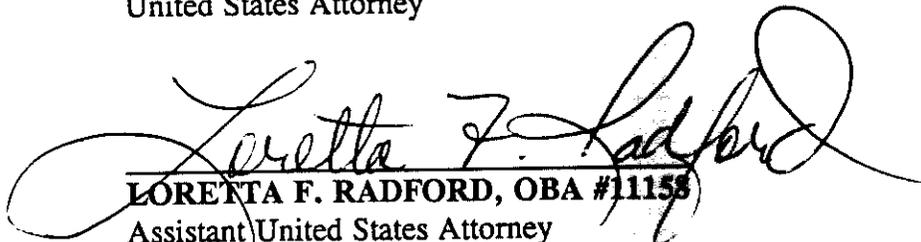
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of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

S/ JAMES O. ELISON

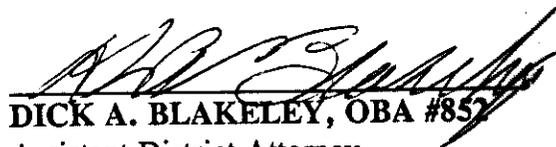
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 96CV 147E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OKLAHOMA

FILED ON DOCKET
DATE SEP 05 1996

IT-TULSA HOLDINGS, INC.,
Plaintiff,
v.
BIG FOUR FOUNDRIES CORP.,
an Oklahoma corporation,
and TULSA-SAPULPA UNION
RAILWAY CO., an Oklahoma
corporation,
Defendants.

Case No. 94-CV-498-K ✓

FILED

SEP 04 1996

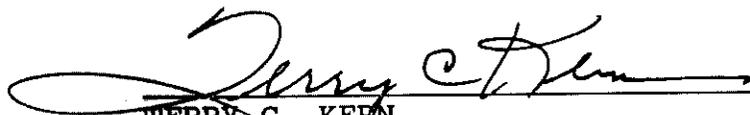
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

Upon the JOINT STIPULATION OF DISMISSAL WITH PREJUDICE filed herein by the Plaintiff IT-Tulsa Holdings, Inc. ("IT-Tulsa"), and Defendant Big Four Foundries Corp. ("Big Four"), the Court hereby orders the above action be and is hereby DISMISSED.

This dismissal is with prejudice, except to not preclude the Parties from subsequently asserting claims, demands, rights, causes of action, or any defenses thereto (1) relating to liabilities created by subsequent changes in laws or regulations applicable to such contamination, or (2) relating to subsequently discovered contamination on Plaintiff's property (located within the southwest quarter of Section 5, Township 18 North, Range 12 East, Creek County, Oklahoma, otherwise described as 5800 West 68th Street, Tulsa, Oklahoma).

ORDERED this 3 day of September, 1996.


TERRY C. KEEN
UNITED STATES DISTRICT JUDGE

43

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH G. HANES; VERA JO HANES;
SERVICE COLLECTION
ASSOCIATION, INC; CITY OF
BROKEN ARROW, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Tulsa County,
Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE SEP 0 5 1996

F I L E D

SEP 0 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96CV 589K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 4 day of September, 1996.

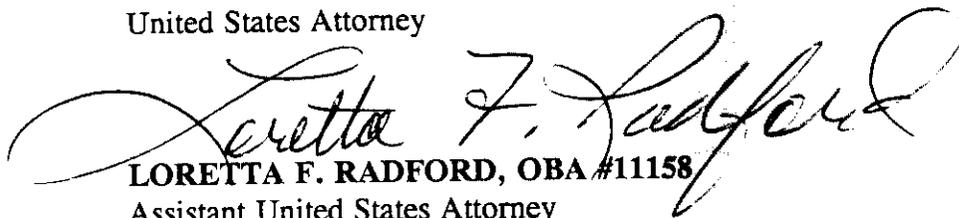
TERRY C. KERN

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE FILED
BY THE CLERK OF COURT AND
PROSE CUTLIFTS IMMEDIATELY
UPON RECEIPT.

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with long, sweeping lines.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

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

ENTERED ON DOCKET
DATE SEP 05 1996

CAROLE LEGGETT,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant.

No. 93-C-704-K

FILED
SEP 04 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

HAVING concluded that the ALJ's determination at step four was not supported by substantial evidence, the United States Court of Appeals for the Tenth Circuit reversed and remanded as to that issue,

ACCORDINGLY, IT IS HEREBY ORDERED this case, No. 93C-704-K, is remanded to the Commissioner for a determination as to Ms. Leggett's ability to perform her past relevant work, which includes both medium and sedentary responsibilities, as well as a step five determination consistent with the Order and Judgment entered herein on April 19, 1996.

SO ORDERED THIS 3 DAY OF September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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572

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

FILED

SEP 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNIE JAMES,

Plaintiff,

vs.

GRAND LAKE MENTAL HEALTH CENTER
INC., et al.,

Defendants.

Case No. 96CV-631C

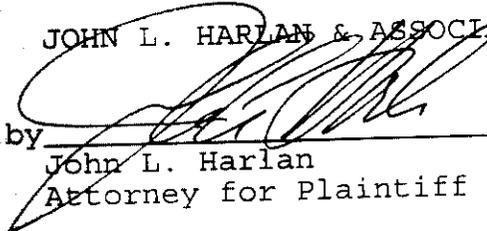
ENTERED ON DOCKET
SEP 04 1996
DATE _____

NOTICE OF DISMISSAL WITHOUT PREJUDICE
AS TO DEFENDANTS EASTERN STATE HOSPITAL
AND STATE OF OKLAHOMA, ONLY

NOTICE is hereby given that Jeannie James, the above-named plaintiff, hereby dismisses her claims against defendants Eastern State Hospital, Vinita, Oklahoma, and against defendant the State of Oklahoma, in the above-entitled action without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, and hereby files this notice of dismissal with the Clerk of the Court before service by either of said defendants of either an answer or a motion for summary judgment. Plaintiff reserves all other causes of action against all other defendants.

JOHN L. HARLAN & ASSOCIATES, P.C.

by


John L. Harlan
Attorney for Plaintiff

16 North Rowe
P. O. Box 1042

19

Pryor, OK 74362
(918) 825-1790
OBA No. 3861

CERTIFICATE OF MAILING

I, JOHN L. HARLAN, do hereby certify that on the 30 day of August 1996, I mailed a true and correct copy of the above and foregoing instrument by regular mail, with proper postage thereon fully prepaid, to the following: BEST, SHARP, HOLDEN, SHERIDAN, BEST & SULLIVAN, Attorneys at Law, 808 Oneok Plaza, 100 West Fifth Street, Tulsa, OK 74103-4225, Jake Jones, 100 North Broadway Ave, Oklahoma City, OK 73102, J. Douglas Mann, 525 S. Main, Tulsa, OK 74103, Fred Sordahl, P.O. Box 870, Pryor, OK 74362, John R. Paul/Leah R. McCaslin, 9 E. 4th, Ste 400, Tulsa, OK 74101, Richard D. Wagner/I. Michele Drummond, Wagner, Stuart & Cannon, 902 S. Boulder, Tulsa, OK 74119-2034, Tim Best/Douglas Stall, 100 W. Fifth Street, Tulsa, OK 74103-4225, Craig Sutter, Deputy General Counsel, Dept. of Mental Health & Substance Abuse Services, P.O. Box 53277, OKC, OK 73152.



John L. Harlan

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

ENTERED ON DOCKET

DATE SEP 04 1996

CLARENCE T. THOMPSON and
ANNA R. THOMPSON,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 95-C-1112-K

FILED

SEP 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendant to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) F.R.Cv.P. Plaintiffs bring this action seeking a refund of federal income taxes, penalties and interest paid for the tax years 1982, 1984 and 1985 in a total amount over \$500,000.00. Plaintiffs participated in a partnership called Davenport Recycling Associates ("Davenport"). Samuel Winer ("Winer") was the promoter of Davenport. The Internal Revenue Service ("IRS") determined Davenport to be an abusive tax shelter.

The complaint contains the following allegations. On August 17, 1984, the United States filed a complaint against Winer in the United States District Court for the Middle District of Florida, seeking his removal as "tax matters partner"¹ for Davenport and eleven other limited partnerships. On January 27, 1986, that court issued an order directing Winer to resign as tax matters partner. The parties dispute whether Winer complied with the order. A permanent injunction of some type was entered against Winer on

¹See 26 U.S.C. §6231(a)(7).

February 18, 1986. The same court entered an order on September 16, 1986, which purported to reinstate Winer as tax matters partner. No copies of these documents have been provided to this Court.

Pursuant to 26 U.S.C. §6229(b)(1)(B), the limitation period for the assessment of taxes attributable to a partnership item may be extended by an agreement between the Secretary and the tax matters partner. The Complaint alleges that on October 8, 1985 and on April 29, 1987, Winer purported to enter such agreements, extending the limitation period as to Davenport, with no notice given to Davenport investors. Plaintiffs also allege that, in 1989, Winer appeared in the United States Tax Court on behalf of the partnerships from which he had been forced to resign as tax matters partner and from which he had been enjoined from serving as tax matters partner. This appearance, plaintiffs allege, was without notice to any of the limited partners, and consisted of Winer consenting to the entry of a \$19,000,000 judgment in favor of the IRS. Plaintiffs contend Winer's "post-resignation" actions were invalid.

In summary, plaintiffs allege the statute of limitation on assessment of tax, penalty and interest had expired prior to the assessment of the same by the IRS, thereby rendering the assessments invalid. Further, specific penalties for negligence (26 U.S.C. §6653) and for valuation overstatement of assets (26 U.S.C. §6659) were improperly assessed and inequitably "stacked" against plaintiffs. In addition, the Complaint asserts the IRS

erroneously assessed additional interest under then-applicable 26 U.S.C. §6621(c), the plaintiffs are entitled to an abatement of interest caused by the unreasonable delay of the IRS in making the assessment (citing 26 U.S.C. §6404(e)), and the plaintiffs are entitled to the same settlement terms which have offered to any other partner in Davenport, citing 26 U.S.C. §6224. Finally, plaintiffs allege (1) violation of their due process rights because they received no notice of the proceedings between the IRS and Winer, and (2) violation of their equal protection rights because the Internal Revenue Code provides disparate treatment regarding notice requirements for corporate Subchapter S shareholders versus partners of partnerships.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A reviewing court presumes all plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir.1991). When reviewing a facial attack on a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), again the district court must accept the allegations in the complaint as true. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir.1995).

Plaintiff concedes defendant's argument that §6404(e) commits the abatement of interest to the Secretary's discretion and is not subject to judicial review. See Selman v. United States, 941 F.2d 1060 (10th Cir.1991). This aspect of the complaint is dismissed.

Defendants concede that plaintiffs' attack upon the merits of individual penalties is not subject to a motion to dismiss. This is the extent of the parties' agreement.

Plaintiffs contend the purported extension executed by Winer on April 29, 1987 was invalid because Winer had resigned pursuant to court order. Plaintiffs argue the "reinstatement" order of September 16, 1986, by the Florida court was obtained as the result of an "illegal" and "bad faith" request by the IRS and does not represent a selection by the Secretary, which, plaintiffs argue, is the only way a TMP can be validly appointed under the circumstances. Defendant responds that Winer did not in fact resign, in spite of the court order; defendant also expresses offense at plaintiff's allegations of bad faith on the part of the IRS in apparently obtaining Winer's reinstatement.

As stated earlier, none of the documents discussed by the parties have been provided to the Court. Indeed, it is inappropriate for a court to consider materials outside the pleadings in resolving a Rule 12(b)(6) motion. The taking of Winer's deposition would seem a reliable method of resolving the factual dispute over his resignation. Plaintiffs have cited no authority for the proposition that a reinstatement of a TMP obtained in bad faith nullifies the reinstatement, but the position is not facially meritless. The Court cannot conclude it is "beyond doubt" plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The motion to dismiss is denied as to

TMP issues.

Similarly, the Court denies the motion as to alleged "stacking" of penalties. While Caulfield v. C.I.R., 33 F.3d 991, 994-95 (8th Cir.1994), acknowledges IRS power to impose penalties for both negligence and substantial understatement additions, the opinion appears to recognize the possibility of judicial review finding abuse of discretion in that imposition. The Court will revisit the issue after full development of the record.

Assertions of violation of due process and equal protection are necessarily fact-intensive. The plaintiffs' allegations, accepted as true, combined with the broad language of 28 U.S.C. §1346(a)(1), state claims which survive a motion to dismiss. Finally, the claims alleging excessive interest and failure to be presented settlement offers appear quite marginal. After careful consideration, bearing in mind the applicable standard, the Court concludes these also survive defendant's motion, and discovery may proceed.

It is the Order of the Court that the motion of the defendant to dismiss (#3) is hereby GRANTED solely as to plaintiffs' claim for abatement of interest. In all other respects, the motion is DENIED.

ORDERED this 3 day of September, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

SAC

ENTERED ON DOCKET
DATE 9-4-96

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

GARY McCLAIN,)
)
 Plaintiff,)
)
 vs.)
)
 SOUTHWEST STEEL COMPANY, INC.)
 a corporation,)
)
 Defendants.)

NO. 95-C 751H

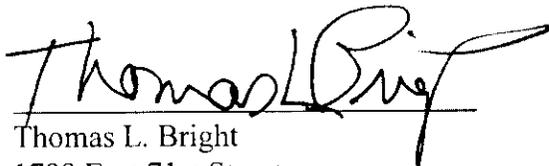
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SEP 3 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

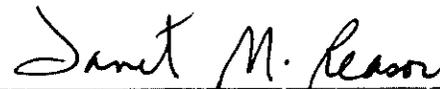
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, GARY McCLAIN and Defendant, SOUTHWEST STEEL COMPANY, INC., pursuant to Rule 41 of the Federal Rules of Civil Procedure, hereby stipulate and agree to the dismissal with prejudice of the above- styled action, all issues therein presented having now been compromised, settled, satisfied, and released between the parties. Each party shall bear its own costs, expenses, and attorney fees.



Thomas L. Bright
1799 East 71st Street
Tulsa, Oklahoma 74136
(918) 492-0008

Attorney for Plaintiff



Janet M. Reasor
Zieren & Reasor
321 South Boston, Suite 900
Tulsa, Oklahoma 74103
(918) 587-8644

Attorney for Defendant

C/MES-PAM

-ENTERED ON DOCKET
DATE 9/4/96

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**
NORTHERN DISTRICT OF OKLAHOMA

AUG 30 1996 *SAC*

TEDDY J. INMAN,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 SHIRLEY S. CHATER,)
)
)
 COMMISSIONER OF THE SOCIAL)
)
)
 SECURITY ADMINISTRATION,)
)
)
 Defendant.)

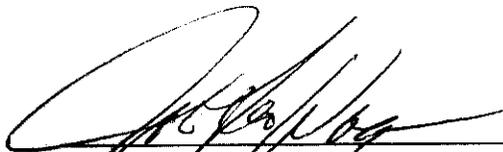
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-445-W ✓

JUDGMENT

Judgment is entered in favor of Teddy J. Inman pursuant to this court's Order filed August 29, 1996 remanding case to the Defendant for further testimony by a vocational expert concerning claimant's residual functional capacity and whether jobs exist in the national economy which he can perform.

Dated this 30th day of August, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:jud.sent4

ENTERED ON DOCKET

DATE 9/4/96

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

TEDDY J. INMAN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

F I L E D

AUG 29 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-445-W ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge John M. Slater (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

8

in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant was severely impaired as the result of postoperative status, pituitary adenoma, degenerative disk disease of the lumbar spine, status post dislocation of the right shoulder, and degenerative joint disease of the ankle. He concluded that the claimant did not experience pain of such intensity and severity as to prevent him from engaging in all substantial gainful activity, but he

² Judicial review of the Secretary's determination 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 decisions. 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) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

was unable to return to his past relevant work. The ALJ found that claimant retained the residual functional capacity to perform work of a sedentary nature and was a younger individual with a high school education. Having determined that claimant could do sedentary work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ ignored the opinions of claimant's treating doctors.
- (2) The ALJ ignored claimant's exertional and nonexertional impairments, including nausea, weakness, dizziness, lack of a sense of taste, smell, and thirst, ankle, back, and shoulder pain, and poor memory.
- (3) The ALJ placed incorrect weight on a VA disability rating.
- (4) The ALJ improperly relied on the social security grids.
- (5) The ALJ did not properly question the vocational expert.
- (6) The decision of the ALJ that claimant can do sedentary work is not supported by substantial evidence.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant alleges that he has been unable to work since January 1, 1991 (TR 118, 333), but in his vocational report he stated he worked as a pipe fitter until February 12, 1992 (TR 134) and his doctor reported he had been working on February 18, 1992 (TR 208). In 1974, he underwent surgery to remove his pituitary gland, which resulted in panhypopituitarism, diabetes insipidus, and the lack of a

thirst mechanism (TR 189-196). He was placed on replacement medications and continued to work until 1992 (TR 216).

Claimant first complained to his doctor, Dr. David Caughell, of back pain on October 22, 1990, and x-rays of his lumbar spine showed a "slight left scoliosis of the lower dorsal and upper lumbar spine accompanied by flattening of the lordotic curve and the changes may reflect muscle spasm [and] [m]ild narrowing of the 3rd and 5th lumbar interspaces with early arthritic changes associated with a narrowed 3rd lumbar interspace." (TR 199-200).

On February 9, 1992, he went to the emergency room after "passing out" for 2-3 minutes and was diagnosed as having hypopituitarism and given medication (TR 203-207). On February 18, 1992, Dr. Jerry Patton examined him for complaints of dizziness, weakness, and confusion at work (TR 208-210). Dr. Patton reported that he was able to walk normally without weakness, had no trouble getting off and on the examination table, and could do normal range of motion exercises (TR 209-212). He had no joint deformity, redness, swelling, or heat (TR 210). The doctor concluded: "It is my opinion that the patient on this physical examination is what appears to be in excellent health with slight obesity. There are no signs or symptoms of any loss of balance, vertigo, or weakness during this examination." (TR 210).

Claimant was seen by Dr. Donald Inbody for a psychiatric examination on March 5, 1992 (TR 216-218). The doctor concluded:

His speech was logical, coherent and sequential with no affective disturbances or associational defects in the thinking. No psychotic symptomatology was noted. He tended to be somewhat of a poor

historian in terms of dates but basically with structure could provide the information I needed. He did not appear to be particularly anxious nor did he show any signs of clinical depression. Sleep pattern and appetite are normal. In terms of memory, his remote memory is excellent and in terms of recent memory he was able to repeat five digits forward and five digits backwards. He was able to recall four items in my office at five and ten minute intervals. He had no difficulty with memory test at this point but states that the memory loss seems to be more over a longer period of time, such as a half day. His fund of general information was excellent and appropriate to his level of formal education, as were mathematical computations, similarities and proverbs. There were no disturbances in attention and concentration, and judgement is felt to be intact.

Dr. Inbody found that claimant had "[p]ossible organic brain syndrome secondary to Axis III diagnosis and characterized by recent memory loss. I saw no noticeable evidence of this today but possibly with his history of his of a pituitary gland tumor, neuropsychological testing might be in order" (TR 217) and a "[c]urrent global assessment of functioning is 45. Highest GAF in the past year is 55. In my opinion, he is able to handle his own money." (TR 218).

On June 26, 1992, claimant's left ankle was x-rayed and there was a "bony irregularity identified at multiple sites of the ankle . . . findings would be most consistent with old post traumatic changes . . . cannot rule out loose bodies within the joint space of the ankle" (TR 240). The report found that the soft tissues were unremarkable and joint mineralization was within normal limits (TR 240).

On July 17, 1992, claimant once again complained of back pain, but x-rays showed: "[t]he vertebral body heights and intervertebral disc spaces are relatively well maintained. No spondylolisthesis or spondylolysis is seen. There is some mild degenerative change in the posterior elements . . . [t]here is very mild degenerative

change and there is some mild scoliosis. No acute abnormality is identified." (TR 239).

On September 7, 1992, Dr. Caughell wrote: "[x]-rays have revealed osteoarthritis and a slight left scoliosis of the lower dorsal and upper lumbar spine. I have advised Mr. Inman that occupations which require lifting of objects over 25 pounds, will continually re-irritate his lower back and other employment opportunities should be searched out." (TR 248). The doctor did not conclude that claimant could not work at that time.

Claimant received a Veterans Administration ("VA") disability rating of 40% in his shoulder on September 29, 1992 (TR 245-246). It is significant that the rating decision included the following:

Private medical report shows the veteran was complaining of right shoulder pain but he gave a history of the left shoulder injury. He says shoulder history shows worse past several days and worse with weather. It was non-tender to palpation. A statement was made about range of motion but this statement is not decipherable. Impression was osteoarthritis.

On the VA examination, veteran was again given subjective complaints of his left shoulder rather than his right shoulder. Objective findings showed no swelling, no deformity. Range of motion right shoulder was flexion 25 degrees and extension 5 degrees, circumduction was markedly limited, abduction was 30 degrees, adduction 5 degrees.

With resolution of reasonable doubt in the veteran's favor, increased evaluation will be established on the now shown markedly decreased range of motion on the VA examination.

It is not known nor shown why this range of motion is so limited and so severe in limitation. Due to this, a 1 year exam will be rescheduled to determine future residuals rather than a normal 2 year exam.

(TR 245-246) (emphasis added).

Claimant's blood pressure was elevated in January of 1993 (TR 310), but he was told to lose weight, watch his diet, and monitor his blood pressure and reported by April 29, 1993 that it was usually normal (TR 308).

In early 1994, claimant underwent a mental evaluation. On January 26, 1994, Dr. Thomas Goodman reported as follows:

He was slightly agitated and tense during the interview. However, he showed no other unusual mannerisms. His psychomotor activity is slightly increased. His mood was neither depressed nor elated. His affect was normal. His speech was logical and appropriate. He gave no indications of hallucinations, delusions or suicidal thinking.

His sensorium was clear and he was oriented to time, place and person. He could immediately repeat three separate objects and could remember all of them after two minutes.

....

The claimant, clinically, shows no evidence of any kind of organic brain impairment. His orientation, memory, ability to calculate, use abstract thinking and judgment were all normal on the clinical mental status examination which I gave him. It sounds to be consistent with the evaluation done by Dr. Inbody in 1992. However, his complaints are really that he experiences some difficulty concentrating and thinking when placed under various kind of stresses, usually occupational stress, scrutiny, and pressure to perform. He shows no other psychiatric problems at the present time. There is certainly reason for him to have possible mild organic brain syndrome although this is not apparent on clinical examination.

....

The claimant under normal conditions of the examination showed no impairment of his intellectual functioning. Under normal work conditions, I see no reason why he would not be able to psychologically perform moderately complicated type work activities, or at least the same kind of work activities he was done in the past. He also appeared

capable of managing his own funds (TR 313-314).

Dr. Goodman concluded that claimant could make occupational adjustments, but that under stress he had difficulty concentrating and remembering (TR 316, 318). The doctor stated that claimant had "possible mild organic brain syndrome from the pituitary tumor and its treatment," but there was no problem when he was not under stress (TR 318) (emphasis in original).

Dr. Michael Karathonos, a neurologist, conducted a consultative examination of claimant on January 29, 1994. He stated:

I do not detect any motor deficits or any sensory deficits. The reflexes are symmetrical without any pathological reflexes. Straight leg raising is negative. He does have decreased cervical spine extension of about 10 degrees and lateral bending at 29 degrees. Gait is well preserved. He can walk well on heels and toes. IMPRESSION: Chronic lumbosacral strain. History of panhypopituitarism.

(TR 320).

The VA reevaluated his shoulder condition on September 22, 1994, and found:

There was no swelling noted in the right or left shoulder. There was severe restriction of motion in the right shoulder. The left had no restriction of motion. Range of motion in right shoulder was shown to be forward flexion 30 degrees, extension 20 degrees, internal rotation 30 degrees, abduction 40 degrees, adduction 30 degrees. There was normal range of motion in the left shoulder. Examiner showed a diagnosis of severe restriction in motion of the right shoulder with pain at the AC joint.

No change is shown to be warranted in the 40 percent evaluation of the veteran's service-connected residuals, right shoulder dislocation.

(TR 71).

Dr. Caughell concluded on September 16, 1994 that claimant could not work:

Joe Inman is a 49 year old gentleman with chronic low back pain with known osteoarthritis of the low back. He also has post traumatic left ankle arthritis with associated pain. In situations where lifting is required, Mr. Inman suffers greatly. Also, in situations where he is required to stand, he indicates that he suffers greatly. Mr. Inman experiences a great deal of emotional stress due to his inability to be productive in activities requiring use of his back or his foot and I believe it is highly unlikely that he will ever be able to obtain gainful/productive employment, given his response to these pains.

(TR 69).

On April 22, 1994, a vocational expert heard claimant's testimony and reviewed his records. Her testimony was very limited. After the ALJ concluded that claimant could not do his past work as a pipefitter, her testimony was as follows:

Q Well, if he did have memory problem and couldn't do that work, would there be other jobs that'd be consistent with sedentary-type work activity?

A Sedentary?

Q Sedentary. Where he could lift ten to 20 pounds and --

A Light or sedentary, just that --

Q Well, the, because of his ankle, he's going to have to sit.

A Okay. Well, there's the sedentary assembly work. There's 144,000 of those jobs in the national economy and 18,000 in this region of Texas, Arkansas, Oklahoma and Louisiana. There's sedentary order clerk. There's 105,000 of those in the national economy and 13,000 in this region. And there's sedentary cashier, there's 221,000 in the national economy and 18,000 in this region.

Q If there is no additional -- require the same kind of memory or memory measurements and things like that, that the --

A Well, some memory, not as --

Q Not the same type of memory.

A No, not numbers and figures and measurements and --

Q If he couldn't sit over an hour at a time, would he be able to do these jobs?

A No, he'd have to be able to sit an hour-and-a-half to two-and-a-half hours at a time to be able to perform sedentary work.

(TR 349-350)

Two grocery store owners wrote letters in September of 1994 saying claimant had applied for a cashier position, but could not perform the work because of his limitations on lifting more than 25 pounds, bending, and stooping (TR 72-73).

There is no merit to claimant's first contention that the ALJ erred in ignoring the opinion of the "treating physicians." It is true that "[a] treating physician's opinion must be given substantial weight unless good cause is shown to disregard it." Goatcher v. U. S. Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995). However, when the treating physician's opinion is not consistent with other medical evidence, the ALJ must examine the other medical evidence to determine if it outweighs the treating physician's report. Id. At 290. The weight to be given to a physician's opinion depends, in part, on the extent to which it is consistent with other evidence. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994).

The ALJ discussed the opinions of all the medical experts in detail (TR 92-94). The only doctor who concluded that claimant could not work was Dr. Caughell in late 1994 (TR 69), who found that he could work in a job that did not require lifting in

1992 (TR 248). The other doctors did not reach such a conclusion. The ALJ properly disregarded Dr. Caughell's opinion because it was not consistent with the other medical evidence.

There is also no merit to claimant's second contention that the ALJ did not consider his multiple impairments, including nausea, weakness, dizziness, lack of taste, smell, and thirst, ankle, back, and shoulder pain, and poor memory. When a claimant has several impairments, the ALJ is to consider their combined effect in making a disability determination. Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987). The ALJ discussed the claimant's dizziness and fainting episode (TR 92), ankle pain (TR 93-95), lumbar pain (TR 93-95), shoulder impairment (TR 94-95), poor memory ("[t]he claimant alleges disability in part as the result of a memory impairment. Evaluation by two board-certified psychiatrists have provided a psychiatric diagnosis of only possible organic brain syndrome. The mental status examinations have been essentially negative or within normal limits") (TR 95), and psychological problems such as memory loss ("[t]he Administrative Law Judge notes that Dr. Inbody rated the claimant as a current global assessment of functioning 45 with the highest GAF of the past year at 55. There is no clear reason for this rating and Dr. Goodman commented that it was unclear why the claimant was rated at that low level because, otherwise, he did not present any psychiatric symptoms.") (TR 95).⁴

⁴ The court in Irwin v. Shalala, 840 F. Supp. 751, 759 n.5 (D. Or. 1993), described the significance of this score:

The ALJ completed a psychiatric review technique form (TR 99-100) and concluded that:

[t]he evidence does not suggest that the claimant's memory impairment has resulted in any greater than slight restriction of activities of daily living and slight difficulty in maintaining social functioning. The claimant seldom experiences deficiencies of concentration, persistence, or pace resulting in failure to complete tasks in a timely manner, and has never experienced episodes of deterioration or decompensation in work or work-like settings which caused him to withdraw from that situation or to experience exacerbation of signs and symptoms.

(TR 95). The ALJ noted that "claimant's testimony and other evidence of record reveals that his daily activities are not unduly restricted and include yard work, tending the garden, watching television, light housework, and enjoying morning trips to the local coffee shop." (TR 96).

Pain, even if not disabling, is 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. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical

The Global Assessment of Functioning Scale ("GAF") ranges from 90 (absent or minimal symptoms) to 1 (persistent danger of severely hurting self or others, or unable to care for herself). A score between 41 and 50 is defined as manifesting "serious symptoms" (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).

evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

The ALJ applied the Luna factors in assessing claimant's complaints of pain and concluded:

[t]he claimant takes no medication for pain relief other than Ibuprofen. The claimant is not receiving any type of active medical care or treatment relative to his alleged painful joints. The claimant is capable of sitting, standing, and walking without the use of any assistive device. There is no evidence that any psychological disorder combines with the claimant's physical problems. The Administrative Law Judge is convinced that while the claimant does experience some pain, that the evidence does not suggest that the claimant experiences pain of such intensity and severity as to prevent him from engaging in all substantial gainful activity.

(TR 96).

There is no merit to claimant's third claim that the ALJ failed to place "great weight" on the VA disability rating. The Tenth Circuit held in Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993), that, although findings of other agencies are not binding on the ALJ, they are entitled to weight and must be considered. The ALJ followed the ruling in Baca, finding:

[t]he claimant has a veterans service connected disability rating of 40 percent as a result of residuals of a dislocation of the right shoulder. The claimant, moreover, alleges disability in part as a result of pain and degenerative changes in his left ankle. It is noted that the claimant has a full range of motion of all joints at the time of Dr. Patton's evaluation in February 1982. There is no evidence of persistent marked limitations of motion of either the claimant's shoulder or his ankle. There is no x-ray evidence of any gross anatomical deformity.

(TR 94-95).

There is merit to claimant's fourth contention that the ALJ improperly relied on the medical-vocational guidelines ("grids"). The grids contain tables of rules which direct a determination of disabled or not disabled on the basis of a claimant's residual functional capacity, age, education, and work experience. 20 C.F.R. Pt. 404, Subpt. P, App. 2. "Under the Secretary's own regulations, however, the grids may not be applied conclusively in a given case unless the claimant's characteristics precisely match the criteria of a particular rule." Erey v. Bowen, 816 F.2d at 512 (quoting Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985) (other citations omitted)). A mismatch may occur because of a particular exertional or nonexertional impairment, or a particular combination of impairments.

"Residual functional capacity" is defined by the regulations as what the claimant

can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567. "Sedentary work" involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(a).

An ALJ may rely conclusively on the grids if he finds that the claimant has no significant nonexertional impairment, can do the full range of work at some RFC level on a daily basis, and can perform most of the jobs in that RFC level; each of these findings must be supported by substantial evidence. Thompson v. Sullivan, 987 F.2d at 1488.

There is substantial evidence that claimant had nonexertional impairments which would limit his ability to do certain jobs during the relevant time period, particularly if his physical problems are considered in combination. While the ALJ concluded that claimant's subjective complaints of pain, ankle, back and shoulder problems, dizziness, and poor memory were not sufficiently credible to support a finding of disability (TR 94-96), this credibility determination was just a step on the way to the ultimate decision. Id. At 1491. The ALJ had to also determine whether

claimant had a residual functional capacity level and could perform the full range of work at that level on a daily basis and most of the jobs at that level. Id.

There is not substantial evidence that claimant could do the full range of sedentary work, given his shoulder, ankle, and lumbar problems, pituitary adenoma, memory lapses under stress, and absence of thirst, smell, and taste. There is no doubt that many of the jobs involve the stress of dealing with people in the work place, and lifting and carrying, including the cashier positions for which he was not hired (TR 72-73). Generally, if the claimant suffers from nonexertional impairments that limit his ability to perform the full range of work in a specific guideline category, the ALJ is required to utilize testimony of a vocational expert. Reed v. Sullivan, 988 F.2d 812, 816 (8th Cir. 1993). The ALJ did call an expert, but her testimony was extremely limited. As claimant points out, she never testified that he could do sedentary work. In fact, she stated that he could not do such work if he would not be able to sit for an hour and a half to two and a half hours (TR 350). Claimant had testified that he could not sit that long unless he was in his recliner (TR 344-345).

The vocational expert also never discussed claimant's physical abilities or limitations. The ALJ did not ask her any hypothetical questions comparing claimant's residual functional capacity with the demands of various sedentary jobs. There is merit to claimant's contention that the ALJ did not properly question the vocational expert. This failure violated the established rule that an ALJ's inquiries must include all (and only) those impairments borne out by the evidentiary record. Gay v. Sullivan, 986 F.2d 1336, 1340-41 (10th Cir. 1993) (following Hargis v. Sullivan, 945 F.2d at

1492, and Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990)).

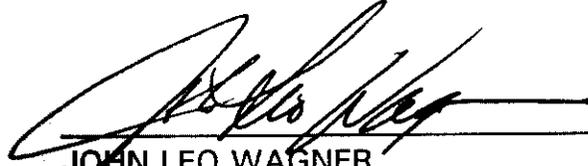
Finally, there is not substantial evidence in the record that claimant can perform a substantial majority of the work in the sedentary category. The ALJ, at the fifth step of the sequential evaluation process, had the burden of identifying, and establishing the claimant's ability to perform, some specific occupations which-- however few in themselves -- encompass a significant number of available jobs. 20 C.F.R. § 404.1566(b) ("Work exists in the national economy [for step-five purposes] when there is a significant number of jobs (in one or more occupations) having requirements which [the claimant is] able to meet" (emphasis added)); Trimiar v. Sullivan, 966 F.2d 1326, 1330 & n.10 (10th Cir. 1992) (court focused on the number of jobs rather than the three occupations involved in affirming ALJ at fifth step of evaluation). The ALJ failed to do this (TR 96-97).

This case was remanded for a second hearing by the Appeals Council on November 30, 1993 (TR 285-286). In the order of remand, the court specifically ordered the ALJ to, among other things, "obtain evidence from a vocational expert to clarify the effect of the assessed limitations on the claimant's occupational base (Social Security Rulings 83-14 and 85-15). In so doing, the Administrative Law Judge must ensure that the hypothetical questions reflect the specific capacity/limitations established by the record as a whole." The ALJ failed to follow these instructions.

This case is remanded for further testimony by a vocational expert concerning claimant's residual functional capacity and whether jobs exist in the national economy

which he can perform.

Dated this 28th day of August, 1996.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:inman

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

FRANCES E. WILSON,

Plaintiff,

v.

TULSA JUNIOR COLLEGE, and
KENNETH HALL, in his capacity as
supervisor for Tulsa Junior College,

Defendants.

No. 95-C-51-K ✓

FILED

SEP 03 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EOD 9/4/97

ORDER

Now before the Court is the motion of Defendant Tulsa Junior College ("TJC") for Judgment as a Matter of Law, or alternatively, for a New Trial or Remittitur. Following a jury trial before this Court, the jury returned a verdict for the Plaintiff Frances Wilson ("Wilson") and against the Defendants TJC and Kenneth Hall ("Hall")¹ as to the Plaintiff's hostile environment sexual harassment claim. The jury awarded Plaintiff \$100,000 in compensatory damages.²

I. Facts

During the relevant events, Wilson was employed by TJC as a custodian at its Southeast Campus. Defendant Hall was the Campus Lead Custodian at the Southeast Campus and Wilson's supervisor. On the evening of February 15, 1994, during Wilson's work shift, Hall approached Wilson in an empty classroom, exposed his penis,

¹ Hall was sued in his capacity as supervisor for Tulsa Junior College.

² The jury's verdict found for the Defendants and against the Plaintiff as to the Plaintiff's claims of retaliation and *quid pro quo* sexual harassment.

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requested sexual favors, threatened her, and told her that he would return the next night for her answer. After leaving work at approximately 1:00 a.m. on February 16, Wilson called 911 and reached the Broken Arrow Police Department. She told the person who answered the phone that she worked at TJC and that her supervisor, Ken Hall, had exposed himself to her. Since TJC was outside its jurisdiction, the Broken Arrow Police Department connected Wilson with the Tulsa Police Department. Wilson filed a complaint with the Tulsa Police Department and made arrangements to wear a concealed body microphone when she returned to work the following evening.

At approximately 7:00 a.m. on February 16, Sgt. Mike Martin of the Broken Arrow Police Department, who also worked as a part-time TJC Campus Police officer, called Herb Weber, the Campus Police Supervisor for the TJC Southeast Campus. Martin told Weber about the call Wilson had made to the Broken Arrow Police Department. Martin named Hall as the alleged perpetrator, but did not disclose the identity of the caller. Weber took no action on this information until his shift ended at 3:00 p.m. At that time, he assigned Al Read, the Assistant Police Supervisor for the Southeast Campus, to investigate the matter when the custodial night shift began work at 5:00 p.m. At approximately 6:00 p.m., Read interviewed Hall about the alleged incident. Hall denied that it had happened.

At around 7:00 p.m. on the same evening, Wilson told Gary Sanders, a Campus Police officer, about the incident the previous night. She told him that she had reported the incident to the Tulsa Police Department who was going to monitor her contacts with Hall. Wilson also asked Sanders to watch her. At approximately 10:00 p.m., Sanders recounted this conversation to Read. At approximately 11:00 p.m., Hall approached Wilson and the two engaged in a 45 minute conversation, during which Hall made various incriminating statements that were monitored and recorded by the Tulsa Police Department. In the course of the conversation, Hall also threatened Wilson's job and the personal safety of people close to her if she followed through with her complaint. Tulsa Police officers arrested Hall just after midnight on February 17 at TJC. Hall was suspended from his position at TJC the following evening and three weeks later was transferred to the Northeast Campus. Following the arrest, Wilson had no further contact with Hall outside of a courtroom.

II. Judgment as a Matter of Law and New Trial

A. Standards of Review. Pursuant to Rule 50(b), Fed.R.Civ.P., TJC renews the motion for judgment as a matter of law it made at trial, and in the alternative, requests a new trial.

1. Judgment as a matter of law. An order granting a motion for judgment as a matter of law under Fed.R.Civ.P. 50 is proper

when the court, reviewing the evidence and inferences most favorably to the non-moving party, finds that there is insufficient evidence upon which the jury could properly find for the non-moving party. Rajala v. Allied Corp., 919 F.2d 610, 615 (10th Cir. 1990), cert. denied, 500 U.S. 905 (1991). See Richter v. Limax International, 45 F.3d 1464, 1470 (10th Cir. 1995) ("A judgment as a matter of law rendered after a verdict has been entered is appropriate only when reasonable minds could not possibly differ as to an issue's necessary outcome."). A judgment as a matter of law "should be cautiously and sparingly granted." E.E.O.C. v. Prudential Federal Sav. & Loan Ass'n, 763 F.2d 1166, 1171 (10th Cir.) (quoting Joyce v. Atlantic Richfield Co., 651 F.2d 676, 680 (10th Cir. 1981)), cert. denied, 474 U.S. 946 (1985).³ It is "appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.'" Id. (quoting Symons v. Mueller Co., 493 F.2d 972, 976 (10th Cir. 1974)).

B. New trial. Pursuant to Rule 59(a), Fed.R.Civ.P., a court may grant a new trial in an action in which there has been a trial by jury. Motions for a new trial are "not regarded with favor and

³ Although these opinions pertain to "judgment notwithstanding the verdict," that term was replaced by amendment to Rule 50 in 1991 with "judgment as a matter of law," and the applicable legal standards are identical. 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §2521 at 242-43 & n.13.

should only be granted with great caution." United States v. Kelley, 929 F.2d 582, 586 (10th Cir.), cert. denied, 502 U.S. 926 (1991). The Tenth Circuit has explained,

In ruling on a motion for a new trial, the trial judge has broad discretion. He has the obligation or duty to ensure that justice is done, and, when justice so requires, he has the authority to set aside the jury's verdict. He may do so when he believes the verdict to be against the weight of the evidence or when prejudicial error has entered the record.

McHargue v. Stokes Div. Of Pennwalt Corp., 912 F.2d 394, 396 (10th Cir. 1990) (citations omitted). The power to grant a new trial on the ground that the verdict is contrary to the weight of the evidence is invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. United States v. Evans, 42 F.3d 586, 593-94 (10th Cir. 1994). In reviewing a motion for a new trial the court must view the evidence in the light most favorable to the prevailing party. Griffin v. Strong, 983 F.2d 1544, 1546 (10th Cir. 1993). A new trial based upon an error of law is unwarranted unless that error affected the substantial rights of the parties. Fed.R.Civ.P. 61; Heyen v. United States, 731 F.Supp. 1488, 1489 (D.Kan. 1990), aff'd, 945 F.2d 359 (10th Cir. 1991).

B. Discussion

1. **Sufficiency of Evidence.**⁴ TJC contends that the jury's verdict finding hostile work environment sexual harassment was against the weight of evidence for several reasons. First, TJC contends that it was shielded from such liability because TJC had in place effective policies and procedures on sexual harassment. Second, TJC contends that Plaintiff failed to prove by a preponderance of the evidence two of the elements of TJC's vicarious liability under Title VII: that management level employees knew, or should have known, of the incident of harassment; and that management level employees failed to implement prompt and appropriate corrective action.

a. **Existence of effective sexual harassment policy.** The Supreme Court has left open the question whether effective policies and procedures shield an employer from sexual harassment liability. See Meritor Sav. Bank, 477 U.S. 57, 72-73 (1986) (rejecting petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability). Nor has the Tenth Circuit ruled on this question. TJC relies on authority from sister circuits in asserting that TJC's

⁴ For this inquiry, the Court will apply the less demanding standard for granting a new trial. If Defendant fails to demonstrate that a new trial is warranted based on insufficiency of the evidence, then Defendant also fails to demonstrate that a judgment as a matter of law is warranted.

policy on sexual harassment shielded it from liability. See Gary v. Long, 59 F.3d 1391 (D.C. Cir.), cert. denied, 116 S.Ct. 569 (1995); Bouton v. BMW North American, 29 F.3d 103, 107 (3rd Cir. 1994) (holding that Meritor "allowed for the possibility that an employer could escape liability if the procedure was sufficiently effective").

Even if this Court were to adopt the rule that an employer could escape liability if it had in place a sufficiently effective procedure, the evidence at trial supported the conclusion that TJC's procedures for dealing with sexual harassment were not sufficiently effective. Under the TJC policy, an employee must report an incident of sexual harassment to the Director of Personnel Services if the employee did not feel that she could bring it to her supervisor's attention--for instance, if her supervisor was the harasser, as in the instant case. However, there is no provision in the TJC policy for complaints made to the Campus Police. A female employee who experiences threatening sexual behavior from a supervisor at night when the Personnel Office is closed would naturally go to the Campus Police to report the incident. However, under the TJC policy, there were no procedures established for such a contingency. The Campus Police did not, as a matter of course, pass on complaints of sexual harassment to the Personnel Office nor provide employees with the appropriate forms or means to file such a complaint. TJC appeared

to take the position throughout trial that since a report of sexual harassment to the Campus Police was not envisioned in their policy, such a report was not an appropriate complaint of sexual harassment.

Moreover, in the instant case, the response of the Campus Police, once they became aware of the alleged incident, was grossly inadequate. Herb Weber, the Campus Police Supervisor, knew as early as 7:00 a.m. on February 16, 1996, about the report to the Broken Arrow Police Department alleging Hall's conduct. Weber did nothing for eight hours, whereas he could have informed the Personnel Office⁵ or taken action to prevent Hall from repeating his threatening sexual behavior when he returned to work that evening. Finally, at 3 p.m., Weber directed Read to investigate the incident that evening when the night custodial crew came to work. Read proceeded to put the alleged perpetrator, Hall, on notice that his victim had reported his conduct to the police, thereby putting the victim in jeopardy.

Wilson did not go immediately to the Campus Police, but first sought assistance from local law enforcement. Given the Campus Police's apparent lack of policies and procedures for dealing with complaints of sexual harassment, Wilson's course of action was

⁵ TJC's written policies and procedures provide, "It is the responsibility of each supervisor within his/her area of control to report all formal complaints [of sexual harassment] to the Director of Civil Rights." Def. Ex. C at 40. Although Wilson did not lodge a formal complaint under the terms of the policy, the jury reasonably could have concluded that Weber should have promptly reported the alleged incident to the Director of Civil Rights.

reasonable and does not detract from the conclusion that the procedures at TJC for dealing with such situations as well as the actual response by the Campus Police were inadequate. Indeed, the following excerpt from the Supreme Court's decision in Meritor is quite apposite in this case:

[The employer's] contention that [the employee's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

Meritor, 477 U.S. at 63.

b. Vicarious liability of TJC. TJC contends that Wilson failed to prove by a preponderance of the evidence two elements necessary to establish TJC's vicarious liability for Hall's conduct. Employer liability for sexual harassment by a supervisor accrues when the employer negligently fails to respond to an employee's complaint of a hostile work environment. The employer may be deemed negligent if it fails to take appropriate action to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known. Hirase-Doi v. U.S. West Communications, 61 F.3d 777, 783 (10th Cir. 1995) (quoting Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir. 1990)). See also Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989).

i. Knowledge. The evidence suggested that management-level employees of TJC had actual or constructive knowledge of the incident by the beginning of the day on February 16. Herb Weber,

Supervisor of Campus Police, knew about the reported incident by 7 a.m. that morning. Even if, as Defendant asserts, Weber is not a management-level employee, given the seriousness of the reported conduct, Weber should have, in the exercise of reasonable care, informed TJC management of the incident immediately. Therefore, Plaintiff established through evidence at trial the *knowledge* element of the standard for employer liability.

ii. *Prompt and appropriate remedial action.* As discussed in Part II.B.1.a., *supra*, evidence at trial supported the conclusion that TJC failed to take prompt, effective and appropriate action to remedy or prevent the hostile or offensive work environment. Once the Campus Police became aware of a potentially violent sexual encounter between a male supervisor and a female employee, it did nothing to prevent continued threat to and harassment of the employee. To the contrary, the Campus Police aggravated the threat by giving notice to the alleged perpetrator without warning the victim (of whose identity they were fairly certain). The Campus Police had an entire working day to take remedial action before the perpetrator had an opportunity to make contact with the victim. TJC cannot hide behind its standard complaint procedure (which unreasonably excluded the Campus Police from TJC's sexual harassment procedures) to insulate itself from the Campus Police's mishandling of the incident. Nor can TJC claim that it is not responsible for the Campus Police's actions. The

Campus Police was clearly an agent of TJC.

That Wilson donned a wire on Feb. 16, with the expectation of encountering Hall, does not diminish the fact that the Campus Police's response was inadequate. The Campus Police's actions must be viewed independently of Wilson's. Well before the taped conversation between Hall and Wilson occurred, the Campus Police were aware of Hall's alleged conduct and were fairly certain that Wilson had been the complainant. Yet the Campus Police never evinced an intention of protecting Wilson, preventing the reoccurrence of Hall's conduct, or even warning Wilson that Hall had been informed of her complaint.

In sum the evidence at trial supported the jury's verdict. Therefore, neither a judgment as a matter of law nor a new trial is warranted on this ground.

2. Asserted Errors of Law. Defendant asserts two categories of legal errors allegedly committed by the Court, warranting a new trial: errors relating to jury instructions and improper exclusion of trial testimony.

a. Jury instructions. Defendant argues that the Court's instructions on vicarious liability and the Court's failure to give an instruction submitted by Defendant constituted error.

i. Vicarious liability. Defendant argues that the Court's instruction regarding educational institutions acting through their agents suggested an incorrect standard of vicarious

liability. The objectionable instruction is as follows,

**EDUCATIONAL INSTITUTIONS CAN ACT ONLY THROUGH AGENTS
SINCE AN EDUCATIONAL INSTITUTION CAN ACT ONLY THROUGH ITS OFFICERS, OR
EMPLOYEES, OR OTHER AGENTS, ANY ACT OR OMISSION OF AN EMPLOYEE OR AGENT
OF AN EDUCATIONAL INSTITUTION IN THE PERFORMANCE OF HIS DUTIES IS HELD IN
LAW TO BE THE ACT OF THE EDUCATIONAL INSTITUTION.**

This instruction was given as a preliminary instruction to the jury to explain that an educational institution can act only through its agents. It was not meant, as Defendant suggests, to establish the standard for TJC's liability for harassment by its employees. That standard was expressly and clearly stated in a separate instruction:

**HOSTILE ENVIRONMENT SEXUAL HARASSMENT – ELEMENTS
DEFENDANT TULSA JUNIOR COLLEGE, THE EMPLOYER, IS RESPONSIBLE OR LIABLE
FOR THE ACTIONS OF MS. WILSON'S FELLOW EMPLOYEES IN MS. WILSON'S CLAIM OF
SEXUAL HARASSMENT IF MS. WILSON PROVES, BY A PREPONDERANCE OF THE
EVIDENCE, ALL OF THE FOLLOWING ELEMENTS:**

- FIRST:** SHE SUFFERED FROM INTENTIONAL DISCRIMINATION BECAUSE OF HER SEX BY THE INTENTIONAL CONDUCT OF A FELLOW EMPLOYEE CONSISTING OF CONDUCT OF AN UNWELCOME SEXUAL MOTIVE, SUCH AS UNWELCOME SEXUAL PROPOSITIONS OR ADVANCES;
- SECOND:** THE CONDUCT WAS SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE CONDITIONS OF MS. WILSON'S EMPLOYMENT AND CREATE AN INTIMIDATING, HOSTILE, OR OFFENSIVE WORK ENVIRONMENT;
- THIRD:** THE ALLEGED CONDUCT DETRIMENTALLY AFFECTED MS. WILSON;
- FOURTH:** THE CONDUCT WOULD HAVE DETRIMENTALLY AFFECTED A REASONABLE PERSON OF THE SAME SEX IN MS. WILSON'S POSITION;
- FIFTH:** **MANAGEMENT LEVEL EMPLOYEES KNEW, OR SHOULD HAVE KNOWN, OF THE ALLEGED SEXUAL HARASSMENT DESCRIBED ABOVE; AND**
- SIXTH:** **MANAGEMENT LEVEL EMPLOYEES FAILED TO IMPLEMENT PROMPT AND APPROPRIATE CORRECTIVE ACTION.**

IN DETERMINING WHETHER MANAGEMENT LEVEL EMPLOYEES KNEW, OR SHOULD HAVE KNOWN, OF THE ALLEGED SEXUAL HARASSMENT, YOU MAY CONSIDER WHETHER THERE WERE REASONABLE AVENUES AVAILABLE TO MS. WILSON TO FILE A COMPLAINT OF SEXUAL HARASSMENT TO MANAGEMENT LEVEL EMPLOYEES. YOU MAY ALSO CONSIDER WHETHER OR NOT THE EXISTING COMPLAINT PRACTICES AND PROCEDURES AT TJC WERE EFFECTIVE.

IN DETERMINING WHETHER THE REMEDIAL ACTION TAKEN BY MANAGEMENT LEVEL EMPLOYEES WAS APPROPRIATE, YOU SHOULD CONSIDER WHETHER IT WAS REASONABLY LIKELY TO PREVENT THE MISCONDUCT FROM RECURRING.

(Emphasis added.) See Hirase-Doi v. U.S. West Communications, 61 F.3d 777, 783 (10th Cir. 1995) (quoting Hirschfeld v. New Mexico Corrections Dept., 916 F.2d 572, 577 (10th Cir. 1990)).

Thus while the initial stock instruction, "EDUCATIONAL INSTITUTIONS CAN ACT ONLY THROUGH AGENTS," if read alone, would have been an incorrect statement of the standard of vicarious liability, the instruction, "HOSTILE ENVIRONMENT SEXUAL HARASSMENT -- ELEMENTS" clearly stated the appropriate standard of liability and averted any chance of juror confusion. See United States v. Consolidated Mayflower Mines, Inc., 60 F.3d 1470, 1475-76 (10th Cir. 1995) (holding that review of a challenged jury instruction is conducted against a backdrop of the jury instructions as a whole and the entire record). See also McDonough Power Equip., Inc., 464 U.S. 548, 553 (1984) (holding that the court should "ignore errors that do not affect the essential fairness of the trial."). Reversal is warranted only where a deficient jury instruction is prejudicial. Fitzgerald v. Mountain States Telephone and Telegraph Co., 68 F.3d 1257, 1262 (10th Cir. 1995). Given the thorough and clear instruction regarding the elements of vicarious liability, this Court holds that the instruction, "EDUCATIONAL INSTITUTIONS CAN ACT ONLY THROUGH AGENTS," even if deficient, was not prejudicial.

ii. *Appropriateness of response.* Defendant argues that this Court's failure to give Defendant's Requested Jury Instruction

No. 21, concerning the appropriateness of TJC's remedial action, was prejudicial error. This Court gave an instruction (quoted above) that completely and accurately described the standard for employer liability, including an explanation of the defense of an appropriate response. Therefore, the Court's failure to give Defendant's Requested Jury Instruction No. 21 was not in error.

b. Exclusion of witnesses' testimony. TJC appears to argue that this Court's exclusion of the testimony of Rick Kennedy⁶ and Mary Foster⁷ was reversible error. The testimony of Rick Kennedy, concerning Wilson's alleged conduct toward a third party unrelated to this lawsuit, was clearly inadmissible as irrelevant, Fed.R.Evid. 401, and more prejudicial than probative, Fed.R.Evid. 403. Although the testimony of Foster--involving an alleged sexually suggestive remark by Wilson to Hall--was relevant, Foster's testimony was substantially more prejudicial than probative. On the probative side of the balance, Foster's testimony could have been used for two potentially proper purposes. First, Defendant apparently sought to use the testimony to impeach Wilson, who had denied making the alleged remark. Second, Defendant might have sought to use the testimony to refute

⁶ Kennedy allegedly would have testified that one evening at work, Wilson grabbed his hand, placed a condom in it, and asked him if he had anything to put into the condom. Def. Br. Supp. Mot. J. Matter of L. ("Def. Br.") at 4.

⁷ Foster allegedly would have testified that she observed Wilson grab Hall's hand, comment on the size of his hands, and state that she would love to take a man with big hands onto the roof and make love to him. Def. Br. at 3-4.

Plaintiff's required showing that Hall's conduct was unwelcome.⁸ However, given the outrageousness and aggressiveness of Hall's conduct, such an alleged remark by Wilson would have been only remotely probative on the issue of whether Hall's conduct was welcome. On the prejudicial side of the balance, the danger of unfair prejudice to Wilson was great. Since the probative value of the objectionable testimony was substantially outweighed by the danger of unfair prejudice, this testimony was properly excluded, even if it were offered only for the purpose of impeachment. Rule 403, Fed.R.Evid. See Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 839 (10th Cir. 1988), cert. denied, 490 U.S. 1021.

III. Remittitur. Defendant asserts that the verdict of \$100,000 was excessive and requests that it be reduced by fifty percent.

[A]bsent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc) (citations omitted), cert. denied, 464 U.S. 824 (1983). Plainly excessive damages, however, may support an inference that bias, passion, or prejudice contributed to the award. Wells v. Colorado College, 478 F.2d 158, 162 (10th Cir. 1973).

Fitzgerald v. Mountain States Telephone and Telegraph Co., 68 F.3d

⁸However, TJC never asserted in its pretrial motions, in its trial brief, or during opening statement or closing argument that Hall's conduct was not unwelcome.

1257 (10th Cir. 1995).

Considering the seriousness of Hall's conduct and the inappropriateness of the Campus Police's response, this Court holds that the jury award does not shock the judicial conscience and was not plainly excessive to compensate Plaintiff's emotional pain, suffering, and mental anguish and her potential expenses associated with psychotherapy.

FOR THE REASONS DISCUSSED HEREIN, Plaintiffs' motion for a judgment as a matter of law, motion for a new trial, and motion for remittitur are DENIED.

IT IS SO ORDERED THIS 29 DAY OF AUGUST, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

F I L E D

AUG 30 1996

DONALD L. SMIDDY,

Plaintiff,

vs.

PRYOR FOUNDRY, INC.,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-306-K

ENTERED ON DOCKET
SEP 03 1996

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys fees.

DATED this 30th day of August, 1996.

Respectfully submitted,

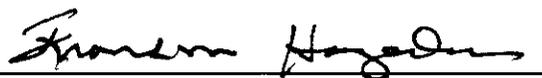
JOHN L. HARLAN & ASSOCIATES, P.C.

By: 

John L. Harlan
404 E. Dewey, Suite 106
P.O. Box 1326
Sapulpa, OK 74067

ATTORNEYS FOR PLAINTIFF

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

By: 

Frank Hagedorn, OBA 3693
Judith Colbert, OBA 13490
320 S. Boston, Suite 400
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(918) 594-0400

ATTORNEYS FOR DEFENDANT
PRYOR FOUNDRY, INC.

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

WILLIAMS PIPE LINE COMPANY,)
a Delaware corporation, and)
WILLIAMS BROKERING SERVICES,)
INC. (now known as WILLIAMS)
ENERGY NETWORK, INC.), a)
Delaware corporation,)

Plaintiffs,)

vs.)

VOG ENERGY, INC., a Texas)
corporation, KENNETH VESTAL,)
an individual, DAVID G.)
OWNBY, an individual, and)
DAVID A. GREGORIO, an)
individual,)

Defendants.)

FILED

AUG 30 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-290-BU

ENTERED ON BOOKET
SEP 8 3 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding 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 the parties have not reopened this case within 45 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 30th day of August, 1996.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
AUG 30 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HELEN MARIE VARNER, JERRY VARNER and
MID-AMERICA STOCKYARDS, INC.,

Plaintiffs,

vs.

SUN COMPANY, INC. (R&M), TEXACO INC., a
Delaware corporation, and RHODES,
HIERONYMUS, JONES, TUCKER & GABLE,
INCORPORATED,

Defendants.

No. 95 C 713-H ✓

ENTERED ON DOCKET
DATE **SEP 3 1996** ✓

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Helen Marie Varner, Jerry Varner and Mid-America Stockyards, Inc., and Defendants, Sun Company, Inc. (R & M), Texaco Inc., and Rhodes, Hieronymus, Jones, Tucker & Gable, pursuant to Federal Rule of Civil Procedure 41 (a)(2) hereby stipulate to an Order of Dismissal with Prejudice, dismissing Defendants, Sun Company, Inc. (R & M), Texaco Inc., and Rhodes, Hieronymus, Jones, Tucker & Gable, from the above styled case with prejudice as agreed by the parties in this case. Each party to this dismissal is to bear their own costs.

WHEREFORE, the parties request the Court enter an Order dismissing the Defendants, Sun Company, Inc. (R & M), Texaco Inc., and Rhodes, Hieronymus, Jones, Tucker & Gable, with prejudice.

CARPENTER, MASON & MCGOWAN

By Richard Carpenter

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ATTORNEYS FOR PLAINTIFFS

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ATTORNEYS FOR DEFENDANT,
SUN COMPANY, INC. (R & M)
AND TEXACO INC.

TAB-1
9-3-96

COPY 41

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

ZYDOT UNLIMITED, INCORPORATED,)
)
 Plaintiff,)
)
 vs.)
)
 ONE STOP, INC.)
)
 Defendant.)

No. 95-C-789-B

FILED

AUG 30 1996

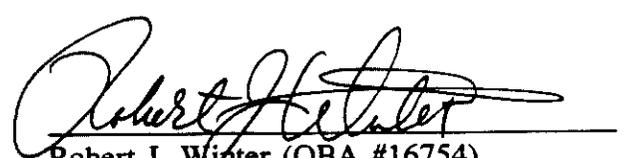
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 3 1996

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Zydote Unlimited, Incorporation, through its counsel of record, Pray, Walker, Jackman, Williamson & Marlal, and hereby dismisses its action against Defendant, One Stop, Inc., without prejudice, pursuant to Federal Rules of Civil Procedure 41 (a)(1). Counsel for Plaintiff has discussed this Dismissal with counsel for the Defendant and both parties request that the above-entitled action be dismissed without cost to either party and without prejudice to the Plaintiff.

Respectfully submitted,



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ENTERED ON DOCKET
DATE 9/2/96

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

F I L E D

AUG 28 1996 *SAC*

SAMMY J. MILLER,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER,)
 COMMISSIONER OF THE SOCIAL)
 SECURITY ADMINISTRATION,)
)
 Defendant.)

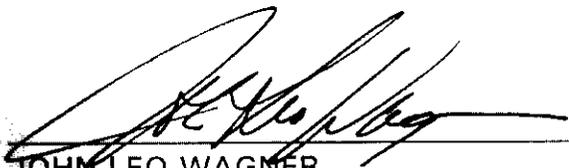
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 95-C-168-W ✓

JUDGMENT

Judgment is entered in favor of Sammy J. Miller pursuant to this court's Order filed August 28, 1996 remanding case to the Defendant for further review by the ALJ and additional vocational expert testimony after claimant's VA records have been obtained.

Dated this 28th day of August, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:jud.sent4

ENTERED ON DOCKET

DATE 9/2/96

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

F I L E D

AUG 28 1996 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SAMMY J. MILLER,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 95-C-168-W ✓

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge (the "ALJ"), Richard Kallsnick, which summaries are incorporated herein by

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

15

reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertion requirement of light work, but was unable to perform his past relevant work as a railroad brakeman and welder's helper. He determined that claimant's residual functional capacity to perform the full range of light work was reduced by mild to moderate exertional back pain. He concluded that the claimant

²Judicial review of the Secretary's determination 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 decisions. 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) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

was 46 years old, which is defined as a younger individual, had a 12th grade education, and did not have any acquired work skills which are transferable to the skilled or semiskilled work activities of other work. He determined that there were a significant number of jobs in the national economy which he could perform, such as handpacker/filler, janitor, and presser/cleaner.

Having determined that claimant's impairments did not prevent him from performing light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ erred in failing to find that claimant had a listed mental impairment and failing to discuss in his opinion the evidence he considered in reaching the conclusions expressed on the psychiatric review technique form ("PRTF") which he completed.
- (2) The ALJ made an erroneous decision regarding his findings in Part B of the PRTF.
- (3) The ALJ failed to accord weight to the claimant's Veterans Administration ("VA") disability pension.
- (4) The ALJ erred in determining that the claimant could perform light work, which requires an ability to stand and/or work for six hours out of an eight-hour workday, after finding that claimant had severe lower lumbar pain.
- (5) The ALJ posed an improper hypothetical question to the vocational expert by not including the mental impairments he had reported on the PRTF.
- (6) The ALJ erred in basing his decision on the vocational expert's testimony, which concluded that claimant could do jobs listed as medium work in the Dictionary of Occupational Titles, after the ALJ determined claimant could perform only light work.

It is well settled that the claimant bears the burden of proving disability that prevents him from engaging in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant's application for social security benefits filed on December 21, 1992, listed his impairment as "back problems" (TR 50). His disability report filed on December 22, 1992 also listed cervical and lumbar back condition, mental condition, muscle spasm, and arthritis (TR 99). His reconsideration disability report filed on April 27, 1993, also listed probable emphysema and probable cirrhosis of the liver (TR 111).

Claimant first complained of back pain on July 31, 1986, and x-rays of his spine showed no evidence of significant abnormality (TR 168). He complained of back pain again during an examination on September 14, 1987 (TR 197). There is no record of further complaints until March 21, 1990, when he reported that he lost his job the week before because he could not work (TR 192). He reported lower back pain upon palpation and Soma and Darvocet N100 were prescribed (TR 192). On July 10, 1990, he told a doctor he fell in the shower and landed on his lower back (TR 189). The doctor reported that his back was tender to palpation and prescribed Motrin, Soma, and hot packs (TR 189). He had no complaints by April 25, 1991 (TR 186).

On September 11, 1992, claimant reported low back pain, frequency of urination, and terminal dribbling, and the doctor concluded he had a probable prostrate infection and prescribed Bactrim (TR 184). The complaints were repeated

on September 22, 1992 and Bactrim, Motrin, and Flexeril were prescribed (TR 183). On February 5, 1993, Dr. Jerry Patton reported he had been seeing claimant for six months for lumbar strain, caused by lifting cement, but x-rays were negative (TR 148). On March 23, 1993, claimant reported that his back pain was continuing, but he had not taken his medications for four months since "they would not help anyway" (TR 181). On September 14, 1993, he reported trouble with his back and problems with sleeping and depression, but the doctor noted that all his medication prescriptions had only been filled four times in six months (TR 180).

Claimant also alleges he is disabled by depression. The only record of mental treatment is a report from Eastern State Hospital on March 2, 1983, where claimant was sent for observation after being charged with shooting two policemen (TR 119-121). He told the doctor that he had received three months of psychiatric treatment when he was in the Air Force twenty years earlier (TR 120). He was diagnosed as alcohol dependent and having a schizotypal personality disorder and severe anxiety (TR 121). He was given a consultative psychiatric exam on March 24, 1993 and reported he had never sought psychotherapy or taken any anxiolytic drug (TR 159-161). He told the doctor he had a life-long history of anxiety, and the doctor concluded he had chronic anxiety and depression but no serious mental problems (TR 159-161).

Claimant testified at a hearing on December 17, 1993, that he has back and neck pain every day (TR 215). He stated that he can sit one hour, stand one hour, walk three or four blocks, and lift 25 pounds (TR 226-227). He testified that he

drinks alcohol every day and attends AA meetings once a week (TR 222). He stated that he has a history of psychological problems and was hospitalized when he was in the Air Force for post traumatic stress syndrome (TR 219). However, he admitted that he cooks, shops, drives, visits with his mother and ex-wife, and needs no help with personal grooming (TR 225, 229).

Claimant admitted that he had a criminal record.⁴ He also confirmed that he

⁴The testimony was as follows:

- Q. [I]n '83, you had a shootout with police, is that correct?
A. That's right.
Q. Were you, were you sent for psychological observation at that time?
A. Yes, sir.
Q. Where did you go?
A. Where did I go, Eastern State.
Q. Did they keep you a little while over there?
A. Yes, sir.
Q. And then you went back and subsequently incarcerated is that correct?
A. Yeah, I don't think that's where they should have put me, but that's what they did. (TR 220-221).

.....

- Q. How many DUI's have you had, do you recall, if you recall?
A. I've had two, maybe three.
Q. Okay.
A. Probably, probably three.
Q. All of them misdemeanors, all lowered to misdemeanors?
A. I think so. (TR 221-222).

.....

- Q. Did you drive yourself to the hearing today?
A. Yeah, I did.
Q. Okay. You don't have a license, I assume you don't have any insurance with you, like that, either do you?

has an alcohol addiction.⁵ He indicated that his doctors had not put

- A. You're not going to put me in jail, are you?
Q. No, I'm not going to put you in jail, but I just was curious, you told me that you had your license suspended?
A. I just took the chance, I couldn't get anybody to bring me. (TR 235).

⁵The testimony was as follows:

- Q. Are you, are you continuing to drink?
A. Yeah.
Q. When's the last time you had something to drink, Sam?
A. This morning.
Q. Do you drink every day?
A. Yes.
Q. What do you drink?
A. Oh, about anything I can get.
Q. How long have you had this problem? When did, when was alcohol first a real problem in your life?
A. 20 years ago.
Q. Have you undergone treatment for substance abuse?
A. Yeah.
Q. How many times?
A. Two or three times, I still go to AA meetings.
Q. Do you still go?
A. I still go.
Q. How, how often do you make AA meetings now?
A. About once a week, it's what they call where you just walk in, you know, tell them your name and stuff. (TR 222).

.....

- Q. Have you had anything to drink today?
A. Yeah.
Q. Okay, so, so you're drinking with these medications?
A. Oh, I just had, I think a beer this morning.
Q. A beer?
A. Yeah, shot of whiskey or something or other.
Q. Well, what did you have, a beer or a shot of whiskey?

significant restrictions on his physical activities, but had merely instructed him on

- A. Both.
Q. Okay, so you're mixing these, these with the medications. Are you telling a doctor that you're drinking with these medications?
A. Not really. (TR 233).

.....

- Q. Okay, what are your drinking habits?
A. You mean like, well, when I get up in the morning, sometimes I'll drink a little beer, or whatever I've got in the icebox or.
Q. Is that what you usually have during the day, just in the morning, or do you have it at other times too?
A. Well, sometimes I'll go three or four days in a row and not eat, just drink, you know.
Q. Can you control your drinking at all?
A. Never really tried.
Q. What about when you were in prison?
A. There's not much choice there.
Q. So you, you could control it for those three years then, is that correct?
A. It's easier to get stuff in the penitentiary than one thinks. (TR 235-236).

.....

- Q. Okay. What problems do you think you'd have, Mr. Miller, if you tried to go back to work?
A. I don't, I just don't think that I could really be at a sitting job, a standing job or whatever it is, I don't believe I could do it for, for eight hour shifts, and I basically don't like to be around, you know, a lot of people and stuff for very long.
Q. Okay, did I understand you to say you like to go down to the bar to go drinking sometimes?
A. Yeah.
Q. Why do you go to the bar if you don't like to be around people?
A. Having a drink, shoot pool. (TR 236).

how to lift, and on maintaining proper posture when sitting or standing.⁶ It is significant that he testified that he believes he is entitled to social security benefits: "the main reason that, that I filed for this is because I'm unable to work, and I, I can't make it on what, what I do get and I feel like I worked in society over 20 some years and I'm entitled to, you know, part of something of what I paid in." (TR 236-237).

There is merit to several of claimant's contentions. He first asserts that the ALJ erred in failing to find that he had a listed mental impairment and failing to discuss in his opinion the evidence he considered in reaching his conclusion expressed on the PRTF which he completed. Claimant also contends that the ALJ reached an erroneous conclusion on Part B of the form.

When evidence of a disabling mental impairment is presented, the ALJ must follow the procedure outlined in 20 C.F.R. § 404.1520a. Cruse v. U.S. Dept. of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1995); Tibbits v. Shalala, 883

⁶The testimony was as follows:

Q. Okay. Have your doctors placed any physical restrictions on your activities?

A. A bit.

.....

Q. And what did he tell you?

A. It's a she, she said that just, you know, do what I could do, because I told her I couldn't work and she told me just, you know, to try to remember, you know, like when you pick something up to bend over with your knees and stuff like that, sit up, stand up against a wall. (TR 233-234).

F.Supp. 1492, 1498 (D. Kan. 1995).

This procedure first requires the Secretary to determine the presence or absence of 'certain medical findings which have been found especially relevant to the ability to work,' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.R.F.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria.

Cruse, 49 F.3d at 617.

In Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994), the court stated that "there must be competent evidence in the record to support the conclusions recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." See also, Cruse, 49 F.3d at 617-18. The only reference in the ALJ's opinion to the PRFT was "[a]fter reviewing all of the evidence in the case, the Administrative Law Judge has completed a Psychiatric Review Technique form, which is attached to this decision and made a part hereof." (TR 29). He reviewed the findings of the consultative psychiatric examination and noted that it was "essentially normal" (TR 29).

The ALJ noted that claimant had a substance addiction disorder (TR 33). However, § 105 of Public Law Number 104-121, 110 Stat. 847 (1996), entitled Denial of Disability Benefits to Drug Addicts and Alcoholics, provides, in pertinent part, that: "[a]n individual shall not be considered to be disabled for purposes of this

title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." This amendment of the Social Security Act applies to any individual who applies for, or whose claim is finally adjudicated by the Commissioner of Social Security with respect to, benefits under Title II of the Social Security Act based on disability on or after the date of the enactment of the amendment.⁷ The court noted in Coleman v. Chater, 58 F.3d 577, 579-580 (10th Cir. 1995):

Even if we were to accept plaintiff's contention that he is an alcoholic, "[t]he mere presence of alcoholism is not necessarily disabling." Thompson v. Sullivan, 957 F.2d 611, 614 (8th Cir. 1992) (quoting Cruse v. Bowen, 867 F.2d 1183, 1186 (8th Cir. 1989)); see also 20 C.F.R. § 404.1525(e) (diagnosis of alcoholism alone will not be basis for determining disability). Rather, alcoholism, "alone or in combination with other impairments, must render [claimant] unable to engage in any substantial gainful employment." Thompson, 957 F.2d at 614.

The ALJ also concluded on Part A of the PRTF that the evidence showed that claimant had an affective disorder, depressive syndrome, characterized by sleep disturbance, psychomotor agitation, feelings of worthlessness, and thoughts of suicide (TR 33-34). However, he found in Part B of the PRTF that this resulted in only moderate restriction of activities and social functioning and often resulted in deficiencies of concentration. He gave no reason for these conclusions. Thus, the ALJ did not satisfy the requirement of Washington and Cruse that he discuss what evidence he considered in reaching the conclusions expressed on the PRTF. The

⁷The court concludes that this new statutory provision will be applicable to this case upon remand, although it was not applicable at the time the Commissioner's original decision became final.

court cannot determine whether he erred in his findings in Part B of the PRTF and whether he erroneously found claimant did not have a disabling mental impairment.

There is also merit to claimant's contention that the ALJ erred in failing to accord weight to the claimant's VA disability pension. During the hearing, the claimant was asked if he had any military benefits and answered yes; he explained that he'd been receiving a VA pension for about a year "for post disorder thing" (TR 212). The ALJ failed to mention the VA benefit in his hypothetical to the vocational expert (TR 239-241), and in his decision he merely mentioned that the claimant receives VA benefits "for mental problems suffered in Vietnam." (TR 29).

In Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 480 (10th Cir. 1993), the court held that the ALJ should have considered the VA disability rating in making his decision: "Although findings by other agencies are not binding . . . they are entitled to weight and must be considered." In addition, "the ALJ has a basic duty of inquiry to fully and fairly develop the record" by obtaining pertinent, available medical records which come to his attention during the course of a hearing. Carter v. Charter, 73 F.3d 1019, 1021 (10th Cir. 1996). Here, the ALJ made no attempt to obtain the VA record and it is unclear whether he gave the VA rating any weight in reaching his decision.

There is also merit to claimant's contention that the ALJ erred in determining that he could perform light work. In Baca, 5 F.3d at 480, the court held that "once a claimant proves by objective medical evidence the existence of a pain-producing impairment and a loose nexus between the impairment and the alleged pain, the ALJ

must evaluate the claimant's subjective complaints of pain." The ALJ reviewed the claimant's medical record and concluded that no evidence existed to support the claimant's assertions of disabling pain (TR 28-29). He noted that, while claimant stated he had low back pain, there was no history of trauma or accidental injury to the back (TR 28). Physical examinations had revealed flexion, extension, and lateral bending of the back were normal (TR 28). Claimant had never complained of muscle spasms to any of his treating doctors and spasms were only present once, when he fell in the shower (TR 28). X-rays performed by Dr. Patton on February 5, 1993, showed no signs of arthritic type problems. The ALJ concluded claimant had "severe lower lumbar pain." (TR 31). He determined that claimant was "credible only to the extent that it is reconciled with his ability to perform light work." (TR 29).

"Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R § 404.1567. "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [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 and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b).

Next claimant asserts that the ALJ posed an improper hypothetical question to

the vocational expert by not including the symptoms of claimant's mental disorders. In Hargis v. Sullivan, 945 F.2d 1482, 1491 (10th Cir. 1991), the court stated: "[w]henver a claimant's residual functional capacity is diminished by both exertional and nonexertional impairments, the Secretary must produce expert vocational testimony or other similar evidence to establish the existence of jobs in the national economy." The court also ruled that "[t]estimony 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." Id. at 1492 (citing Ekeland v. Bowen, 899 F.2d 719, 724 (8th Cir. 1990)).

In his hypothetical, the ALJ told the vocational expert to consider that the claimant's record established that he suffered from affective disorders, an anxiety related disorder, and a substance abuse disorder (TR 239). While it is true that he did not mention the specific symptoms that the claimant suffered which brought the ALJ to his conclusion, Hargis did not establish that the ALJ must enunciate the specific symptoms in his hypothetical. Furthermore, the vocational expert heard all of the testimony at the hearing and he reviewed the appellant's file prior to the ALJ's hypothetical (TR 237-238). There is no merit to this contention.

Finally, there is merit to claimant's allegation that the ALJ erred in basing his decision on the vocational expert's testimony which gave examples of medium work which claimant allegedly could perform, even though the ALJ had determined he could perform only light work.

In Campbell v. Bowen, 822 F.2d 1518, 1522 (10th Cir. 1987) the court said,

"[i]f a claimant cannot return to his or her past work, the Secretary has the burden of producing evidence that the claimant retains the ability to do alternative work and that such work exists in the national economy." When expert testimony conflicts with the Dictionary of Occupational Titles (D.O.T.), the D.O.T. controls. *Id.* at 1523 n. 3. See also, Smith v. Shalala, 46 F.3d 45, 47 (8th Cir. 1995).

The vocational expert erred in stating, in response to the ALJ's hypothetical, that at the unskilled light exertion level there were jobs claimant could do, such as hand packer and fillers and janitorial services. (TR 240). This is inconsistent with the D.O.T. In the D.O.T., Hand Packager 920.587-018 is listed at the medium exertional level and janitor (any industry) 382.664-010 is also listed at the medium exertional level (See attachments to Plaintiff's brief, Docket #11). The vocational expert also testified that presser/cleaner was a light job which claimant could perform (TR 240). Although the expert did not specify what type of presser/cleaner he was referring to, many of the presser/cleaner jobs listed in the D.O.T. are also medium exertional level jobs.

The expert testified that in Oklahoma there are 700 presser jobs available. Claimant asserts that 700 jobs are not a significant number of jobs. The Tenth Circuit, in Trimiar v. Sullivan, 966 F.2d 1326, 1330 (10th Cir. 1992), ruled that there is no bright line test to determine what constitutes a "significant number" of jobs; the court held that 800-1000 jobs were a significant number. *Id.* at 1330-1332. The court added that this issue must be determined on a case by case basis. *Id.* at 1130. Other circuits have decided in particular cases what is a "significant number" of jobs:

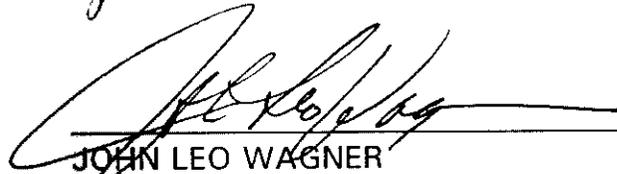
the Sixth Circuit has found that 1350 is significant, the Ninth Circuit, 1266, the Eighth Circuit, 500, the Eleventh Circuit, 174, and the Seventh Circuit, 675. Lee v. Sullivan, 988 F.2d 789, 794 (7th Cir. 1993). There is merit to claimant's contention, particularly since many presser/cleaner jobs are listed in the D.O.T. as medium exertional level jobs, which claimant cannot perform. The ALJ did not meet his burden of showing that a significant number of jobs existed in the economy that claimant could perform.

Based on the record, the court has doubts that this is a case where disability benefits should be awarded. There is no medical evidence of an injury or abnormality supporting claimant's allegation of back pain. No back surgery has been recommended or performed, and claimant has been cavalier with respect to his non-use and misuse of prescribed medication. Claimant clearly has a longstanding history of alcohol abuse, which continues without restraint or remorse.

Although disability for social security purposes is contraindicated by the record before the court, that record is incomplete, and the decision of the ALJ is predicated upon flawed expert testimony. Claimant is entitled to have the ALJ consider a complete record before determining whether or not benefits are to be awarded, and to have the ALJ's decision supported by valid occupational data. The court reluctantly remands this case for further review by the ALJ and additional vocational expert testimony after claimant's VA records have been obtained. The ALJ is instructed to do a fresh review of the complete record, and make a determination on the merits based on the complete and supplemented record. The court wishes to

make clear that this instruction on remand should not be construed as directing a finding of disability, although such a finding, if merited, is certainly not precluded. However, unless the fully developed record reveals more significant impairment than what has been demonstrated to date, benefits need not to be awarded.

Dated this 30th day of August, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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