

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

FILED
NOV 06 1996

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

KEITH PICKENS,
Plaintiff,

v.

BUDDY'S PRODUCE OF
TULSA, L.L.C., an Oklahoma
Limited Liability Company,

Defendant.

Case No. 95-CV-1218-H ✓

NOV 8 1996

ORDER

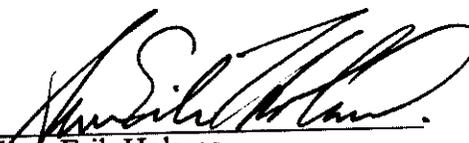
This matter comes before the Court on Plaintiff's Motion to Assess Costs (Docket #5) and Plaintiff's Supplemental Pleading Concerning Motion to Assess Costs (Docket #11).

Plaintiff's cause of action in this case was brought under the Fair Labor Standards Act, 29 U.S.C. §§ 206 & 207. 29 U.S.C. § 216 provides in pertinent part as follows: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." The Court granted default judgment to Plaintiff on May 30, 1996. Plaintiff attached to his motion to assess costs a sworn affidavit and exhibit describing the legal services rendered in this case. Plaintiff has requested an award of \$1,687.50 in attorney's fees.¹ Based on a review of the affidavit and the time sheet contained in the attached exhibit, the Court finds this to be a "reasonable attorney's fee" under the facts of this case.

Thus, the Court hereby grants Plaintiff's Motion to Assess Costs.

IT IS SO ORDERED.

This 6TH day of November, 1996.


Sven Erik Holmes
United States District Judge

¹Plaintiff also requested costs in the amount of \$126.52; costs were taxed to Defendant by the Court Clerk on June 27, 1996 (Docket #8).

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

FILED

NOV 06 1996

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

Case No. 95-CV-1218-H

KEITH PICKENS,

Plaintiff,

v.

BUDDY'S PRODUCE OF
TULSA, L.L.C., an Oklahoma
Limited Liability Company,

Defendant.

~~ENTERED ON DOCKET~~
DATE NOV 8 1996

JUDGMENT

This matter came before the Court on Plaintiff's Motion to Assess Costs (Docket #5). The Court granted Plaintiff's motion to assess an attorney's fee in the amount of \$1,687.50 on November 6, 1996.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant in the amount of \$1,687.50.

IT IS SO ORDERED.

This 6TH day of November, 1996.


Sven Erik Holmes
United States District Judge

MW
11-7

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

NOV - 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANNY TOLLETTE

Defendant.

CIVIL ACTION NO. 96-C-0222B

ENTERED ON DOCKET

DATE NOV 08 1996

ORDER

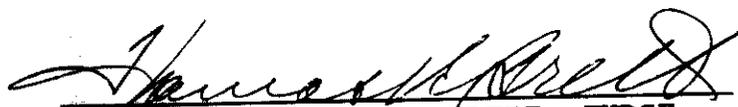
This matter is before the Court pursuant to a regularly scheduled status conference. The plaintiff appears by and through Assistant United States Attorney, Loretta F. Radford. The Defendant, Danny Tollette, appears not.

The Plaintiff has failed to obtain service on the Defendant within the time constraints established by Rule 4 of the Federal Rules of Civil Procedure and orally moves to dismiss the complaint without prejudice.

For good cause shown, the Plaintiff's oral motion to dismiss without prejudice to a future filing is hereby granted.

IT IS SO ORDERED.

DATED this 7th day of Nov., 1996.

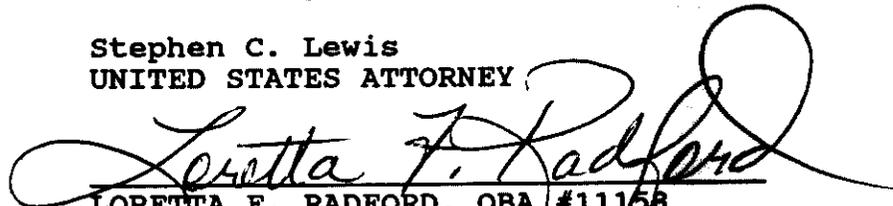


HONORABLE THOMAS R. BRETT, JUDGE
NORTHERN DISTRICT OF OKLAHOMA

(2)

Submitted by:

Stephen C. Lewis
UNITED STATES ATTORNEY

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the typed name and extends to the right, ending in a large loop.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 West Fourth Street Ste 3460
Tulsa, OK 74103
(918) 581-7463

LFR/llf

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

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

Plaintiff,

vs.

ALLIEDSIGNAL INC.,
a Delaware corporation;

and

CFC AVIATION SERVICES, L.P.,
a Delaware limited partnership,
d/b/a GARRETT AVIATION SERVICES,

and

UNC INCORPORATED,
a Delaware corporation,

Defendants.

11-8-96
Case No. 96 CV 811K

FILED
NOV 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF THE DEFENDANT UNC INCORPORATED**

The plaintiff, BizJet International Sales & Support, Inc., hereby dismisses without prejudice its claims against the defendant UNC Incorporated. This dismissal does not affect the continuation of plaintiff's claims against the defendants AlliedSignal Inc. and CFC Aviation Services, L.P., and is filed concurrently with a Second Amended Complaint substituting UNC-CFC Acquisition Co., Inc. d/b/a Garrett Aviation Services for UNC Incorporated.

Respectfully submitted,

Joel L. Wohlgemuth, OBA #9811
John E. Dowdell, OBA #2460
William W. O'Connor, OBA #13200
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEYS FOR THE PLAINTIFF, BIZJET
INTERNATIONAL SALES & SUPPORT, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 1996, a true and correct copy of the foregoing instrument was hand-delivered to:

Donald L. Kahl, Esq.
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103-3708

Michael J. Gibbens, Esq.
Brad R. Carson, Esq.
CROWE & DUNLEVY
500 Kennedy Building
321 South Boston
Tulsa, OK 74103-3313

L. K. Smith, Esq.
Paul J. Cleary, Esq.
Scott R. Rowland, Esq.
BOONE, SMITH, DAVIS, HURST
& DICKMAN
500 ONEOK Plaza
100 West 5th Street
Tulsa, OK 74103

and mailed, with proper postage thereon, to:

Jeffrey M. Shoet, Esq.
Paul H. Roder, Esq.
GRAY CARY WARE & FREIDENRICH
401 B Street, Suite 1700
San Diego, CA 92101

William J. Maledon, Esq.
Brett Dunkelman, Esq.
OSBORN MALEDON
The Phoenix Plaza
2929 North Central Avenue
21st Floor
Phoenix, AZ 85012-2794

Alison L. Smith, Esq.
VINSON & ELKINS, L.L.P.
2300 First City Tower
1001 Fannin
Houston, TX 77002-6760

Joel L. Wohlgenuth

bj.as.notdis1/mdc

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

F I L E D

NOV - 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Plaintiff,

v.

REYNOLDS STANLEY, an individual,

Defendant.

Case No. 96C 386B

ENTERED ON DOCKET

DATE NOV 07 1996

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW on this 3rd day of November, 1996, the above-styled case comes on before the Court. The Plaintiff appearing by its attorney, Steven W. Soulé of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and the Defendant Reynolds Stanley, having been duly and properly served, appears not. The Court, being fully advised and having reviewed the pleadings on file herein, finds and orders as follows:

1. That Plaintiff Thrifty Rent-A-Car System, Inc. ("Plaintiff") is an Oklahoma corporation with its principal place of business in Tulsa County, State of Oklahoma, and that Defendant Reynolds Stanley ("Stanley") is a resident of the State of California, and that Stanley has had significant contacts with the State of Oklahoma in connection with the below described agreements. Therefore, this Court has jurisdiction over the subject matter herein and the parties hereto.

2. The Defendant Reynolds Stanley has been duly and properly served with Summons herein. That the answer date for the Defendant has expired without his having answered or otherwise pled herein and Defendant is adjudged in default pursuant to Rule 55(b)(2) of the

(6)

Federal Rules of Civil Procedure, and **accordingly**, all allegations in Plaintiff's Complaint shall be deemed true.

3. On August 26, 1993, an **agreement** entitled "License Agreement for Vehicle Rental, Leasing & Parking" (the "License Agreement") was entered into between Stanley and Thrifty. The License Agreement granted Stanley the **right** to operate a Thrifty Car Rental business in the specified territory of the city limits of **Santa Rosa** in the County of Sonoma in the State of California. The License Agreement was **amended** by Amendments which were effective on August 26, 1993, May 12, 1994, and **June 30, 1995**.

4. On August 26, 1993, an **agreement** entitled "Master Lease Agreement" (the "Vehicle Lease Agreement") was entered **into by** Stanley and Thrifty for the purpose of leasing to Stanley vehicles owned by Thrifty to be **used** in the operation of Stanley's Thrifty Car Rental business.

5. On August 26, 1993, an **agreement** entitled "Courtesy Vehicle Lease Agreement" (the "Courtesy Vehicle Lease Agreement") was entered into by Stanley and Thrifty for the purpose of leasing to Stanley courtesy **vehicles** owned by Thrifty to be used in the operation of Stanley's Thrifty car rental business.

6. Pursuant to paragraph 3.20 **of the** License Agreement, Stanley agreed to pay to Thrifty, as and when due, all obligations **incurred** by Stanley to Thrifty in the operation of his Thrifty car rental business, whether **incurred** under the License Agreements or any other agreements with Thrifty.

7. On or about November 1, 1994, Stanley executed and delivered a Promissory Note and Security Agreement ("Note") to Thrifty in the amount of \$7,364.46. The purpose of the

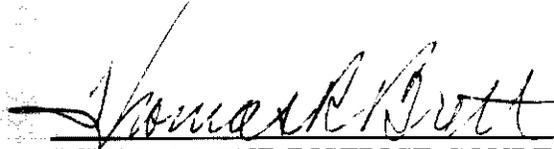
Note was for the repayment of past due **deficiencies** owed by Stanley to Thrifty. Thrifty filed UCC-1 Financing Statements to protect its **security** interest under the Note.

8. Stanley is in default of his **obligations** under the Note and the agreements described above.

9. Thrifty issued notices of **termination** of the agreements to Stanley and Stanley failed to cure the breaches of the agreements. Effective 5:00 p.m. CST on November 14, 1995, the agreements relating to Stanley's **license location** were terminated because of defaults by Stanley in the performance of his **obligations** under these agreements. Amounts remain due and owing from Stanley to Thrifty following **the termination** of these agreements.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the Defendant, Reynolds Stanley, has wholly **failed** and refused to timely answer or otherwise plead herein and therefore is in default, and **as a result** of such default, all material allegations in Thrifty's Complaint are deemed **confessed** by said Defendant, and that judgment should be entered against said Defendant accordingly.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Thrifty Rent-A-Car System, Inc. have and recover **judgment** in its favor against the Defendant, Reynolds Stanley, (i) for the amount of \$182,612.62, **plus** interest at the rate of \$87.76 per day from May 7, 1996, through the date of judgment, (ii) **for principal** in the amount of \$621.46, plus interest thereon at the rate of 10.25% per annum **from** November 1, 1995, until paid; (iii) reasonable attorney's fees in the amount of \$2,000 **and costs** in this action in the amount of \$150.00, plus (iv) post-judgment interest at the statutory **rate** ^{5.64%} until paid, plus all accruing attorneys' fees and costs incurred herein.



JUDGE OF THE DISTRICT COURT

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Steven W. Soulé, OBA #13781
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0466
(918) 594-0505 (facsimile)
ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA NOV - 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS L. STUESSY, SR.)

Petitioner,)

v.)

UNITED STATES OF AMERICA)

Respondent.)

Case No. 96-MC-39-B ✓

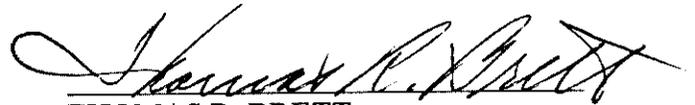
ENTERED ON DOCKET

DATE NOV 07 1996

ORDER

The above-styled case is hereby **DISMISSED**. The issues herein have been decided by the Honorable Sven Erik Holmes in case number 96-MC-44-H. (See Exhibit 1).

IT IS SO ORDERED this 7th day of November, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
NOV 04 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Petitioner,

v.

THE ENROLLMENT CENTER
INSURANCE AGENCY, INC.,

Respondent.

Case No. 96-MC-44-H

ENTERED ON DOCKET
DATE NOV 6 1996

ORDER

This matter comes before the Court on Petitioner's Motion to Enforce Internal Revenue Service Summons (Docket # 1).

At a hearing on October 31, 1996, this Court declared service of the summons good, and heard testimony of Fred Van Eman, president of the respondent corporation, and Revenue Officer James Tinkler, and arguments of counsel. After considering the arguments of counsel and the evidence received, the Court finds that the summons is overbroad. This Court will not permit Petitioner's request for a wholesale production of documents without a sufficient showing as required by law. Petitioner has the option of submitting a more narrowly tailored summons directed to the production of documents by or pertaining to Mr. Thomas Stuessy, who is the subject of the government's inquiry.

Respondent's Petition to Quash the Summons is hereby granted.

IT IS SO ORDERED.

This 4TH day of November, 1996.


Sven Erik Holmes
United States District Judge

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

FILED

NOV 7 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARRY SALEM, an individual
resident of the State of
Oklahoma,

Plaintiff,

vs.

Case No. 96-C-539-B

PARK INNS INTERNATIONAL, INC.,
a Delaware corporation; and
AMERICAN ARBITRATION ASSOCIATION,
INC., a New York corporation,

Defendants.

NOV 07 1996

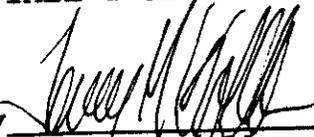
DATE

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, Harry Salem, by and through its undersigned attorney of record, Moyers, Martin, Santee, Imel & Tetrick, and the defendant, Park Inns International, Inc., by and through its undersigned attorneys of record, Crouch & Hallett, L.L.P., pursuant to the provisions of Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate to the dismissal of the above-styled cause of action without prejudice. Defendant, American Arbitration Association, has not appeared or otherwise filed a responsive pleading in this matter.

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

By



Terry M. Kollmorgen, OBA #13713
320 S. Boston, Suite 920
Tulsa, OK 74103-3722
Telephone: (918) 582-5281

ATTORNEYS FOR PLAINTIFF
Harry Salem

CROUCH & HALLETT, L.L.P.

By



Patrick O. Strauss
Kelly N. Helling
717 N. Harwood, Suite 1400
Dallas, TX 75201
(214) 953-0053

ATTORNEYS FOR DEFENDANT,
Park Inns International, Inc.

CERTIFICATE OF MAILING

I certify that on the 7th day of November, 1996, I caused to be mailed, with sufficient postage affixed thereon, a true and correct copy of the foregoing **Stipulation Of Dismissal** to the following:

American Arbitration Association
Attn: Helmut Wolff
13455 Noel Road
Dallas, TX 75240

Sean H. McKee, Esq.
Woodstock & McKee
1518 S. Cheyenne
Tulsa, OK 74119



Terry M. Kollmorgen

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

FILED
NOV 05 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BS&B SAFETY SYSTEMS, INC.

Plaintiff,

v.

CONTINENTAL DISC CORPORATION,

Defendant.

Case No. 94-CV-1027-H /

ENTERED ON DOCKET

DATE NOV 7 1996

ORDER

1. Subject to the provisions of paragraph 3 below, Defendant Continental Disc Corporation, its officers, agents, employees, and attorneys, and those persons acting in concert with Continental Disc Corporation who receive actual notice of this Order, are hereby enjoined from directly or indirectly infringing claims 1 through 5 of Plaintiff BS&B Safety Systems's U.S. Patent No. 5,082,133 by manufacturing, using, selling, or offering to sell in the United States any Continental Disc Corporation disc that has a hexagonal pattern of embossments in the dome, including without limitation any disc that has been previously marketed under the name SANITRX or STARTRX, and all variations thereof (collectively the "Products"). This injunction shall remain in effect until U.S. Patent No. 5,082,133 expires or until claims 1 through 5 of the patent are declared unpatentable, invalid, or unenforceable in a final decision from which there is no further appeal, or are lost in reissue, disclaimed, or otherwise abandoned.

2. Within fifteen (15) days of the effective date of this injunction as provided in paragraph 3, Continental Disc Corporation shall provide a copy of this Order to each of its employees, sales representatives, and those individuals and entities to whom Continental Disc Corporation has sold the Products for "resale," meaning those individuals and entities who have purchased the Products for the purpose of reselling them in the normal course of business, either

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in the form or condition in which they were purchased or as attachments to or integral parts of other tangible personal property. See, e.g., Okla. Stat. tit 68, §§ 1352(N)(1), 1357(3).

3. The effective date of this injunction shall be November 15, 1996, provided, however, if prior to November 15 Continental Disc Corporation (i) appeals this injunction to the Federal Circuit and (ii) files a motion with this Court to stay this injunction pending appeal, then the effective date of this injunction shall be seven (7) calendar days following the date on which Continental Disc Corporation's appeal is docketed by the Federal Circuit.

IT IS SO ORDERED.

This 5TH day of November, 1996.



Sven Erik Holmes
United States District Judge

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

NOV 6 1996

B

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

MIKE ALEXANDER COMPANY, INC.,)
d/b/a MALCO,)
)
Plaintiff,)
)
vs.)
)
TRAFALGAR HOUSE, INC., d/b/a)
JOHN BROWN ENGINEERS &)
CONSTRUCTORS; JOHN BROWN)
ENGINEERS AND CONSTRUCTORS,)
LTD.; and JOHN BROWN, PLC;)
)
Defendants.)

Case No. 96-C-538-BU ✓

ENTERED ON DOCKET

DATE NOV 7 1996

ORDER OF DISMISSAL WITH PREJUDICE

The above cause comes before the Court pursuant to Plaintiff's Application for Order of Dismissal with Prejudice. Upon review of Plaintiff's application, and being otherwise fully advised in the premises, the Court finds that the application should be, and is hereby is, granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled and numbered cause is hereby dismissed as to all Defendants, with prejudice to refiling of this action, and with each party to bear their own costs and attorney's fees.

ENTERED this 6th day of November, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

The Secretary must follow a five-step process in evaluating a claim for disability benefits. 20 C.F.R. §404.1520 and §416.920. If a determination can be made at any of the steps that the claimant is or is not disabled, the review ends. The five steps are as follows:

1. A person who is working is not disabled. 20 C.F.R. §416.920(b)
2. A person who does not have an impairment or combination of impairments severe enough to limit the ability to do basic work is not disabled. 20 C.F.R. §416.920(c).
3. A person whose impairments meets or equals one of the impairments listed in the regulations is conclusively presumed to be disabled. 20 C.F.R. §416.920(d).
4. A person who is able to perform work he has done in the past is not disabled. 20 C.F.R. §416.920(e).
5. A person whose impairment precludes performance of past work is disabled unless the Secretary demonstrates that the person can perform other work. Factors to be considered are age, education, past work experience, and residual functional capacity. 20 C.F.R. §416.920(f).

Reyes v. Bowen, 845 F.2d 242, 243 (10th Cir. 1988).

The claimant bears the burden of establishing a disability, i.e., the first four steps. Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993). Williams v. Bowen, 844 F.2d 748, 751 n.2 (10th Cir. 1988). Once step five is reached, the burden shifts to the Secretary to show that claimant retains the capacity to perform alternative work types which exist within the national economy. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 776 (10th Cir. 1990).

The administrative law judge ("ALJ") denied benefits at step five, finding that plaintiff was not precluded from performing

sedentary work.

The Secretary's decision and findings will be upheld if supported by substantial evidence. Nieto v. Heckler, 750 F.2d 59, 61 (10th Cir. 1984). Substantial evidence is evidence a reasonable mind would accept as adequate to support a conclusion Andrade v. Sec'y Health & Human Services, 985 F.2d 1045, 1047 (10th Cir. 1993). The inquiry is not whether there was evidence which would have supported a different result but whether there was substantial evidence in support of the result reached. In addition, the agency decision is subject to reversal if the incorrect legal standard was applied. Henrie v. U.S. Dep't Health and Human Services, 13 F.3d 359, 360 (10th Cir. 1993); Williams v. Bowen, 844 F.2d at 750.

Plaintiff raises the following issues to be considered:

- (1) the ALJ's finding that the defendant carried her step 5 burden to show that Mr. Hill retained the residual functional capacity ("RFC") to perform the full range of sedentary work is not supported by substantial evidence;
- (2) the ALJ should have called a vocational expert to testify concerning the vocational impact of Mr. Hill's nonexertional impairments; and
- (3) the ALJ improperly relied on the grids for the ultimate conclusion of disability because Mr. Hill suffered from severe pain, a nonexertional impairment, which precluded conclusive reliance on the grids.

Sedentary work is that which "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), 416.967(a). Plaintiff testified during his hearing before the ALJ that he was capable of performing a job requiring lifting ten pounds and sitting for six hours in an eight-hour day. (TR. 44-45). This testimony, coupled with the ALJ's consideration of the medical evidence, leads to a conclusion that substantial evidence supported the ALJ's determination on the "sedentary work" issue.

Resolution of the two other issues raised by plaintiff requires discussion of the Medical-Vocational Guidelines (the "grids"). The grids were promulgated to aid in the fifth stage of the procedure. The grids specify whether a significant number of jobs in the national economy exist for a claimant of a given age, education, work experience, and residual functional capacity (that is, functional level of work that the claimant can physically perform on a sustained basis.) Exclusive reliance on the grids is appropriate in cases involving only exertional impairments (impairments which place limits on an individual's ability to meet job strength requirements). Foote v. Chater, 67 F.3d 1553, 1559 (11th Cir.1995). Pain is a nonexertional impairment. Id.

If the limitations are nonexertional and not covered by the grids, a vocational expert is required to identify jobs that match

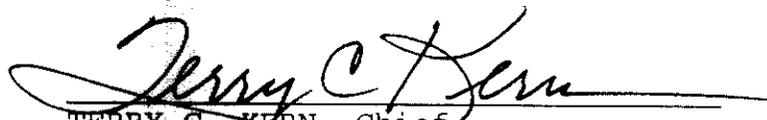
the abilities of the claimant, given his limitations. Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir.1995). The grids may be used, however, where the ALJ finds, based on substantial evidence, that the nonexertional impairment **does** not affect residual functional capacity. Glass v. Shalala, 43 F.3d 1392, 1396 (10th Cir.1994). See generally Ragland v. Shalala, 992 F.2d 1056, 1058 (10th Cir.1993).

Upon review of the record, the Court concludes the ALJ did not err in his analysis. He fully and properly considered, and disregarded, the claimant's complaints of disabling pain. See generally Luna v. Bowen, 834 F.2d 161 (10th Cir.1987). The treating physicians were uniform that conservative treatment would enable claimant to perform the physical exertion requirements of sedentary work. Reliance on the grids was, therefore, appropriate, and there was no need to obtain the testimony of a vocational expert.

The Court has reviewed the record and concludes the plaintiff retains the residual functional capacity to engage in sedentary exertional activity and, therefore, is not disabled. The ALJ's conclusion that plaintiff **has** not been disabled at any time relevant to the ALJ's decision is supported by substantial evidence. The ALJ's decision is also supported by the residual functional capacity assessments of record. The physicians' assessments are consistent with plaintiff's ability to perform the requirements for the full range of sedentary work. Essentially, plaintiff asks the Court to reject the ALJ's credibility

determination. The Court declines to do so, also noting such determinations are generally treated as binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir.1988). Upon thorough review of the medical evidence, plaintiff's testimony and transcript of the record, the Court concludes the record fully supports the ALJ's determination, and the Magistrate Judge's Report and Recommendation. Plaintiff's objection (#16) is overruled. Plaintiff's complaint for benefits is hereby DENIED.

So ordered this 4th day of November, 1996.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV - 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM,)
INC., an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
REYNOLDS STANLEY, an individual,)
)
Defendant.)

Case No. 96C 386B

ENTERED ON DOCKET
DATE NOV 07 1996

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW on this 9th day of November, 1996, the above-styled case comes on before the Court. The Plaintiff appearing by its attorney, Steven W. Soulé of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and the Defendant Reynolds Stanley, having been duly and properly served, appears not. The Court, being fully advised and having reviewed the pleadings on file herein, finds and orders as follows:

1. That Plaintiff Thrifty Rent-A-Car System, Inc. ("Plaintiff") is an Oklahoma corporation with its principal place of business in Tulsa County, State of Oklahoma, and that Defendant Reynolds Stanley ("Stanley") is a resident of the State of California, and that Stanley has had significant contacts with the State of Oklahoma in connection with the below described agreements. Therefore, this Court has jurisdiction over the subject matter herein and the parties hereto.

2. The Defendant Reynolds Stanley has been duly and properly served with Summons herein. That the answer date for the Defendant has expired without his having answered or otherwise pled herein and Defendant is adjudged in default pursuant to Rule 55(b)(2) of the

(6)

Federal Rules of Civil Procedure, and accordingly, all allegations in Plaintiff's Complaint shall be deemed true.

3. On August 26, 1993, an agreement entitled "License Agreement for Vehicle Rental, Leasing & Parking" (the "License Agreement") was entered into between Stanley and Thrifty. The License Agreement granted Stanley the right to operate a Thrifty Car Rental business in the specified territory of the city limits of Santa Rosa in the County of Sonoma in the State of California. The License Agreement was amended by Amendments which were effective on August 26, 1993, May 12, 1994, and June 30, 1995.

4. On August 26, 1993, an agreement entitled "Master Lease Agreement" (the "Vehicle Lease Agreement") was entered into by Stanley and Thrifty for the purpose of leasing to Stanley vehicles owned by Thrifty to be used in the operation of Stanley's Thrifty Car Rental business.

5. On August 26, 1993, an agreement entitled "Courtesy Vehicle Lease Agreement" (the "Courtesy Vehicle Lease Agreement") was entered into by Stanley and Thrifty for the purpose of leasing to Stanley courtesy vehicles owned by Thrifty to be used in the operation of Stanley's Thrifty car rental business.

6. Pursuant to paragraph 3.20 of the License Agreement, Stanley agreed to pay to Thrifty, as and when due, all obligations incurred by Stanley to Thrifty in the operation of his Thrifty car rental business, whether incurred under the License Agreements or any other agreements with Thrifty.

7. On or about November 1, 1994, Stanley executed and delivered a Promissory Note and Security Agreement ("Note") to Thrifty in the amount of \$7,364.46. The purpose of the

Note was for the repayment of past due deficiencies owed by Stanley to Thrifty. Thrifty filed UCC-1 Financing Statements to protect its security interest under the Note.

8. Stanley is in default of his obligations under the Note and the agreements described above.

9. Thrifty issued notices of termination of the agreements to Stanley and Stanley failed to cure the breaches of the agreements. Effective 5:00 p.m. CST on November 14, 1995, the agreements relating to Stanley's license location were terminated because of defaults by Stanley in the performance of his obligations under these agreements. Amounts remain due and owing from Stanley to Thrifty following the termination of these agreements.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the Defendant, Reynolds Stanley, has wholly failed and refused to timely answer or otherwise plead herein and therefore is in default, and as a result of such default, all material allegations in Thrifty's Complaint are deemed confessed by said Defendant, and that judgment should be entered against said Defendant accordingly.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Thrifty Rent-A-Car System, Inc. have and recover judgment in its favor against the Defendant, Reynolds Stanley, (i) for the amount of \$182,612.62, plus interest at the rate of \$87.76 per day from May 7, 1996, through the date of judgment, (ii) for principal in the amount of \$621.46, plus interest thereon at the rate of 10.25% per annum from November 1, 1995, until paid; (iii) reasonable attorney's fees in the amount of \$2,000 and costs in this action in the amount of \$150.00, plus (iv) post-judgment interest at the statutory rate ^{5.64%} until paid, plus all accruing attorneys' fees and costs incurred herein.


JUDGE OF THE DISTRICT COURT

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Steven W. Soulé, OBA #13781
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0466
(918) 594-0505 (facsimile)
ATTORNEYS FOR PLAINTIFF

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

FILED
NOV 04 1996
Phil Lombard, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Petitioner,

v.

THE ENROLLMENT CENTER
INSURANCE AGENCY, INC.,

Respondent.

Case No. 96-MC-44-H

ENTERED ON DOCKET
DATE NOV 6 1996

ORDER

This matter comes before the Court on Petitioner's Motion to Enforce Internal Revenue Service Summons (Docket # 1).

At a hearing on October 31, 1996, this Court declared service of the summons good, and heard testimony of Fred Van Eman, president of the respondent corporation, and Revenue Officer James Tinkler, and arguments of counsel. After considering the arguments of counsel and the evidence received, the Court finds that the summons is overbroad. This Court will not permit Petitioner's request for a wholesale production of documents without a sufficient showing as required by law. Petitioner has the option of submitting a more narrowly tailored summons directed to the production of documents by or pertaining to Mr. Thomas Stuessy, who is the subject of the government's inquiry.

Respondent's Petition to Quash the Summons is hereby granted.

IT IS SO ORDERED.

This 4TH day of November, 1996.


Sven Erik Holmes
United States District Judge

10

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

FILED

NOV 05 1996 *MLW*

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

RLI INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
KEN LAMP and DENISE LAMP, d/b/a)
MID-AMERICA AVIATION; CONNIE R.)
KING, Individually and as Personal)
Representative of the Estate of Donald)
W. King, Deceased; JUANITA FRANKLIN,)
Individually and as Personal)
Representative of the Estate of Kenneth)
W. Franklin, Deceased; PHILIP DAVIS;)
BARBARA DAVIS; ROSIE SAWYER,)
Individually and as Personal)
Representative of the Estate of Bradley)
Scott Sawyer, Deceased; LONE STAR)
INDUSTRIES, INC., and NATIONAL UNION)
FIRE INSURANCE COMPANY OF PITTSBURGH,)
P.A.,)
)
Defendants.)

Case No. 95-C-467-B /

ENTERED ON DOCKET

DATE NOV 06 1996

ORDER

Before the Court for consideration is Defendant, Lone Star Industries, Inc.'s ("Lone Star's"), Motion for Costs and Attorney Fees, (Docket #81), and Defendants, Ken Lamp's and Denise Lamp's (the "Lamps'"), Motion for Costs and Attorney Fees (Docket #83).¹ Following a thorough review of the record and the applicable legal authority, the Court concludes the Defendants' motions should be GRANTED.

¹ Although Defendants' motions are for costs and attorneys fees, only the attorney fees issue will be addressed in this Order. The costs issue has been adjudicated by orders dated September 24, 1996 (Docket #89 and Docket #90).

Background Facts

Plaintiff, RLI Insurance Company ("RLI"), issued an Aviation Insurance Policy to Ken Lamp and Denise Lamp, d/b/a Mid-America Aviation, covering the applicable date in question, August 18, 1994. According to the terms and conditions of the policy, chartered flights were excluded from coverage.

On August 18, 1994, a Cessna 310 Aircraft on the return leg of a round-trip from Pryor, Oklahoma, to El Paso, Texas, crashed. Three of the four occupants died. RLI maintained that the flight was a charter, not a rental. As a result, RLI denied coverage to its insureds, Ken Lamp and Denise Lamp, d/b/a Mid-America Aviation, on or about September 22, 1994.

On May 22, 1995, RLI filed a Complaint for Declaratory Relief in this Court seeking a declaration of no coverage and no duty to defend under the policy. A fact question existed as to whether the flight was a charter or rental. On July 24, 1996, a jury determined the flight in question was not a charter and granted judgment against RLI.

Subsequently, Lone Star and the Lamps filed these motions for attorneys fees.

Legal Analysis

Lone Star and the Lamps are entitled to attorneys fees based on 36 Okla.Stat. § 3629(B). This statute provides:

A. An insurer shall furnish, upon written request of any insured claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not by reason of the requirement so to furnish forms, have any responsibility for or with reference to the

completion of such proof or the manner of any such completion or attempted completion.

B. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. This provision shall not apply to uninsured motorist coverage.

It is well-settled Oklahoma law that the prevailing party in an action to recover under an insurance contract is entitled to attorneys fees under this statute. See McCorkle v. Great Atlantic Insurance Co., 637 P.2d 583 (Okla. 1981); See also Thompson v. Shelter Mutual Insurance Company, 875 F.2d 1460 (10th Cir. 1989). However, the issue in this case is whether this statute is applicable to a declaratory judgment action. This Court holds the statute is applicable to a declaratory judgment action.

In An-Son Corp. v. Holland-America Insurance Company, 767 F.2d 700 (10th Cir. 1985), the insurance company refused to defend the insured in a state court action relying on an exclusion in its policy. The insured then brought a declaratory judgment action seeking to recover its expenditures. The jury returned a verdict in favor of the insured and against the insurance company, and the Court awarded the insured attorney fees based on 36 Okla.Stat. §3639(B). Id. at 701-02.

RLI contends An-Son is distinguishable from the case at bar because RLI did not fail to provide a defense in the state court

action while maintaining the declaratory relief action. The Court disagrees.

Even though RLI did provide a defense in the state court action, Lone Star and the Lamps still had to defend the federal court action. The result would not have been any different had RLI not provided a defense in the state court action. Lone Star and the Lamps would have had the same expenditures. As noted by 7A Appleman, Insurance Law and Practice, s 4691 (1962) in Upland Mutual Insurance, Inc. v. Noel, 519 P.2d 737 (1974), "[i]f the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above." Accordingly, Lone Star and the Lamps are entitled to their attorneys fees.

As to the amount of the attorneys fees, RLI does not dispute the amount in its objection to the motions for attorneys fees. Thus, RLI has waived any objection to the amount of those fees. McCorkle v. Great Atlantic Insurance Company, 637 P.2d 583, 586 (1981).

Accordingly, the Court hereby GRANTS Defendant, Lone Star's, and Defendants, Ken Lamp's and Denise Lamp's, motions for attorneys fees. Wherefore, Plaintiff, RLI is ordered to pay to Defendant, Lone Star, the amount of \$2,698.00 and to Defendants, Ken Lamp and Denise Lamp, the amount of \$47,820.00.

IT IS SO ORDERED THIS 5th DAY OF NOVEMBER, 1996.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

NOV 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HORSEHEAD INDUSTRIES, INC.,
d/b/a ZINC CORPORATION OF
AMERICA, et al.,

Plaintiffs,

v.

ST. JOE MINERALS CORPORATION,
et al.,

Defendants.

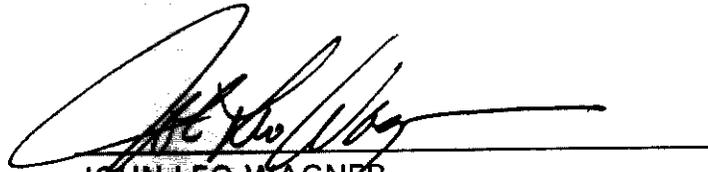
Case No: 94-C-98-B ✓

ENTERED ON DOCKET
DATE NOV 06 1996

ORDER

Having considered Plaintiffs' Submission of Fees and Expenses (Docket #260), Defendant Cyprus Amax Minerals Company's Response thereto (Docket #264), and Plaintiffs' Reply to Cyprus' Response (Docket #265), the court determines and hereby orders that plaintiffs recover from Cyprus Amax, as the non-prevailing party in the hearing conducted by the court on September 25, 1996, the total sum of \$14,252.11, representing those costs and expenses the court deems to have been reasonably and necessarily incurred, and directly related to the September 25, 1996 hearing, consistent with the court's previous Order entered on October 16, 1996.

IT IS SO ORDERED.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

Handwritten initials

Removal jurisdiction raises significant federalism concerns, thus removal statutes are to be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 85 L.Ed 1214 (1941). In determining whether not a case is to be remanded for lack of subject matter jurisdiction, a court must look at the face of the complaint or petition in the underlying action. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L.Ed. 702 (1951). Additionally, the Tenth Circuit has asserted that only those portions of the complaint which directly and necessarily relate to the plaintiff's cause of action should be considered. *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 481 (10th Cir. 1975). The plaintiff is master of the complaint, and may choose not to assert a federal cause of action, even if one is available to him. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L.Ed.2d 318 (1987) (upholding the well-plead complaint rule); *Albertson, Inc. v. Carrigan*, 982 F.2d 1478, 1481 (10th Cir. 1993); *Heckelmann v. Piping Companies, Inc.*, 904 F. Supp. 1257,1260 (N.D. Okla 1995). However, some federal courts will go behind the face of the complaint to determine whether the real nature of the claim is federal regardless of how the plaintiff characterizes the claim. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n. 2, 101 S. Ct. 2424, 2427 n.2, 69 L.Ed.2d 103 (1981) (endorsing the artful pleading doctrine); *United Association of Journeymen and Apprentices of the Plumbers and Pipefitters Industry of the United States and Canada, Local 57 v. Bechtel Power Corp*, 834 F.2d 884,887-888 (10th Cir. 1988); 14A Charles A. Wright,

et al., *Federal Practice and Procedure* Jurisdiction 2d § 3722 at 266-270 and cases cited therein (1985).

At issue in this case is whether Plaintiff's Petition establishes a claim under the Americans with Disabilities Act, creating federal jurisdiction under 28 U.S.C. § 1331 (1988), or whether Plaintiff's Petition alleges only state law claims, thus leaving this Court without subject matter jurisdiction. This Court had an opportunity to address a similar issue in *Heckelmann v. Piping Companies, Inc.*, 904 F. Supp. 1257 (N.D. Okla. 1995). In *Heckelmann*, the plaintiff sought to remand a public policy cause of action based on age discrimination. The defendant claimed that the plaintiff, on the face of his petition, raised all the elements necessary to state a claim under the Age Discrimination in Employment Act, and thus established federal question jurisdiction. This Court held that both state and federal remedies existed, and that the plaintiff, as master of his lawsuit, was free to eschew the available federal remedy. *Id.* at 1262. The case currently under consideration is distinguishable from the *Heckelmann* decision in a number of respects. First, the state law of Oklahoma has changed. The Oklahoma Supreme Court has specifically held that the *Burk*¹ public policy exception to the at-will employment doctrine does not apply to cases of age discrimination. *List v. Anchor Paint Mfg. Co.*, 910 P.2d 1011 (Okla. 1996). Second, unlike the petition in *Heckelmann*, the petition in the present case does make specific reference to a federal remedy, the ADA. In his petition,

¹ *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989).

the plaintiff alleges that PSO is an employer within the meaning of the ADA (ADA and Okla. Stat. tit. 25 § 1101 et seq.) Third, unlike the *Heckelmann* plaintiff, Plaintiff has filed complaints with the Equal Employment Opportunity Commission ("EEOC") and the Oklahoma Human Rights Commission ("OHRC") alleging handicap discrimination. Although these differences present a more factually compelling basis for exercise of federal question jurisdiction, these differences are not significant enough to survive a motion for remand.

The defendant asserts that the *List* case has clearly established that the *Burk* exception does not apply to cases in which there is an adequate statutory remedy available to the claimant. Plaintiff asserts that the issue of whether or not the *Burk* exception applies to handicap discrimination remains open in spite of the *List* decision. This Court agrees with Plaintiff inasmuch as *List* does not specifically apply to handicap discrimination. However, this Court finds that if the Oklahoma Supreme Court were confronted with this question, they would extend the *List* decision to apply to cases of handicap discrimination because there are adequate federal and state statutory protections which would trump common law remedies.

Regardless of how the Oklahoma courts would decide such an issue, the outcome in this case would be the same. If it was determined that there was no cause of action under Oklahoma public policy for handicap discrimination, such a claim could be dismissed by the state court. The lack of colorable claim under state common

law does not translate the allegations into a federal cause of action. Even if Plaintiff's complaint does allege a claim for handicap discrimination rather than violation of Oklahoma public policy, he has remedies available under both state and federal law. "Federal jurisdiction is not preferred merely because the nature of the claim is such that it could be framed as a federal cause of action as well as one arising under state law." *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th Cir. 1984). While it is true that the concept of reasonable accommodation is not specifically enunciated in the Oklahoma employment discrimination statute,² it is unclear whether an employer's failure to accommodate a handicap would constitute employment discrimination under Oklahoma law. See, e.g., *Mendenhall v. Koch Service, Inc.*, 872 F. Supp. 907 (N.D. Okla. 1993) (granting summary judgment on ground that employer had no duty to accommodate handicapped employee under Oklahoma law by transferring him to another position) rev'd 37 F.3d 1509 (10th Cir. 1994) (finding that the failure to consider handicapped employee for other positions could constitute a failure to hire rather than a refusal to accommodate by transferring employee to another position).

Here the Plaintiff has chosen to eschew his federal remedies under the ADA, and this Court must honor that choice absent clear evidence that the plaintiff has engaged in artful pleading. "Where there is a choice between state and federal remedies, the federal courts will not ignore the plaintiff's choice of state law as the

² Okla. Stat. tit. 25 § 1302.

basis for the action." *Wright, supra* at 268-70, 275-76 (1985) (footnotes omitted).

Under the artful pleading doctrine, a plaintiff may not defeat removal by failing to plead necessary federal questions in his or her complaint. *Howard v. Hibbard Brown & Co., Inc.*, 835 F. Supp. 1331, 1332 (D. Kansas 1993). Where a party alleges artful pleading, a court must evaluate the motive for a plaintiff's failure to plead the cause of action to determine whether such failure was in good faith or was an attempt to conceal the fact that a claim was truly federal. *Id.* The artful pleading doctrine is to be construed narrowly so as not to tread on the long-established well-plead complaint rule. *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 447, 479 (9th Cir. 1990) (holding that the doctrine should be invoked only when the particular conduct complained of is governed exclusively by federal law); *United Jersey Banks v. Parell*, 783 F.2d 360, 368 (3d Cir. 1986) ("Unless applied with circumscription, the artful pleading doctrine may raise difficult issues of federal-state relations. An expansive application of the doctrine could effectively abrogate the rule that a plaintiff is master of his or her complaint."); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984) citing *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 577 (N.D. Cal. 1981) ("the conclusion of artful pleading is properly drawn when the plaintiff 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal has made his claim a federal one.'").

The artful pleading doctrine has been applied in two different circumstances. First, artful pleading is recognized in cases in which a federal statute's preemptive force is so strong that it converts a state law claim into a federal claim for purposes of the well-plead complaint rule. See, e.g., *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d. 55 (1987) (ERISA); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968) (§ 301 of the Taft-Hartley Act). Second, the artful pleading doctrine has been applied in cases where state law claims have been filed in order to circumvent the res judicata impact of a prior federal judgment. This is precisely what occurred in the Supreme Court case *Federated Dep't Stores, Inc. v. Moxie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L.Ed.2d 103 (1981). In *Moxie*, the plaintiffs refiled their antitrust claims in state court after each of their claims were dismissed by the federal court. The state claims were removed, and the federal court declined to remand the claims stating that "the complaints, though artfully couched in terms of state law, were 'in many respects identical' with the prior complaints and were thus properly removed to federal court because they raised 'essentially federal law' claims." *Moxie*, 452 U.S. at 396, 101 S. Ct. at 2427 (quoting from the underlying case).

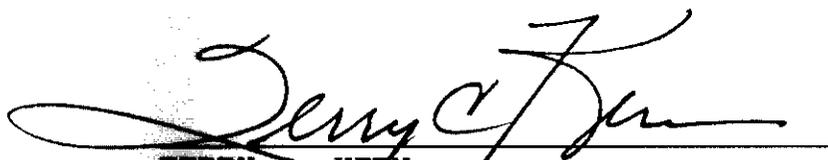
The Court finds nothing in the present claim to warrant application of the artful pleading doctrine. The Americans with Disabilities Act has neither preempted the field of handicap discrimination, nor has the plaintiff subjected himself to federal

jurisdiction prior to filing his state law claims. Additionally, this is not a case in which the vindication of a state right necessarily turns on some construction of federal law, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10, 103 S. Ct. 2841, 2846, 77 L.Ed.2d 420 (1983). While Plaintiff's actions do suggest that he may have considered filing an ADA or state handicap discrimination claim, and thus took the proper administrative actions to do so, this hardly constitutes the fraudulent activity usually associated with the artful pleading doctrine. Similarly, the brief reference to the ADA in Plaintiff's petition hardly rises to the level of a claim for relief under the statute.

Since the complaint, on its face, has not alleged a claim for relief under the Americans with Disabilities Act, but rather seeks relief under Oklahoma public policy and Workers' Compensation statutes, this Court is without jurisdiction to hear this claim.

For the foregoing reasons, the Motion to Remand is hereby GRANTED. Pursuant to 28 U.S.C. § 1447(c), this action is hereby remanded to the District Court of Tulsa County, State of Oklahoma.

ORDERED this 31 day of OCTOBER, 1996.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 11/6/96

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

TRINA MAHONEY and JAMIE D.
MAHONEY

Plaintiffs,

vs.

SHIRLEY S. CHATER, ¹ Commissioner
Social Security Administration,

Defendant,

F I L E D

NOV 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-415-M

ORDER

Plaintiffs, TRINA MAHONEY and JAMIE D. MAHONEY, seek judicial review of a decision of the Secretary of Health & Human Services denying Social Security mother's and child's insurance benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 U.S.C. §405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de*

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. 103-297. However, this order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiffs' January 7, 1993 applications for insurance benefits were denied March 4, 1993 and were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 26, 1994. By decision dated August 25, 1994 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 7, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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novo. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427. In addition, the Court must assess both whether the Secretary applied the correct legal standards and whether her decision contains sufficient detail to enable the Court to determine that she has done so. *Winfrey v. Chater*, 92 F.3d 1017, 1019 (10th Cir. 1996); *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994).

The issue decided by the ALJ on behalf of the Secretary is whether Trina Mahoney and Jamie Mahoney are entitled to mother's insurance benefits and child's insurance benefits, respectively, on the earnings record of Michael J. Mahoney. The ALJ stated that the specific issue before him was whether Michael J. Mahoney is deceased. Based on the evidence before him, the ALJ determined: "The record fails to show that Michael J. Mahoney is deceased." [R. 14]. Plaintiffs challenge this finding, maintaining that the evidence established a presumption of death, unrebutted by the record. The Court has meticulously examined the entire record.

Title Two of the Social Security Act provides for the payment of insurance benefits to the divorced widow and/or child "of an individual who dies a fully or currently insured individual." 42 U.S.C. § 402(d)(1). According to regulations established by the Secretary, the death of an insured can be proven in any of several ways. 20 C.F.R. § 404.720. However, when a claimant cannot produce evidence of death (i.e. death certificate, statement of physician or funeral director, etc.) but evidence of death is needed, a person will be presumed dead based upon submission of the following evidence:

(b) Signed statements by those in a position to know and other records which show that the person has been absent from his or her residence, for no apparent reason, and has not been heard from, for at least 7 years.

20 C.F.R. § 404.721.

The record reflects that Trina Mahoney and Michael were married on February 23, 1980. [R. 22]. Their daughter, Jamie, was born in Tulsa on July 21, 1981. [R. 34]. At one point in the record Trina states she last saw Michael when he signed their divorce decree [R. 21], she places the approximate date as September 10, 1985. Since the decree was filed August 14, 1985 [R. 35], she must have seen him on or before that date. At the hearing Trina testified she last saw Michael in person when Jamie was 2 years old, in 1983. [R. 100]. Trina also testified that she left Michael in January of 1985. [R. 101]. The last address Trina knew of for Michael was their home together in the Dallas area [R. 58, 105], but she did know that he was residing in Tulsa with another woman after he lost his job in Dallas. [R. 104, 105]. Trina

testified that she last spoke with Michael by telephone sometime in 1985 or 1986 when he called her from a motel room in Dallas or Tulsa and said people were after him. [R. 22, 26-27, 87, 101, 102]. Trina also related that "sometime in about December of 1985" a man from a Dallas Bank called trying to find Michael "because he had borrowed about \$80,000 from several branch banks in Dallas and had not made any payments on them." [R. 26]. Trina stated Michael was addicted to cocaine when she last saw him. [R. 22, 23, 101].

A form 723, Statement regarding the Inferred Death of an Individual by Reason of Continued and Unexplained Absence, was completed using information supplied by Michael's mother, Virginia Mahoney, by telephone. [R. 53-56]. Mrs. Mahoney answered "no" to the question: "Was the missing person on good terms with his family and acquaintances." [R. 54]. She explained, "Michael could be difficult -- was angry at times felt family didn't help as much as they could." [R. 54]. The form reflected the last time she saw Michael was in 1983 at his home near Tulsa, Oklahoma. In answer to the question: "Did the missing person express satisfaction with surroundings, work, home conditions, etc.?" Mrs. Mahoney answered, "did say in '85 he'd seen Trina's lawyer and signed over house." [R. 55]. "Do you believe that the missing person is dead?" was answered, "never considered it I just thought he stayed away from family." The question: "Do you know of any reason why the missing person, if living, should not reveal his whereabouts?" was answered "yes," "some anger with family." [R. 56]. The form 723 is not signed by Mrs. Mahoney. From the record it appears that she contacted the Social Security Administration

stating the form contained information **she had not agreed to** and would only sign that she had not seen Michael since **1985 and has no idea of his whereabouts.** [R. 58]. The record contains a letter signed by Virginia M. Mahoney, mother of Michael J. Mahoney, dated May 9, 1994 which **states** in its entirety: "I haven't seen Michael Mahoney in over 7 years or heard from him!" [R. 80].

A form 723 sent to Michael's brother, Paul, was not returned. Although the Social Security Administration tried to **contact** him by phone, no verbal contact was made. [R. 49, 58]. The record contains a letter to Trina dated March 18, 1994 from Phyllis, Michael's step-mother. She **relates** that Michael's father died in November of 1990 and that Michael had not called **his dad** before he died:

The last time Lee [Michael's father] spoke to Paul [Michael's brother] was a few days **before** he died. Paul told him he thought Michael was in **Texas.** (This is 19_0).

[R. 77]. The number where the **blank is** in the preceding quotation appears to be an "8," however, the numeral has clearly **been** written over so that it could be a "9"; one cannot tell from the photocopy in **the record.** From the context it seems that 1990, rather than 1980 would be the **appropriate** date.

The only effort to locate Michael **revealed** by the record occurred in 1991 when the Oklahoma Department of Human **Services** sent a letter concerning his child support obligations to his last known address **in Dallas.** [R. 51]. The bureaus of vital statistics for Oklahoma, Kansas, and Texas **reported** no record of the death of Michael J. Mahoney. [R. 48, 62, 63]. The last **earnings** recorded for Michael was in 1986. [R. 71].

During an interview Trina stated that Michael's grandmother, Katherine Kaveney, passed away in the late 1980's and was rich and she may have left Michael money since he was her favorite. [R. 59]. Inquiries by the Social Security Administration failed to turn up a social security number for Katherine Kaveney. *Id.* In a letter dated October 1, 1994, after the ALJ decision, Trina disputed that she ever stated Michael may have received an inheritance. [R. 87].

In his decision, the ALJ found that the "record fails to establish that Mr. Mahoney is deceased" [R. 14]. Under 42 U.S.C. § 402, the claimants had the burden of establishing Mr. Mahoney's death.

Citing *Edwards v. Califano*, 619 F.2d 865 (10th Cir. 1980), Plaintiffs contend the Secretary failed to recognize the presumption of death established by the evidence under 20 C.F.R. 404.721 and then failed to rebut the presumption.³ Therefore, Plaintiff argues, the ALJ failed to engage in the proper legal analysis of the claim, requiring reversal.

Before the presumption in 20 C.F.R. 404.721 can be invoked, the claimants must establish the foundational facts which give rise to the presumption. "A presumption must rest upon proven facts and cannot be inferred from another assumption", *Montgomery-Ward & Co. v. Sewell*, 205 F.2d 463 (C.A. Tex. 1953). Here the foundational facts are that Mr. Mahoney was absent from his residence, for no apparent reason and he has not been heard from for at least 7 years.

³ Because a presumption is not evidence and does not alter the party bearing the burden of proof, F.R. Evid. 301, it is imprecise to say that the presumption needs to be rebutted.

The record is clear that the claimants have not known Mr. Mahoney's residence since at least the divorce in 1985. There is no evidence in the record to establish where Mr. Mahoney's residence is or that he has been absent from his residence for any period of time. Therefore, the foundational facts that give rise to the presumption under 20 C.F.R. 404.721 have not been established and, therefore, the presumption cannot be invoked. The ALJ did not err by failing to recognize and rebut the presumption.

The Court is well aware of the burden placed upon claimants, such as Plaintiffs, in attempting to establish death by negative evidence. However, this appeal presents only the issue of the ALJ's alleged failure to recognize and rebut the presumption of death under 20 C.F.R. 404.721. The Secretary's regulation clearly requires that the claimants prove that Mr. Mahoney was absent from his residence. The Court is not free to ignore this requirement of the regulation. In the absence of the foundational facts which give rise to the presumption, the ALJ did not commit legal error in failing to consider it. While there is evidence in the record to support a conclusion that Mr. Mahoney is dead, there is also substantial evidence in the record to support a finding that his death has not been proven. Resolution of this issue is properly left to the sound discretion of the ALJ.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Secretary and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the

decision of the Secretary finding Plaintiffs not entitled to insurance benefits is
AFFIRMED.

SO ORDERED this 5th day of November, 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 11/6/96

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

TRINA MAHONEY and JAMIE D.
MAHONEY

Plaintiffs,

vs.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant,

Case No. 95-C-415-M

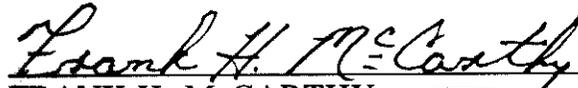
FILED

NOV 5 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiffs. Dated this 5th
day of NOV., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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FILED
NOV 04 1996

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

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM JORDAN,
Plaintiff,

vs.

LIFE INSURANCE COMPANY OF NORTH
AMERICA,

Defendant.

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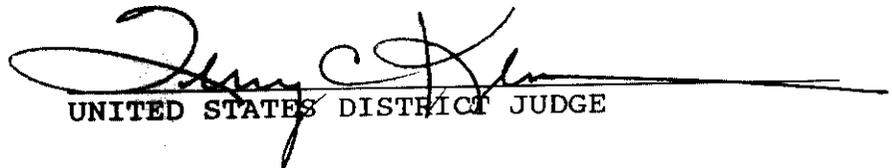
Case No. 96-C-0033K ✓

11-6-96

ORDER OF DISMISSAL WITH PREJUDICE

Upon the Stipulation of the parties, this action is hereby dismissed with prejudice, each party to bear its own costs and attorney's fees.

IT IS SO ORDERED this 4 day of November, 1996.


UNITED STATES DISTRICT JUDGE

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

FILED

NOV 4 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VERNON A. HAYES,
Petitioner,

vs.

DENISE SPEARS,
Respondent.

No. 96-CV-527-B

ENTERED ON DOCKET
DATE NOV 05 1996

ORDER

This is a proceeding on a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections (DOC), contends the State of Oklahoma lost jurisdiction over him when the DOC relinquished him to federal authorities to serve his federal sentence. As a result, he argues the State of Oklahoma is illegally detaining him. Petitioner further argues that he is entitled to earned time credits for the time he was incarcerated in the federal system. As more fully set out below the Court concludes that Respondent's motion to dismiss (Docket #3) should be granted and that Petitioner's motion for an evidentiary hearing (Docket #6) should be denied.

In 1990, Petitioner was convicted in Tulsa County district court of uttering forged instruments, possessing a stolen credit card, and displaying a fictitious driver license. Case Nos. CRF-90-3553, CRF-89-3770, CRF-89-3771, CRF-89-3774, and CRF-89-4031. The district court sentenced Petitioner to thirty years imprisonment in each case with the sentences to run concurrent. On May 11, 1990, Petitioner was received at the Lexington Assessment and Reception Center to begin serving his thirty-year sentence.

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On May 24, 1991, Petitioner pled guilty before this Court in case number 91-cr-44-B and received a twelve-month sentence and three years of supervised release. On October 24, 1991, Judge B.R. Beasley modified Petitioner's state sentence to reflect that it would run concurrent with his federal sentence and that "upon completion of the [federal] sentence . . . in Case No. 91-CR-44-B, that Defendant be returned to the custody of the Oklahoma Department of Corrections for completion of the sentence" in his state cases.

On November 6, 1991, the DOC released Petitioner to the custody of the United States Marshal's Office to serve his federal sentence. On November 5, 1992, Petitioner completed the term of his federal incarceration and was taken to the Bowie County Detention Center, Texarkana, Texas, pending transfer to the Oklahoma Department of Corrections. Petitioner then waived extradition back to Oklahoma.

After exhausting his state remedies, Petitioner filed the instant petition for a writ of habeas corpus. He contends Judge Beasley lacked jurisdiction to modify his state sentence to run concurrent with his federal sentence and that the DOC relinquished custody over Petitioner when it released him to federal authorities.¹

28 U.S.C. § 2254(a) permits a federal court to entertain a

¹ Petitioner further contends that the ruling of the District Court of Cleveland County on his application for post-conviction relief was incorrect. The Court need not address this contention as it does not raise a federal constitutional claim.

habeas petition "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." Violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable under section 2254.

The Court finds Petitioner has not raised any federal constitutional issues in the instant petition. Judge Beasley merely gave Petitioner credit against his State sentence for time served in the federal penitentiary. Moreover, the record in this case shows that Petitioner was discharged from the DOC only long enough to serve his federal sentence. It is now well established that "[a] sovereign does not lose its power to keep a convict in custody by turning the convict to another sovereign for service of a sentence." Tavarez v. U. S. Attorney General, 668 F.2d 805, 809 (5th Cir. 1982). Moreover, "the federal government and a state are perfectly free to make any agreement between themselves concerning which of their sentences will be served first, as long as the prisoner is not compelled unnecessarily to serve his sentence in a piecemeal fashion." Causey v. Civiletti, 621 F.2d 691, 694 (5th Cir. 1980). See also Williams-El v. Carlson, 712 F.2d 685 (D.C.Cir. 1983); Hernandez v. United States Attorney General, 689 F.2d 915 (10th Cir. 1982); United States v. Warren, 610 F.2d 680 (9th Cir. 1980); Floyd v. Henderson, 456 F.2d 1117 (5th Cir. 1972); United States v. Acevedo-Ramos, 605 F.Supp. 190 (D.C.P.R. 1985).

Regardless the Court does not detect any element of unfairness in the instant case. While Petitioner is dissatisfied that he

faces unexpired portions of his state sentence, it is undisputed he benefitted from the modification of his state sentence. Petitioner served time in a likely better environment afforded by the federal penal system while at the same time receiving credit toward his state sentence. See Johnson v. State of West Virginia, 679 F.Supp. 596, 599 (S.D.W. Va. 1988). Moreover, Petitioner acknowledges that he waived extradition proceedings in order to return to Oklahoma to complete his state sentence. Therefore, this Court finds that the State of Oklahoma has not displayed such a fatal lack of interest which would amount to a waiver of jurisdiction over the Petitioner. See Milstead v. Rison, 702 F.2d 216, 217-218 (11th Cir. 1983) (comparing Shields v. Beto, 370 F.2d 1003 (5th Cir. 1967), with Piper v. Estelle, 485 F.2d 245 (5th Cir. 1973)).

Next Petitioner contends that he is entitled to earned time credits for the time served in the federal penitentiary. In Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974), the U.S. Supreme Court held that the Due Process Clause alone does not create a liberty interest in good-time credits. The Wolff court, however, recognized that once a state creates a right to good-time credits, the Due Process Clause protects that right from being arbitrarily abrogated. Id. at 557. Therefore, the issue in this case is whether Oklahoma law creates a justifiable expectation in earning credits in the DOC during federal incarceration.

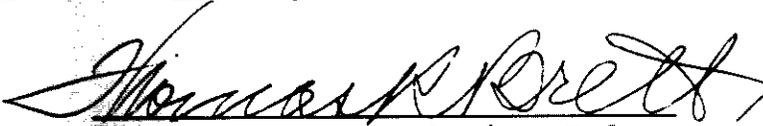
The Supreme Court recently reformulated the test for determining whether a state law creates a protected liberty interest. See Sandin v. Conner, 115 S.Ct. 2293 (1995). In Sandin,

the court abandoned the methodology established in Hewitt and Thompson and decided to return to the due process principles established in Wolff v. McDonnell, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215, 224-225 (1976). Under Sandin, therefore, courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it "present[s] the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301.

Based on the Supreme Court's decision in Sandin, the Court finds that there is no liberty interest at issue in this case. The inability to earn credits in the DOC during federal incarceration does not "present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." Sandin, 115 S.Ct. at 2301. Petitioner alleges no law or facts that suggest the basis for any reasonable expectation on his part of a right to unearned good-time credits. Nor has the Court found any.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss the petition for a writ of habeas corpus (Docket #3) is GRANTED and this action is hereby DISMISSED WITH PREJUDICE. Petitioner's motion for an evidentiary hearing is DENIED.

SO ORDERED THIS 4th day of Nov., 1996.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

NOV 01 1996

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

OSTEOPATHIC HOSPITAL FOUNDERS
ASSOCIATION, INC., d/b/a TULSA
REGIONAL MEDICAL CENTER,

Plaintiff,

v.

GARTH L. SPLINTER, M.D., Chief Executive
Officer and CHARLES ED McFALL, Chairman
of Oklahoma Health Care Authority,

Defendants.

Case No. 93-C-869-H

ENTERED ON DOCKET

DATE NOV 5 1996

ORDER

This matter comes before the Court on a motion for summary judgment by Defendants Garth L. Splinter, M.D. and Charles Ed McFall (Docket # 67) and on a motion to assess security bond or, in the alternative, to modify temporary injunctive order by Defendants (Docket # 74).

In 1993, the Oklahoma Department of Human Services ("DHS"), the predecessor to Oklahoma Health Care Authority ("OHCA"), claimed that it had overpaid Tulsa Regional Medical Center ("TRMC") under the Oklahoma State Medicaid Program (the "Oklahoma Plan") for services provided by TRMC to indigent patients. DHS alleged that the overpayment occurred because TRMC had incorrectly reported the number of Medicaid patient days during 1991, and that, based upon that information, DHS had deemed TRMC to qualify for disproportionate share payments ("DSH" payments). DSH payments are made to hospitals that either serve a disproportionately high number of Medicaid clients or provide a disproportionately high amount of charity care. DHS contended that TRMC was paid, from July 1, 1992 through May 27, 1993, the highest amount of disproportionate share adjustment possible because it was deemed qualified under one of two formulas that provided for such payment adjustments. DHS alleged that if TRMC had not reported the patient days as it had, it would only have received payments under the formula providing for lesser adjustments.

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DHS sought to recoup the alleged overpayments through offsets against future payments owed to TRMC for providing services to indigent patients. In response, TRMC filed this lawsuit on September 24, 1993, seeking injunctive relief to prevent these offsets. In its amended complaint, TRMC asserts that Defendants' determination of the reimbursement rate due Plaintiff under the Oklahoma Plan violates the Medicaid Act and that it is entitled to a declaratory judgment that TRMC qualified for DSH adjustments and a permanent injunction prohibiting Defendants from offsetting future payments or attempting to enforce the Oklahoma Plan.

On December 1, 1993, the Court held a hearing in which evidence was presented regarding the Plaintiff's motion for a preliminary injunction. The parties agreed to maintain the status quo pending the decision. By order dated August 23, 1994, the Court entered its findings of fact and conclusions of law, granting TRMC's request for a preliminary injunction. The Court found that Plaintiff sufficiently established that the proposed offsets would irreparably harm it and that the injury to its interests would outweigh whatever damage the injunction might cause Defendants. The Court further determined that the issuance of an injunction was not adverse to the public interest and that Plaintiff had shown some probability of success on the merits.¹

The instant summary judgment motion, if granted, would conclude this litigation.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Winton Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

¹ On September 1, 1994, Defendants requested the Court to put into place a bond or otherwise secure the amount in dispute. By minute order on February 17, 1995, the Court denied Defendants' motion on the condition that they could reurge the motion upon any indication of financial difficulty on behalf of the hospital.

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a “genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (“the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment”). “Factual disputes that are irrelevant or unnecessary will not be counted.” Id. at 248.

Summary judgment is only appropriate if “there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” Id. at 250. The Supreme Court stated: “[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 (“there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” (citations omitted)).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

II.

The Court has determined that the following facts are uncontroverted for purposes of resolving the instant motion for summary judgment.

1. TRMC is an Oklahoma non-profit corporation providing health care services in Tulsa, in the Northern District of Oklahoma, to patients eligible to receive Medicaid reimbursement for those services pursuant to Title XIX of the Social Security Act (42 U.S.C. § 1396 *et seq.*), commonly known as the Medicaid Act (the “Act”).

2. The Defendants, Dr. Garth L. Splinter and Charles Ed McFall (the former Chairman of the OHCA Board), are state officials responsible for the administration of the Act. As part of the administration of the Act, the Defendants are responsible for carrying out the provisions of the Oklahoma State Title XIX Medicaid Plan (the “Oklahoma Plan”).

3. The Oklahoma Plan is a cooperative federal-state program established pursuant to the Act for the purpose of enabling the state of Oklahoma to furnish medical assistance to aged, blind, or disabled individuals, or members of families with dependent children, whose income and resources are insufficient to meet the costs of necessary medical services.

4. The federal government and Oklahoma share the costs of such aid. Approximately 70% of the cost of each dollar is borne by the federal government and 30% is borne by Oklahoma.

5. Under the Oklahoma Plan, DHS makes payment adjustments to provide additional payments to certain hospitals that service a disproportionate number of low-income patients.

6. TRMC is a Disproportionate Share Hospital and has received Disproportionate Share Adjustments from DHS.

7. On October 1, 1990, the State Medicaid Agency established a new methodology of payment for hospitals in Oklahoma. This new methodology was used to pay the Plaintiff hospital during the years 1992 and 1993. The reimbursement methodology is set out in the OHCA’s promulgated rules found at OAC (Oklahoma Administrative Code) 317:3-5-47.

8. The reimbursement methodology used since October 1, 1990 by DHS and OHCA has four major components which are additive components used to set prospective per diem rates.² These components are the level of care per diem, plus the fixed capital per diem, a direct medical education per diem, and a disproportionate share add-on. With respect to the level of care per diem, there are eight levels of care which are reimbursed: routine care, intensive care, psychiatric care, rehabilitation care, surgical care, maternity care, neonatal intensive care, and burn care.

9. The reimbursement methodology was established using the aggregate data from all hospitals in Oklahoma. The aggregate data included all hospital cost reports from 1989, paid claims history from all hospitals in 1989, and a capital data base. The use of aggregate data from the Oklahoma Hospital industry allowed the Medicaid agency to establish rates that, in the aggregate, covered costs at the median in 1991 of 96.3% of all costs. The use of aggregate data from the Oklahoma hospital industry allowed the Medicaid agency to establish rates that, in the aggregate, covered costs at the mean in 1991 of 101.1% of all costs.

10. Despite the system's design in the aggregate, each Oklahoma hospital's rate, like the Plaintiff's, is set individually on the basis of its own cost report in the base year.

11. Disproportionate share payments are payments made to eligible hospitals in Oklahoma which serve either an unusually high amount of Medicaid patients or many low-income patients. These payments are made in addition to the "base rate." As of May, 1993, of the approximately 130 hospitals participating in the Oklahoma Medicaid program, only 29 Oklahoma hospitals receive disproportionate share payments.

12. Under the Oklahoma Plan, there are two tests under which a hospital qualifies to receive Disproportionate Share Adjustments: (a) if its Medicaid inpatient utilization rate is at least one standard deviation above the mean Medicaid inpatient utilization rate for hospitals receiving

² A prospective per diem rate is a rate which is set each June 30th to be applicable to hospitals' services performed for Medicaid patients between July 1 and June 30th of the next year. The rate for each hospital is individually set each year for all eight levels of care.

Medicaid payments in the state (the “**Medicaid Test**”) or (b) if the hospital’s low-income utilization rate exceeds 25% (the “**Low-Income Test**”). See also 42 U.S.C. § 1396r-4(b)(1).

13. The Oklahoma Plan provides for **different** minimum Disproportionate Share Adjustments depending upon whether the **hospital** qualifies as a Disproportionate Share Hospital under the Medicaid Test or the **Low-Income Test**. Hospitals qualifying under the Low-Income Test receive a smaller minimum adjustment.

14. As of May, 1993, of the 29 **hospitals** receiving disproportionate share payments, 20 hospitals were eligible for such payments **under** the Medicaid Inpatient Utilization test and the remaining 9 were eligible under the **Low-Income Utilization** test.

15. DHS examines a hospital’s **eligibility** under the Medicaid Utilization test by reviewing a hospital’s Medicare cost report in the **spring** of the year. Once eligibility is established, an additional payment is made to the hospital. **Under** the Oklahoma Medicaid State Plan effective July 1, 1992 (or state fiscal year 1993), **these payment** adjustments varied depending on which eligibility test a hospital was qualified to use.

16. On July 1, 1992, the **payment adjustment** for a DSH hospital eligible under the Medicaid Inpatient Utilization Test varied **according** to bed size, location of the hospital (urban/rural), and proportion of Medicaid **services** utilized when compared to other Oklahoma hospitals.

17. On July 1, 1992, the **payment adjustment** for a DSH hospital eligible under the Low-Income Utilization Test began with a 4% **add on** with a .25% increase for every additional 10% increase in low income utilization. The **payment adjustment** under the Low-Income Utilization Test also increased as the hospital provided **more services** to low income persons.

18. During 1992 and 1993, the **State’s** payment adjustment for hospitals which qualified under the Medicaid Inpatient Utilization **Test** was a larger payment adjustment than for those hospitals who qualified under the **Low-Income Utilization Test**.

19. In early 1992, the Plaintiff hospital filed a Medicare cost report. Based upon TRMC's filed Medicare cost report, DHS made TRMC eligible under the Medicaid Inpatient Utilization test on July 1, 1992. Based upon the cost report, TRMC showed that they had served 35,964 patients out of 99,000 total patients served. This gave TRMC a Medicaid percentage of approximately 36%. One standard deviation above the mean for state fiscal year 1993 (beginning July 1, 1992) was 35%. Based upon this cost reporting information, DHS gave TRMC a disproportionate share payment as a Medicaid Utilization hospital for an entire year.

20. TRMC received a 24.92% add-on to every payment they received from DHS during the year from July 1, 1992 through June 30, 1993.

21. The 12,933 patient days included in the 1991 Medicare Cost Report were all attributable to low-income patients. Of those 12,933 days, 4,612 were attributable to patients considered to be Medicaid-eligible.

22. When the 12,933 days were included on the Medicare Cost Report, TRMC was not aware how it would be used to determine TRMC's disproportionate share status. TRMC included those days on the Medicare Cost Report because it interpreted the report as seeking the number of patient days paid by the state for care of low-income patients.

23. Based upon a survey sent out by DHS, TRMC later reported only 23,031 Medicaid days of 93,236 total days. The survey was received in January, 1993 -- halfway through the state fiscal year. TRMC interpreted the survey to be seeking information regarding numbers of paid or provided and allowed Medicaid days and that specific information was provided. Therefore, some of the low-income patient days previously reported under the Medicare Cost Report were not reported there. Based upon the survey results, Defendants contend that the earlier cost report filed by Plaintiff incorrectly aggregated Medicaid patient days with Oklahoma Department of Health patient days. Plaintiff, however, denies any intentional misstatement in the incorrect

figures. Defendants determined that **Plaintiff** was no longer eligible under the Medicaid inpatient utilization test.

24. Under the appeal rules for **hospital reimbursement**, there are very complex requirements for Request for Exception, **which is a specific standard that must be met by the hospital making the request**. A hospital **must show** that the Medicaid rates paid did not allow the hospital to meet its marginal costs.

25. Under the appeal rules for **hospital reimbursement**, a rate appeal must be filed by the hospital within 30 days of receiving notification of its yearly rate. Since the inception of the new hospital reimbursement methodology in 1990, there have been 10 appeals. Of these 10 hospital appeals, two appeals were granted, six **appeals were denied**, and two hospitals failed to prosecute their rate appeal.

26. By letter dated May 27, 1993, Mr. Haddock of the Medicaid agency, advised Mr. Steichen, Plaintiff's Reimbursement Manager, that Plaintiff was not eligible for DSH and should return \$1,923,246.11 in DSH that it had **erroneously** received.

27. On June 23, 1993, TRMC **appealed** the Medicaid agency's determination of a DSH overpayment and requested a sixty day **extension** of the appeal.

28. On August 26, 1993, the State **found** that the hospital did qualify under the low-income test. The payment rate under this **second** test was substantially different under the Oklahoma Plan. Therefore, the State **concluded** that an overpayment still existed in the amount of \$1,677,000.00.

29. Defendants contend that TRMC **qualifies** as a Disproportionate Share Hospital under the Low Income Test but not under the **Medicaid** Test and that, consequently, TRMC is entitled only to a payment adjustment of 4% effective **July 1, 1992** and 2% effective January 1, 1993 (at which time the Oklahoma Plan was **amended to reduce** the Disproportionate Share Adjustment

percentages) under the Low Income Test, **instead of 24.92% and 12.46%** respectively under the Medicaid Test.

30. On August 26, 1993, Defendants advised TRMC that, on September 26, 1993, Defendants would begin offsetting future payments to TRMC in order to recover the amounts allegedly overpaid. To date, approximately \$320,000.00 owed for services actually provided by TRMC has been withheld by Defendants.

31. Defendants have advised Plaintiff that Disproportionate Share Adjustment percentages established under the Oklahoma Plan may not be administratively appealed.

32. Plaintiffs contend that the payments by Defendants to Plaintiff under the Oklahoma Plan, and the proposed offsets, violate the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A), which mandates a state plan setting payment rates “which the State finds, and makes assurances to the Secretary [of Health and Human Services], are reasonable and adequate to meet the costs which must be incurred by **efficiently** and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards” The specific violations alleged in the amended complaint are that the Oklahoma Plan does **not** provide reimbursement rates adequate to permit TRMC to meet its reasonable costs, that the Plan discriminates against TRMC which qualifies under the Low-Income Test but not the Medicaid Test, and that the amendments to the Oklahoma Plan reducing payment percentages were **not supported** by necessary findings and were promulgated arbitrarily. Defendants contend that the treatment of TRMC under the Oklahoma Plan complies with the Act.

33. TRMC contends that it lost approximately \$660,000.00 from providing services to Medicaid patients during the time DHS alleges TRMC was overpaid. Defendants note that generally accepted accounting principles were **not used** in this determination.

34. The budget of DHS for the **Oklahoma Plan** is in excess of \$1 billion dollars. Total revenues for TRMC in 1992 were approximately \$137 million dollars. However, less than 10% of this amount was from DHS payments.

35. Disproportionate Share payments are made in addition to the "base rate" paid to hospitals under Medicaid.

III.

Plaintiff alleges that, pursuant to 42 U.S.C. § 1983, Defendants have violated both the substantive and the procedural components of the Boren Amendment, see 42 U.S.C. § 1396a(13)(A).³ The substantive component of the Boren Amendment gives health care providers an enforceable right "to the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility that provides care to Medicaid patients." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 509-10 (1990). In its response to Defendants' motion, Plaintiff states that "TRMC is alleging OHCA is substantively in violation of the Boren Amendment because of a systemic pattern of inadequate reimbursement and a lack of adequate findings under the Oklahoma Plan." Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment ("Response") at 22. Defendants assert that Plaintiff has not pled the existence of a systemic problem; rather, the allegations focus solely on the adequacy of the

³ In the third amended complaint filed on February 21, 1995, Plaintiff alleges that:

The Oklahoma Plan does not comply with the Act in that it does not provide for reimbursement rates adequate to compensate TRMC and allow it to meet its reasonable costs. In fact, during the period of time TRMC was allegedly overpaid, it lost in excess of \$666,000.00 by providing services to Medicaid patients under the Oklahoma Plan, even after receiving the \$1,677,693.94 that DHS alleged had been overpaid.

Moreover, the Oklahoma Plan violates the Act because it provides for Disproportionate Share Adjustments that discriminate against certain Disproportionate Share Hospitals based upon whether they qualify under the Medicaid Test or Low Income Test.

Furthermore, the amendments to the Oklahoma Plan to reduce Disproportionate Share Adjustment percentages were not supported by necessary findings and were promulgated arbitrarily.

reimbursements made to Plaintiff. A careful review of the third amended complaint makes clear that the gravamen of Plaintiff's action is the allegedly inadequate reimbursement rate applied to TRMC under the Oklahoma Plan.

The third amended complaint asserts three claims for relief. Plaintiff's first claim is that "the Oklahoma Plan does not comply with the Act in that it does not provide for reimbursement rates adequate to compensate TRMC and allow it to meet its reasonable costs." As relief, Plaintiff requests that "the Court declare that the Oklahoma Plan was, at the time of DHS's alleged overpayments, and is now in violation of the Act, and that Defendants be required to promulgate a new state plan providing reimbursement rates and Disproportionate Share Adjustment percentages that comply with the Act." TRMC further requests "that Defendants be required, in the interim, to reimburse TRMC at rates adequate to meet its reasonable costs."

Plaintiff's second claim is that "TRMC is entitled to a declaration that it qualified for Disproportionate Share Payments under the Medicaid Low-Income Utilization Test and that, consequently, it was not overpaid." Accordingly, TRMC requests a declaratory judgment "that it qualified for Disproportionate Share Payments under the Medicaid Low-Income Utilization test pursuant to 42 U.S.C. § 1396r-4 and that it was not overpaid by DHS."

Plaintiff's third claim for relief requests that "the Court permanently enjoin defendants from offsetting future payments to TRMC to recover the alleged overpayments or from otherwise attempting to enforce the unlawful Oklahoma Plan."

Notwithstanding these clear statements, Plaintiff's response brief to Defendants' motion for summary judgment now asserts that:

TRMC is challenging the methodology the State used in determining its Disproportionate Share Payment Scheme and Base Rates, which is a systemic challenge alleging the State violated federal statutes in developing its reimbursement system and that, in doing so, it had an adverse effect on many hospitals operating under the Oklahoma Plan.

The Court, however, declines to accept **this** characterization of Plaintiff's claims. Rather, the actual allegations contained in the third **amended** complaint should control the instant motions. The Court finds that the third amended **complaint** does not allege a systemic problem, but instead claims that the reimbursements made to **Plaintiff** under the Oklahoma Plan were incorrect.

IV.

Defendants' first argument is that **this** Court should decline to rule on Plaintiff's Boren Amendment claims based upon the **abstention doctrine** established by the United States Supreme Court in Burford v. Sun Oil, 319 U.S. 315 (1943). The Tenth Circuit has stated:

It is recognized by all courts that: "Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'"

Grimes v. Crown Life Ins. Co., 857 F.2d 699, 703 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989) (quoting Moses H. Cone Hosp. v. Mercury Const. Corp., 460 U.S. 1, 14 (1983)). In Burford, the Supreme Court held **abstention to be** appropriate where questions of state law are unclear and there is a need for centralized **state administration** of the issue in question. Burford, 319 U.S. at 327-28; see also Erwin Chemerinsky, Federal Jurisdiction 703 (1994). The Supreme Court has characterized Burford **abstention as** proper where:

there have been presented difficult **questions** of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar In some cases, however, the state question itself need not be determinative of state policy. It is **enough that** exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with **respect to** a matter of substantial public concern.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). The Supreme Court has further held that Burford **abstention** is appropriate only where federal court jurisdiction over "the question in a case **and in similar cases** would be disruptive of state efforts to

establish a coherent policy with respect to a matter of substantial public concern,” New Orleans Pub. Service, Inc. v. Council of the City of New Orleans, 491 U.S. 348, 361 (1989), or where there is a danger that federal court review “would disrupt the State’s attempt to ensure uniformity in the treatment of an essentially local problem.” Id. at 364. Thus, a court should abstain under Burford where the administrative system in question has a primary purpose of achieving uniformity within a state and there is a danger that federal court review would undermine the desired uniformity. See Chemerinsky at 706.

The Tenth Circuit has not addressed the issue of Burford abstention in the context of state administered Medicaid reimbursement plans. In Grimes, the Tenth Circuit held that the district court should have abstained under Burford in a case involving the rights of an insolvent insurer under the McCarran-Ferguson Act, 15 U.S.C. § 1011, and the Oklahoma statutory scheme for resolving insurer insolvency. Grimes, 857 F.2d at 700-03.⁴ The Court stated that the formulation of “comprehensive schemes for insurance regulation and liquidation” by the states do not deprive the federal courts of jurisdiction as a general matter. Id. at 704. Following Burford and its progeny, however, the Court provided a four factor analysis to determine whether abstention would be warranted in the exceptional case:

- (1) whether the suit is based on a cause of action which is exclusively federal . . . ;
- (2) whether the suit requires the court to determine issues which are directly relevant to the liquidation proceeding or state policy in the regulation of the

⁴The McCarran-Ferguson Act is a federal mandate devolving to the states authority over the regulation and taxation of the “business of insurance.” Grimes, 857 F.2d at 702 n.3. The Tenth Circuit stated that the act was relevant to the case

because it encourages the states to formulate their own systems to regulate insurers doing business in their states. Therefore, in instances where states have responded to this congressional policy by formulating complex and specialized administrative and judicial schemes to regulate insurers . . . it becomes increasingly possible that the exercise by a federal court of its jurisdiction will prove to be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

Id. at 703 (quoting Colorado River, 424 U.S. at 814).

insurance industry . . . ; (3) whether state procedures indicate a desire to create special state forums to regulate and adjudicate these issues . . . ; and, (4) whether difficult or unusual state laws are at issue.

Id. at 704-05 (citations omitted). Applying these four factors, the Tenth Circuit concluded that Burford abstention was warranted and reversed and remanded the case with instructions that it be remanded to the District Court of Oklahoma County. Id. at 707.⁵

In Bethphage Lutheran Serv., Inc. v. Weicker, the Second Circuit undertook a similar analysis in an action seeking to enjoin Connecticut officials' proposed payments under the Medicaid Act. 965 F.2d 1239, 1242 (2d Cir. 1992). In that case, the district court below

looked to three factors in determining that the instant case was appropriate for Burford abstention . . . : "the degree of specificity of the state regulatory scheme, the necessity of discretionary interpretation of state statutes, and whether the subject matter of the litigation is traditionally one of state concern"

Id. at 1243 (quoting Bethphage Lutheran Serv., Inc. v. Weicker, 777 F. Supp. 1093, 1098 (D. Conn. 1991)).

In assessing the degree of specificity of the state regulatory scheme, the district court in Bethphage took note of "the eighteen regulatory sections governing, substantively and procedurally, the determination of rates and the inclusion of particular costs." Bethphage, 965 F.2d at 1243. The court concluded that the state Medicaid regulations provided a "comprehensive statutory framework to formulate policy and decide cases." Id.

The second factor considered by the district court was whether the decision would require interpretation of "broad terms" in the state statutes "that properly should be interpreted by a state agency and the experts in a particular field." Id. The district court held that "the statutory framework at issue necessarily invokes the expertise and best judgment of the Commissioner of Mental Retardation and does not lend itself to consistent judicial interpretation." Id. The court

⁵The Court notes that "[a]pplication of the Grimes factors must be considered in conjunction with the Supreme Court's subsequent decision in [New Orleans Pub. Serv., Inc.], which refined the Burford doctrine." Crawford v. Employers Reinsurance Corp., 896 F. Supp. 1101, 1104 (W.D. Okla. 1995).

noted that “reasonable persons can disagree as to what constitutes reasonable payments for necessary services under the Waiver Act and that a federal court might establish reimbursement rates either above or below those determined in state court.” *Id.* The court reasoned that the potential for inconsistency inherent in such a situation “would create a divisive reimbursement rate in which providers with substantially the same needs are reimbursed at different rates, encouraging plaintiffs to forum shop.” *Id.* at 1243-44 (quoting *Bethphage Lutheran Serv., Inc. v. Weicker*, 777 F. Supp. 1093, 1100 (D. Conn. 1991)).⁶ As a result, the district court held that “proper respect for the expertise of state officials and the expeditious and evenhanded administration of [the] state program[] counsels restraint.” *Bethphage*, 777 F. Supp. at 1100 (quoting *Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980)) (alterations in original). To maintain a consistent interpretation of the state’s plan, the court in *Bethphage* concluded that *Burford* abstention was appropriate.

Applying the third factor, the district court in *Bethphage* “found that abstention under *Burford* was appropriate because the subject matter . . .—reimbursement rates under the Medicaid Act—is an area of legitimate state interest.” *Bethphage*, 965 F.2d at 1244. The Medicaid Act requires states to create administrative frameworks that establish the methods and procedures to be used for procurement of and payment for care and services. On appeal, the Second Circuit stated, “Congress has recognized that the establishment and review of reimbursement rates is a legitimate state concern.” *Id.*

Finally, the district court in *Bethphage* “considered the availability of a state remedy.” *Id.* The court found that an adequate state remedy did exist and that the plaintiff was able “to challenge the service rates set . . . by the Commissioner of Mental Retardation” through an

⁶As the Second Circuit stated, “[i]n *Burford*, the Supreme Court observed that if a statutory standard lends itself to variation in its application and if conflicts in interpretation would be dangerous to the success of state policies, federal courts should abstain.” *Bethphage*, 965 F.2d at 1243 (citing *Burford*, 319 U.S. at 332-34).

administrative procedure specified in the **Regulations of Connecticut State Agencies**. *Id.* Under the Connecticut Administrative Procedures Act, the plaintiff could then appeal the administrative decision to State Superior Court and, ultimately, to the State Supreme Court.

In reviewing the decision of the district court, the Second Circuit stated that the only potentially relevant factor not considered below was “that in Burford Texas had created a centralized system of judicial review of commission orders, which ‘permit[ted] the state courts, like the Railroad Commission itself to acquire a specialized knowledge’ of the regulations and industry” *Id.* at 1245 (quoting Burford, 319 U.S. at 327) (alteration in original). Under the facts of Bethphage, the Second Circuit found “no such consolidation of judicial review,” but held that “this factor has never been thought to be indispensable to Burford abstention. *Id.*”⁷ The court concluded that the district court correctly **abstained** under the Burford doctrine. *Id.* at 1248.

In the instant case, Defendants argue that abstention is appropriate under the Burford doctrine. The Court concludes that under the facts present here, the issue of abstention is controlled by the decisions in Grimes and Bethphage described above. Accordingly, the following factors should guide the Court’s decision: (1) whether the suit is based on a cause of action that is exclusively federal in nature, (2) whether the suit requires the court to determine issues that are directly relevant to the rate appeal proceeding or Oklahoma policy in the administration of the Oklahoma Plan, (3) whether the Oklahoma Medicaid State Plan indicates a desire to create special state forums to regulate and adjudicate these issues, and (4) whether difficult or unusual state laws are at issue. See Grimes, 857 F.2d at 704-05; see also Bethphage, 965 F.2d at 1243-45.

Applying these four factors, it is well settled that jurisdiction for claims brought under section 1983 is not exclusive in federal court, since such claims may be pursued in state court. See, e.g., Robert K. Bell Enterprises, Inc. v. Tulsa County Fairgrounds Trust Auth., 695 P.2d

⁷The Second Circuit noted that “[e]very abstention case is to be decided upon its particular facts and not with recourse to some ‘mechanical checklist.’” Bethphage, 965 F.2d at 1245 (quoting Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38, 40 (2d Cir. 1986)).

513, 517 (Okla. 1985). Thus, Plaintiff's suit, seeking injunctive relief to prevent DHS's offset against future payments, is not based on an exclusively federal cause of action. Plaintiff's third amended complaint is brought pursuant to 42 U.S.C. § 1983 "to enforce civil rights conferred under provisions of the Medicaid Act" Third Amended Complaint at ¶5. Moreover, as discussed above, Plaintiff's claims in the instant case are not based on a systemic defect, but rather arise out of allegedly inadequate reimbursement payments to one hospital, TRMC. Cf. Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 657 (4th Cir. 1989) (distinguishing the case at hand from another case where "[t]he substantive issue . . . is not, as here, the propriety of reimbursement rates generally, but whether providers are entitled to a certain type of reimbursement"). Thus, there is nothing "exclusively federal" about this cause of action that would counsel against abstention.

Secondly, the Court finds that to grant the relief requested by Plaintiff would require the Court to determine issues directly relevant to the general administration of the Oklahoma Plan and the rate appeal process. Oklahoma, in its administration of the Medicaid program, has a very complex system of reimbursement. As part of this system, Oklahoma has a fairly extensive appeals process in place, as required by federal law. See 42 C.F.R. § 447.253(c) (requiring the state to have an appeals process). An appeal may be taken from the administrative proceedings under the provisions of the Oklahoma Administrative Procedures Act ("APA"). Okla. Stat. tit. 75, § 250 et seq. Section 318(B) of the Oklahoma APA provides for judicial review by either by "appellate proceedings in the Supreme Court of Oklahoma" or by filing a petition in the state district court. This appeals process allows individual hospitals, such as TRMC, to challenge reimbursement rates in a manner that promotes consistent decisions.

Furthermore, the Oklahoma Plan has been designed and administered in response to a complex set of competing demands. DHS must administer Medicaid funding for every hospital in the state and do so in compliance with the mandates of the federal government. The goal of the

Oklahoma Plan is to satisfy these demands in a consistent and uniform manner. By granting Plaintiff's request for relief, and thereby **modifying** the rate by which TRMC is reimbursed under the Oklahoma Plan, would require the Court to **decide** issues potentially disruptive to this goal of uniform treatment of all state hospitals.

Third, the Oklahoma Plan includes a **specific** rate appeal process available to any hospital seeking to dispute its reimbursement.⁸ See OAC 317:30-5-54. Oklahoma has an important stake in maintaining its reimbursement system. To **function** effectively, DHS must achieve uniformity in determining which appeals are granted or **denied** and a consistent application of the burden of proof standard in each proceeding.

Fourth, the state Medicaid Plan at **issue** in this case is controlled by complex and difficult state law. Cf. Grimes, 857 F.2d at 705 (“**In the instant** case the state of Oklahoma has formulated a complex and comprehensive scheme of **insurance** regulation which contains the Uniform Insurers Liquidation Act . . .”). While it **would be** possible to render a decision in this matter, the Court believes that any such decision **would** unduly interfere with a complex state system established for the purpose of coherent **regulation**. Exercising jurisdiction in this case would disrupt the ability of the OHCA to **efficiently and** consistently operation the system of administration established under the state **statutes**. See id. at 706. Moreover, there exists ample opportunity for administrative and state **judicial review**. Thus, it is clear that abstention under Burford is appropriate.

Unlike other forms of federal court **abstention**, Burford abstention requires the Court to dismiss the case rather than merely **stay the proceedings** pending state court adjudication. Chemerinsky, at 707. The Court has **balanced** TRMC's choice of forum against the importance of maintaining a harmonious relationship **between the state** and federal governments. Consequently, the Court will refrain from becoming **involved with** state policy making and administration of the

⁸Which appeal process TRMC utilized on June 23, 1993. See supra ¶ 27.

Oklahoma Plan. Thus, the Court hereby **abstains** and Plaintiff's third amended complaint is hereby dismissed.

Because the Court holds **Burford abstention** appropriate in this case, the Court need not reach the other arguments raised in **Defendants'** motion for summary judgment. Furthermore, the dismissal of this action vacates the **temporary injunctive** order previously issued by the Court, thus rendering moot Defendants' Motion to **Assess Security Bond** or in the Alternative to Modify Temporary Injunctive Order (Docket #74).

IT IS SO ORDERED.

This 1ST day of November, 1996.


Sven Erik Holmes
United States District Judge

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

TOMMY RAY ISHAM,

Petitioner,

vs.

RONALD J. CHAMPION,
Warden, Dick Conners Correctional
Center,

Respondent.

ENTERED ON DOCKET

DATE NOV 5 1996

CASE NO. 95-C-323-H

FILED

NOV 01 1996

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

ORDER

There being no objection, the Court adopts the Magistrate's Report and Recommendation filed July 16, 1996, 1996 [Dkt. 11]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED WITHOUT PREJUDICE** as outlined in the Magistrate Judge's Report and Recommendation.

Dated this 1st day of November, 1996.


SVEN ERIK HOLMES
U.S. DISTRICT COURT JUDGE

13

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

ENTERED ON DOCKET
DATE **NOV 5 1996**

HENRY LEE JEFFERSON,

Plaintiff,

vs.

WASHINGTON COUNTY BOARD OF COUNTY
COMMISSIONER, PAT BALLARD, MIKE
SILVA, and JACK JACKSON,

Defendants.

No. 96-CV-776-H ✓

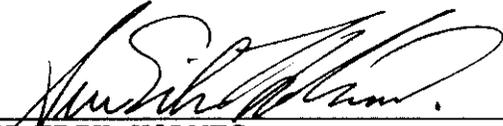
FILED
NOV 01 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On October 8, 1996, the Court informed Plaintiff that this action would be dismissed as frivolous or for failure to state a claim unless he filed an amended complaint setting out his allegations with more specificity within fifteen days. 28 U.S.C. §§ 1915(e)(2)(B). On October 16, 1996, the above order was returned to the Court because Plaintiff was no longer at the address listed on his complaint.

Accordingly, this action is hereby DISMISSED without prejudice as frivolous.

IT IS SO ORDERED this 24TH day of OCTOBER, 1996.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

1

4

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

FILED
NOV 01 1996

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

MICHAEL H. CHAMPAGNE and KIMBERLY)
KAY CHAMPAGNE, individually and as)
parents and next friends of their son,)
BRANDON M. CHAMPAGNE, a minor,)

Plaintiffs,)

vs.)

Case No. 96-CV-769-H ✓

THE PRUDENTIAL INSURANCE)
COMPANY OF AMERICA,)

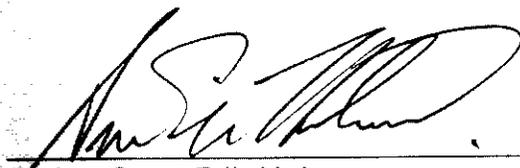
Defendant.)

RECEIVED COURT CLERK
DATE NOV 5 1996

ORDER OF DISMISSAL WITH PREJUDICE

For good cause having been shown, the parties, Plaintiffs, Michael H. Champagne and Kimberly Kay Champagne, and Defendant, The Prudential Insurance Company of America, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiffs' Complaint, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 1st day of November, 1996.



Judge Sven Erik Holmes
United States District Court for the
Northern District of Oklahoma

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

FILED

NOV 01 1996

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

JAMES E. SANDERS and LYDA R. SANDERS,)

Plaintiffs,)

v.)

CLECO LTD. and CLECO SYSTEMS, a)
division of OWEN INDUSTRIES, INC.,)

Defendants.)

Case No. 94-CV-1141-H

ENTERED ON DOCKET

DATE NOV 5 1996

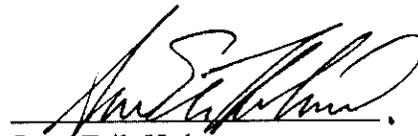
JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant Cleco Systems. The Court duly considered the issues and rendered a decision in accordance with the order filed on August 28, 1995.

IT IS THEREFORE ORDERED, **ADJUDGED**, AND DECREED that judgment is hereby entered for the Defendant Cleco Systems and against the Plaintiffs.

IT IS SO ORDERED.

This 31st day of October, 1996



Sven Erik Holmes
United States District Judge

33

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

FILED
NOV 07 1996

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

ELECTRICAL POWER SYSTEMS, INC.,)
)
 Plaintiff,)
)
 v.)
)
 CEGELEC AUTOMATION, INC.)
)
 Defendant.)

Case No. 95-C-1097-H

ENTERED ON CLERK'S OFFICE
DATE NOV 5 1996

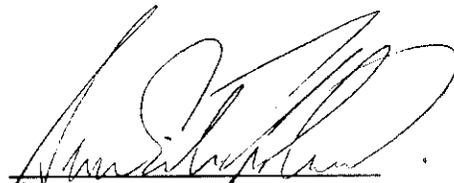
JUDGMENT

This action came on for consideration before the Court, the Honorable Sven Erik Holmes, United States District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of Plaintiff.

IT IS THEREFORE ORDERED that Defendant make payment to Plaintiff in the amount of \$125,000.

IT IS SO ORDERED.

This 7th day of November, 1996.


Sven Erik Holmes
United States District Judge

33

ENTERED ON DOCKET
DATE 11/5/96

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

FILED

LINDA FAYE STEADMAN,)
)
 Plaintiff,)
)
 v.)
)
 SHIRLEY S. CHATER, Commissioner)
 of Social Security Administration,)
)
 Defendants.)

NOV 1 1996
SJA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

96-C-269-W ✓

ORDER

Upon the motion of the defendant, Commissioner of Social Security Administration, to vacate and set aside the order remanding proceedings (Docket #9) and for good cause shown, the motion is granted. IT IS HEREBY ORDERED that this case is reopened to allow the defendant to file its answer along with a certified copy of the administrative record. The court was advised by Gayle Troutman, plaintiff's attorney, that she has no objection to the granting of this motion.

Dated this 31st day of October, 1996.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
DATE 11/5/96

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

F I L E D

BRENDA F. DUNIPHIN,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,¹)
)
Defendant.)

NOV 1 1996 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-1070-W ✓

ORDER

This order pertains to Plaintiff's Complaint for Judicial Review of Administrative Decision (Docket #1) and Defendant's Answer (Docket #9). On June 27, 1995, the Administrative Law Judge ("ALJ") issued a partially favorable decision awarding social security disability benefits to plaintiff commencing on July 3, 1991. The decision was sent to plaintiff, along with a notice that stated that if plaintiff disagreed with the decision she should file written exceptions within thirty days or file a new civil action between the 61st and 121st days.

On July 20, 1995, plaintiff's counsel sent a written request to the Appeals Council for an extension of time to file written exceptions to the ALJ's decision which appears at page 490 in the record. Counsel states that he sent written exceptions to the Appeals Council on August 25, 1995, and attached a copy marked "Exhibit C"

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.

to his response (Docket #6) for the court's review. On September 26, 1995, counsel claims that he telephoned the Appeals Council in order to inquire whether the written exceptions had been received and to request that action be taken prior to expiration of the 121st day deadline so it would not be necessary to file a new civil action. To document the phone call, a copy of the phone bill from United States Cellular is attached as "Exhibit D" to his response. When plaintiff's counsel received no response from the Appeals Council by the 121st day deadline, he filed this civil action in order to protect her right to appeal the ALJ decision.

Plaintiff has properly perfected an administrative review of the ALJ's decision, and the Council has not yet rendered a decision. The Supreme Court in Bowen v. City of New York, 467 U.S. 467, 472 (1986), found that proceeding through three stages, the state agency's consideration, the hearing before the ALJ, and review by the Appeals Council, exhausts a claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court. Id.

Plaintiff has not yet exhausted her administrative remedies. This case will be held in abeyance pending the decision of the Appeals Council. Plaintiff is to notify the court when a decision is rendered.

Dated this 31st day of October, 1996.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\DUNIPHIN.OR

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 20 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RENARD ELVIS NELSON,)
)
Petitioner,)
)
v.)
)
TULSA COUNTY, OKLAHOMA,)
a political subdivision, and THE ATTORNEY)
GENERAL OF THE STATE OF OKLAHOMA)
)
Respondents.)

No. 95-C-371-K
(Base File)

ENTERED
NOV 4 1996

REPORT AND RECOMMENDATION

Now before the Court is Respondents' Motion to Dismiss. [Doc. No. 37]. The undersigned offers the following Report and recommends that Respondents' Motion to Dismiss be GRANTED.

In connection with this case, the undersigned finds the following:

1. On April 26, 1995, Petitioner filed a deficient Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [Doc. No. 1].
2. The Court Clerk issued a deficiency letter to Petitioner on April 27, 1995.
3. On June 2, 1995, Petitioner complied with the Clerk's deficiency letter by filing an amended Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. [Doc. No. 2].
4. Petitioner's petition for a Writ of Habeas Corpus is premised on his allegation that he is being detained prior to trial in violation of his constitutional right to a speedy trial. In particular, Petitioner alleges that he is being denied the right to a speedy trial in two Tulsa County District Court cases: CF-93-5912 and CF-95-1199.
5. On February 7, 1996, Respondents filed a motion to dismiss Petitioner's petition. [Doc. No. 8].

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6. On May 7, 1996, the undersigned entered a Report and Recommendation. In this Report and Recommendation, the undersigned noted that this case was improperly brought pursuant to 28 U.S.C. § 2254 because § 2254 only applies to situations in which a petitioner is "in custody pursuant to the judgment of a state court." 28 U.S.C. § 2254(b). At the time Petitioner filed this action, he was a pre-trial detainee. He was not yet in custody pursuant to the judgment of a state court. The undersigned noted, however, that the Court could grant relief under 28 U.S.C. § 2241(c)(3), which applies to persons in custody, regardless of whether a final state court judgment has been entered. See, e.g., Capps v. Sullivan, 13 F.3d 350 (10th Cir. 1993); Dickerson v. State of Louisiana, 816 F.2d 220, 224 (5th Cir. 1987); and Moore v. DeYoung, 515 F.2d 437, 441-42 (3rd Cir. 1975); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 503-504 (1973) (Rhenquist, J., dissenting). The undersigned then recommended that Petitioner's petition be dismissed because Petitioner had failed to exhaust his state remedies. [Doc. No. 12].
7. Petitioner filed an objection to the May 7th Report and Recommendation, which was sustained by Judge Terry Kern on June 28, 1996. [Doc. Nos. 13 and 14]. Judge Kern determined that the factual record should be further developed before the Court dismissed Petitioner's claim for failure to exhaust state remedies. Judge Kern ordered Respondents to address how long Petitioner's criminal cases had been pending without trial, the nature of any delays, and whether the speedy trial issue had been presented to the state trial court. [Doc. No. 14].
8. On August 14, 1996, the undersigned entered an unobjected to Order converting this case from a 28 U.S.C. § 2254 (i.e., post-trial) habeas case to a 28 U.S.C. § 2241(c)(3) (i.e., pre-trial) habeas case. [Doc. No. 24]. Petitioner was provided with the appropriate § 2241 Petition and ordered to complete and file it.
9. On August 27, 1996, Respondents responded to Judge Kern's June 28th Order by addressing how long Petitioner's criminal cases had been pending without trial, the nature of any delays, and whether the speedy trial issue had been presented to the state trial court. [Doc. No. 26].
10. On August 29, 1996, Petitioner filed his completed § 2241 pre-trial habeas Petition. The three grounds for relief alleged by Petitioner all relate to violations of his right to a speedy trial. [Doc. No. 28].

11. The evidentiary materials attached to Respondents' most recent Motion to Dismiss establish that on September 25, 1996 Petitioner (a) was tried, found guilty and sentenced on the charges pending in Tulsa County case CF-93-5912; and (b) plead guilty and was sentenced on the charges pending in Tulsa County case CF-95-1199. [Doc. No. 38, Exhibits "A" and "B"].

The only relief generally available in a pre-trial habeas proceeding alleging a violation of the sixth amendment's right to a speedy trial is an order from this Court forcing the state to proceed to trial. Capps v. Sullivan, 13 F.3d 350, 353-54 (10th Cir. 1993). In this case, the state has proceeded to trial. There is no other relief which this Court can grant in this pre-trial habeas action pursuant to 28 U.S.C. § 2241(c)(3). Therefore, Petitioner's claim is moot and the undersigned recommends that Respondents' Motion to Dismiss be **GRANTED**.

Plaintiff may raise the speedy trial issue in his direct appeal to the Oklahoma Court of Criminal Appeals and in his petition for post-conviction relief under the Oklahoma Post Conviction Procedure Act. Once Petitioner has exhausted these state remedies, and if he has obtained adverse results in the Oklahoma state courts, he may file a post-conviction habeas action in this Court, pursuant to 28 U.S.C. § 2254. See Rose v. Lundy, 455 U.S. 509 (1982) (holding that a district court must dismiss unexhausted habeas claims under 28 U.S.C. § 2254).

TIME FOR OBJECTIONS

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). **Failure to timely object to the findings or recommendations in this Report waives appellate review of all factual and legal issues.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 28 day of October 1996.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Report and Recommendation was served on each of the parties herein and a true and correct copy to them or to their attorneys of record on the 1st day of November, 1996.
C. Portillo, Deputy Clerk

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

FILED

NOV - 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEOFFREY WELLS,)
)
Plaintiff,)
)
vs.)
)
BOSTON AVENUE REALTY, an Oklahoma)
general partnership comprised Joseph L. Hull, JR.)
and Joseph L. Hull, III; WORLD)
PRODUCTIONS, INCORPORATED, an Oklahoma)
corporation; TIMOTHY BARRAZA; and)
39 PRODUCTIONS, INC., an Oklahoma)
corporation; all d/b/a SRO)
)
Defendants.)
)
39 PRODUCTIONS, INC., an Oklahoma)
corporation,)
)
Cross-Plaintiff,)
)
vs.)
)
DALLAS FIRE INSURANCE COMPANY, INC.,)
a Texas corporation,)
)
Cross-Defendant.)

No. 95-C-1252-E

ENTERED ON DOCKET
DATE NOV 04 1996

ORDER

Before the Court, pursuant to Fed. R. Civ. P. 59, is Plaintiff's, GEOFFREY WELLS ("WELLS") motion for a new trial and his request for certification of questions of law to the Oklahoma Supreme Court. (Docket no. 45).

51

I. ANALYSIS

WELLS asserts that the order entered by the Court on August 20, 1996(Docket no. 43), contains three errors: First, the Court's determination that an invitor's duty to protect an invitee from third party criminal acts is limited to instances where the invitor has reason to know the act is occurring or about to occur; Second, its conclusion that a landlord does not have a duty to protect a tenant's invitee from an assault by a third person unless the landlord has knowledge of the attack; and Third, its determination that it was prohibited from considering the hearsay evidence WELLS offered in his response to Defendants' motions for summary judgment. Because of the errors he alleges, WELLS asks this Court for a new trial; WELLS also requests the Court to certify two question of law to the Oklahoma Supreme Court.

A. The Court's Determination That An Invitor's Duty to Protect An Invitee From A Third Party Assault Is Limited To Those Instances Where The Invitor Has Knowledge The Act is Occurring Or About To Occur.

Prior to 1993, an invitor's liability to an invitee for an intentional act by a third party was controlled by Davis v. Allied Supermarkets, Inc., 547 P.2d 963 (Okla. 1976). The Davis Court derived its holding from McMillin v. Barton-Robison Convoy Co., 78 P.2d 789, 790 (Okla. 1938). Although these authorities recognized that there might be exceptions, the decisions stood for the rule that an invitor did "not have a general duty to protect invitees from criminal acts by third parties." Taylor v. Hinson, 856 P.2d 278, 281 (1993).

However, in 1993, the Oklahoma Supreme Court held that the exception articulated by McMillin and Davis applied to situations where the invitor had knowledge of the third party act. Taylor, 856 P.2d at 281. Under Taylor, an invitor is required to protect its invitees from criminal acts of others if the invitor "knows or has reason to know the acts of the third person are occurring, or

about to occur.” *Id.* (citing Restatements (Second) of Torts § 344 cmt. f (1965)).¹ Although *Taylor* explained that the *McMillin* exception included instances where the invitor had knowledge of the third party act, it otherwise reaffirmed the holdings of *McMillin* and *Davis*. *Id.* at 282. *McMillin*, as explained by *Taylor*, is consequently controlling in the present case.

The *McMillin* decision indicated that with exceptions, an invitor did not have a general duty to protect an invitee from third party acts. 78 P.2d at 790. The *McMillin* Court also established boundaries to the exception it recognized when it rejected an argument advanced by the plaintiff. *Id.* The court stated: “It is urged that the nature of the property handled, the prevalence of crime in the community, and the location of the business raised a duty which, presumably would not have been raised in what we may term a more law-abiding community.” *Id.* (emphasis added). However, the court declined to impose a duty upon the defendant for these reasons. Rather, the *McMillin* Court indicated that it was “unable to see any exceptional circumstances in [the] case which would give rise to such a duty.” *Id.*

WELLS claims that the Court erred by declining to broaden the exception initially recognized in *McMillin*, and subsequently explained in *Taylor*, to include the latter portion of Restatements (Second) § 344 cmt. f. The latter portion of the comment is important to WELLS because it allows liability to be imposed on an invitor who does not have actual knowledge of the third party act, if the

¹The Comment states:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally, or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.. Section 344, cmt. f (emphasis added).

act was reasonably foreseeable. The comment indicates that the invitor may “have reason to know . . . that there is a likelihood of conduct on the part of the third persons . . . which is likely to endanger the safety of the visitor.” Section 344, cmt f. The comment explains that this “reason to know” may arise because of “the place or character of his business, or his past experience . . . [.]” *Id.* WELLS argues that the Court erred in not applying the comment to this case because the Oklahoma Supreme Court has not expressly rejected it. The Court is not persuaded by WELLS’ argument.

The reasoning now articulated in the comment to the 1965 Restatement was rejected in 1938 by the *McMillin* Court. The *McMillin* Court expressly rejected the argument that duty should be imposed because of the nature of the invitor’s business, and the prevalence of crime in the location of his business. 78 P.2d at 790. The court also implicitly declined to impose a duty upon the invitor because of his past experience.² *Id.* By rejecting these arguments, the *McMillin* Court undeniably rejected the grounds that are now enumerated in comment f.³ Consequently, the Court is satisfied that its determination that *McMillin*, as explained by *Taylor*, controls; an invitor only has a duty to protect an invitee from a third party act in instances where the invitor has knowledge the act is occurring or about to occur.

B. The Court’s Determination That A Landlord Does Not Have A Duty To Protect A Tenant’s Invitee From An Assault By A Third Person Unless The Landlord Has Knowledge Of The Attack

²The *McMillin* Court recognized that the “master had some knowledge of the threat . . . as is witnessed by [his use] of guards on occasion.” 78 P.2d at 790. Yet, the court refused to impose a duty upon the defendant. *Id.*

³WELLS directs the Court to one sentence in its August 20, 1996, order which incorrectly implies that the *McMillin* Court rejected the latter portion of comment f, which it did not. The Court did not intend to imply that *McMillin* rejected comment f, but as evident in subsequent sentences in the same paragraph, only the reasoning and language now enumerated in comment f.

In the second error WELLS asserts, he alleges that the Court erred in determining that BOSTON AVENUE REALTY (“BAR”) and WORLD PRODUCTIONS INCORPORATED (“WORLD”) did not owe WELLS a duty to protect him from the third party act unless they had knowledge the act was occurring. WELLS asserts this error for two reasons: First, he claims the Court erred in its interpretation of Weaver v. U.S., 334 F.2d 319 (10th Cir. 1964)(interpreting Oklahoma law); and Second, even if the Court’s interpretation was correct, WELLS claims that after Lay v. Dworman, 732 P.2d 455 (Okla. 1986), a landlord has a duty to protect a tenant’s invitee from foreseeable acts.

Weaver recognized that when land is leased for a public or semi-public purpose that a landlord can be liable for injuries suffered by a tenant’s invitees. 334 F.2d at 321. However, Weaver explained that the landlord’s liability is “limited by the rule that his duty to keep the premises reasonably safe for invitees applies only to defects or conditions in the nature of hidden dangers, traps, snares, pitfalls and the like” Id (emphasis added). WELLS suggests that a third party criminal act might constitute such a defect or condition, and that this question is for the jury to decide. The Court is not persuaded by WELLS’ argument and is satisfied that its interpretation of Weaver is correct; a third party act is not the type of defect or condition in the premises referred to in Weaver.

The Court is also not persuaded by WELLS argument that, in this instance, the Lay decision expands a landlord’s duty to a tenant’s invitee. The Lay decision, which involved a residential landlord’s duty to his tenant, disapproved of the rule articulated in McMillin only to the extent it was inconsistent with the holding of that case. 732 P.2d at 460. Lay did not overrule the holding of McMillin. Taylor, 856 P.2d at 282. WELLS’ interpretation of the Lay holding, that a landlord can

owe a duty to a tenant's invitee to him protect him from foreseeable criminal acts, is in conflict with McMillin, Davis, and Taylor. WELLS' interpretation would impose a greater duty upon the landlord to protect a tenant's invitee than McMillin and progeny places upon the invitor himself.⁴ Consequently, the Court declines to extend the Lay holding to the facts of this case.

C. The Court's Determination That The Statement Made By Sundi Tyler Was Inadmissible Hearsay

In the third error alleged, WELLS claims that the Court should have considered the hearsay evidence he submitted in his response to Defendants' motions for summary judgment.⁵ He contends the Court should have considered the statements under two exceptions to the hearsay rule.

First, WELLS directs the Court to Fed. R. Evid. 801(d)(2)(B), the adoptive admissions exception. "Under established principles an admission may be made by adopting or acquiescing in the statement of another." Fed. R. Evid. 801(d)(2) advisory committee's notes. WELLS asserts that the hearsay statements have been admitted by 39 PRODUCTIONS, INC. ("TPI") by its failure to

⁴If an invitor, even if he owns the property, does not have a duty to protect his invitee from a third party act unless he has knowledge the act is occurring or about to occur, it is inconceivable that the duty can be imposed on a landlord without knowledge, if the act was foreseeable.

⁵WELLS submitted an investigative report from a private investigator which contained hearsay statements made by Sundi Tyler, a witness to the event. In the order entered by the Court on August 20, 1996 (Docket no. 43), the Court indicated that the this hearsay appeared in an affidavit submitted by WELLS. This statement is incorrect; the hearsay appeared not in an affidavit, but an unsigned investigative report.(Pl.'s Resp. To Def.s' Mot.s for Summ. J., Docket no. 22, Ex. 4 at 2). The report indicated: "Just prior to the final punch, Steve Lamont, [an agent of TPI,] walked out of the club. . . . Tyler asked Lamont 'to please break this up, this is ridiculous.'" Id.

The out of court statements, if admissible, would constitute evidence that TPI had knowledge of the third party act, which might give rise to liability. However, it is not certain that the evidence would give rise to liability, because WELLS would still have to prove that Lamont's subsequent actions constituted a breach of duty.

deny these statements in its reply.⁶ Moreover, WELLS asserts that TPI's subsequent "Good Samaritan" argument "clearly" demonstrates that it adopted a belief in the truth of the statement.⁷

The narrow question is whether TPI's lack of denial, and advancement of the "Good Samaritan" argument, constitute an admission under Fed. R. Evid. 801(d)(2)(B). The adoptive admission exception is based on the theory that "the person would, under the circumstances, protest the statement made in his presence, if untrue." Fed. R. Evid. 801(d)(2)(B) advisory committee's notes. However, inadmissible hearsay will not defeat summary judgment. Treff v. Galetka, 74 F.2d 191, 195 (10th Cir. 1996). As the statements were inadmissible when introduced, the Court declines to interpret TPI's failure to expressly deny these statements, or its assertion of the Good Samaritan argument, as an unequivocal admission that the hearsay statements are true.

Second, WELLS directs the Court to Fed. R. Evid. 803(6), the business record exception. This exception to the hearsay rule is also of no assistance to WELLS. WELLS claims that, because interviewing witnesses is a record of the investigator's regularly conducted activity, the statements should be admissible under Fed. R. Evid. 803(6). The Court disagrees.

First, even if the investigator's report qualifies as record that meets Fed. R. Evid. 803(6), the exception only allows for the admission of the report, not the second-level hearsay the report contains. For such a report to be admitted in its entirety, the observer who furnished the information to be recorded must be acting in the 'regular course of business.' "If, however, the supplier of the

⁶TPI, in its reply, did not expressly affirm or deny these statements. TPI only indicated that the statements by Sundi Tyler were hearsay (TPI's Reply to Pl.'s Resp. To Mot.s for Summ. J., Docket 27).

⁷TPI subsequently argued that under Okla Stat. Tit. 76, § 5, the Good Samaritan Act, that absent a contractual relationship, one does not have a duty to come to the aid of another (TPI's Reply to Pl.'s Resp. To Mot.s for Summ. J., Docket 27).

information does not act in the regular course, an essential link is broken. . . . An illustration is the police report incorporating information obtained by a bystander: the officer qualifies acting in the regular course but the informant does not.” Fed. R. Evid. 803(6) advisory committee’s notes; see also Timberlake Constr. Co. V. U.S. Fidelity and Guaranty Co., 71 F.3d 335, 341-42 (10th Cir. 1996). The statements by Sundi Tyler, a bystander not acting in the ‘regular course,’ do not fall under this exception. Rather, her statements constitute second-level hearsay. For Sundi Tyler’s statements to be admissible, a second exception to the hearsay rule must be found.

Finally, the Court is not convinced that the investigative report submitted by WELLS is even admissible under the business records exception. “It is well established that one who prepares a document in anticipation of litigation is not acting in the regular course of business.” Timberlake Constr. Co., 71 F.3d at 342 (citing Palmer v. Hoffman, 318 U.S. 109, 114 (1943)). An investigator’s report prepared in anticipation of litigation is not admissible under Fed. R. Evid. 803(6). Consequently, the Court is satisfied that it properly refused to consider Sundi Tyler’s statements, because her statements were inadmissible hearsay.

D. WELLS’ Request To Certify Questions Of Law To The Oklahoma Supreme Court.

WELLS also request the Court to certify two questions to the Oklahoma Supreme Court pursuant to Oklahoma’s Uniform Certification Of Questions Of Law Act. Okla Stat. tit. 20, §§ 1601-1605. Specifically, WELLS urges the Court to certify: whether Oklahoma recognizes the latter portion of Restatement(Second) of Torts, § 344 Comment f; and whether a third party assault is the type of defect or condition in the premises that a landlord may have a duty to protect a tenant’s invitees from.

The Court declines WELLS’ request for two reasons. First, judgment has been rendered on

WELLS' cause of action and the request is not timely. Second, even if WELLS' request was timely, the Court is not persuaded that the two questions should be certified to the Oklahoma Supreme Court. It is unnecessary to certify the first question because the Court finds McMillin, Davis, and Taylor controlling. Certification is unnecessary on the second question because the Court is satisfied that its interpretation of a landlord's duty to a tenant's invitee is correct; a third party assault is not the type of defect or condition in the premises that a landlord has a duty to protect a tenant's invitee from.

II. CONCLUSION

ACCORDINGLY, IT IS ORDERED that WELLS' motion for new trial, and his request to certify questions of law to the Oklahoma Supreme Court (Docket no. 45), are each denied.

SO ORDERED THIS 1st day of November, 1996.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

NOV 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EUGENE FINCH and VESTA)
FINCH, Parents and Next)
Friend of TYRONE L. FINCH,)
a Minor Child,)

Plaintiffs,)

v.)

Case No. 96-C-0243-C

FANELLI BROTHERS TRUCKING)
COMPANY, a corporation,)
LINCOLN GENERAL INSURANCE)
COMPANY, H. RAY BOWLES and)
JENNIFER BOWLES d/b/a BOWLES)
TRUCKING COMPANY, ASSOCIATES)
INSURANCE COMPANY, INC. and)
BOBBY B. BOWLES,)

Defendants.)

ENTERED ON DOCKET
NOV 0 1 1996
DATE _____

ORDER OF DISMISSAL

This matter comes before the Court on the joint motion of the plaintiffs and defendants in the above entitled and captioned case for an order dismissing this case with prejudice to the refiling of same.

The Court finds that such motion should be and is hereby GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this cause is hereby dismissed with prejudice to the filing of any future action, each party to bear its own costs and attorneys' fees.



H. Dale Cook
United States District Judge

28

closed out

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

FILED

EUGENE FINCH and VESTA)
FINCH, Parents and Next)
Friend of TYRONE L. FINCH,)
a Minor Child,)

NOV 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

v.)

Case No. 96-C-0243-C

FANELLI BROTHERS TRUCKING)
COMPANY, a corporation,)
LINCOLN GENERAL INSURANCE)
COMPANY, H. RAY BOWLES and)
JENNIFER BOWLES d/b/a BOWLES)
TRUCKING COMPANY, ASSOCIATES)
INSURANCE COMPANY, INC. and)
BOBBY B. BOWLES,)

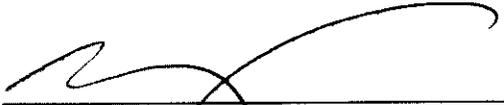
ENTERED ON DOCKET
DATE NOV 01 1996

Defendants.)

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs and defendants in the above captioned case, by their attorneys of record, hereby agree that the action shall be, and the same is hereby dismissed, with prejudice to the filing of any future action, pursuant to Federal Rule of Civil Procedure 41(a)(1). Each party shall bear its own costs.

Respectfully submitted,



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Tulsa, OK 74119

ATTORNEY FOR PLAINTIFFS

79K
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ATTORNEYS FOR DEFENDANTS

2

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

FILED

OCT 31 1996

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

KATHLEEN EVANS,)
)
Plaintiff,)
)
vs.)
)
ADVANCED MEDICAL INSTRUMENTS,)
)
and GARY KINLEY, individually)
)
and as President of ADVANCED)
)
MEDICAL INSTRUMENTS,)
)
Defendants.)

Case No. 96-C-308-BU

ENTERED ON DOCKET
DATE NOV 1 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 31 day of October, 1996.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

14

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

FILED

OCT 29 1996

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

GINA THOMISON,)
)
Plaintiff,)
)
vs.)
)
CITY OF BARTLESVILLE, ex rel.)
BARTLESVILLE POLICE DEPARTMENT,)
)
Defendant.)

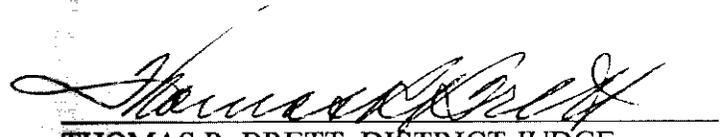
Case No. 95-C-836-B ✓

ENTERED ON COURT
DATE 11-1-96

JUDGMENT

Pursuant to the jury verdict filed in open court October 28, 1996, the Court hereby enters Judgment in favor of Defendant, City of Bartlesville, ex rel., and the Bartlesville Police Department and against the Plaintiff, Gina Thomison.

SO ORDERED THIS 29th day of October, 1996.


THOMAS R. BRETT, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

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

FILED
OCT 31 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA THOMAS, surviving widow)
of HAROLD THOMAS, Deceased,)
)
Plaintiff,)
)
v.)
)
MARS B. GONZAGA, M.D.,)
)
Defendant.)

Case No. 95-C 1046K

ENTERED ON DOCKET
NOV 01 1996
DATE _____

AMENDED JUDGMENT

This action came on for trial to a jury on September 23, 1996, the Honorable Terry C. Kern, District Judge, presiding. The jury returned a verdict on September 27, 1996, finding the Defendant, Mars B. Gonzaga, M.D., liable for the wrongful death of Harold Thomas, and awarded \$81,000.00 in damages. In addition to finding the Defendant liable, the jury also found that the deceased, Harold Thomas, was 50% contributory negligent for his own death.

Judgment is therefore ORDERED in favor of Plaintiff and against the Defendant on all claims, with the damages awarded hereby reduced by the percentage of contributory negligence of the deceased, Harold Thomas.

IT IS THEREFORE ORDERED that the Plaintiff recover from the Defendant the sum of \$40,500.00 with prejudgment interest thereon at a rate of 8.31% for the final 73 days of 1995 and at a rate of 9.55% for the 271 days prior to judgment during 1996 as well as post-judgment interest thereon at a rate of 5.90% as provided by law.

ORDERED this 30 day of October, 1996.


Terry C. Kern
U. S. DISTRICT JUDGE

106

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

FILED
NOV 2 1996
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
MUSKOGEE, OKLAHOMA

FERN FRIEND and LOREN FRIEND,
PLAINTIFFS,

vs.

ARROWHEAD STATOR & ROTOR, INC.,
a Minnesota corporation; FORD MOTOR
COMPANY, a Delaware corporation;
CURRENCE DISTRIBUTING, INC., a
Missouri corporation; TRU-PART
MANUFACTURING CORP., a Minnesota
corporation; AUTO ELECTRIC SERVICE
AND SUPPLIES, INC., a Florida cor-
poration,

CASE NO. 95-C-774-B

DEFENDANTS.

ENTERED ON DOCKET
DATE NOV 01 1996

and

TRU-PART MANUFACTURING CORPORATION,
a Minnesota corporation,

THIRD PARTY PLAINTIFF,

vs.

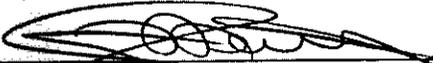
AUTO IGNITION PVT., LTD., a
foreign corporation; UNIPOINT
ELECTRIC MANUFACTURING CO., LTD.,
a foreign corporation,

THIRD PARTY DEFENDANTS.

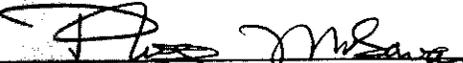
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiffs and the remaining Defendants,

through their respective counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to the dismissal with prejudice of all claims between the Plaintiffs and the Defendants, only, with each party to bear its own costs, and with Defendant, Tru-Part Manufacturing Corporation, reserving its right to pursue its third party action herein against Third Party Defendants, Auto Ignition PVT., Ltd., and Unipoint Electric Manufacturing Co., Ltd.



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SERVICE AND SUPPLIES, INC.

ENTERED ON DOCKET
DATE 10/1/96

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

RONALD STEWART,)
)
Plaintiff(s),)
)
vs.)
)
SHIRLEY S. CHATER, Commissioner of Social)
Security,)
)
Defendant(s).)

OCT 1 1996 SA
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-452-M ✓

ORDER

Plaintiff, Ronald Stewart, seeks **judicial review** of a decision of the Commissioner of the Social Security Administration (SSA) **denying Social Security benefits**.¹ In accordance with 28 U.S.C. § 636(c) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be **directly to the Circuit Court of Appeals**.

The role of the court in reviewing **the decision** of the Secretary under 42 U.S.C. § 405(g) is to determine whether there is **substantial evidence** in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by **substantial evidence**, the court must meticulously examine the record. However, the court may **not substitute** its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are **conclusive** and must be affirmed. *Richardson v. Perales*,

^{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. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The entire record of the proceedings before the Social Security Administration has been meticulously reviewed by the Court. The Court finds that the Administrative Law Judge (ALJ) has adequately and correctly set forth the facts and the required regulatory sequential evaluation process applicable to this case. The Court therefore incorporates that information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff has appealed the denial of benefits by the SSA², alleging that the ALJ erred by failing to address the side effect of "grogginess" from pain medication and the necessity of employing a TENS unit twice a day as nonexertional impairments and that the ALJ's decision that Plaintiff can perform sedentary work is not supported by substantial evidence. The Court agrees.

Plaintiff Ronald Stewart was 45 years old at the time of the final decision and had a high school education [R. 33, 304]. His past relevant work has been as a cook, apartment maintenance worker and janitor [R. 75, 77, 81, 87, 91]. It is not clear when Plaintiff last worked. There is evidence that he worked part-time as a cook and full-time in apartment maintenance in 1989 [R.

^{2/} Mr. Stewart filed an application for disability benefits on May 10, 1990, which was denied June 25, 1990. No further action was taken on that claim. Mr. Stewart filed a second application for disability benefits on November 9, 1990. That claim was denied on February 4, 1991. The denial was affirmed on reconsideration on March 27, 1991. A hearing before an Administrative Law Judge was held July 10, 1991. By Decision dated August 26, 1991, the ALJ found Plaintiff not disabled. The Appeals Council affirmed his findings on July 24, 1992. The decision was appealed to the United States District Court for the Northern District of Oklahoma. On September 23, 1993, the District Court Judge remanded the claim to the SSA with directions to hold a supplemental hearing in order to obtain the testimony of a vocational expert and for further development of the record as to claimant's subjective pain. A second hearing was held on January 5, 1994 wherein the testimony of claimant and a vocational expert were heard. On August 11, 1994, the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 17, 1995. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal, 20 C.F.R. §§ 404.981, 416.1481.

34, 87, 95]. At his second hearing, Plaintiff testified that he had worked as recently as 1993 [R. 306, 321]. He claims he cannot work at all now, due to back pain and the side effects of his pain medication [R. 37, 103, 111]. The ALJ found that Plaintiff has not been gainfully employed since March 1, 1989 and that he is impaired by back pain but that the impairment neither meets nor equals the Listings of Impairment criteria under 20 C.F.R. 404, Subpart P, Reg. 4. He decided that Plaintiff is unable to perform his past relevant work but that he has the residual functional capacity to perform work of a sedentary nature. His finding, therefore, was that Plaintiff is not disabled under 42 U.S.C. § 423(d)(1)(A).

Plaintiff's medical records reveal that he was examined on June 28, 1989 by Jimmy C. Martin, M.D. for a February 6, 1989 injury to his back [R. 185-187]. Dr. Martin evaluated Plaintiff for Workers' Compensation benefits. Dr. Martin's records show that Plaintiff was prescribed Anexsia 7.5 mg on July 17, 1989 [R. 183].

Plaintiff was also treated for this back injury by Anthony C. Billings, M.D., a neurosurgeon [R. 189-200]. Dr. Billings conducted a Workers' Compensation evaluation and diagnosed a "herniated nucleus pulposa C6-7" on July 17, 1989 [R. 199-200]. He prescribed Vicodin on July 28, 1989 [R. 183, 198]. MRI scans of the lumbar and cervical spine on August 4, 1989 revealed disc herniation at C6-7 and at L4-5 [R. 195-198]. A conservative course of treatment was decided upon at that time since Plaintiff was working and "getting along fairly well despite the pain" [R. 198]. Phenaphen, Vicodin and Naprosyn were prescribed during this time [R. 195, 198]. On August 14, 1989, Dr. Billings noted that Plaintiff had slipped on some water and fallen while at work and had increasing spasm in the region of the neck [R. 198]. Dr. Billings took Plaintiff off work and prescribed Tylox and Valium through September, 1989 [R.

194-198]. On September 25, 1989, Dr. Billings performed an anterior cervical discectomy and fusion [R. 193]. He prescribed Demerol in early October, 1989 and switched to Fiorinal #3 and Dalmane 30 mg. on October 18, 1989 [R. 193]. Noting that the Fiorinal did not seem to be of benefit, Dr. Billings prescribed Demerol and Valium on October 27, 1989 [R. 192]. In November, 1989, Dr. Billings prescribed Tylenol #3 and Tylenol #4 [R. 192]. Phenaphen #4 was prescribed in December, 1989 [R. 191-192]. An MRI scan on January 17, 1990 revealed central disc protrusion of considerable size of the L4-5 disc [R. 191]. On January 24, 1990, Dr. Billings recorded that Plaintiff seemed to be doing fairly well with regard to his neck and that he was "not interested in pursuing anything" (as to the lower back condition) with which Dr. Billings agreed. On that date, Dr. Billings gave Plaintiff a prescription for Vicodin with three refills and discharged him from neurosurgical care [R. 189].

Emergency room notes from St. Francis Hospital on January 26, 1990 reveal that Plaintiff came in for treatment claiming that he had fallen the night before at a grocery store [R. 234]. He complained of pain mostly in the upper thoracic spine. Hospital X-rays demonstrated interbody fusion of C6-C7 level and no significant abnormalities of the thoracic and lumbar spine [R. 235]. Plaintiff was denied a refill for Vocodin but was given Laprosyn 500 and told to see Dr. Billings [R. 234]. On May 7, 1990, Dr. Billings wrote:

Mr. Stewart came in and apparently had another accident somehow the day after I discharged him. I think that this patient has other motives for his problems than are apparent on the surface and I, therefore, refused to take him on as a patient and to treat him for this other additional accident [R. 189].

Plaintiff returned to Dr. Martin for treatment and was continued on "narcotic analgesics, muscle relaxants and physical therapy" from January 25, 1990 through April 11, 1990 [R. 157-

184]. He was discharged from treatment as Dr. Martin reported that, medically, he had done everything possible to help him despite the fact that Plaintiff continued "to have a great deal of pain and discomfort" [R. 158].

In May 1990, Plaintiff sought treatment at St. Francis Hospital complaining of back pain and headaches and was given Naprosyn [R. 241, 245]. On August 30, 1990, a radiologist, John T. Forsythe, M.D., reported that the lumbosacral spine showed anterior degenerative changes at L3-4, 4-5 and wedging of the disc space at L5-S1 [R. 268].

Plaintiff was treated at Westview Medical Clinic by Ronald H. English, M.D. and Lawrence A. Reed, M.D. from September, 1990 through November 1, 1993 [R. 246-267, 351-392 and 409-422]. During this treatment period, Plaintiff was prescribed Tylenol #3, Flexoril #60, Elavil 50 mg., Vicodin, Xanax .5 mg, Meclermon 100 and Lortab 7.5 mg. Plaintiff was fitted for a TENS unit on February 11, 1991 and, because it was said to be of benefit, was continued on that method of treatment [R. 278, 370, 376]. On March 22, 1992, Dr. Reed sent a report to the Department of Human Services regarding Plaintiff's treatment and condition [R. 352-354]. In that report, Dr. Reed stated that he hesitated to issue medication for pain for a man who will have long term problems (fearing the possibility of drug dependency) [R. 353]. Dr. Reed noted, however, that Plaintiff was being maintained on medications for pain and inflammation as well as small doses of a tranquilizer (Xanax) and expressed an opinion that Plaintiff's "pain is real" [R. 353]. Dr. Reed recommended retraining for Plaintiff within his current documented physical limitations [R. 353]. The last documentation in the record by these two treating physicians are hand-written notes of July 2, 1993 stating that Plaintiff had the "same complaints," indicating renewal of medications and scheduling a return visit for seven weeks

hence [R. 409]. A corner note on that page indicates that medications, Lortab and Xanax, were again renewed for Plaintiff on September 7, 1993. Plaintiff's medication list, dated January 4, 1994, indicates that at the time of the supplemental hearing on January 5, 1994, he was still taking Lortab, Xanax and Voltaren, [R. 431].

The record also contains treatment notes from Gilcrease Medical Center which apparently were submitted subsequent to the supplemental hearing and which are dated April 21, 1993 through June 21, 1993 [R. 432-435]. These notes, by Kenneth R. Trinidad, D.O., indicate that Plaintiff was placed on Doxepin 10-20 mg, Feldene and Tylenol #3 [R. 435]. Dr. Trinidad released Plaintiff to return to work on June 22, 1993 with "no evidence of permanent impairment as he has no evidence of ongoing muscle spasm and has had resolution of any range of motion abnormalities" [R. 432].

Virtually all of the pain medications Plaintiff was prescribed from March, 1989 through September, 1993 by treating and examining physicians list side effects including drowsiness.³ In

^{3/} Plaintiff's medications referred to in this record are described below as found in the 49th Ed. of the Physicians' Desk Reference (1995):

Anexsia 7.5 mg: (Hydrocodone Bitartrate and Acetaminophen tablets) Warning: may be habit forming, for the relief of moderate to moderately severe pain, Adverse Reactions include lightheadedness, dizziness, sedation, nausea and vomiting, drowsiness, mental clouding, lethargy, impairment of mental and physical performance, p. 648;

Dalmane: (Flurazepam hydrochloride) a hypnotic agent useful for treatment of insomnia, Adverse Reactions include dizziness, drowsiness, lightheadedness, staggering ataxia and falling have occurred, severe sedation, lethargy, disorientation, p. 2069;

Demerol: (Hydrochloride), indicated for relief of moderate to severe pain, Adverse Reactions: include lightheadedness, dizziness sedation, p. 2206;

Doxepin 20 mg: (Adapin), recommended for treatment of depression and/or anxiety, Precautions: Since drowsiness may occur with use patients should be warned of the possibility and cautioned against driving a car or operating hazardous machinery, p. 1374 - 1375;

Feldene: (piroxicam), indicated for acute or long-term use in relief of osteoarthritis, rheumatoid arthritis, Adverse Reactions: include gastrointestinal distress, edema, dizziness, headache, malaise, p. 1900;

Fiorinal #3: (butalbital, aspirin, caffeine), indicated for relief of tension or muscle contraction headache, Adverse Reactions: drowsiness and dizziness, p. 2160;

Flexeril, 50 mg: (Cyclobenzaprine HCl), indicated as an adjunct to rest and physical therapy for relief of muscle spasm associated with acute, painful musculoskeletal conditions. Improvement is manifested by relief of muscle spasm and its associated signs and symptoms, namely pain, tenderness, limitation of motion and restriction in activities of daily

addition to the objective medical evidence, Plaintiff testified at both hearings that he suffers drowsiness and grogginess as a side effect of the medication he takes for pain relief [R. 40, 314, 321]. Furthermore, Plaintiff also claimed drowsiness and adverse side effects of pain medication affected his ability to work in the disability report attached to his application for benefits [R. 95] and in the pain questionnaire also made part of the record [R. 118]. Plaintiff also testified that he continues to use the TENS unit prescribed by Dr. Reed [R. 319-320].

The ALJ found that Plaintiff does experience some neck and low back discomfort but that he does not experience pain of such intensity and severity as to prevent him from engaging in all substantial gainful work activity [R. 291]. The ALJ's Decision [R. 286-294] recounted Plaintiff's medical treatment history and noted Plaintiff's testimony that "he attempts to gain pain relief by use of a TENS unit and with pain medications which cause grogginess" [R. 291]. However, the

living, p. 1550;

Lortab 7.5 mg: (Hydrocodone Bitartrate and Acetaminophen - Warning: may be habit forming), semisynthetic narcotic analgesic and antitussive with multiple actions qualitatively similar to those of codeine, indicated for the relief of moderate to moderately severe pain, Adverse Reactions: lightheadedness, dizziness, sedation, nausea and vomiting, drowsiness, mental clouding, lethargy, impairment of mental and physical performance, p. 2631;

Meclomen 100 mg: (Meclofenamate) [from Springhouse Corp. Nursing86 Drug Handbook], for Rheumatoid arthritis and osteoarthritis, Adverse Reactions: include drowsiness, dizziness, nervousness, headache, p. 209 - 210;

Naprosyn: (Naproxen) indicated for treatment of arthritis, spondylitis, tendinitis and bursitis and for relief of mild to moderate pain, Adverse Reactions: include gastrointestinal reactions, headache, dizziness, drowsiness, lightheadedness, vertigo, p. 2478 - 2479;

Phenaphen: (Acetaminophen with codeine) p. 2010, narcotic [no other information], p. 2010;

Tylenol No. 3 and No. 4: (Acetaminophen with codeine) indicated for relief of mild to moderately severe pain, Adverse Reactions: include lightheadedness, dizziness, sedation, p. 1473 - 1474;

Tylox: (Oxycodone and acetaminophen), indicated for relief of moderate to moderately severe pain, Adverse Reactions: include lightheadedness, dizziness, sedation, p. 1474 - 1475;

Valium 10 mg: (diazepam), indicated for management of anxiety disorders, Adverse Reactions: include drowsiness, fatigue and ataxia, p. 2078 - 2079;

Vicodin 7.5 mg: (Hydrocodone bitartrate - Warning: may be habit forming - acetaminophen) narcotic analgesic, for the relief of moderate to moderately severe pain, Adverse Reactions include drowsiness, mental clouding, lethargy, impairment of mental and physical performance, p. 1242 - 1243;

Voltaren 75mg: (diclofenac sodium) nonsteroidal anti-inflammatory drug, analgesic, indicated for the acute and chronic treatment of signs and symptoms of rheumatoid arthritis, osteoarthritis and ankylosing spondylitis, Adverse Reactions; gastrointestinal disturbances, insomnia, drowsiness, depression, diplopia, anxiety, p. 1078 - 1079;

Xanax .5 mg: (alprazolam) indicated for the management of anxiety disorder, Warnings: dependence and withdrawal reactions, Adverse Reactions: drowsiness or lightheadedness, p. 2589 - 2591.

ALJ did not discuss Plaintiff's claim of drowsiness or grogginess caused by pain medication in assessing Plaintiff's residual functional capacity. The ALJ did not reject Plaintiff's testimony in this regard as incredible. The ALJ simply ignored it. This omission was particularly significant given the vocational expert's testimony that Plaintiff's need for a TENS unit and medication and the fact that the medication made him groggy would render him unable to do either his past work or any of the other work previously listed as available by the vocational expert [R. 333].

The Court notes that when the Secretary is considering the side effects of medication on a Plaintiff's ability to perform work, the 9th Circuit requires an analysis similar to that undertaken with regard to pain.

Like pain, the side effects of medications can have a significant impact on an individual's ability to work and should figure in the disability determination process. *Cf. Howard*, 782 F.2d at 1488. Also like pain, side effects can be a "highly idiosyncratic phenomenon" and a claimant's testimony as to their limiting effects should not be trivialized. *Cf. id.* Therefore, if the Secretary chooses to disregard a claimant's testimony as to the subjective limitations of side effects, he must support that decision with specific findings similar to those required for excess pain testimony, as long as the side effects are in fact associated with the claimant's medication(s). *Cf. Cotton*, 799 F.2d at 1407; *see also Figueroa v. Secretary of Health, Education and Welfare*, 585 F.2d 551, 554 (1st Cir. 1978) (ALJ must make finding on appellant's claim regarding side effects of medication). Because no such findings were made here, we remand the matter so that, as in the case of the pain testimony, the ALJ may either accept Varney's evidence regarding side effects or make specific findings rejecting such evidence. Again, any specific findings rejecting her testimony must be supported by the record and will be subject to further review by the courts.

Varney v. Secretary of Health and Human Services, 846 F.2d 581 (9th Cir. 1988). While this Court is not requiring the analysis adopted by the 9th Circuit, the Court would commend this

framework for consideration by the Secretary.

Because the ALJ failed to properly evaluate the side effects of Plaintiff's medication, the Court finds that his ultimate conclusion that Plaintiff could perform sedentary work was not supported by substantial evidence. The Court, therefore, REVERSES AND REMANDS this case to the Commissioner to evaluate Plaintiff's complaints of inability to engage in substantial gainful work activity due to side effects from pain medication and daily use of a TENS unit.

SO ORDERED this 31ST day of OCT., 1996.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 11/1/96

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

FILED

RONALD STEWART,

Plaintiff(s),

vs.

SHIRLEY S. CHATER, Commissioner of Social
Security,

Defendant(s).

OCT 11 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-452-M ✓

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 31ST

day of OCT., 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

17

ENTERED ON DOCKET

DATE 11/1/96

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

ROBERT D. EDWARDS,
SS# 445-44-9763

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

OCT 31 1996 *SLC*

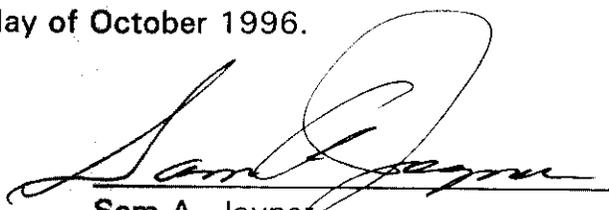
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 5 C-1143-J ✓

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 31 day of October 1996.



Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
DATE 11/1/96

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

ROBERT D. EDWARDS,
SS# 445-44-9763

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of
Social Security Administration,

Defendant.

OCT 31 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. ~~96~~ C-1143-J ✓

ORDER^{1/}

Plaintiff, Robert D. Edwards, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the decision of the Commissioner should be reversed because (1) the ALJ misinterpreted and misstated several facts, (2) the ALJ improperly relied on the "absence of evidence" as evidence, (3) the ALJ made conclusory statements concerning Plaintiff's health without sufficient elaboration or inquiry, (4) the ALJ improperly relied on the Grids^{3/} although Plaintiff had nonexertional limitations, and

^{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.

^{2/} Plaintiff filed an application for disability and supplemental security insurance benefits on January 28, 1993. [R. at 58]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge R.J. Payne (hereafter, "ALJ") was held December 22, 1994. [R. at 211]. By order dated January 27, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 38]. Plaintiff appealed the ALJ's decision to the Appeals Council. On November 12, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 4].

^{3/} The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Supbt. P, App. 2. The Grids are frequently referred to in the regulations as "Appendix 2."

failed to consult a vocational expert. For the reasons discussed below, the Court reverses and remands the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff's past relevant work has consisted predominantly of truck driving and working in a warehouse. [R. at 112, 227]. Plaintiff alleges that he became disabled on May 4, 1992, when his truck hit a car that flipped over in front of him. [R. at 218]. Plaintiff asserts that he injured his neck, shoulder and back in the accident, still experiences pain, and is unable to lift his arm over his shoulder. [R. at 216-17]. Plaintiff additionally claims that his knees hurt, that he has breathing difficulties, and that he has cataracts. [R. at 217, 221-23].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

^{4/} 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 that the claimant 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. § 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 the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (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 Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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 is disabled under the Social Security Act 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).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States 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).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a 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.

This Court must also 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.

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff was not disabled at Step Five of the sequential evaluation process. The ALJ noted Plaintiff's breathing problems and concluded that Plaintiff's impairment would "limit the claimant . . . requiring a relatively clean air environment with no exposure to dust, temperature changes, gases, chemicals." [R. at 44]. The ALJ discounted Plaintiff's claims of vision difficulties

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

based on reports from Plaintiff's eye examiners. The ALJ additionally found that Plaintiff had no mental impairment. The ALJ concluded that Plaintiff retained the RFC to perform light work, with a limitation only for overhead reaching (due to a "frozen left shoulder) and the environmental restriction to clean air (for his breathing problems). The ALJ relied solely on the Grids to find Plaintiff was not disabled.

IV. REVIEW

Thompson v. Sullivan: "absence of evidence"

With respect to Plaintiff's claim of depression, Plaintiff asserts that the ALJ's statement that "[claimant] has not sought any kind of treatment nor even mentioned it to any of his examiners . . . " is an example of the ALJ relying on the "absence of evidence" rather than evidence, and is prohibited. Plaintiff relies on Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993).

The Tenth Circuit, in Thompson, addressed an ALJ's finding that a claimant could perform sedentary work although the record contained no evidence to support a finding of the claimant's RFC. The Thompson court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." Id. at 1490.

Thompson concerned an ALJ's failure to support his conclusions with respect to an individual's physical RFC. Unlike Thompson, in this case, the record contains several consultative examinations which support Plaintiff's physical RFC. [R. at 63, 89, 195].

Regardless, Plaintiff alleges that the ALJ improperly relied on the "absence of evidence" with respect to Plaintiff's asserted mental impairment. However, Plaintiff's argument ignores the burden of proof requirements with respect to this issue.

The procedure for the evaluation of a mental impairment is explained in 20 C.F.R. 1520a. A claimant has the initial burden to establish the existence of a mental impairment.

If you are not doing **substantial** gainful activity, we always look first at your **physical** or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.

20 C.F.R. § 404.1508 (emphasis added). See also 20 C.F.R. § 404.1528 ("*Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.")(emphasis in original).

To establish the existence of a mental impairment, Plaintiff must do more than allege its existence. Considering the record and facts in this case, the ALJ did not err in concluding Plaintiff did not have a severe mental impairment.^{6/}

^{6/} The Court does not hold that Thompson would never apply to an assertion of a mental impairment. However, a claimant must first present some medical evidence of the alleged mental impairment.

Application of the Grids

Plaintiff asserts that the ALJ **erred** by applying the Grids (which direct a finding of non-disability) when the Plaintiff **suffers** from nonexertional limitations such as pain and Chronic Obstructive Pulmonary Disease ("COPD"). The ALJ concluded that Plaintiff did not suffer from severe disabling pain, that Plaintiff's breathing difficulties could be solved by limiting Plaintiff to a "clean air environment," and that Plaintiff was restricted from overhead reaching due to a frozen left shoulder.^{7/}

Exertional vs. Nonexertional Limitations

Limitations imposed by an impairment can be either exertional or nonexertional. The regulations provide that when an impairment affects only exertional limitations, the Grids may be applied. 20 C.F.R. § 404.1569(b). When an impairment affects nonexertional limitations, or exertional and nonexertional limitations, the regulations state that the Grids will not direct a conclusion. 20 C.F.R. § 404.1569(c) & (d). Limitations from an impairment such as pain can be either exertional or nonexertional.

(a) *General.* Your impairment(s) and related symptoms, such as pain, may **cause** limitations of function or restrictions which limit **your ability** to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect **your ability** to meet the strength demands of jobs. . . . Limitations or restrictions which affect your ability to **meet** the demands of jobs other than the strength demands, **that is**, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. . . .

^{7/} The ability to reach is classified as "nonexertional" by the regulations. 20 C.F.R. § 404.1569a.

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following: (i) You have difficulty functioning because you are nervous, anxious, or depressed; (ii) You have difficulty maintaining attention or concentrating; (iii) You have difficulty understanding or remembering detailed instructions; (iv) You have difficulty in seeing or hearing; (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g. you cannot tolerate dust or fumes; or (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations and restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet

both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

20 C.F.R. § 404.1569 (italics in original, underline added).

Defendant relies on several Tenth Circuit cases and asserts that if a claimant can perform a “full range of activity” in a particular category, application of the Grids to determine that the claimant is not disabled is appropriate.^{8/} Defendant’s argument is correct. However, as the Tenth Circuit has explained, a finding by the ALJ that the claimant can perform a substantial number of jobs in a particular category, even though he has nonexertional limitations, requires support from the record.

Use of the Medical-Vocational Guidelines is predicated on an impairment that limits the strength or exertional capacity of the claimant. Therefore, if a claimant’s impairment is of a different nature, the grids may not be fully applicable. For instance, the regulations note that certain mental, sensory, or skin impairments, environmental restrictions, or postural and manipulative restrictions may be independent from exertional limits. Where such “nonexertional” limitations combine with exertional limitations which do not in and of themselves establish a disability, then the grids are to provide no more than a framework for determining disability. The hearing officer is not to automatically or mechanically apply the grids but instead must consider all the relevant facts in determining whether the nonexertional

^{8/} In Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989), the Tenth Circuit noted that the “mere presence of some nonexertional pain did not automatically preclude reliance on the grids.” In Gossett v. Bowen, 862 F.2d 802, 806 (10th Cir. 1988), the Tenth Circuit upheld the ALJ’s decision that the record supported a finding that the claimant did not suffer disabling pain, and therefore “the ALJ properly applied the grids.” The Tenth Circuit also states, that “[t]he presence of nonexertional impairments precludes reliance on the grids only to the extent that such impairments limit the range of jobs available to the claimant.” Id. at 807-08 citing Channel v. Heckler, 747 F.2d 577 (10th Cir. 1984).

limitations diminish the claimant's ability to perform other work. Similarly, if a claimant's residual functional capacity does not meet the definition of one of the exertional ranges (sedentary through heavy), then the ALJ is to "consider the extent of any erosion of the occupational base and assess its significance

Where the extent of the erosion of the occupational base is not clear, the adjudicator will need to consult a vocational resource." In other words, there are situations where the grids alone cannot yield the answer to one's ability to engage in other work in the national economy.

* * *

Admittedly, a nonexertional impairment can have a negligible effect on the range of jobs available. The ALJ, however, must back such a finding with the evidence to substantiate it.

Talbot v. Heckler, 814 F.2d 1456, 1459 (10th Cir. 1987) (citations omitted).

Plaintiff's Nonexertional Impairments

Plaintiff initially asserts that the ALJ erred by applying the Grids although Plaintiff experiences pain. As noted above, an impairment based on pain can impose either exertional or nonexertional limitations. In this case, the ALJ concluded that Plaintiff's complaints of pain were not fully credible and did not further limit his RFC. Consequently, the ALJ's failure to consider Plaintiff's pain, assuming such conclusions were supported with substantial evidence, was not error. See, e.g., Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990) (ALJ required to present only those limitations to the vocational expert which ALJ finds supported by the record).

In determining Plaintiff's RFC, the ALJ "conclude[d] that the claimant retains the residual functional capacity to perform the wide range of light work, with no limitations on walking, sitting, or standing, and the only nonexertional limitations are restriction

to no overhead reaching due to the frozen left shoulder and restriction to clean air and no exposure to dust, temperature changes, gases, or chemical due to the reported breathing problems." [R. at 45 emphasis added]. Consequently, the ALJ specifically found that Plaintiff had two nonexertional limitations: reaching limitations and environmental limitations. In accordance with the regulations, when a nonexertional limitation is present, the Grids do not direct a finding. Consequently, an ALJ's reliance solely on the Grids, absent a finding, supported by the record, that the nonexertional limitation does not impair the ability to perform a "full range of work," is error.

Plaintiff claimed he dislocated his shoulder in an accident in May 1992. [R. at 109]. The ALJ found that Plaintiff had a frozen left shoulder and could perform no overhead reaching. [R. at 45]. The record supports the ALJ's conclusions.^{9/} However, the ALJ does not explain, as required by Talbot, how the nonexertional impairment has a "negligible effect on the range of jobs available," or "back the finding . . . with evidence. . . ." ^{10/} Talbot, 814 F.2d at 1465.

^{9/} James A. Rodgers, M.D., noted on March 10, 1993, that Plaintiff had "some pain in his left shoulder and forward flexion is best tolerated." [R. at 142]. Dr. Rodgers also noted in August 1993 that Plaintiff's range of motion of his left shoulder was improving. [R. at 169]. David E. Nonweiler, M.D., noted on November 2, 1993, that Plaintiff had a partial permanent impairment to his left shoulder of nine degrees. [R. at 177]. J.D. McGovern, J.D., who performed state disability evaluation, noted that Plaintiff had a "left frozen shoulder." [R. at 192]. Dr. McGovern noted that "[b]y history, reaching on the left was reported to be impossible above heart level. This would hurt his left shoulder. Frozen shoulder will usually improve over 18 months spontaneously." [R. at 194, 196]. Consequently, although Plaintiff's condition is predicted to improve, and appeared to be improving during the disability determination process, the record supports the ALJ's conclusion that Plaintiff had a reaching limitation.

^{10/} The ALJ does note that the limitation of "no overhead reaching [was] not [a] significant limitation to the wide range of light work. As noted, Dr. Nonweiler found that the claimant had almost a full range of motion of his shoulder by November 1993 and the examination by Dr. McGovern in November 1994 strongly suggests that any limitations observed by others, and even in his own case, was a result of poor effort or noncooperation." [R. at 49]. Consequently, the ALJ appears to suggest that the range of jobs would not be affected by Plaintiff's reaching limitation because Plaintiff was exaggerating his limitation. Besides appearing

The ALJ additionally found that Plaintiff had breathing problems and should be restricted to working in a clean air environment. In Talbot, the Tenth Circuit, in analyzing an ALJ's application of the Grids to a claimant's nonexertional environmental restrictions noted

[a]rguably, only vocational testimony could have provided sufficient data as to whether substantially all of the jobs in the light work category could accommodate the claimant's environmental restrictions. Given our conclusion here, we need not resolve this question.

Talbot, 814 F.2d at 1465. Although the Tenth Circuit suggests that vocational testimony may be required when a claimant has environmental limitations, the Court specifically declined to decide the issue. Talbot, 814 F.2d 1456, 1465 (10th Cir. 1987) n. 6 ("We decline, however, to determine whether environmental restrictions are by their nature the kind of nonexertional impairment that requires vocational testimony in order to determine the extent of the erosion of the occupational base."). See also Kail v. Heckler, 722 F.2d 1496, 1497-98 (9th Cir. 1984) (ALJ's reliance on grids error where claimant's impairment dictated necessity of environmental restrictions).

Although the ALJ states, with respect to Plaintiff's reaching limitation, that the Plaintiff would still be able to perform a wide range of light work because the doctors indicated that Plaintiff was exaggerating, the ALJ provides no specific reasons to support his conclusion that Plaintiff could perform a wide range of light work in spite

to contradict his finding that Plaintiff does have a reaching limitation, this suggestion by the ALJ does not provide evidence that Plaintiff's limitation would not affect his ability to perform a substantial number of jobs.

of his environmental limitations.^{11/} **“Absent a specific finding, supported by substantial evidence, that despite his nonexertional impairments, [claimant] could perform a full range of sedentary work on a sustained basis, it was improper for the ALJ conclusively to apply the grids in determining that [claimant] was not disabled.”** Channel v. Heckler, 747 F.2d 577, 581 (10th Cir. 1984).

The ALJ does note, in his discussion of the medical records detailing Plaintiff’s breathing difficulties, that Plaintiff’s difficulties did not preclude his previous employment at the heavy exertional level of a truck driver.^{12/} Plaintiff testified that for the past fifteen years he has worked for a warehouse driving a truck. [R. at 226].^{13/} However, the ALJ does not indicate this as support for his conclusion that Plaintiff could perform a wide range of activities of light work. Regardless, Plaintiff’s ability to control his environment while working as a truck driver appears to significantly differ from Plaintiff’s ability to maintain control over his environment in a “full range of light work.” Absent additional evidence, the Court cannot uphold the ALJ’s

^{11/} The ALJ states, “Furthermore, the undersigned concludes that the limitation to clean air requirements and no overhead reaching are not significant limitations to the wide range of light work. As noted, Dr. Nonweiler found that the claimant had almost a full range of motion of his shoulder by November 1993 and the examination by Dr. McGovern in November 1994 strongly suggests that any limitations observed by others, and even in his own case, was a result of poor effort and noncooperation.” [R. at 49].

^{12/} Some courts have suggested that evidence that an individual was able to work although the individual had a nonexertional impairment may justify evidence to support an ALJ’s reliance on the Grids. See, e.g., Cummins v. Schweiker, 670 F.2d 81 (7th Cir. 1982) (“A vision impairment is ‘nonexertional’ and therefore not encompassed in the definition of ability to do sedentary work. . . . The Department recognizes this and in cases where there is a nonexertional impairment the ALJ must go beyond the grid. He did so in a responsible manner here, finding that Cummins’ blindness in one eye had not interfered with his previous work and would not interfere with sedentary work of which he was ‘exertionally’ capable.”).

^{13/} Plaintiff also stated that he was sometimes asked to “work warehouse,” and he would “work warehouse.” [R. at 227]. The record does not indicate what this work involved.

summary conclusion (that Plaintiff's environmental restrictions would not significantly interfere with his ability to work) and the ALJ's subsequent application of the Grids.

Miscellaneous Alleged Factual Errors

Plaintiff asserts that the ALJ **misstated** several facts in reaching his conclusion that Plaintiff was not disabled, and that this constitutes error.

Plaintiff is correct that the ALJ's decision indicates Plaintiff was not issued a handicapped parking permit, but the **record** indicates that one of Plaintiff's doctors signed the permit. However, this **asserted** factual error does not constitute a basis for reversing the ALJ's decision. If the ALJ's findings and conclusions are otherwise supported by substantial evidence, **the determination** as to Plaintiff's disability will be upheld.

Plaintiff asserts that the ALJ **stated** that Plaintiff has not sought treatment for his "depression" or mentioned it to his **examiners**. Plaintiff contends that this does not indicate that "there . . . is no evidence **that** treatment for depression was not sought." Plaintiff, however, has the burden of **proof** to establish the existence of an impairment. See, e.g., 20 C.F.R. § 404.1508. Plaintiff has not submitted any records concerning a mental impairment, did not submit **any additional** record to the Appeals Council for their review, and has not alleged that **the ALJ** failed in his duty to develop the record. Based on the facts of this case and **the arguments** posed by Plaintiff, the Court cannot accept Plaintiff's "suggestion" that **there may** be some medical records that are not present.

Plaintiff additionally argues that the ALJ's statements that Plaintiff had no difficulty grooming himself, was able to sit for 1 ½ hours, and can mow his front yard on a riding lawn mower misrepresent the facts. To the extent that Plaintiff is correct, and such statements are not properly supported by the record, any "mischaracterizations" do not dictate a reversal unless the ALJ's conclusions are not supported by substantial evidence.

Failure to Adequately Question/Elaborate

Plaintiff asserts that although the ALJ noted that Plaintiff took only a minimum amount of pain medication the ALJ failed to ask Plaintiff why he did not take more pain medication. Plaintiff asserts that Plaintiff goes to the doctor only when he is able to afford to go.

The Tenth Circuit has recognized the frequency with which pain medicine is taken as a factor for consideration in the evaluation of a claimant's complaints of pain. See Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("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."). Furthermore, a claimant's failure to seek low-cost medical treatment, such as Medicaid, has been relied upon as supporting an ALJ's conclusion that a claimant's pain was not as debilitating as claimed by the

claimant. Murphy v. Sullivan, 953 F.2d 383, 386-87 (8th Cir. 1992). The Court cannot conclude that the ALJ erred in his evaluation of Plaintiff's failure to take pain medicine.

Plaintiff further objects to the ALJ's "statements" that Plaintiff continues to smoke. Plaintiff complains that the ALJ drew conclusions without making sufficient inquiry from the Plaintiff. However, the ALJ found that Plaintiff had breathing problems and should be restricted to a clean air environment. [R. at 45]. The ALJ additionally noted that Plaintiff's treatment of his breathing difficulties with Proventil had proven effective.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with **this Order**.

Dated this 31 day of October 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

IN RE:)
)
ASBESTOS PERSONAL INJURY)
LITIGATION,)

M-1417

NOV 31 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KIM SHUMATE, Individually and as)
Personal Representative of the Heirs and)
Estate of HERBERT EUGENE FLICKINGER,)
Deceased,)

Plaintiff,

No. 90-C-260-C ✓

vs.

FIBREBOARD CORPORATION, et al,)
)
Defendants.)

ENTERED ON DOCKET

NOV 01 1996

DATE

**ORDER OF DISMISSAL WITH PREJUDICE AS TO
DEFENDANTS FLINTKOTE COMPANY, GARLOCK INC.,
NATIONAL GYPSUM COMPANY and U.S. GYPSUM COMPANY**

NOW ON THIS 31st day of October, 1996, the above-styled

and numbered cause comes before the undersigned Judge of the United States District Court for

the Northern District of Oklahoma for the Dismissal With Prejudice as to the Defendants,

Flintkote Company, Garlock Inc., National Gypsum Company, and U.S. Gypsum

Company, with each party to pay their own costs and attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the
above-styled and numbered cause be and the same is hereby dismissed, with prejudice, as to the

Defendants, Flintkote Company, Garlock Inc., National Gypsum Company, and U.S. Gypsum Company, with each party to pay their own costs and attorney fees.

A handwritten signature in black ink, appearing to read "Wanda L. Cook", written over a horizontal line.

Judge of the District Court
Northern District of Oklahoma