

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

NATIONAL ENVIRONMENTAL SERVICE)
COMPANY, an Oklahoma Corporation,)

Plaintiff,)

vs.)

RONAN ENGINEERING COMPANY, a)
California Corporation; and MOTOROLA,)
INC., a Delaware Corporation,)

Defendants.)

ENTERED ON DOCKET

DATE MAR 31 1999

Case No. 97-C-860-H-(E) ✓

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

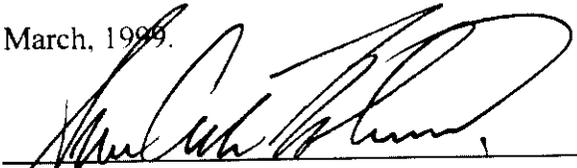
**ORDER GRANTING MOTOROLA, INC.'S
MOTION FOR SUMMARY JUDGMENT**

There comes on for hearing this 18th day of March 1999 the Motion of Defendant Motorola, Inc. ("Motorola") for summary judgment. Motorola appears by and through its attorneys of record Scott W. Breedlove and S. Douglas Dodd; the Plaintiff National Environmental Service Company ("NESCO") appears by and through its attorneys of record Joe M. Fears and Robert J. Bartz, and Defendant Ronan Engineering Company ("Ronan") appears by and through its attorneys of record, Craig W. Hoster and Alexander F. King.

The court, having reviewed Motorola's Motion and Brief for Summary Judgment, the Response of NESCO and Motorola's Reply in Support of its Motion for Summary Judgment; having heard the arguments of counsel and being fully advised in the premises, determines that Motorola's Motion for Summary Judgment should be and hereby is granted.

IT IS THEREFORE THE ORDER OF THE COURT that the Motion of Motorola, Inc. for Summary Judgment is granted in its entirety as to the claims of Plaintiff National Environmental Service Company.

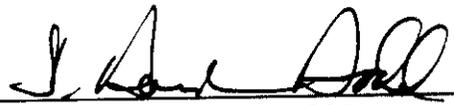
IT IS SO ORDERED this ^{26th} ~~18th~~ day of March, 1999.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 30 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JIMMIE C. CARL,
SSN: 440-40-1673

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-504-K(J) ✓

ENTERED ON DOCKET
DATE MAR 31 1999

REPORT AND RECOMMENDATION

Plaintiff, Jimmie C. Carl, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{1/} Plaintiff asserts that the decision of the Commissioner should be reversed because (1) the Appeals Council erred in refusing to consider new evidence regarding Plaintiff's condition, (2) the ALJ did not properly evaluate or consider Plaintiff's exertional and non-exertional impairments, (3) the ALJ did not include all of Plaintiff's impairments in the hypothetical question presented to the vocational expert, and (4) the ALJ's decision is not supported by substantial evidence. For the reasons discussed below, the United States Magistrate Judge recommends that the District Court **REVERSE AND REMAND** the decision of the Commissioner for further proceedings.

^{1/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated October 28, 1996. [R. at 13]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on May 15, 1998. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born February 23, 1941, and was 55 years old at the time of the hearing before the ALJ. [R. at 127]. Plaintiff obtained his GED when he was in the Army. Plaintiff served in the military from 1958 until 1961. [R. at 129].

Plaintiff testified that both of his knees troubled him and that he could not walk or squat. [R. at 132]. According to Plaintiff, he could stand for approximately two hours before his legs became weak, and walk for approximately one and one-half to two blocks before his "emphysema and weak knees" would bother him. [R. at 136]. Plaintiff believes that he could lift approximately 40 to 50 pounds, but could not do so repetitively. [R. at 138]. Plaintiff testified that he had no difficulty sitting, and that he enjoyed fishing.^{2/} [R. at 136].

In Plaintiff's disability report, Plaintiff claimed that his knees and legs had been trapped between two trucks. [R. at 72]. As a result of this injury, Plaintiff claimed he had difficulty standing, walking, and bending. Plaintiff also reported arthritis in his hands, headaches, and difficulty breathing when he walked. [R. at 72].

Plaintiff reported that he was able to cook and fish, and that he drove once each month despite his lack of a drivers license. [R. at 75]. Plaintiff testified that his license was taken away due to a DUI in 1985. [R. at 128].

^{2/} Plaintiff testified that he did not have problems fishing because "I avoid sitting down when I'm fishing." [R. at 138]. This statement seems somewhat contradictory to Plaintiff's testimony that he has no difficulty sitting, but that he can stand for only two hours.

A social security interviewer noted that Plaintiff walked slowly, seemed stiff, and appeared older than his stated age. [R. at 79]. The interviewer additionally reported that Plaintiff had not been to the doctor in the past ten years. [R. at 79].

Plaintiff was examined by a social security doctor on January 30, 1996. [R. at 93]. The doctor noted Plaintiff's chief complaints consisted of a crush injury to his knees which Plaintiff claimed that he suffered approximately four years prior to the examination. According to Plaintiff, Plaintiff was able to stand for only three to four hours due to the injury. [R. at 93]. Plaintiff additionally complained of shortness of breath over the prior six years, especially after walking approximately two blocks. [R. at 93]. The examiner noted that Plaintiff was 6' 1" tall and weighed 146 pounds. The examiner reported normal gait, good grip strength, no muscle atrophy, and normal range-of motion in Plaintiff's upper extremities. The examiner assessed: (1) chronic bilateral knee weakness by history, and (2) chronic dyspnea^{3/} on exertion by history. [R. at 94].

Plaintiff's records include the results of a pulmonary function study, and Plaintiff's "forced vital capacity and "FEV1" numbers are recorded. [R. at 98-103]. However, no interpretation of the results of this testing appears in the record. A few of Plaintiff's very limited medical record mention "COPD" (chronic obstructive pulmonary disease). [R. at 114, 116].

^{3/} Taber's Cyclopedic Medical Dictionary 593 (17th ed. 1993), defines "dyspnea" as "air hunger resulting in labored or difficult breathing, sometimes accompanied by pain."

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

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

^{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).

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.

^{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."

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

The ALJ found that Plaintiff was limited to light work activity which did not require more than occasional bending, crouching, or stooping, and no repetitive pushing or pulling of leg controls. [R. at 20]. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform work in the national economy. [R. at 22-23].

IV. REVIEW

CONSIDERATION OF NEW EVIDENCE BY APPEALS COUNCIL

Plaintiff attaches, as Exhibit "A," to Plaintiff's brief, medical records dated August 7, 1997 through September 9, 1997. Plaintiff states that these records were submitted to the Appeals Council, after the issuance by the ALJ of his decision. Plaintiff notes that the Appeals Council determined that the records were not material to the issue of whether or not Plaintiff was disabled on or before October 25, 1996. Plaintiff asserts that the medical records indicate that Plaintiff may have suffered a stroke at some time prior to August 7, 1997, and therefore the Appeals Council erred in declining to consider the documents.

Evidence which has been submitted to the Appeals Council can be considered as part of the record on appeal.^{6/} See O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). However, the records must relate to the time period for which Plaintiff is asserting he is disabled. In this instance, the relevant time period of Plaintiff's disability claim is April 30, 1994 (date of onset) until October 25, 1996 (date of the ALJ's decision). Plaintiff is correct that the submitted records do suggest that Plaintiff may have suffered an infarction prior to August 7, 1997. However, nothing suggests that the "early" infarction occurred prior to October 25, 1996. In fact, the treatment notes indicate that Plaintiff reported a "similar incident" two months prior to the August examination. The record does not indicate that the Appeals Council erred in failing to consider Plaintiff's additionally submitted records.

ALJ'S EVALUATION OF PLAINTIFF'S IMPAIRMENTS

Plaintiff asserts that his subjective complaints of pain and numbness in his hands and fingers were supported by his diagnosed condition of Raynaud's Disease. Additionally, Plaintiff argues that the combination of his osteoarthritis, the bilateral contusion of his legs, and the leg weakness would impose significant limitations in his ability to perform work on a sustained basis.

Plaintiff appears to be asserting that the medical evidence supports his complaints, and therefore the ALJ erred in his evaluation of Plaintiff's subjective

^{6/} The Appeals Council evidently returned the documents to Plaintiff, and the documents do not appear in the record from the Social Security Administration.

complaints. Plaintiff does not discuss the relevant case law or the ALJ's analysis of Plaintiff's complaints.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

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.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ noted that Plaintiff had not been to a doctor in the past ten years (with a few exceptions), that Plaintiff took no medication for his migraine headaches, that Plaintiff testified he had no problem sitting, could stand two hours and walk one to two blocks, and that Plaintiff acknowledged fishing, cleaning, cooking, and socializing.

Based on the specifics of the credibility analysis of the ALJ, the testimony, and the lack of medical records, the Magistrate Judge concludes that the ALJ did not err in evaluating Plaintiff's credibility.

EVALUATION OF COPD

Plaintiff asserts that he was diagnosed with COPD. Plaintiff states that although a Pulmonary Function Test was performed on Plaintiff, the ALJ concluded that the test was "within normal limits." Plaintiff asserts that although the results of the test did not meet the Listings, COPD would provide limitations on Plaintiff's ability to work.

As noted above, Plaintiff's medical record is quite sparse, and contains limited mention of "COPD." Plaintiff was examined by a consultative examiner, and a Pulmonary Function Test was done. [R. at 93-103]. In addition, as noted by Plaintiff, the ALJ interpreted the findings of the Pulmonary Function Test as "within normal limits." [R. at 21]. The problem with the ALJ's conclusion is that nothing in the record explains the results of the pulmonary function test, lists the results as normal, or otherwise interprets the test.^{7/} Although the ALJ may well be correct that the results are "normal," the record must contain something to support the ALJ's conclusion. The court cannot rely on the ALJ's apparent "medical expertise" in interpreting the test results.

Because Plaintiff's limited medical records reference COPD, because the consultative examiner concluded that Plaintiff had chronic dyspnea by history, and

^{7/} The number results of the test are in the record at 98. Page 101 of the record explains that if the numbers are used in specific calculations and graphed on a chart that the results would fall within ranges which can be interpreted. The Court attempted to perform such calculations and graphing. The Court's results could be interpreted as placing Plaintiff in a "combined" or possible "obstructive" area of the graph, or as placing Plaintiff in the "grey" area of the graph. Regardless, this Court's resulting information is simply insufficient to support the ALJ's conclusion that Plaintiff was within the "normal" ranges.

because the results of the pulmonary function test were not interpreted by a medical authority, the Court concludes that the record does not contain substantial evidence to support the ALJ's conclusion that Plaintiff is entirely unaffected by his COPD. On remand, the ALJ should obtain some medical authority to interpret the effect, if any, of Plaintiff's COPD, and determine if Plaintiff's claimed COPD would impact Plaintiff's ability to perform work-related activities. If the COPD would have no impact on Plaintiff's ability to perform work, then the present record is sufficient to support the conclusion of the ALJ that Plaintiff was not disabled. If the asserted COPD would impose any limitations on Plaintiff's ability to perform work-related activities, than those limitations should be presented to a vocational expert.

VOCATIONAL EXPERT

Plaintiff asserts that the ALJ did not include all of Plaintiff's limitations in the question posed by the ALJ to the vocational expert. An ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true. The ALJ is only required to include the limitations in the question to the vocational expert which the ALJ properly finds are established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). In this case, with the exception of the problem noted above related to Plaintiff's claimed COPD, the ALJ properly included Plaintiff's limitations in the question to the vocational expert.

Plaintiff additionally notes that the last hypothetical question posed to the vocational expert resulted in an answer favorable to Plaintiff, and that the ALJ erred in ignoring this testimony of the vocational expert.

The vocational expert, in answer to the "last question" posed by the ALJ, focused on Plaintiff's difficulty using his hands and ability to grasp and handle with his fingers. The vocational expert testified that, "a person who's not able to have that level of ability to (inaudible) handle objects, so would not be able to do any of the past relevant work or for that matter (inaudible) transferable skills or any other jobs that I (inaudible)" [R. at 146]. However, this "limitation," which is the basis of the vocational expert's conclusion, is not supported by the record. The consultative examiner found that Plaintiff could effectively oppose the thumb to the fingertips, could manipulate small objects, and could effectively grasp tools. [R. at 97].

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court reverse and remand this action for further consideration and evaluation of Plaintiff's complaint of COPD (chronic obstructive pulmonary disease).

OBJECTIONS

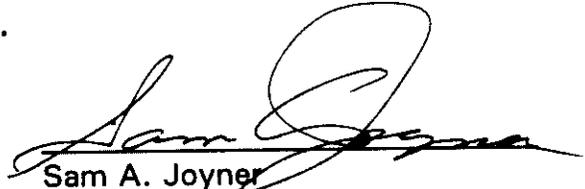
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 30 day of March 1999.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

31 Day of March, 1999 -- 13 --
Other


Sam A. Joyner
United States Magistrate Judge

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

ENTERED ON DOCKET
DATE MAR 31 1999

DWIGHT W. BIRDWELL,)
)
Plaintiff,)

v.)

Case No. 99-CV-0156-H (M)

CHARLIE ADDINGTON, JOEL THOMPSON,)
BOB LEWANDOWSKI, MARK McCOLLOUGH,)
JOE BYRD, BOB POWELL, HOUSING)
AUTHORITY OF THE CHEROKEE NATION)
BOARD OF COMMISSIONERS, IN THEIR)
OFFICIAL AND REPRESENTATIVE)
CAPACITIES ONLY, COMPOSED OF SAM)
ED BUSH, STANLEY JOE CRITTENDEN,)
ALEYENE HOGNER, BILLY HEATH)
AND MELVINA SHOTPOUCH,)

Defendants.)

FILED

MAR 29 1999 *h*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL

The Plaintiff, Dwight W. Birdwell, and the Defendants, the Housing Authority of the Cherokee Nation, and its individual commissioners, Sam Ed Bush, Stanley Joe Crittenden, Aleyene Hogner, Billy Heath and Melvina Shotpouch, stipulate as follows:

1. Plaintiff has named as defendants in this litigation and has served a complaint and process upon Sam Ed Bush, Stanley Joe Crittenden, Aleyene Hogner, Billy Heath and Melvina Shotpouch in their official and representative capacities as members of the board of commissioners of the Housing Authority of the Cherokee Nation. Plaintiff has also named as a defendant and served a

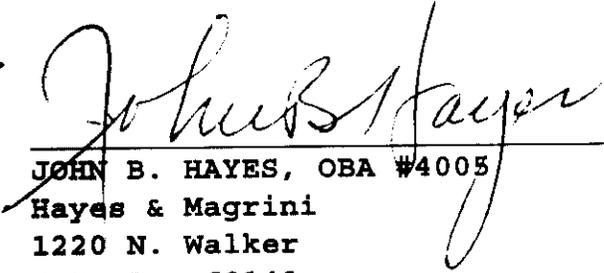
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complaint and process upon the Housing Authority of the Cherokee Nation.

2. By separate stipulation the parties have agreed that the Housing Authority of the Cherokee Nation may be sued without naming as parties its individual commissioners in their official capacities. In reliance upon the separate stipulation, the plaintiff, Dwight Birdwell hereby dismisses without prejudice the individual members of the board of commissioners of the Housing Authority of the Cherokee Nation, namely Sam Ed Bush, Stanley Joe Crittenden, Aleyene Hogner, Billy Heath and Melvina Shotpouch. Although counsel for the Housing Authority of the Cherokee Nation may have construed the style of the case otherwise, the complaint does not name the "Housing Authority of the Cherokee Nation Board of Commissioners" as a separate defendant. Therefore, it is not necessary to dismiss "Housing Authority of the Cherokee Nation Board of Commissioners."

Dated March 25, 1999.



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Nation, and its individual
commissioners, Sam Ed Bush,
Stanley Joe Crittenden,
Alyene Hogner,
Billy Heath and
Melvina Shotpouch

CERTIFICATE OF SERVICE

This is to certify that on the 2th day of March, 1999, a true and correct copy of the above and foregoing instrument was mailed, postage fully prepaid thereon to the following named counsel of record:

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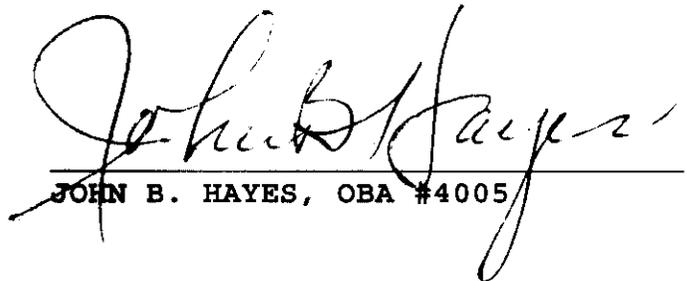
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JOHN B. HAYES, OBA #4005

FILED

MAR 31 1999

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

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

JOEL A. GRIESHABER, an individual,)
)
 Plaintiff,)
)
 vs.)
)
 EDWARD J. FERRO, and BRENDA G.)
 FERRO, d/b/a American Offshore, and)
 AMERICAN OFFSHORE, INC., an)
 Oklahoma corporation,)
)
 Defendants.)

Case No. 97-C-496-E ✓

ENTERED ON DOCKET

DATE 3-31-99

O R D E R

Now before the Court is the Motion for New Trial (Docket #31) of the Plaintiff, Joel A. Grieshaber.

ON September 17, 1996, defendant Ed Ferro entered into a written contract to sell to plaintiff a 2600 Catamaran boat for a total purchase price of \$38,706.00. The contract provided that plaintiff would be provided a credit of \$23,796.00 for the trade in of his 1991 Rapid Craft, and the total amount due would therefore be \$15,000. The Ship date for the boat was specified by the contract to be "April 15, 1997 (or sooner)."

In November of 1996, plaintiff, a resident of Woodbury, Minnesota, dropped off his trade-in, without a manufacturer's statement of origin, at defendant's place of business. Shortly thereafter, defendant sold the boat for \$17,000. In March of 1997, the defendants repurchased the boat that had been offered as trade-in, and in April, 1997, defendants rejected the boat offered as a trade-in and demanded a cashier's check for the total purchase price of \$38,706.

Plaintiff refused to accept the return of the trade-in boat, and sent a facsimile copy of a check for \$15,000 with a letter stating, in part: "With this letter I am tendering my payment to you for Fifteen Thousand and no/100 (\$15,000.00) dollars. A copy of my cashier check no. 141672 is attached. I am planning to travel to Oklahoma immediately upon confirmation from you that the boat is ready for pick-up." Plaintiff admits that he never forwarded the actual cashier check, and defendant admits that he did not deliver the new boat.

Plaintiff sued defendant for breach of contract, alleging damages in the amount of \$37,000.00; conversion of the new boat, alleging damages in the amount of \$52,000.00 (which is the asserted value of the new boat on April 15, 1997) with punitive damages in the amount of \$500,000.00; and violation of the Oklahoma Consumer Protection Act alleging damages in the amount of \$37,000.00 plus a \$2,000.00 civil penalty. Defendant filed a motion for summary judgment on the conversion claim, arguing that plaintiff had no right in the new boat upon which to base a claim of conversion because plaintiff had, at most, tendered a copy of a cashier's check for the amount owed on the boat. Defendant then argued that the case should be dismissed because, once the conversion claim is disposed of, plaintiff does not meet the \$75,000.00 jurisdictional amount required by 28 U.S.C. §1332 in diversity cases. The Court granted the Motion for Summary Judgment on the conversion claim, and dismissed the action for lack of subject matter jurisdiction.

Plaintiffs filed this Motion for New Trial, arguing that an

absolute right to possession is not necessary to maintain a cause of action for conversion; Plaintiff's actions were sufficient to constitute tender which would give rise to a right of possession; and issues of fact preclude summary judgment.

Legal Analysis

The tort of conversion consists of wrongful exercise of dominion over another's personal property in denial of or inconsistent with his rights therein. Steenbergen v. First Federal Savings and Loan of Chickasha, 753 P.2d 1330, 1332 (Okla. 1988). Grieshaber, relying on Shipman v. Craig Ayers Chevrolet, Inc., 541 P.2d 876 (Okla Ct. App. 1975), argues that he can maintain his action for conversion because refusal to deliver goods can constitute conversion. Shipman is distinguishable and does not support Plaintiff's argument. In Shipman, the car in question had already been paid for when the dealership requested additional money. In this case, the boat had not been paid for, and therefore, Plaintiff did not have sufficient rights in the personal property to support a conversion claim. See First State Bank v. Diamond Plastics Corporation, 891 p.2d 1262, 1273 (Okla. 1995). Similarly, the cases relating to creditor's claims for conversion are not applicable to these facts.

Plaintiff also argues that, as a matter of law, his tender was sufficient because he made an unconditional offer to pay. However, while Plaintiff's authority supports this proposition, it does not support the proposition that "tender" gives him any rights in the property sufficient to establish a conversion claim.

Lastly, Plaintiff argues that factual issues preclude summary judgment. Plaintiff asserts that there are factual issues as to whether the trade-in boat was materially misrepresented, whether demand was made for a manufacturer's statement of origin, whether the delivery or lack of delivery of the manufacturer's statement of origin is material to the transaction, whether the age of the trade-in's motor is material, and whether the defendants accepted, timely rejected, or timely revoked acceptance of the trade-in boat. None of these facts bear on the legal issue of the sufficiency of Plaintiff's interest in the property. Instead, these are disputed issues of fact concerning the contract claim that the Court does not reach.

Plaintiff's Motion for New Trial (Docket #31) is Denied.

SO ORDERED this 31st day of MARCH, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

SUSAN HARRIMAN,
Plaintiff,
vs.
SCHNEIDER (USA) INC.
PFIZER HOSPITAL PRODUCTS
GROUP,
Defendant.

ENTERED ON DOCKET
MAR 31 1999
DATE _____

No. 97-CV-134-K

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for consideration before the Court and jury, Honorable Terry C. Kern, Chief District Judge, presiding, and the verdict (advisory in part) having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Susan Harriman recover from the Defendant Schneider (USA) Inc., Pfizer Hospital Products Group, the sum of \$188,402.00 in back pay (including prejudgment interest), the sum of \$150,000 in front pay, and the sum of \$300,000 in punitive damages, all with post-judgment interest thereon at the rate provided by law.

ORDERED this 30 day of March, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

M. LOYCE MCFERRAN)

Plaintiff,)

vs.)

KARLA STARKEY, LARRY Y. COLE,)
PAULA COLE FLY, and)
DENNIS MCFERRAN, collectively)
known as the "TEXAS MCFERRANS")

Defendants.)

ENTERED ON DOCKET

DATE MAR 31 1999

No. 97-CV-694-K

F I L E D

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

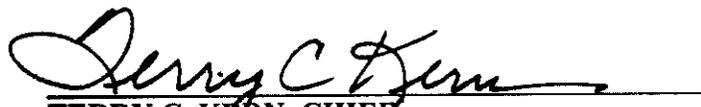
JUDGMENT

This action came on for non-jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding. Having reviewed the pleadings, testimony, and evidence in this case, the Court finds in favor of the Defendants, Karla Starkey, Larry Cole, and Paula Cole Fly, and against the Plaintiff, M. Loyce McFerran on this claim which arose out of a disputed Settlement Agreement.

IT IS THEREFORE ORDERED, ADJUDGED, DECREED that the Defendants, Karla Starkey, Larry Cole, and Paula Cole Fly are each individually entitled to exercise their option in the underlying Settlement Agreement for either a cash payment or mineral interests. The decision of one party to the Agreement does not bind the remaining parties. Plaintiff is ordered to promptly comply with all other terms of the Settlement Agreement as written.

Parties may make any motions for taxation of costs and attorney fees upon entry of judgment pursuant to *Local Rules 54.1 and 54.2*.

ORDERED this 30 day of MARCH, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

36

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

M. LOYCE MCFERRAN)

Plaintiff,)

vs.)

KARLA STARKEY, LARRY Y. COLE,)

PAULA COLE FLY, and)

DENNIS MCFERRAN, collectively)

known as the TEXAS MCFERRANS)

Defendants.)

No. 97-CV-694-K

F I L E D

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Findings of Fact

1. M. Loyce McFerran ("Plaintiff") resides in and is a citizen of the State of Oklahoma and is the Plaintiff in this case.
2. Karla Starkey, Larry L. Cole, and Paula Cole Fly ("Defendants") reside in and are citizens of Texas and are the Defendants in this case.
3. Defendants Karla Starkey, Larry Cole and Paula Fly were heirs at law of their uncle, John Harmon McFerran, who in 1992 married the Plaintiff, Loyce McFerran. When the marriage occurred, the Defendants filed suit in Oklahoma state court alleging their uncle was elderly and senile. They sought and obtained a court order appointing them as their uncle's guardian, finding him incompetent and annulling his marriage.
4. John Harmon McFerran died in May 1993.
5. In November 1994, the Plaintiff and the Defendants herein entered into a Settlement Agreement ("Agreement") that sought to resolve certain disputes arising out of state court

litigation.

6. The Settlement Agreement was drafted by Eugene de Verges, an attorney representing both Plaintiff and the Third Party Defendant Trust Company of Oklahoma.¹ Attorneys for the Defendants had an opportunity to review, comment, and revise the de Verges draft.
7. The Settlement Agreement was entered into on November 30, 1994.
8. A Pledge and Security Agreement was entered into on November 30, 1994, by M. Loyce McFerran, the "Texas McFerrans" and the Trust Company of Oklahoma.
9. The executed Settlement Agreement is between Loyce McFerran and a group of heirs named individually but described in the agreement as the "Texas McFerrans."
10. The term "Texas McFerrans" is a term used in the Settlement Agreement and Pledge and Security Agreement to refer to Karla Starkey, Larry Cole, Paula Fly, Laverne McFerran and Dennis McFerran.
11. Paragraph 2(a) of the Settlement Agreement provides that Loyce McFerran was to make an initial payment to the Defendants and to Laverne McFerran as following: \$600,000.00 cash, along with deeds to an undivided 1/3 interest in the original McFerran homestead interest owned by the Estate of John Harmon McFerran.
12. On December 22, 1994 Plaintiff caused the initial payment of \$600,000.00 to the "Texas McFerrans," but payable to Billy Mickle, attorney for Karla Starkey, Paula Fly, Larry Cole, and Laverne McFerran. From the check proceeds, Billy Mickle distributed respectively to the Defendants and to Laverne McFerran the individual portions due to each such persons.

¹The Third-Party Defendant, The Trust Company of Oklahoma, was released from this case per Judgment entered by this Court on April 23, 1998.

13. By check dated November 27, 1996, the Plaintiff caused to be issued a check for \$408,830.00 to "June Laverne McFerran, a Single Person," and hand delivered by Plaintiff's attorney Eugene de Verges to Laverne McFerran. The Defendants herein had no knowledge until early in 1997 that such payment had been made to their Aunt Laverne and did not authorize Laverne McFerran to act on their behalf or as their agent in exercising her own individual rights under the Settlement Agreement.
14. Laverne McFerran was a fifty percent (50%) stakeholder in the "Texas McFerrans."
15. In January 1997, the attorney for Loyce McFerran wrote to the Defendants' attorney and advised him that the final decree of distribution had been signed and filed for the John Harmon McFerran Estate.
16. By letter dated January 1, 1997, Plaintiff's attorney notified Defendants' attorney Charles Eppright that Laverne McFerran had been paid in cash the balance payment due her under paragraph 2 (b) of the Settlement Agreement, but acknowledged the Defendants' right to elect to be paid their balance in kind or cash.
17. In February 1997, Loyce McFerran and her attorney caused a check for \$408,830.00 to be mailed to Charles Eppright, attorney for the Defendants Karla Starkey, Larry Cole, and Paula Fly and payable to the individually named Defendants. This check was never negotiated by the Defendants, and at no time did they accept cash, in the form of this check or otherwise, for the balance payment due them under paragraph 2(b) of the Settlement Agreement.
18. The Defendants held the February 27, 1997 payment of \$408,830.00 until June 10, 1997, a period of approximately three (3) months and ten (10) days, before they returned the check

to the Trust Company of Oklahoma.

19. The properties at issue are presently being held by the Trust Company of Oklahoma under the terms of the Pledge and Security Agreement, and approximately \$30,000 per month is being paid by operators and purchasers of production to the trust company in respect of production from the estate's mineral properties.

Conclusions of Law

1. It is a general principle of law that "a settlement agreement is a contract." Stubblefield v. Windsor Capital Group, 74 F.3d 990 (10th Cir. 1996). In Oklahoma, the interpretation of a contract is governed by a comprehensive statutory scheme. See Okla.Stat. Ann. tit. 15, §§ 151-177 (West 1966). The mutual intention of the parties at the time of contracting governs the interpretation of a contract. Okla.Stat. Ann. tit. 15, § 152 (West 1966). In determining the intention of the parties, the express language of a contract controls if it is unambiguous on the face and there exists no fraud, accident, or pure absurdity. Okla.Stat. Ann. tit. 15, § 154 (West 1966); Premier Resources, Ltd. v. Northern Natural Gas Co., 616 F.2d 1171, 1180 (10th Cir. 1980), *cert. denied*, 449 U.S. 827, 101 S.Ct. 92 (1980); Johnson v. O-Kay Turkeys, Inc., 392 P.2d 741, 743 (Okla. 1964); Lindhorst v. Wright, 616 P.2d 450, 453 (Okla.Ct.App. 1980). Hence, when a contract is written, the intention of the parties must be determined from the writing alone, if possible. Okla.Stat. Ann. tit. 15, § 155 (West 1966).
2. As with any other contract, the presence of ambiguity in a term of a settlement agreement is to be determined as a matter of law. Max True Plastering v. U.S. Fidelity & Guaranty Co., 912 P.2d 861 (Okla. 1996). A contract is only determined to be ambiguous if it is

susceptible to two constructions. Max True Plastering, 912 P.2d at 869; Littlefield v. State Farm Fire and Casualty Co., 857 P.2d 65, 69 (Okla. 1993).

3. In the presence of an ambiguity, extrinsic evidence may be admitted to determine the parties' intent at the time they entered into the contract. HBOP, Ltd. v. Delhi Gas Pipeline Corp., 645 P.2d 1042, 1044 (Okla.Ct.App.1982). A court is without authority to admit extrinsic evidence unless the contract terms are ambiguous. Id. Finally, regardless of the breadth of the terms used in a contract, the obligations established extend only to those contemplated by the parties. Okla.Stat. Ann. tit. 15 §164 (West 1966).
4. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Okla.Stat. Ann. tit. 15 § 158 (West 1966). See Smith v. Englerth, 1995 WL 94475 *2 (10th Cir. 1995) (unpublished opinion).
5. The essential task before the Court is interpreting the Settlement Agreement, particularly paragraph 2(b). Paragraph 2(b) of the Settlement Agreement states:

The balance will be paid no later than six (6) months following the entry of a Final Decree of Distribution in the probate of the Decedent's estate. ***The balance of the payment will be paid, at the election of the Texas McFerrans, in cash (if reasonably available) or in the interests of the estate's oil and gas properties.*** The Personal Representative will determine whether cash is reasonably available. If the Texas McFerrans choose to receive their balance payment in mineral interests, the value used will be those finally determined for federal estate tax purposes. (Emphasis added.)

5. Although the term "Texas McFerrans" is a term used to collectively name one group of parties in the underlying settlement, the language of the Settlement Agreement, in its introduction, states:

This Settlement Agreement...is entered into this 30th day of November, 1994, by and among M. LOYCE McFERRAN...and KARLA STARKEY ("Karla"), LARRY L. COLE ("Larry"), PAULA COLE FLY ("Paula"), LAVERNE McFERRAN ("Laverne") and DENNIS McFERRAN ("Dennis"), collectively (the "Texas McFerrans").

6. The Pledge and Security Agreement, which must be taken together with the Settlement Agreement, Okla.Stat. Ann. 15 § 158 (West 1966), reads:

This Pledge and Security Agreement ("Pledge Agreement") dated as of November 30th, 1994, is entered into between M. LOYCE McFERRAN ("Loyce"), THE TEXAS McFERRANS ("Texas McFerrans") (more specifically described on the signature page hereon) and THE TRUST COMPANY OF OKLAHOMA ("The Trust Company").

The signature page of the Pledge Agreement contains, in relevant part, the names and signatures of:

Eugene P. de Verges, Counsel for M. Loyce McFerran; M. Loyce McFerran; The Trust Company of Oklahoma, signatory James R. McKinney, Senior Vice President; Billy A. Mickle, Counsel for Texas McFerrans; Karla Starkey; Larry Cole; Paula Cole Fly; Laverne McFerran; Dennis McFerran.

7. The meaning of the term "Texas McFerrans" throughout the Settlement and Pledge Agreements is ambiguous as written, and is susceptible to more than one reasonable interpretation. Max True Plastering, 912 P.2d at 869. The Agreement provides little guidance regarding whether the parties intended the "Texas McFerrans" be bound together as one party in the election of method of payment under Paragraph 2(b). Given that the Court has found an ambiguity exists as a matter of law, the tenets of construction under Oklahoma law are applicable.
8. Because the parties' intent cannot be deciphered from the writing alone, Okla.Stat. Ann. tit.

15 § 155, the Court must consider the extrinsic evidence admitted at trial to determine the parties' intent. HBOP, Ltd. v. Delhi Gas Pipeline Corp., 645 P.2d at 1044.

9. The Plaintiff's primary contention is that, when taken together, the Settlement Agreement and Pledge Agreement are clear that there are only two parties to the Agreement. The two parties involved are M. Loyce McFerran and the "Texas McFerrans." Plaintiff concedes that the "Texas McFerrans" is comprised of five individuals; nevertheless they must be treated as a collective entity under the Agreement.

10. The Plaintiff argues that a critical element in the resolution of this case is Paragraph 2(b) of the Settlement Agreement, which states:

The balance of the payment due to the Texas McFerrans will be paid, at the election of the Texas McFerrans, in cash (if reasonably available) or in interest in the estate's oil and gas properties.

11. The Plaintiff's interpretation that the "Texas McFerrans" must be treated as a singular entity leads to the conclusion that the acceptance of cash by the Texas McFerrans who are not parties in this suit constituted the election of cash payment under paragraph 2(b). Plaintiff asserts that the language of paragraph 2(b) of the Settlement Agreement makes clear that the Plaintiff is required to pay the balance of payment due the "Texas McFerrans" in either cash or in oil and gas interest. The plain reading, Plaintiff posits, is that the method of payment is to be made in one manner or the other, but not both.

12. Plaintiff argues, further, that Laverne McFerran's acceptance of cash in the amount of \$408,830.00 bound the other stakeholders, who failed to protest or object. Plaintiff contends that the Defendants knew as early as November of 1996 that an election to take cash had been made by Laverne McFerran, and as late as March 13, 1997, the Defendants had failed

to make an election.

13. The Defendants' evidence admitted at trial conclusively points to the contrary. In the October 27, 1995 letter from Charles Eppright (attorney to Larry Cole, Paula Fly, and Karla Starkey, Defendants herein) to Eugene de Verges (attorney to Plaintiff), Mr. Eppright clearly states:

Our clients have not yet decided whether they desire to take the balance of the settlement payment in cash or in mineral interests, although they have advised me that if they take their distribution in mineral interests, they want an undivided interest in all of the Estate's mineral properties rather than a distribution of specific mineral properties. Plaintiff's Ex. 6. (Emphasis added.)

14. However, in a following letter, dated July 9, 1996, four months **prior** to Laverne McFerran receiving her cash payment, Defendants' attorney, Charles Eppright, corresponded once again with Plaintiff's attorney, Mr. de Verges:

Our clients (Larry Cole, Paula Fly, and Karla Starkey) have asked me to advise you that they desire to receive their respective interests in the remaining portion of the settlement payment in oil and gas properties... This Firm does not represent either Laverne McFerran or Dennis McFerran. You should correspond directly with them or their attorney (Billy A. Mickle) concerning their desire with respect to their interests in the final distribution of the Settlement Payment. Defendants' Exhibit 8. (Emphasis added.)

This letter clearly indicates the Defendants' decision to take the option of mineral rights, and demonstrates their individual choices as separate and distinct from those of the other parties, Laverne McFerran and Dennis McFerran. Furthermore, Mr. Eppright's letter instructs Mr. de Verges that the various parties to the Settlement Agreement may elect different options under the Agreement, and he advises Mr. de Verges to deal directly with Laverne McFerran

and Dennis McFerran to ascertain their positions on payment.

15. Any question which might have remained at that time as to whether the Plaintiff and her attorney fully recognized that the Defendants had opted for mineral rights instead of cash payment under paragraph 2(b), was clarified in the August 27, 1996 letter from Plaintiff's attorney to Defendants' attorney, reading:

I do appreciate hearing that your clients wish to receive the balance of their portion of the settlement payment in oil and gas properties.
I understand that your clients are to receive ½ of the total payment with the balance going to Laverne McFerran. Defendants' Exhibit 10. (Emphasis added.)

16. When, in fact, Laverne McFerran opted for a cash payment in the amount of \$408,830.00, the check was made out to "June Laverne McFerran, a Single Person." The check was not directed to Laverne McFerran's attorney, nor was it made payable to the "Texas McFerrans" to be distributed equally, as was the initial \$600,000.00 payment.
17. Finally, even after Plaintiff's attorney had extended the \$408,830.00 check to Laverne McFerran, he composed a letter on January 3, 1997, to Defendants' attorney, stating:

I am also prepared to transfer mineral interests if that is what your clients choose... I would be happy to discuss any suggestions you may have in that regard. Defendants' Exhibit 12. (Emphasis added).

18. Despite clear indication from Defendants' attorney that the Defendants herein would be taking the mineral interest option, Plaintiff's counsel nevertheless sent an unsolicited check on February 27, 1997, in the amount of \$408,830.00 to the Defendants. The check was not made out to the "Texas McFerrans," but was made payable to each of the individual Defendants, Larry Cole, Paula Fly, and Karla Starkey. That check was not negotiated by the

Defendants, and at no time did they accept cash, in the form of this check or otherwise, for the balance payment due them under paragraph 2(b) of the Settlement Agreement.

19. The Court finds the extrinsic evidence in this case makes clear any ambiguity which might have existed in the terms of the Settlement Agreement. The Plaintiff's treatment of the Defendants throughout this dispute clearly indicates that the Defendants were acting as individual entities, and were recognized as such by the Plaintiff. The November, 1996 check to Laverne McFerran was made payable to her individually. There was no effort on the part of the Plaintiff to settle the balance of the Agreement with the "Texas McFerrans" in one cash payment as had been done with the mandatory \$600,000.00 payment.² Furthermore, the cash payment for the balance of the Agreement was sent to the Defendants herein, not as "Texas McFerrans," but also in their individual capacities.
20. Despite continued requests by the Defendants for the option of mineral interests instead of cash, the Plaintiff nevertheless sought to force upon Defendants a cash payment. Plaintiff's *post hoc* explanation of this activity was her belief that all the McFerrans were bound by Laverne McFerran's acceptance of a cash payment. But the Record clearly indicates that Plaintiff's counsel was notified long before November 1997, the time in which Laverne McFerran received her check, that the Defendants did not want cash under the settlement. They had plainly and firmly asserted their option for mineral interests. It appears the Plaintiff sought all along to bind the Defendants to the option which she preferred, and when

²As discussed *supra*, that initial check for \$600,000.00 was made payable to the "Texas McFerrans" on December 22, 1994, and was to be dispersed by attorney Billy Mickle to the individual parties.

her efforts failed, she called upon the Court to do so.

21. The Court finds that the ambiguity in the Agreement, whether the "Texas McFerrans" are to be treated as individuals or a collective entity, is resolved in favor of the Defendants. Larry Cole, Paula Fly, and Karla Starkey are each individually entitled to exercise their option under the Agreement for either a cash payment or mineral interests. The decision of one party to the Agreement does not bind the remaining parties.
22. The only other issue before the Court is the Plaintiff's claim that the doctrine of equitable estoppel bars Defendants' claim for mineral interests under the Agreement.
23. Under Oklahoma law, the essential elements of estoppel are set forth as follows: "First, there must be a false representation or concealment of facts. Second, it must have been made with knowledge, actual or constructive, of the real facts. Third, the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts. Fourth, it must have been made with the intention that it should be acted upon. Fifth, the party to whom it was made must have relied on or acted upon it to his prejudice." Gypsy Oil Company v. Marsh, 121 Okla. 135, 248 P. 329, 335 (Okla. 1926); see Oxley v. General Atlantic Resources, 936 P.2d 943, 946 (Okla. 1997). Oklahoma clearly requires a proponent of a claim of estoppel to establish *inter alia* a false representation or concealment of facts and detrimental reliance on the misrepresentation or concealment. Western State Hospital v. Stoner, 614 P.2d 59, 64 (Okla.1980); see Allied Steel Construction Co. v. Employers Casualty Co., 422 F.2d 1369, 1371 (10th Cir.1970); Marshak v. Blyth Eastman Dillon & Co., Inc., 413 F.Supp. 377, 383 (N.D.Okla.1975). The burden of proving all the essential elements of estoppel is on the party asserting it. Tom W. Carpenter Equipment Co., Inc. v.

General Electric Credit Corp., 417 F.2d 988, 990 (10th Cir.1969). Silence of a party who is under an imperative duty to speak can create estoppel. Aire Cardinal International, Inc. v. United Air Leasing Corporation, 705 F.2d 1263, 67 (10th Cir.1983); Lacy v. Wozencraft, 188 Okla. 19, 105 P.2d 781 (Okla. 1940).

24. The Plaintiff asserts, assuming *arguendo*, the Defendants did have the right to choose the option for oil and gas properties as individuals under the Agreement, that option is now barred by the doctrine of equitable estoppel. The Plaintiff argues that the Defendants knew of Laverne McFerran's acceptance of the cash payment in November of 1997, were aware of the Plaintiff's reliance on such an acceptance, and had a duty to timely object to the payment. Notwithstanding this duty, the Defendants failed to object to Laverne McFerran's election for a cash payment until June, 1997.³ The time which passed between the mailing of the check to Laverne McFerran and Defendants' rejection of the cash payment was so extensive, Plaintiff argues, as to induce reasonable reliance. Thus, Defendants' claim for

³Plaintiff contends that the Defendants knew of Laverne McFerran's election for a cash payment in November, 1996, and had a duty to object. Plaintiff argues: "When one considers the contentious relationship between the Plaintiff and the Defendants and the circumstances of this case, one would expect that the Defendants would have immediately objected to the election and payment of cash [to Laverne McFerran]." This argument is wholly without merit. First, there is nothing in the Record which convinces this Court that the Defendants did, indeed, know of the cash payment to Laverne McFerran in November, 1996. Defendants have stated time and again that it was not until early in the year of 1997 that the payment was made known to them. Secondly, the Record establishes that Defendants never intended to take cash payments. Their on-going correspondence with Plaintiff's attorney is a clear indicator of their election for mineral interests under the Agreement. Additionally, the Defendants clearly believed their individual election under the Agreement was to be made freely and independently of the choices made by other parties to the Agreement. Therefore, even if Defendants had known of Laverne McFerran's option for cash payment, there was no reason for Defendants to think that payment bound them to the same settlement. Thus, they had no reason to object to the Plaintiff's arrangement with Laverne McFerran.

mineral interests is barred.

25. The Defendants contend, first, that the November, 1996 check was sent to their Aunt Laverne completely without their knowledge. They only discovered the payment had been made to their Aunt in early 1997. Secondly, the Defendants did not receive the unsolicited check from the Plaintiff for their portion of the estate until late in the month of February, 1997. Thus, the amount of time that lapsed between the date of their receipt of the check and the return of the check was merely three (3) months and ten (10) days, not an excess of seven (7) months as the Plaintiff has suggested. Indeed, the Record demonstrates that the Plaintiff's check was written on February 27, 1997, and it was returned on June 10, 1997. Furthermore, Defendants inform the Court that the delay in Charles Eppright's response in returning the check to the Plaintiff and her attorney was due in part to a new, increased cash offer made by Mr. de Verges to Mr. Eppright. The new offer had to be circulated to the Defendants for consideration.
26. Although courts within this jurisdiction have attributed various factors to the doctrine of equitable estoppel, it is clear that Oklahoma requires a false representation or concealment of facts and detrimental reliance on the misrepresentation or concealment. Western State Hospital, 614 P.2d at 64; Allied Steel Construction Co., 422 F.2d at 1371. The Court finds that there is no evidence of concealment or misrepresentation on the part of the Defendants. Although Defendants' option for mineral interests was clear by February, 1997, and the immediate return of Plaintiff's check would have been appropriate, a three month delay in returning the check was not unreasonable. There is no indication that Defendants held on

to the check to induce reliance by the Plaintiff.⁴ On the contrary, Defendants' counsel had to confer and discuss the payment with three separate clients, while continuing cash settlement negotiations with Plaintiff's counsel. Though it is true that silence can induce detrimental reliance, Aire Cardinal International, Inc., 705 F.2d at 1267, this case is replete with evidence of Defendants' constant articulation of their wishes. Throughout the correspondence with Plaintiff's counsel, Defendants insisted, time and again, on the option for mineral interests. Despite this, Plaintiff nevertheless sent an unsolicited check to the Defendants, and now seeks to foreclose the mineral interest option based on a theory of equitable estoppel. Finding that there is no concealment or misrepresentation on which to base an equitable estoppel claim, the Court need not reach the second prong of the inquiry, whether the Plaintiff relied to her detriment on the silence of the Defendants.

27. Thus, with the burden of proof on the proponent of the equitable estoppel theory, Tom W. Carpenter Equipment Co., Inc., 417 F.2d at 990, the Court finds that the Plaintiff's equitable estoppel claim must fail.
28. In conclusion, the Court finds that the ambiguity which exists in the written contract is to be construed in favor of the Defendants, Larry Cole, Paula Fly, and Karla Starkey. The term "Texas McFerrans" has been used solely as a term of convenience, and the Defendants herein are each individually entitled to exercise their option under the Agreement for either a cash

⁴In fact, although the Court will not reach the second prong of the equitable estoppel inquiry *infra*, there is absolutely no evidence in the Record demonstrating that Plaintiff relied to her detriment on Defendants' three month delay in returning Plaintiff's check. In order to sustain a claim of equitable estoppel, the party asserting it must provide some evidence of a detrimental change in position in reasonable reliance on the conduct. No such showing has been made. Paul v. Monts, 906 F.2d 1468, 1474 (10th Cir. 1990).

payment or mineral interests. The decision of one party to the Agreement does not bind the remaining parties. Plaintiff is ordered to comply promptly with all other terms of the Settlement Agreement as written.

29. As to the Plaintiff's equitable estoppel claim, there is no evidence of a misrepresentation or concealment on the part of the Defendants. The Defendants are not precluded by the doctrine of equitable estoppel from individually exercising their options for mineral interests under the Agreement.
30. The parties' motions for taxation of costs and attorney fees may be filed upon entry of judgment pursuant to *Local Rules 54.1 and 54.2*.

ORDERED this 30 day of March, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ALPHONSO BROWN,

Petitioner,

vs.

JOHN WHETSEL, Sheriff of Oklahoma
County, Oklahoma; and MARK READ,
Regional Director of the Immigration and
Naturalization Service,

Respondents.

ENTERED ON DOCKET
DATE **MAR 31 1999**

Case No. 99-CV-14-H(J)

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRANSFER ORDER

This Court has previously construed Petitioner's Petition for Writ of Habeas Corpus as alleging two different habeas claims. First, Petitioner attacks his conviction in Tulsa County District Court based on his trial counsel's failure to advise him that his guilty plea might lead to deportation. This is a habeas corpus claim cognizable under 28 U.S.C. § 2254. See Oyler v. Allenbrand, 23 F.3d 292, 293-94 (10th Cir. 1994); and Clonce v. Presley, 640 F.2d 271, 273 (10th Cir. 1981). Second, Petitioner challenges the constitutionality of his detention by the Immigration and Naturalization Service ("INS"). This is a habeas corpus claim cognizable under 28 U.S.C. § 2241(c)(1) and/or (c)(3). See Reno v. Flores, 507 U.S. 292, 314 (1993). On February 10, 1999, the Court dismissed Petitioner's § 2254 claim. See Docket #6. Petitioner's remaining claim before the Court is his § 2241 habeas claim against the INS.

Pursuant to 28 U.S.C. § 2241(d), a Petitioner may file a petition for a writ of habeas corpus "in the district court for the district wherein [he] is in custody or in the district court for the district within which the State court was held which convicted and sentenced him" Petitioner's § 2241 claim is not based on any state court conviction. Rather, Petitioner's § 2241 claim is based on a detention being carried out by a federal agency - the INS. Thus, the second clause in § 2241(d) cited above does not apply. Furthermore, a § 2241 habeas corpus petition must be filed in the district where the prisoner is confined. Bradshaw v. Story, 86 F.3d 164 (10th Cir. 1996).

Petitioner is currently being detained by the INS in the Oklahoma County Jail in Oklahoma City, Oklahoma, located in the territorial jurisdiction of the United States District Court for the Western District of Oklahoma. In "furtherance of justice," § 2241(d) permits a court to transfer a habeas corpus petition to another district. Both the INS agents responsible for Petitioner's detention and Petitioner are in Oklahoma County. The Court finds, therefore, that this action should properly be transferred to the United States District Court for the Western District of Oklahoma, where Petitioner is currently being held by the INS.

ACCORDINGLY, IT IS HEREBY ORDERED that this case is transferred to the United States District Court for the Western District of Oklahoma.

IT IS SO ORDERED.

This 30TH day of MARCH, 1999


Sven Erik Holmes
United States District Judge

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

SUSAN HARRIMAN,
Plaintiff,

vs.

SCHNEIDER (USA) INC.,
PFIZER HOSPITAL PRODUCTS
GROUP,

Defendant.

No. 97-CV-134-KV

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

This case came on for trial on the plaintiff's claim alleging a violation of Title VII's prohibition against pregnancy-based discrimination. The jury returned a verdict in plaintiff's favor as to liability. The jury assessed damages in the amounts of \$238,613.00 in back pay, \$330,016.00 in front pay and \$400,000 in punitive damages. Because of the unsettled nature of certain legal issues, the Court withheld entry of Judgment pending briefing by the parties. That briefing is now complete.

The Court announced to the parties during trial that the issues of front pay and back pay were being submitted to the jury in an advisory capacity, because the Tenth Circuit had not definitively spoken on the effect of the Civil Rights Act of 1991 on court/jury responsibility in Title VII cases. In the interim since trial of this case, the Tenth Circuit has expressly held that front pay is an issue for equitable determination by the district court. McCue v. State of Kansas, Dept. of Human Resources, 165

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F.3d 784, 791-92 (10th Cir.1999). Dicta in McCue makes the same observation regarding back pay, and the weight of authority supports this reasoning as well. See Deavenport v. MCI Telecommunications Corp., 973 F.Supp. 1221, 1227-28 (D.Colo.1997). Accordingly, the Court must render its own decisions as to front pay and back pay.

"Back pay" commonly refers to the wages and other benefits that an employee would have earned if the unlawful event that affected the employee's job-related compensation had not occurred. Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 936 n.8 (5th Cir.1996), cert. denied, 117 S.Ct. 767 (1997). "Front pay" is an equitable remedy referring to future lost earnings. Id. Defendant argues that the Court's own calculations should lead it to deny any award of front pay in this case, and to substantially reduce the jury's recommendation of back pay. By contrast, plaintiff contends that the Court should award more than the advisory verdict as to both front and back pay.

Defendant hired plaintiff as a sales representative to sell cardiology products. Plaintiff was employed by defendant from November 6, 1995 to October 25, 1996. The parties have both contended for roughly similar figures as gross salary. It seems reasonable to the Court to take as a base figure the amount appearing in plaintiff's W-2 form from defendant for 1996, that being \$92,037.85¹. This figure, divided by the nine months of 1996

¹The parties make much of the fact that plaintiff was on a "guaranteed" income for her first six months of employment with defendant and made the decision in April, 1996 to change to a

for which plaintiff was employed by defendant, results in a monthly income figure of \$10,226². That figure, multiplied by the twenty-three months from plaintiff's discharge to the date of verdict, produces a total of \$235,198.00.

Defendant objects that the monthly income figure should be reduced based upon defendant's business fortunes after plaintiff was discharged. Specifically, defendant cites (1) declining sales, (2) earnings decreased by returned products, and (3) earnings decreased by product deficiencies. As plaintiff notes, much of this argument does not take account of what the record reflects to be plaintiff's superior qualities as a salesperson. Further, many of the many of the examples defendant cites were never major clients of defendant. (Plaintiff's Response Brief at 5-6).

The Court also notes that defendant has cited no authority which permits a deduction of back pay based upon such factors. The purpose of a back pay award is to make the employee whole. Where there is a finding of unlawful discrimination, back pay should be denied or reduced only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating

"commission" basis of compensation. No doubt there was a difference between plaintiff's income in her first months of employment and the precise month in which she was discharged, but in the interest of seeking a monthly average, the gross figure for 1996 is appropriate.

²The Court refers to "nine months" in 1996 because plaintiff was suspended with pay September 17, 1996, but prohibited from contacting customers, resulting in a loss of commissions until her termination on September 30, 1996, effective October 25, 1996. Defendant arrives at a monthly income figure of \$7,859.00 by dividing a gross nine-month salary of \$94,312.20 by a full twelve months. This is clearly erroneous.

discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Even accepting defendant's factual assertions, it seems anomalous that an employer making less competitive products should be more insulated from Title VII damages than an employer which does not. The Court will not disturb the figure of \$235,198.00³.

From that total, the parties agree that plaintiff's earnings from her subsequent employment at Merrill Lynch must be deducted. The parties also agree on the figure, \$96,036.00. This deduction results in a figure of \$139,162.00. To this amount, plaintiff seeks to add the value of various benefits which she received while employed with defendant. Lost fringe benefits are available under the remedial provisions of Title VII. Metz v. Merrill Lynch, Pierce, Fenner & Smith, 39 F.3d 1482, 1493 (10th Cir.1994).

Plaintiff testified as to fringe benefits which she perceived to have been lost and assigned totals to those items. Defendant attacked plaintiff's testimony by cross-examination, but did not present testimony of its own with alternate figures. Plaintiff testified that, while employed with defendant, she received a company car which would have cost her \$500 per month to lease, car insurance with a value of \$125 per month, \$625 per month for gas, mileage, and car repairs, and \$1667 per month for "business expenses". In the absence of contrary evidence, the Court accepts

³The Court is also unpersuaded by defendant's assertion that plaintiff was "overpaid" \$4,128.80 in commissions for product that customers later returned for credit. The calculation was only performed by defendant after plaintiff had filed this lawsuit, and was apparently never calculated as to any other employee.

the first three figures. Plaintiff's testimony regarding "business expenses" was rambling and unclear. She appeared to be including gas and car repair in this figure as well. (Tr. Vol.III at 343, 345). She also included training courses which are required by Merrill Lynch without discussing if similar courses were paid for by defendant. (Id. at 344). A reference was made to \$500 to \$600 per month for "catering" and also a \$150 monthly bonus to her secretary. (Id.). Plaintiff has not demonstrated why such items are compensable. The Court declines to include any additional award for "business expenses".

Plaintiff also sought recovery for what she describes as "one-time" benefits which were lost when she was discharged. Her calculations were (1) \$11,500 for Flex Plan [a type of 401(k)]; (2) loss of trip worth \$10,000 for winning Rookie of the Year; (3) \$2,990 for difference in medical insurance; (4) \$6,000 for a specific medical expense, i.e., the birth of a child after her discharge. The Court declines to award any funds for the Rookie of the Year trip, as it is based upon the assumption that plaintiff would have received that award from defendant. Despite plaintiff's success as a salesperson, the Court does not conclude plaintiff proved she would have been selected. The remainder of plaintiff's "one-time" expenses will be included as back pay.

Defendant attacks all of plaintiff's testimony regarding fringe benefits as "rank speculation". Again, defendant chose not to present contrary evidence on these matters. The Court finds (as apparently did the advisory jury) plaintiff's testimony to have

sufficient credibility under the present record. Although damages may not be based on speculation, uncertainty in determining what an employee would have earned but for discrimination should be resolved against the employer. Metz, 39 F.3d at 1494. Pursuant to the Court's findings, back pay will be awarded in the amount of \$188,402.00, and the jury's advisory verdict is reduced to that figure.

Turning to front pay, defendant first argues that plaintiff is entitled to no such award because Schneider (USA) Inc., plaintiff's employer, was sold to Boston Scientific in September, 1998, a few days before trial of this case. The Court disagrees. The record reflects that, of Schneider's sales force, 44 people were granted interviews for new positions with Boston Scientific, and some were hired. Given plaintiff's record as a salesperson, the Court does not find it "purely speculative", as defendant does, that plaintiff would have been one of the Schneider employees hired. However, due to the lack of certainty that plaintiff would have been hired, the Court will limit the award of front pay to one year.

Plaintiff received a one-time Pfizer stock option grant in August, 1996. In her post-trial brief, plaintiff values those stock options at \$137,500. The Court is persuaded by the argument set forth in defendant's reply brief that this figure is inflated and will be reduced.

Neither party has suggested how the jury arrived at its front pay figure of \$330,016.00. Examining the success plaintiff has had and the potential for similar if not greater success she has as a

Merrill Lynch stockbroker, the Court is persuaded that a significant reduction is in order. Further, plaintiff's benchmark figure of a yearly salary from Schneider of \$187,848 seems to err on the side of optimism, when compared to the evidence presented. An award of front pay may be made despite a district court's inability to predict the future with absolute precision. See Mason v. Okla. Turnpike Auth., 115 F.3d 1442, 1458 n.13 (10th Cir.1997). On the other hand, the purpose of such an award is to make the plaintiff whole, not grant plaintiff a windfall. Id. at 1458. Upon review, the Court reduces the front pay award to \$150,000⁴.

Defendant also asserts that the jury's award of punitive damages, although not advisory, must be reduced to \$300,000 to conform to the limitation imposed by 42 U.S.C. §1981a(b)(3)(D). Plaintiff concedes this argument, and the punitive damages award will be so reduced⁵.

In awarding front pay, the Court is necessarily granting plaintiff's separate motion which explicitly asks for front pay in lieu of reinstatement. Although reinstatement is the preferred remedy, where it is not feasible, a plaintiff will be entitled to

⁴Defendant's argument that both front and back pay should be reduced because of plaintiff's "voluntary abandonment" of medical sales is rejected upon review of the record. Defendant's argument that plaintiff's termination by Merrill Lynch in Tulsa tolls front and back pay is also rejected. As the Court ruled at trial, Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1168-69 (6th Cir.1996), upon which defendant relies, requires "wilful loss of earnings". The record does not reflect that plaintiff missed a single paycheck in her transfer to Indianapolis.

⁵The Court did not advise the jury of any limitation on punitive damages, pursuant to 42 U.S.C. §1981a(c)(2).

front pay. Acrey v. American Sheep Industry Assoc., 981 F.2d 1569, 1576 (10th Cir.1992). Reinstatement is not feasible in this case, because plaintiff's former employer has been subsumed into Boston Scientific, a non-party to this litigation.

Plaintiff's request for an award of prejudgment interest will also be granted. Under Title VII, a district court is authorized to grant such interest. Daniel v. Loveridge, 32 F.3d 1472, 1478 (10th Cir.1994). A district court must determine if the equities preclude such an award. See U.S. Industries, Inc., v. Touche Ross & Co., 854 F.2d 1223, 1256-57 (10th Cir.1988). The defendant has argued that the award should be precluded because of delay caused by plaintiff changing counsel and the Court permitting the assertion of the pregnancy discrimination claim late in the litigation. The Court is not persuaded and hereby awards prejudgment interest. The parties are directed to present the Court with calculations in post-judgment motions so that the Court may issue an Amended Judgment.

Finally, plaintiff has requested an augmentation of her award, to take account of the increased income tax liability which will result from receiving a lump sum payment of salary. The Court has authority to render such an augmentation, but only in "special circumstances." Sears v. Atchison, Topeka & Sante Fe Ry., 749 F.2d 1451, 1456 (10th Cir.1984), cert. denied, 471 U.S. 1099 (1985). "A tax component may not be appropriate in a typical Title VII case." Id. The Court perceives no special circumstances which would make such an increased award appropriate. See also Dashaw v. Pena, 12

F.3d 1112, 1116 (D.C.Cir.), cert. denied, 513 U.S. 959 (1994) (general rule that victim be made whole does not support tax "gross-up").

It is the Order of the Court that the motion of the plaintiff to award prejudgment interest and to award sum reflected by increased cost of taxation (#127) is hereby GRANTED in part and DENIED in part. The motion of the plaintiff to award front pay in lieu of reinstatement and for judgment on the verdict (#128) is hereby GRANTED. The motion of the defendant to disregard verdict awarding front and back pay (#130) is hereby GRANTED in part and DENIED in part. The motion of the defendant to reform verdict regarding punitive damages (#131) is hereby GRANTED.

ORDERED this 30 day of March, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
STATE OF OKLAHOMA

FILED

MAR 26 1999

U.S. DISTRICT COURT

WAYNE A. PENCE,
SSN: 445-60-6558

Plaintiff,

vs.

KENNETH S. APFEL,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION,

Defendant.

CASE NO. 98-CV-865-BU (M)

ENTERED ON DOCKET

DATE 3/30/99

NOTICE OF DISMISSAL

COMES NOW, Plaintiff herein, Wayne A. Pence, by and through his attorney of record, Nathan E. Barnard of the Law Firm of BOETTCHER, RYAN & MARTIN, and pursuant to Federal Rule of Civil Procedure Rule 41(a)(1) and dismisses this action without prejudice of refiling same in the future.

Respectfully submitted,



Nathan E. Barnard CBA #15183
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4111 South Darlington, Ste. 1075
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ATTORNEY FOR PLAINTIFF

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Law

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

MAR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OUITA ROACH HAUBURSIN,)
)
Plaintiff,)
)
v.)
)
FARMERS INSURANCE)
COMPANY, INC.,)
)
Defendant.)

Case No. 99CV 0047B (M)

ENTERED ON DOCKET

DATE **MAR 30 1999**

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

COMES NOW, the Plaintiff, Ouita Roach Haubursin, by and through her attorneys of record, David Garrett Law Office, P.C., and the Defendant, Farmers Insurance Company, Inc., by and through its attorneys of record, Wilburn, Masterson & Smiling, and hereby jointly dismiss without prejudice as to the refiling of the same at a later date the above-styled case as against Farmers Insurance Company, Inc.

Respectfully submitted this 29th day of March, 1999.

David M. Garrett

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ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUAN WESLEY ADAMS,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

Case No. 99-CV-202H(J)

ENTERED ON DOCKET

DATE MAR 30 1999

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus in the Western District of Oklahoma on December 22, 1997. Petitioner is represented by counsel. By Report and Recommendation dated February 17, 1999, Magistrate Judge Bana Roberts of the Western District of Oklahoma recommended that the petition be transferred to the Northern District of Oklahoma. The Report and Recommendation was adopted by the District Court on March 10, 1999, and the case was subsequently transferred to the Northern District of Oklahoma.

Petitioner asserts that his sentence was improperly enhanced by the use of prior convictions, and that he was denied effective assistance of counsel. By minute order dated March 15, 1999, this action was referred to the undersigned United States Magistrate Judge for further proceedings consistent with his jurisdiction. The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

I. FACTUAL BACKGROUND^{1/}

In Petitioner's brief, filed in state court, Petitioner asserts that two Tulsa police officers, while in a police car, observed a black automobile traveling without headlights after dark. The officers followed the car for approximately one block, and pulled up in front of the vehicle. The patrol car's spotlight was used to illuminate the vehicle. One of the officers testified that he was "spooked" because Petitioner had "ducked down" inside the car. The officer did not draw his gun and did not call for back up. The Petitioner exited the vehicle with his hands clinched and asked the police why they were bothering him. Officer Felton testified that Petitioner did not unclench his hands when asked, and the officer therefore attempted to open Petitioner's hands. When the officer was unable to open Petitioner's hands he attempted to force Petitioner's hands behind his back. According to Officer Felton, during the struggle he looked into the Petitioner's car and observed a "straight shooter" on the floor mat. The officer testified that after observing the pipe he informed Petitioner that he was under arrest for possession of drug paraphernalia. The officers testified that Petitioner continued to resist them, and Officer Felton sprayed Petitioner with pepper spray. Petitioner was handcuffed, and Officer Leach retrieved a rock of crack cocaine from Petitioner's hand. An inventory search of the car revealed another rock of crack cocaine and another straight shooter.

^{1/} The "factual background" is from the facts as related by Petitioner and Respondent in their briefs.

Petitioner testified at trial. Petitioner testified that he was an associate pastor minister in Bristow, Oklahoma. According to Petitioner, he left the Pioneer Plaza Apartments after visiting his wife and was returning to his home in Bristow. Petitioner additionally stated that the car he was driving belonged to a friend and he had no knowledge of crack cocaine being in the car. Petitioner also noted that he had, earlier that day, gone to Boatmen's Bank and cashed his paycheck.

According to Petitioner, he stopped to take his coat off, and had placed his coat in the back seat when "the whole block lit up" and a public address system informed him to keep his hands on the steering wheel. Petitioner saw guns pointing at him and exited the car. Petitioner claims that he had \$169.00 in cash in his right hand and that the police officers took the money from him during their search. Petitioner also claims that he was hit and kicked repeatedly by both officers after being pepper sprayed and handcuffed. Petitioner denied any knowledge of the crack cocaine or the straight shooter.

II. PROCEDURAL HISTORY

At the trial court, Petitioner asserted that the evidence obtained by the police officers should be suppressed. Petitioner argued that the police officer did not have a reasonable basis to search Petitioner. The trial court denied Petitioner's motion to suppress, and the evidence obtained as a result of the search was admitted.

During the trial, the state moved to admit evidence of Petitioner's prior convictions. Petitioner testified that he believed he was convicted on February 27,

1990 for possession of a controlled dangerous substance, and that he was also convicted for possession of a controlled dangerous substance with the intent to distribute. [Tr. at 309, 311]. Petitioner additionally acknowledged that he was convicted on November 1, 1990 for escape from a penal institution. [Tr. at 311]. During the discussion concerning whether or not the evidence of Petitioner's prior convictions should be admitted, Petitioner's attorney objected to the reference in the judgment and sentence to a prior case that was not being admitted at trial. [Tr. at 312, 337]. Pursuant to Petitioner's objection, the references to the prior convictions were "whited out." [Tr. at 312, 337].

The jury found Petitioner guilty of possession of a controlled dangerous substance (after former conviction of three or more felonies), and he was sentenced to 20 years. In addition, Petitioner was found guilty of possession of drug paraphernalia (after former conviction of three or more felonies) and sentence to one year which was to be served concurrently.

Petitioner filed a direct appeal on March 20, 1996. Petitioner asserted that the trial court erred in failing to suppress the evidence obtained by the police officer's illegal search, that the trial court improperly instructed the jury on the state's burden of proof, that the information failed to allege each required element, and that the Petitioner's sentence was improperly enhanced with a prior conviction.^{2/} The

^{2/} Petitioner asserted that the preliminary information charged Petitioner with three former felony convictions. At the preliminary hearing, according to Petitioner, the State sought and received leave of court to dismiss the third paragraph of the information referring to a 1990 escape. The State refiled the second page six days later but no certificate of delivery to Petitioner or opposing counsel appears. Petitioner asserts
(continued...)

Petitioner's appeal was denied by the Court of Criminal Appeals in a summary opinion filed October 21, 1996.

Petitioner filed an Application for Post Conviction relief in the trial court. By Order dated August 20, 1997, the trial court noted that each of Petitioner's issues had been previously raised on appeal and that the doctrine of *res judicata* barred further judicial review. The trial court denied Petitioner's application.

On September 9, 1997, Petitioner filed an appeal of the trial court's denial of Petitioner's application for post conviction relief in the Oklahoma Court of Criminal Appeals. Petitioner asserted that the trial court erred in failing to suppress the illegally obtained evidence, that the trial court erred in admitting two prior felony convictions,^{3/} that the legal instruction to the jury regarding the state's burden of proof constituted reversible error, and that the Petitioner was denied his right to effective assistance of counsel.

The Court of Criminal Appeals denied Petitioner's application by order dated September 25, 1997. The Court agreed with the trial court's conclusions that the first three asserted errors had been previously raised by Petitioner and were barred by principles of *res judicata*. The Court addressed Petitioner's ineffective assistance of

^{2/} (...continued)

that the State relied on this conviction to enhance the Petitioner's sentence, and that such reliance was therefore improper. This "issue" is not the same enhancement issue which Petitioner appears to be asserting before this Court.

^{3/} Petitioner asserts the same argument outlined above (footnote 1), that the third conviction was stricken at the preliminary hearing, later refiled, but not sent to Petitioner. Petitioner additionally asserts that the prior felonies were over the statutory ten year period and that one of the convictions was of a defendant who is not the Petitioner.

trial counsel claim separately, concluding that Petitioner had not established that he was deprived of effective assistance of counsel.

In his Habeas Petition, Petitioner asserts as ground for relief: (1) the trial court erred in permitting the admission into evidence two prior felony convictions for the purpose of sentence enhancement, (2) Petitioner was denied his sixth amendment right to effective assistance of counsel, and (3) a jury instruction regarding the state's burden of proof constitutes reversible error.^{4/} The completed habeas corpus petition contains a signature of an attorney as representing Petitioner. An "entry of appearance" was filed by Kenneth C. Watson on January 29, 1998, as representing the Petitioner. Mr. Watson filed an answer brief on behalf of Petitioner. The answer brief asserts that Petitioner's sentence was excessive and in violation of the eighth amendment because Petitioner's sentence was improperly enhanced by 1972 convictions which Petitioner did not commit.

III. EXHAUSTION AND EVIDENTIARY HEARING

As a preliminary matter, a court examines whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b)(1)(A) or (B). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for

^{4/} Petitioner does not assert, as error, the previously alleged error on behalf of the trial court in admitting evidence which Petitioner had asserted was illegally obtained.

pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). Each of the claims which Petitioner presents to this Court have been previously submitted to and ruled upon by the Oklahoma courts. The Magistrate Judge concludes that Petitioner has exhausted the claims that he asserts in his Petition.

IV. RECOMMENDATION REGARDING ALLEGED ERROR

USE OF PRIOR FELONY CONVICTIONS TO ENHANCE SENTENCE

Petitioner initially asserts that his sentence was enhanced with two prior 1972 felony convictions. Petitioner references the case numbers for the convictions as: CRF-72-0269 and CRF-72-2364. Petitioner asserts that these prior convictions were not convictions of Petitioner, and that the prior convictions were too old for the purpose of the enhancement statute.

In Petitioner's Brief before the Court of Criminal Appeals, Petitioner further expands upon this argument. Petitioner explains that the two 1972 convictions were over the permissible statutory period of ten years, and that one of the convictions was a conviction not of Petitioner, but of a "John William Rainbolt."

In Petitioner's Answer Brief, filed by Petitioner's attorney, Petitioner asserts that his sentence was excessive and therefore violative of the Eighth Amendment. The only stated reason is that Petitioner "had his sentence enhanced by prior felony

convictions that he did not commit in 1972. These prior convictions were illegally used in prior convictions in 1989 and they serve as a continuing illegality now, insofar as the enhancement of punishment in this present case in 1994." See Petitioner's Answer to Respondent's Response to Petition for Writ of habeas Corpus, filed February 26, 1998, in the Western District of Oklahoma, at 4.

The record does not support Petitioner's argument. The Respondent argues, and the record indicates, that three 1990 convictions were used to enhance Petitioner's sentence. At trial, Petitioner was questioned as to whether or not he was convicted for the charges of possession of a controlled dangerous substance, for possession with intent to distribute a controlled dangerous substance, and for escape. Petitioner testified that he "believed so," with respect to the first two convictions, and "yes," with respect to the third conviction. See Response to Petition for Writ of Habeas Corpus, filed January 26, 1998, in the Western District of Oklahoma, Exhibit "G." During the discussion of whether or not the convictions should be admitted, the trial court and the attorneys discussed the fact that the three convictions included, in the "body that is attached to the judgment and sentence," another case that was not admitted as evidence in the trial court. See Response to Petition for Writ of Habeas Corpus, filed January 26, 1998, in the Western District of Oklahoma, Exhibit "G," at 312, 337. Although the record is not absolutely clear. The possibility exists that the 1990 convictions, which were introduced at Petitioner's trial, contained a reference

to the 1972 convictions. However, the trial court "whited out" any reference, in the 1990 convictions, to the prior convictions.^{5/}

The State included, as Exhibits, the prior convictions which were introduced at trial. Prior conviction "number one" is dated November 1, 1990, for Defendant "Juan Wesley Adams," for "Escape from a Penal Institution." See Response to Petition for Writ of Habeas Corpus, filed January 26, 1998, in the Western District of Oklahoma, Exhibit "H1." Prior conviction "number two" is dated February 27, 1990, for Defendant "Adams, Juan Wesley," for "possession of a controlled dangerous substance." See Response to Petition for Writ of Habeas Corpus, filed January 26, 1998, in the Western District of Oklahoma, Exhibit "H2." Prior conviction "number three," is dated February 27, 1990," for "Adams, John^{6/} Wesley," for "possession of a controlled dangerous substance with intent to distribute."

In Petitioner's Brief before the Court of Criminal Appeals, filed September 9, 1997, Petitioner acknowledges that "three judgments and sentences were introduced, indicating the convictions of Juan Wesley Adams for possession of a Controlled Substance in Oklahoma County in 1990, Possession of a Controlled Substance with Intent to Distribute in Oklahoma County in 1990, and Escape from a Penal Institution in Pittsburgh County in 1990." See Appellant's Brief, attached as Plaintiff's Exhibit

^{5/} Respondent suggests this possibility in Respondent's Brief. Petitioner does not specifically address Respondent's arguments.

^{6/} The first name on this conviction is "John," rather than "Juan." Petitioner does not indicate that this conviction was an error, and this is not the "mistaken name" that Petitioner asserts is on the improperly admitted conviction.

"1" to Petitioner's Petition for Habeas Corpus, filed in the Western District of Oklahoma on December 22, 1997.

Petitioner's assertion in his habeas petition that two 1972 convictions were improperly admitted is not supported by the record. Petitioner's counsel seems to be suggesting, in Petitioner's Answer Brief, that the 1972 convictions were improperly used to enhance the 1990 convictions. Petitioner has provided no information to support this claim. However, assuming this as true, this argument would be properly asserted in a challenge to Petitioner's sentencing in the 1990 convictions. Petitioner is not otherwise challenging his 1990 convictions. Petitioner's current sentences were enhanced using the 1990 convictions, but Petitioner can challenge the 1990 convictions only to the extent that they were improper and therefore wrongly used to enhance Petitioner's current sentence. Petitioner does not challenge the 1990 convictions. Petitioner seems only to be challenging the sentencing in 1990 based on the 1972 convictions. However, even assuming Petitioner's argument as correct, Petitioner still had three 1990 convictions which remain unchallenged.^{7/} Those convictions were therefore properly used to enhance Petitioner's current sentence.

^{7/} Petitioner does not assert that the 1990 convictions were improper. Petitioner seems only to be asserting that in the 1990 convictions, the 1990 court improperly relied on a 1972 conviction in sentencing Petitioner.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Petitioner asserts, in his habeas petition,^{8/} that he was denied his right to effective assistance of counsel because trial counsel failed to allege that the convictions used to enhance his sentence were (1) not committed by Petitioner, and (2) were barred by the state ten year statute of limitations.

As explained above, the facts, as presented in the record and by Petitioner, do not indicate that the sentences used by the trial court to enhance Petitioner's sentence were committed by an individual other than Petitioner or were in excess of the ten year limitation period. Because the underlying basis of Petitioner's ineffective assistance of counsel claim is not supported by the facts presented to this Court, Petitioner's claim must fail.

LEGAL INSTRUCTION ON "MATERIALITY"

Petitioner asserts, in his Petition for a Writ of Habeas Corpus,^{9/} that the jury was informed that the State had the burden of proving "material" allegations in the information, but that the jury was not further instructed on the meaning of "material" and the jury was not instructed on the crucial elements which had to be proven beyond a reasonable doubt.

^{8/} This argument is presented by Petitioner in his Petition for a Writ of Habeas Corpus. Petitioner does not further develop this argument in his Answer Brief, which was filed by Petitioner's attorney.

^{9/} This argument is presented by Petitioner in his Petition for a Writ of Habeas Corpus. Petitioner does not further develop this argument in his Answer Brief, which was filed by Petitioner's attorney.

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), *cert. denied*, 500 U.S. 909 (1991)), *cert. denied*, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "'[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir. 1990) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), *cert. denied*, 444 U.S. 1047 (1980)), *cert. denied*, 498 U.S. 961 (1990).

Respondent notes that Petitioner has waived this argument because Petitioner's trial counsel failed to make this objection before the state court. Respondent additionally identifies the jury instructions given by the trial court, including the instructions which list the required elements of the offenses. The instruction provides that each element must be proven beyond a reasonable doubt. See Respondent Response to Petition for a Writ of Habeas Corpus, filed January 26, 1998, in the Western District of Oklahoma, Exhibit "B," at 9-11.

Petitioner does not respond to any of the arguments raised by Respondent. The Magistrate Judge recommends that the District Court find that Petitioner has not met his burden.

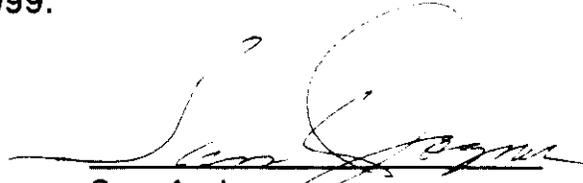
CONCLUSION

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See Rule 8(b)(3) of the Rules Governing Section 2254 cases in the United States District Courts; 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 29th day of March 1999.



Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

30th Day of March, 1999.

C. P. [Signature] Deputy Clerk

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

DIANNA S. BROWN,
446-68-2079

Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-398-M ✓

F I L E D

MAR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 30 1999

ORDER

Plaintiff, Dianna S. Brown, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might

¹ Plaintiff's March 2, 1995, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 9, 1996. By decision dated June 19, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 27, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

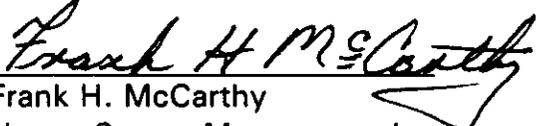
Plaintiff was born April 6, 1961, and was 35 years old at the time of the hearing. She has a General Equivalency Diploma, and formerly worked as a waitress/bartender, cashier, stocker, house cleaner, and doing maintenance of indoor plants. She claims to have been unable to work since December 31, 1991, as a result of mental problems, stomach problems and attention deficit disorder. The ALJ determined that although Plaintiff has some impairments, she is capable of performing work activity that does not require: understanding, remembering, or carrying out detailed or complex job instructions; more than minimal interaction with the public; maintaining attention and concentration for extended periods of time; traveling to unfamiliar places or using public transportation; or work performed in a high stress environment. [R. 17]. The ALJ found that, despite her limitations, Plaintiff is capable of performing her past relevant work as a stocker, house cleaner and plant worker. Alternatively, based on the testimony of a vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could

perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Plaintiff lists several grounds for reversal, only one of which will be discussed as it requires reversal and remand of the ALJ's decision. The ALJ stated: "There is no medical evidence from August 1991 (Exhibit 16) until September 1992 (Exhibits 17 and 18), and no evidence from September 1992 until December 1993 (Exhibit 19)." That statement is not accurate. Numerous counseling/therapy records were generated during these time frames and were contained in the record before the ALJ. [R. 294-330 and 276-290]. Although the ALJ is not required to discuss every piece of evidence, "[t]he record must demonstrate that the ALJ considered all of the evidence." *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996). Since the decision reveals that the ALJ was not aware of the existence of 2 years of counseling records, it is clear that they were not considered in denying benefits. The Court finds that the ALJ's decision must be reversed and the case remanded for the ALJ's failure to consider a significant body of evidence in the record.

The decision of the Commissioner finding Plaintiff not disabled is REVERSED and the case REMANDED for consideration of the entire record.

SO ORDERED this 29th day of March, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DIANNA S. BROWN,
446-68-2079

Plaintiff,

vs.

Case No. 98-CV-398-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAR 30 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this
27th day of March, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

ENTERED ON DOCKET
DATE **MAR 30 1999**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
THE SUM OF TWENTY-THREE)
THOUSAND ONE HUNDRED THIRTY)
DOLLARS(\$23,130.00) IN UNITED)
STATES CURRENCY;)
)
ONE 1991 LINCOLN TOWN CAR,)
VIN 1LNCM81W8MY724833;)
)
ONE 1991 CHEVROLET GCI)
PICKUP,)
VIN 1GCDC14K7MZ110216,)
)
Defendants.)

CIVIL ACTION NO. 96-CV-1085-C ✓

FILED
MAR 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF PARTIAL DISMISSAL

COMES NOW the Plaintiff, the United States of America, and Ruby Walker, the Claimant in the above captioned civil action, and stipulate that the defendant vehicles be dismissed, with prejudice and without any costs from the above captioned action:

One 1991 Lincoln Town Car, VIN 1LNCM81W8MY724833

AND

One 1991 Chevrolet GCI Pickup, VIN 1GCDC14K7MZ110216

Further, the Claimant, Ruby Walker, agrees to release and forever discharge any and all claims and demands which she may have against the United States of America, including, but not limited to, the United States Department of Justice and its agencies, including the Drug Enforcement Administration (DEA), and the Federal Bureau of

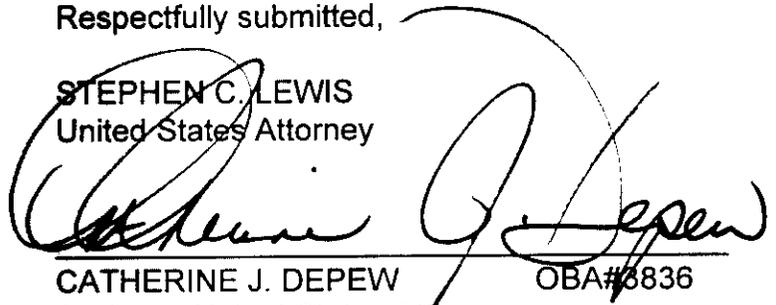
Handwritten initials/signature

Investigation (FBI), its agents and employees, on account of the arrest, seizure, and forfeiture proceedings against the defendant vehicles.

Further, the United States of America and Ruby Walker, Claimant agree that the cost bonds posted as to the defendant vehicles shall be returned to the Claimant, Ruby Walker, by delivery or mailing to her counsel, Jeffrey D. Fischer, 403 South Cheyenne, Tulsa, Oklahoma, 74103.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



CATHERINE J. DEPEW
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

OBA#8836

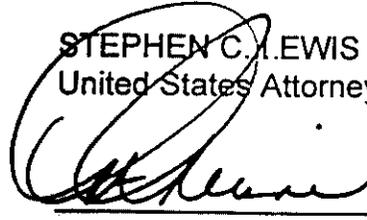
JEFFREY D. FISCHER
Attorney for Claimant, Ruby Walker
403 South Cheyenne
Tulsa, Oklahoma 74103
(918) 585-5997

Investigation (FBI), its agents and employees, on account of the arrest, seizure, and forfeiture proceedings against the defendant vehicles.

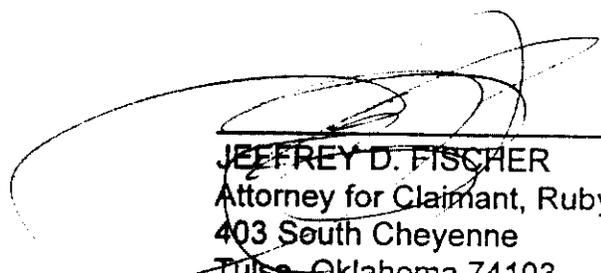
Further, the United States of America and Ruby Walker, Claimant agree that the cost bonds posted as to the defendant vehicles shall be returned to the Claimant, Ruby Walker, by delivery or mailing to her counsel, Jeffrey D. Fischer, 403 South Cheyenne, Tulsa, Oklahoma, 74103.

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



CATHERINE J. DEPEW OBA#8836
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463



JEFFREY D. FISCHER
Attorney for Claimant, Ruby Walker
403 South Cheyenne
Tulsa, Oklahoma 74103
(918) 585-5997

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

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNICE ALEXANDER,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, a municipal corporation, *et al.*)
)
Defendants.)

Case No. 98-C-60-E

ENTERED ON DOCKET
DATE MAR 30 1999

ORDER

Now before the Court is the Motion to Dismiss and Brief in Support of the Defendant, City of Tulsa, and the Amended Special Appearance, Suggestion of Improper Service and Request for Dismissal of all federal defendants, including William Clinton, President of the United States of America, Janet Reno, United States Attorney General, United States Congressmen, representing the State of Oklahoma, and The United States Environmental Protection Agency.

Plaintiff, Bernice Alexander, commenced this action on January 22, 1998, seeking monetary and injunctive relief related to complaints about the city's water and sewer system. Defendants move to dismiss, arguing that service has not been accomplished within the 120 days required by Fed.R. Civ. P. 4(m). Plaintiff has not responded to the motions to dismiss, and there is no evidence in the court file that any defendant has been properly served.

Defendants' motions to dismiss are granted.

IT IS SO ORDERED THIS 29th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

7

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

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNICE ALEXANDER,)
)
Plaintiff,)
)
vs.)
)
WILLIAM CLINTON, President of the United)
States of America, *et al.*)
)
Defendants.)

Case No. 98-C-61-E

ENTERED ON DOCKET
DATE MAR 30 1999

ORDER

Now before the Court is the Motion to Dismiss and Brief in Support of the Defendant, City of Tulsa, and the Special Appearance, Suggestion of Improper Service and Request for Dismissal of all federal defendants, including William Clinton, President of the United States of America.

Plaintiff, Bernice Alexander, commenced this action on January 22, 1998, seeking injunctive relief related to complaints about the city's alleged discrimination and violation of plaintiff's civil rights. Defendants move to dismiss, arguing that service has not been accomplished within the 120 days required by Fed.R. Civ. P. 4(m). Plaintiff has not responded to the motions to dismiss, and there is no evidence in the court file that any defendant has been properly served.

Defendants' motions to dismiss are granted.

IT IS SO ORDERED THIS 29th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNICE ALEXANDER,)
)
Plaintiff,)
)
vs.)
)
WILLIAM CLINTON, President of the United)
States of America, *et al.*,)
)
Defendants.)

Case No. 98-C-107-E

ENTERED ON DOCKET
DATE MAR 30 1999

ORDER

Now before the Court is the Motion to Dismiss and Brief in Support of the Defendant, City of Tulsa, and the Special Appearance, Suggestion of Improper Service and Request for Dismissal of all federal defendants, including William Clinton, President of the United States of America.

Plaintiff, Bernice Alexander, commenced this action on February 9, 1998, seeking a declaratory judgment, injunctive relief, and monetary damages related to complaints about the city's alleged discrimination and violation of plaintiff's civil rights. Defendants move to dismiss, arguing that service has not been accomplished within the 120 days required by Fed.R. Civ. P. 4(m). Plaintiff has not responded to the motions to dismiss, and there is no evidence in the court file that any defendant has been properly served.

Defendants' motions to dismiss are granted.

IT IS SO ORDERED THIS 29TH DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

9

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

FILED

MAR 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNICE ALEXANDER,

Plaintiff,

vs.

SUSAN SAVAGE, Mayor, City of Tulsa, *et al.*,

Defendants.

Case No. 98-C-108-E

ENTERED ON DOCKET

DATE **MAR 30 1999**

ORDER

Now before the Court is the Motion to Dismiss and Brief in Support of the Defendant, City of Tulsa.

Plaintiff, Bernice Alexander, commenced this action on February 9, 1998, seeking a declaratory judgment, injunctive relief, and monetary damages related to complaints about the city's alleged discrimination and violation of plaintiff's civil rights. Defendants move to dismiss, arguing that service has not been accomplished within the 120 days required by Fed.R. Civ. P. 4(m). Plaintiff has not responded to the motions to dismiss, and there is no evidence in the court file that any defendant has been properly served.

Defendants' motion to dismiss is granted.

IT IS SO ORDERED THIS 29th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

GEORGE WIFORD,)
)
) Petitioner,)
)
 vs.)
)
) WARDEN OF THE JOSEPH)
) HARP CORRECTIONAL CENTER,)
)
) Respondent.)

ENTERED ON DOCKET
DATE **MAR 29 1999**

Case No. 99-CV-153-K(J)

F I L E D

MAR 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Petitioner's "Petition for a Writ of Habeas Corpus" brought pursuant to 28 U.S.C. § 2254. Petitioner is an inmate in the Oklahoma Department of Corrections, serving a life sentence after pleading guilty to murder on April 3, 1990 in Ottawa County case number CRF-89-278.

This is Petitioner's second § 2254 attack against his 1990 Ottawa County conviction in CRF-89-278. In 1994, Petitioner filed a § 2254 habeas action with this Court, challenging his conviction in CRF-89-278. See George Wiford v. Boone, No. 94-CV-821-B (N.D. Okla. Aug. 30, 1994). Plaintiff's 1994 habeas petition was denied by this Court and the Tenth Circuit refused to grant a certificate of appealability. See Doc. Nos. 21 and 25 in 94-CV-821-B.

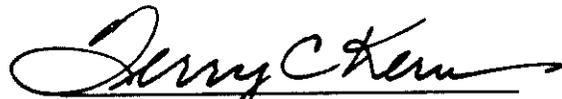
Petitioner now appears to be challenging the sufficiency of the factual basis for his guilty plea. Plaintiff alleges that with respect to the alleged murder weapon, a gun, no gun powder tests were performed and no finger print tests were performed. These

claims were not raised in Petitioner's first habeas petition filed in 1994. This Court is, however, precluded by 28 U.S.C. § 2244 from considering Petitioner's current request for habeas relief.

Under certain very limited circumstances, § 2244(b)(2) permits a court to consider habeas claims that were not presented in a prior habeas action. However, before a district court may consider new claims not presented in a prior habeas action, the petitioner is required to seek permission from a United States Court of Appeals. See 28 U.S.C. § 2244(b)(3). In the instant case, Petitioner has not sought permission from the United States Court of Appeals for the Tenth Circuit to file his current Petition. The Petition in this case is, therefore, **DISMISSED WITHOUT PREJUDICE**.

Before Petitioner will be permitted to file another habeas corpus petition in this Court challenging his Ottawa County conviction in CRF-89-278, Petitioner must first seek authorization to file a petition from the Tenth Circuit. This Court cannot consider additional attacks against the 1990 Ottawa County conviction unless Petitioner first receives authorization from the Tenth Circuit.

SO ORDERED THIS 25 day of March, 1999.



Terry C. Kern, Chief Judge
United States District Court

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

HOWARD, WIDDOWS, BUFOGLE &
VAUGHN, P.C.,

Appellant,

vs.

HEIDI IRENE CRABTREE,

Appellee.

ENTERED ON DOCKET

DATE **MAR 29 1999**

No. 98-CV-178-K

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On February 26, 1999 Magistrate Judge Joyner entered his Report and Recommendation, The Magistrate Judge recommended that the decision of the bankruptcy court below be affirmed. Appellant has timely filed its objection. The appeal is from an order of the bankruptcy court denying appellant's application for nunc pro tunc approval of application for employment. Appellant negotiated the settlement of post-petition personal injury claims of the debtor without being appointed by the bankruptcy court. After obtaining the settlement, appellant submitted the settlement to the bankruptcy court for approval and sought appointment pursuant to 11 U.S.C. §327(a). The bankruptcy court approved the settlement but denied the motion for appointment.

First, appellant argues that there is no authorization for a referral to a United States Magistrate Judge regarding a bankruptcy appeal. Appellant has overlooked Hall v. Vance, 887 F.2d 1041, 1046 (10th Cir.1989), which permits such a referral so long as the

district court reserves for itself the final decision. That is precisely the situation herein.

Turning to the merits, the Magistrate Judge correctly found the case to be governed by In re Land, 943 F.2d 1265 (10th Cir.1991). In that decision, the Tenth Circuit noted a split of authority as to whether a bankruptcy court could even grant such a nunc pro tunc application. Id. at 1267 n.2. The Tenth Circuit went on to say that, even if such authority existed, it could only be exercised under "the most extraordinary circumstances." Id. at 1267-68. It appears in the case below that prior authorization was not sought simply because counsel did not realize that such approval was required. Simple neglect does not justify nunc pro tunc approval. Id. at 1268. The decision should not be reversed absent an abuse of the bankruptcy court's discretion. Id. at 1266. Upon this Court's review of the record, it is not persuaded that the bankruptcy court abused its discretion.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge (#12) is hereby AFFIRMED. The decision of the bankruptcy court below is AFFIRMED in all respects.

ORDERED this 25 day of March, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

jurisdiction to interpret and enforce all aspects of the Agreement and to enter all orders to effectuate the Agreement or protect the rights of the parties.

On December 20, 1989, Otasco commenced an adversary proceeding against SSC, requesting (1) an accounting, (2) turnover of funds belonging to the estate and (3) sanctions. SSC raised the affirmative defenses of waiver, estoppel, unjust enrichment and setoff. The issues were tried to the bankruptcy court, in the person of the Honorable Mickey D. Wilson, on April 24, 25 and 26, 1990. For reasons not appearing in the record, the bankruptcy court did not enter its Memorandum Opinion and Order until May 22, 1997. Judge Wilson retired on June 1, 1997. The parties filed post-judgment motions, which were ruled upon by the Honorable Terrence L. Michael, Judge Wilson's replacement. Both parties then appealed to this Court.

In its complaint which commenced the adversary proceeding, Otasco sought a money judgment of \$674,038.45 plus interest. On March 30, 1990, SSC submitted an offer to confess judgment pursuant to Rule 7068 of the Bankruptcy Rules in the amount of \$450,000.¹ The offer was not accepted by Otasco. On April 19, 1990, SSC tendered the sum of \$229,677.15 to Otasco, which accepted the money. The bankruptcy court found the acceptance to be "without prejudice to any further relief to which Otasco might be entitled." (Memorandum Opinion and Order at 27).

¹Rule 7068 simply states that Rule 68 F.R.Cv.P. applies in adversary proceedings.

In the May 22, 1997 Memorandum Opinion and Order, Judge Wilson held that Otasco was entitled to Judgment against SSC in the sum of \$617,977.81, with postjudgment interest thereon². The order also tersely stated: "Each party shall bear its own costs and attorney fees." On motion of SSC, Judge Michael entered an Amended Judgment in the amount of \$251,970.82 on July 15, 1997³. The Amended Judgment again held without explanation that each party would bear its own costs and attorney fees.

The bankruptcy court finally set forth its rationale regarding fees in an order filed August 1, 1997, in response to motions from both parties. The court agreed with the parties that 12 O.S. §936 governed the issue. That statute provides that, in an action to recover on a contract of the type involved herein, the "prevailing party" shall be allowed a reasonable attorney fee. The bankruptcy court acknowledged that Otasco had received an affirmative judgment against SSC, but found that since Otasco had received "so very much less than it sought", neither party would be declared the prevailing party.

In the Report and Recommendation, the Magistrate Judge recommended reversal on this issue. Under the statute, an award to a prevailing party is mandatory. Arkla Energy Resources v. Roye Realty & Dev., 9 F.3d 855, 865 (10th Cir.1993). The determination

²The total sum included the bankruptcy court's calculation of prejudgment interest.

³No party disputes that the reduction was appropriate because of a clerical or mathematical error made in the original Judgment.

of which party prevails is within the discretion of the trial judge. Id. However, a plaintiff need not recover the full amount sought in order to be the prevailing party. Robert L. Wheeler, Inc. v. Scott, 818 P.2d 475, 481-82 (Okla.1991). A prevailing party must have prevailed on the merits. Arkla 9 F.3d at 866. In the trial below, Otasco clearly prevailed on the merits. The Court agrees with the Magistrate Judge that the bankruptcy court's denial of fees was an abuse of discretion.

More specifically, the Magistrate Judge relied upon Hicks v. Lloyd's General Ins. Agency, Inc., 763 P.2d 85 (Okla.1988), which addressed the interplay of 12 O.S. §936 and 12 O.S. §1101, the latter of which is the state-law equivalent of Rule 68 involving offers of judgment. In Hicks, defendant made two offers of judgment which plaintiff rejected. At trial, plaintiff recovered a judgment, but in an amount less than either offer. Inasmuch as the case involved breach of contract, plaintiff asserted he was the prevailing party under 12 O.S. §936. In response, defendant argued that it should be awarded attorney fees for the period after the first offer, pursuant to §1101.

In a ruling which SSC correctly describes as "internally inconsistent", the Supreme Court of Oklahoma held that plaintiff was not the prevailing party for purposes of §936, but that plaintiff was entitled to attorney fees for the period until the first offer was made⁴. Further, the court held that defendant was

⁴The Hicks court cited no source of an award of fees to plaintiff aside from §936.

entitled to its attorney fees for the period after the first offer was made. Applying Hicks, the Magistrate Judge recommended that on remand Otasco be awarded attorney fees for the period until the offer to confess filed by SSC, and that SSC be awarded its costs and attorney fees for the subsequent period pursuant to Rule 68 F.R.Cv.P.⁵

The Court is unaware of any authority by which a defendant may file an offer to confess judgment, see it rejected, then make a partial payment and continue to rely upon Rule 68. Obviously, "paying down" a plaintiff's claim makes it much more likely that plaintiff will not recover at trial an amount greater than the defendant's offer. Otasco argues that adding the judgment amount of \$251,970.82 and the defendant's pretrial payment of \$229,677.15 produces a total recovery by plaintiff of \$481,647.97, an amount greater than defendant's Rule 68 offer of \$450,000. SSC asserts that with the proper calculation of prejudgment interest, (i.e., not adding the seven years the bankruptcy court's opinion was under advisement), the total is less than the Rule 68 offer. This issue is best resolved by the bankruptcy court on remand. This Court would additionally observe that Hicks is not necessarily binding. While it is true that state law must be referenced to determine if "costs" includes attorney fees, it does not follow that a state court decision interpreting the state-law equivalent of Rule 68 is

⁵Reference to state law is appropriate, because Rule 68 incorporates the definition of "costs" found in the relevant substantive statute of the jurisdiction whose substantive law applies to the case. Gil De Rebollo v. Miami Heat Assocs., Inc., 137 F.3d 56, 66 (1st Cir.1998).

controlling on a federal court interpreting Rule 68 itself.

Turning to the merits, the crux of the parties' dispute involved various expense items deducted by SSC from gross proceeds, and withheld by SSC from net proceeds turned over to Otasco. When the sale concluded in 1989, SSC initially calculated an Otasco share of only \$54,228.01. In its 1997 decision, the bankruptcy court ultimately disallowed an additional \$212,293.64 in expenses claimed by SSC, thereby increasing Otasco's share substantially. The Magistrate Judge recommended affirmance of the lower court's ruling as to bonuses and travel expenses, but reversal as to salaries. Only SSC has objected to this portion of the Recommendation.

First, SSC objects to the Magistrate Judge's recommendation that the bankruptcy court be affirmed as to the disallowance of \$89,300 in bonuses. The Agreement set forth a multi-part definition of "allowed expenses" which SSC could properly pay. The definition included "all salaries, wages or expenses of personnel hired or employed by SSC. . . ." SSC argues that it is clear and unambiguous that the terms "salaries" and "wages" also include bonuses. The bankruptcy court found there was no meeting of the minds between the parties on this point when the contract was formed, and disallowed the expenses. The Magistrate Judge, explicitly finding the Agreement ambiguous on the point, recommended affirmance. Upon review of the record, this Court agrees with both the bankruptcy court and the Magistrate Judge.

SSC also protests the bankruptcy court's ruling on travel

expenses, to the point that it avers that "at least" the relatively minuscule amount of \$1,803.58 should be awarded. The bankruptcy court heard the conflicting witnesses and made its determination. The Magistrate Judge also reviewed the testimony and recommended affirmance. Upon review, this Court is not persuaded that a contrary result is appropriate.

Next, Otasco objects to the Magistrate Judge's recommendation as to prejudgment interest. The bankruptcy court awarded prejudgment interest to Otasco under federal law on equitable grounds. The Magistrate Judge recommended reversal, on the basis that in a diversity case an award of prejudgment interest is governed by state law. This Court agrees with Otasco's objection, which is that the adversary proceeding below was not based on diversity jurisdiction (although the parties are diverse), but upon the bankruptcy court's jurisdiction to enforce its orders. Upon such authority as In re Investment Bankers, Inc., 4 F.3d 1556, 1566 (10th Cir.1993) cert. denied, 510 U.S. 1114 (1994), the Court departs from the Magistrate Judge and affirms the bankruptcy court in its award of prejudgment interest.

In another aspect of the Report and Recommendation, the Magistrate Judge recommended that any prejudgment interest only be included as of the date of the Rule 68 offer by defendant (March 30, 1990), rather than the actual date of judgment seven years later. The Magistrate Judge noted the inequity of penalizing defendant simply because the bankruptcy court did not issue its ruling for seven years. The Recommendation somewhat penalizes

plaintiff, because the offer of judgment was not accepted. However, no objection has been filed on this issue, and the Court affirms.

Finally, Otasco objects to the Magistrate Judge's recommendation that the bankruptcy court be affirmed in its denial of Otasco's request for sanctions against SSC. The Court agrees with the Magistrate Judge's observation that the bankruptcy court observed the parties' conduct "first-hand" and yet concluded that sanctions were not appropriate. This Court has reviewed the record and is not persuaded that the bankruptcy court abused its discretion, even if SSC is properly regarded as a fiduciary.

It is the Order of the Court that the Report and Recommendation of the Magistrate Judge (#28) is hereby adopted and approved in part. The decision of the bankruptcy court below is hereby AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion.

Specifically, the bankruptcy court is affirmed as to the expense issue, with the exception of the salaries paid to Ted Roberts and James Schaye. On remand, the bankruptcy court should determine the portion of expenses allocated to Roberts and Schaye that are "direct expenses" (i.e., payment for time spent on the Otasco sale) and those sums should be awarded to SSC, in accordance with the Report and Recommendation.

The bankruptcy court is affirmed as to the imposition of prejudgment interest, but on remand such interest should be

calculated to run only until March 30, 1990, the date of SSC's offer of judgment.

The bankruptcy court is reversed in its denial of attorney fees. On remand, the bankruptcy court should calculate an appropriate award of fees, considering Otasco the prevailing party under 12 O.S. §936 and the effect, if any, of the Rule 68 offer.

In all other respects, the decision of the bankruptcy court is AFFIRMED.

The Court Clerk is directed to terminate district court case nos. 98-CV-189-K, 98-CV-190-K and 98-CV-191-K, under which these multiple appeals were filed.

ORDERED this 25 day of March, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SHARON S. MATLOCK,)
)
 Defendant.)

CASE NO. 99CV0199H(M) ✓

ENTERED ON DOCKET

DATE MAR 29 1999

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.
2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.
3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$5,790.00, plus accrued interest of \$806.97, plus interest thereafter at the rate of 8.98% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 4.918 until paid, plus costs of this action, until paid in full.

UK
3-22-99

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4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Sharon S. Matlock will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the first day of April, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$100.00, and a like sum on or before the first day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

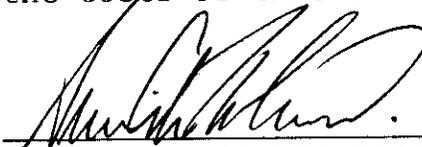
5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

7. The defendant has the right of prepayment of this debt without penalty.

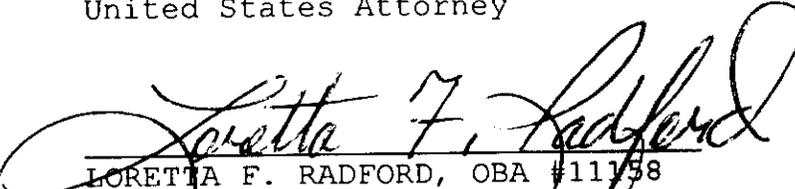
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Sharon

S. Matlock, in the principal amount of \$5,790.00, plus accrued interest in the amount of \$806.97, plus interest at the rate of 8.98% until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.918 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney


SHARON S. MATLOCK

LFR/11f

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- 2299

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

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
Plaintiff,)
vs.)
TERRANCE REVIS; et al.)
Defendants.)

Case No. 97CV1024H ✓

ENTERED ON DOCKET

DATE MAR 29 1999

JUDGMENT

Based upon the Settlement Agreement between the parties and the consent of the Defendant Terrance Revis, Judgment is hereby entered for the United States of America on behalf of its client agency, the United States Department of Health and Human Services, and against the Defendant, Terrance Revis, in the principal amount of \$13405.00. This principal amount is to be paid over a period of sixty months at the current postjudgment interest rate of 4.51% per annum; for a total payout of \$14,998.20 to be paid at the monthly amount of \$249.97. The defendant's repayment is to begin 30 days after payment in full of the restitution ordered in criminal case number 97CR163, for which judgment is already entered.

The Judgment entered herein is entered as to Counts I and II of the Complaint. All other counts, as to Terrance Revis only, are hereby dismissed with prejudice.

Dated: March 25th, 1999.

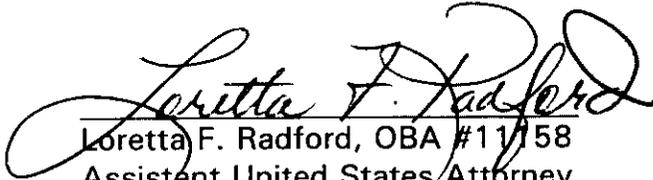

SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

217

JUDGMENT AS TO TERRANCE REVIS
APPROVED AS TO FORM AND CONTENT:



Terrance Revis, Defendant
Pro Se



Loretta F. Radford, OBA #111158
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, OK 74103
918-581-7463
Attorney for the Plaintiff

consent.jud(miscgen)

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

FRED WASHINGTON,

Plaintiff,

vs.

PAUL BRIGNAC,

Defendant.

ENTERED ON DOCKET

DATE MAR 29 1999

Case No. 99-CV-99-H(J) ✓

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff is a prisoner appearing *pro se* and *in forma pauperis*. Now before the Court is Plaintiff's Civil Rights Complaint filed pursuant to 42 U.S.C. § 1983. For the reasons discussed below, the Court **dismisses** Plaintiff's Complaint.

Section 1915(e) provides as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court **shall** dismiss the [*in forma pauperis*] case at any time if the court determines that . . . the action . . . fails to **state** a claim on which relief may be granted

28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added). The Court finds that, even if the allegations in Plaintiff's Civil Rights Complaint are accepted as true, the Complaint fails to state a claim on which relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P. 12(b)(6) and Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (setting forth standards for evaluating the sufficiency of a claim).¹

^{1/} When ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the Court must accept all well-pled factual **allegations** in the complaint as true, and the Court must view all
(continued...)

I. PLAINTIFF HAS FAILED TO STATE A CIVIL RIGHTS CLAIM UNDER 42 U.S.C. § 1983.

Plaintiff alleges that Defendant violated his civil rights and that pursuant to 42 U.S.C. § 1983, Defendant is liable for those violations. The Defendant in this case was Plaintiff's public defender. Defendant was appointed by the Tulsa County District Court in Tulsa, Oklahoma to serve as Plaintiff's counsel in a proceeding to revoke Plaintiff's suspended sentence and return Plaintiff to jail. See Doc. No. 1.

Plaintiff alleges that during the revocation proceeding, Defendant failed to follow Plaintiff's instructions. Plaintiff also alleges that Defendant failed to provide Plaintiff with diligent and competent advice. Plaintiff further alleges that Defendant's conduct directly caused Plaintiff's unlawful imprisonment and violated his Fourteenth Amendment right to due process. As relief, Plaintiff seeks "[i]mmediate release and/or monetary compensation." See Doc. No. 1.

The relevant civil rights statute provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

^{1/} {...continued}

inferences that can be drawn from those well-pled facts in the light most favorable to plaintiff. Viewing the allegations in the complaint through this lens, the Court may grant a Rule 12(b)(6) motion only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. The Court finds that this same standard should be applied when deciding whether to dismiss a claim *sua sponte* under 28 U.S.C. § 1915(e)(2)(B)(ii).

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress .

42 U.S.C. § 1983 (emphasis added). The emphasized language establishes that to be liable under § 1983, the Defendant must have acted under color of state law (i.e., he must have been a state actor). See, e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 724-25 (1989); and Harris v. Champion, 51 F.3d 901, 909 (10th Cir. 1995).

Public defenders, like Defendant in this case, are not state actors within the meaning of 42 U.S.C. § 1983. According to the Tenth Circuit,

Public Defenders, whether court appointed or privately retained, performing in the traditional role of attorney for the defendant in a criminal proceeding, are not deemed to act under color of state law; such attorneys represent their client only, not the state, and are not subject to suit in a 42 U.S.C. § 1983 action.

Lowe v. Joyce, No. 95-1248, 1995 WL 495208, at *1 (10th Cir. Aug. 21, 1995) (citing Harris v. Champion, 51 F.3d 901, 910 (10th Cir. 1995)). The United States Supreme Court agrees. See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding").

The factual situation present in Harris is very similar to that alleged by Plaintiff in this case. The public defenders in Harris had allegedly asked for numerous and unreasonable extensions of time to file appellate briefs on plaintiff's behalf, without considering whether the client desired the extension or whether the extension was in

the client's best interest. The Tenth Circuit held that even if the public defenders' conduct was so egregious that it ultimately deprived their clients of constitutional rights, the actions were still "traditional lawyer functions." The Court went on to hold that

even if counsel performs what would otherwise be a traditional lawyer function, such as filing an appellate brief on his or her client's behalf, so inadequately as to deprive the client of constitutional rights, defense counsel still will not be deemed to have acted under color of state law.

Harris, 51 F.3d at 910. The United Supreme Court agrees. See Briscoe v. LaHue, 460 U.S. 325, 329 n.6 (1983). In Briscoe, the Supreme Court held that "even though the defective performance of defense counsel may cause the trial process to deprive an accused person of his liberty in an unconstitutional manner, the lawyer who may be responsible for the unconstitutional state action does not himself act under color of state law within the meaning of § 1983." Id.

The Court finds that the Defendant's actions complained of in this case were actions taken by Defendant in his traditional role as a defense lawyer for Plaintiff. Defendant's actions were taken on behalf of Plaintiff, not on behalf of the state of Oklahoma. Consequently, Defendant's conduct was not state action for purposes of 42 U.S.C. § 1983. Plaintiff cannot, therefore, maintain an action against Defendant under § 1983. Pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), Plaintiff's Civil Rights Complaint should be dismissed with prejudice for failure to state a claim upon which

relief can be granted. This dismissal constitutes a "prior occasion" for purposes of 28 U.S.C. § 1915(g).²

II. PLAINTIFF'S POTENTIAL HABEAS CORPUS CLAIM UNDER 28 U.S.C. § 2254.

With this Order, the Court has dismissed Plaintiff's civil rights claim against Defendant for "monetary compensation." In his complaint, Plaintiff also seeks "immediate release" as a remedy for Defendant's alleged conduct. A claim for release from custody cannot be litigated under 42 U.S.C. § 1983. Rather, claims for release from state custody based on the ineffective assistance of counsel must be pursued *via* a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. "[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck v. Humphrey, 512 U.S. 477 (1994) (citing Preiser v. Rodriguez, 411 U.S. 475, 488-90 (1973)).

The Court clerk should be directed to mail Plaintiff a copy of the Court's form Petition For a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody. If Plaintiff wishes to proceed with a habeas corpus claim, he must complete a Petition For a Writ of Habeas Corpus and file it with this Court. The filing fee for a habeas corpus action is \$5.00. If Plaintiff wishes to proceed with the habeas

^{2/} 28 U.S.C. § 1915(g) provides that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

action *in forma pauperis*, Plaintiff must also file an Application for Leave to Proceed *In Forma Pauperis* which contains a completed statement of institutional accounts.

CONCLUSION

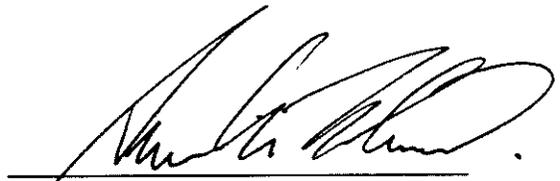
Defendant's alleged conduct is not state action for purposes of 42 U.S.C. § 1983. Therefore, Plaintiff's civil rights complaint should be dismissed with prejudice for failure to state a claim upon which relief may be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's civil rights complaint is dismissed with prejudice for failure to state a claim upon which relief may be granted.
2. The Clerk is directed to "flag" this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
3. The Clerk is directed to send Plaintiff a blank § 2254 petition for writ of habeas corpus (form 2254pet.hc) as well as a motion for leave to proceed *in forma pauperis* (form ifp-hc.dis) and the instructions for each.

IT IS SO ORDERED.

This 25TH day of ~~February~~ ^{MARCH} 1999.


Sven Erik Holmes
United States District Judge

LA 22-99
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 26 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
Plaintiff,)
vs.)
TERRANCE REVIS; et al.)
Defendants.)

Case No. 97CV1024H

ENTERED ON DOCKET
DATE MAR 29 1999

JUDGMENT

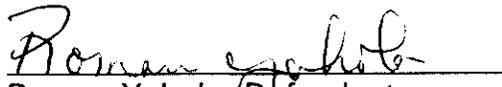
Based upon the Settlement Agreement between the parties and the consent of the Defendant Roman Yahola, Judgment is hereby entered for the United States of America on behalf of its client agency, the United States Department of Health and Human Services, and against the Defendant, Roman Yahola, in the principal amount of \$6,435.00. This principal amount is to be paid over a period of sixty months at the current postjudgment interest rate of 4.51% per annum; for a total payout of \$7,200.00 to be paid in the amount of \$120.00 per month. The defendant's repayment is to begin 30 days after payment in full of the restitution ordered in criminal case number 97CR163, for which judgment is already entered.

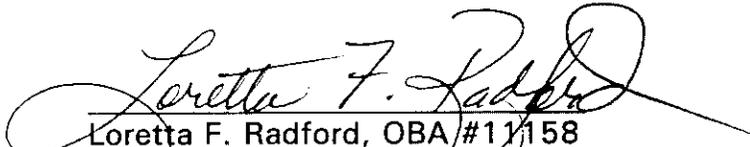
The Judgment entered herein is entered as to Counts I and II of the Complaint. All other counts, as to Roman Yahola only, are hereby dismissed with prejudice.

Dated: March 25TH, 1999.


SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

JUDGMENT AS TO ROMAN YAHOLA
APPROVED AS TO FORM AND CONTENT:


Roman Yahola, Defendant
Pro Se


Loretta F. Radford, OBA #11158
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, OK 74103
918-581-7463
Attorney for the Plaintiff

Yahola consent judgment.wpd(settlement)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DOREEN J. CURRY,
SSN: 440-62-1283

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

MAR 25 1999 *SE*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-362-J

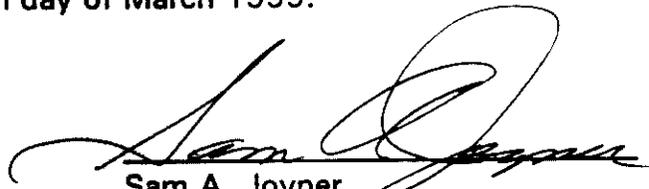
ENTERED ON DOCKET

DATE MAR 26 1999

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's denial of benefits and remanding the case to the Commissioner for further proceedings has been entered. Consequently, Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 25th day of March 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 25 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOREEN J. CURRY,)
SSN: 440-62-1283)

Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner)
of Social Security Administration,)

Defendant.)

No. 98-CV-362-J ✓

ENTERED ON DOCKET

DATE MAR 26 1999

ORDER^{1/}

Plaintiff, Doreen J. Curry, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to properly evaluate the impact of Plaintiff's gastrointestinal problems when assessing her residual functional capacity, and (2) the ALJ failed to properly evaluate the impact of Plaintiff's neck and shoulder impairment when assessing her residual functional capacity. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{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/} Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated March 6, 1996. [R. at 20]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on March 18, 1998. [R. at 5].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on September 18, 1957, and at the time of the hearing weighed 110 pounds. [R. at 41]. Plaintiff testified that she had an associate degree in computer programming and had completed six months of machine shop training. [R. at 44].

Plaintiff stated that she experienced neck pain and that the pain interfered with her ability to drive. [R. at 50]. Plaintiff additionally suffers from headaches. [R. at 59]. Plaintiff has some problems with her foot. [R. at 61]. Plaintiff testified that her biggest problem related to her "dumping syndrome," which she stated began after she had one-half of her stomach removed in surgery. According to Plaintiff, she suffers from low blood pressure which requires her to eat small amounts of food frequently. In addition, after she eats, her stomach will empty itself rather rapidly. Plaintiff stated that she suffered from problems with diarrhea and vomiting. [R. at 64-67]. According to Plaintiff, her "attacks" sometimes last for only 30-45 minutes, but they can last for three to four days. Plaintiff testified that she could sit for approximately two hours. [R. at 58]. Plaintiff additionally indicated that she could walk approximately one-half of a block, and lift five pounds. [R. at 69].

In the forms completed for the Social Security Administration, Plaintiff noted that she had to eat at least six meals each day. Plaintiff additionally indicated that her current household duties included: making beds, washing dishes, cooking, mopping, vacuuming, and shopping. [R. at 123]. Plaintiff also noted that due to her impairments she could not lift anything heavy; she experienced fatigue; she could not

do her chores daily; that it took her thirty minutes to make lunch and two hours to make dinner, and that she needed help with the vacuuming, mopping, folding, and shopping because such activities tired her. [R. at 128-130]. Plaintiff reported that performing her chores took much longer than usual, and that it took her approximately one and one-half hours to do dishes and pick up the kitchen. [R. at 143]. Plaintiff additionally indicated that due to "stomach gas" it was difficult to be around people. [R. at 145]. Plaintiff indicated that it took her three to four hours to do the laundry and vacuuming. [R. at 146].

On November 13, 1987, Plaintiff's weight was reported as 118 pounds. [R. at 152]. Plaintiff's weight on May 1, 1992 was reported as 131 pounds. [R. at 184]. An entry in Plaintiff's record dated July 7, 1992, indicated Plaintiff had lost five pounds due to vomiting and diarrhea. [R. at 182]. On May 17, 1993, Plaintiff's weight was reported as 114 pounds. [R. at 177]. On April 14, 1995, Plaintiff was noted as weighing 105 pounds at the examination. [R. at 286]. On April 19, 1995, Plaintiff's weight loss was reported as "stable" and the record indicates she weighed 111 pounds. [R. at 303].

Plaintiff's medical records contain numerous complaints related to gas, abdominal pain, irritable bowel syndrome, nausea, vomiting, and diarrhea. Plaintiff's records also indicate that she had some problems with her foot and her neck.

Plaintiff's medical records on April 6, 1994, note that Plaintiff was released to return to work. [R. at 228]. One of Plaintiff's doctors completed a Medical Statement of Ability to Work on July 27, 1994, indicating that he saw Plaintiff on May 5, 1994,

that Plaintiff had had her condition since November 1, 1993, and that Plaintiff was able to work. [R. at 275].

At Plaintiff's yearly examination on April 22, 1997, the doctor noted that Plaintiff was "newly employed with a commercial financial service for the last year, and is enjoying this accordingly." [R. at 356]. By letter dated September 21, 1997, Plaintiff submitted "new complaints" to the Social Security Administration. [R. at 344]. Plaintiff indicated that, among other things, she could no longer comb her hair, had difficulty cooking, had no feelings in her hands in the mornings, had difficulty sleeping, could not hold or grab items. [R. at 344].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

^{3/} 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).

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 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

The ALJ concluded that Plaintiff was not disabled at Step Four of the sequential evaluation process. The ALJ noted that Plaintiff typed all of her forms although she complained of arm pain. [R. at 28]. The ALJ found that Plaintiff had the RFC to perform medium work, "diminished by significant nonexertional limitations which make it necessary to be able to have unplanned restroom breaks." [R. at 29]. The ALJ additionally noted that Plaintiff needed to eat frequently. The ALJ observed that Plaintiff's former job as "cashier, office clerk" did not require Plaintiff to lift more than ten pounds or remain on her feet for prolonged periods of time. The ALJ noted that this job was indoors and that restroom facilities were available. The ALJ therefore concluded that Plaintiff could return to her past relevant work.

IV. REVIEW

Plaintiff asserts that the ALJ failed to properly consider and evaluate the effect that Plaintiff's gastrointestinal problems had on her residual functional capacity. Plaintiff notes that her weight decreased from 131 pounds to 105 pounds over this time period. Plaintiff states that her low blood sugar results in fatigue, that she must eat very frequently, that she must frequently go to the bathroom and that consequently she does not have the stamina to work for an entire day. Plaintiff notes that the ALJ's conclusion that Plaintiff's past relevant work "had bathrooms available" is insufficient evidence to support the conclusion that Plaintiff can return to her past relevant work. The Court agrees.

The ALJ found that Plaintiff had the RFC to perform medium work diminished by the need to eat frequently and take frequent unplanned bathroom breaks. The ALJ additionally noted that Plaintiff's past relevant work had restrooms available. The ALJ does not explore and the record contains no information as to whether an individual who must eat frequently and take unplanned bathroom breaks would be able to sufficiently perform the requirements of Plaintiff's past relevant work. A decision at Step Four requires that an ALJ make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. See Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993). The conclusion by the

ALJ that Plaintiff can perform the requirements of her past relevant work is not supported by the record presently before the Court.^{4/}

The Court does not, by this order, intend to express any opinion as to whether or not Plaintiff is disabled. The Court merely concludes that, based on the record before the Court, the conclusion by the Commissioner that Plaintiff can return to her past relevant work is not supported by the present record. In addition, on remand, the ALJ may find it helpful to obtain information from a consultative examiner regarding the effect that Plaintiff's dumping syndrome could have on her ability to perform work-related duties.

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

Dated this 25 day of March 1999.


Sam A. Joyner
United States Magistrate Judge

^{4/} The Court additionally urges the ALJ to conduct a more thorough review of Plaintiff's credibility on remand. For instance, the ALJ noted that although Plaintiff complained of arm pain, all of Plaintiff's forms were typewritten. The ALJ interpreted this to mean that Plaintiff had typed the forms. Although this conclusion may certainly be true, Plaintiff was never asked at her hearing whether or not she actually typed the forms which were completed and submitted to the Administration. The Court additionally notes, however, that although Plaintiff's doctor indicated that Plaintiff had "successfully" returned to work in April of 1997, Plaintiff submitted an additional letter to the Appeals Council on September 21, 1997, outlining all of her presumably current disabilities. [R. at 344, 356].

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

FILED

MAR 25 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

BERTRAND M. BAILEY, JR.)

Defendant.)

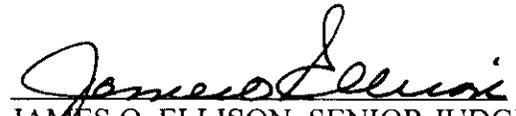
Case No. 97-C-595-E /

ENTERED ON DOCKET
DATE MAR 25 1999

JUDGMENT

In accord with the Order filed this date sustaining the Plaintiff's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Plaintiff, United States of America, and against the Defendant, Bertrand Bailey, in the amount of \$4088.05, plus interest from this date forward at the legal rate of 4.918 per cent per annum. Costs and attorney fees may be awarded upon proper application.

IT IS SO ORDERED THIS 24th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

MAR 25 1999

rw

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERTRAND M. BAILEY, JR.

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-595-E

ENTERED ON DOCKET

DATE MAR 25 1999

ORDER

Now before the Court is the Motion For Summary Judgment (Docket #3) of the Plaintiff, United States.

Plaintiff seeks summary judgment on this action to collect on defaulted student loans, arguing that none of the defenses raised in the answer are supported under the law. There are three groups of loans at issue. Student Loan A from the Texas Opportunity Plan Funds, Austin, Texas, was secured by promissory notes executed on November 22, 1971, January 7, 1972, and January 15, 1975. Currently, according to a Certificate of Indebtedness from the United States Department of Education, a total of \$2,648.25 is owed on this loan. Student Loan B from the Texas Opportunity Plan Fund, Austin, Texas, was secured by a promissory note executed on July 5, 1973. Currently, according to a Certificate of Indebtedness from the United States Department of Education, a total of \$546.34 is owed on this loan. Student Loan C from Bishop College, Dallas, Texas, was secured by promissory notes executed on December 13, 1971, January 13, 1975, June 2, 1977, and July 8, 1977. Currently, according to a Certificate of Indebtedness from the United States Department of Education, a total of \$893.46 is owed on this loan.

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Initially, Defendant responded to the motion for summary judgment by requesting additional time, stating that his defenses, statute of limitations, dispute over amount owed, and that he never got the benefit of the loan, could not be proved because the government had failed to respond to his discovery requests. In a subsequent response combined with a motion to compel, defendant asserted that the facts relied on by plaintiff are disputed, and that "there is a general issue as to the validity of all of the documents allegedly evidencing the genuineness of these debts." Defendant received the requested discovery in June of 1998, and has been directed to supplement his response to the motion for summary judgment. Defendant has failed to do so.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986). *cert den.* 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322, it is stated:

"[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."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, (1986).

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson, the Court stated that:

" . . . The 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.

The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

Because the undisputed facts regarding the balance due on the notes are supported by the declaration of Lynda Faatalale, a loan analyst with the U.S. Department of Education, and have not been specifically controverted with any admissible evidence by defendant, the Court must accept these facts as true. Anderson, at 252. The only remaining issues, then, are whether this claim is barred by the statute of limitations, or defeated by the fact that defendant did not receive the benefit of the monies.

Under 20 U.S.C. §1091a, statutes of limitations on the collection of student loans were retroactively eliminated:

(a) In general

(1) It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced.

(2) Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by – [a public institution seeking to collect a student loan or a guaranty agency].

Defendant argues that this provision constitutes an unconstitutional impairment of contract and an *ex post facto* law. Defendant's authority regarding his impairment of contract argument is distinguishable. Both cases relied on by defendant deal with a statutory provision that operates to change the named beneficiary to death benefits in the case of divorce. Whirlpool Corporation v. Ritter, 929 F.2d 1318 (8th Cir. 1991), Bruner v. Bruner, 846 P.2d 1289 (Okla. App. 1993). In this case, what is changed is the statute of limitations, and not any specific contractual provision agreed to by the parties. The Court does not find either Ritter or Bruner persuasive.

Moreover, the argument that §1091a constitutes an *ex post facto* law has been specifically rejected by the Court in United States v. Singer, 943 F.Supp. 9 (D.D.C. 1996), on the ground that the *Ex Post Facto* clause of the Constitution applies only to penal statutes. The Court agrees with the analysis in Singer.

Lastly, Defendant argues that he is not liable for the debt because he did not derive any benefit from the use of the money. Defendant asserts that "due to fraudulent practices of the school that he was to attend, he never got the benefit of the proposed loan." Lack of benefit from the loan, however, does not relieve the debtor from his obligation to repay the Department of Education. Wayne v. U.S. Dept. of Educ., 915 F.Supp. 1143, 1145 (D.Kan. 1996).

The Motion for Summary Judgment (Docket #3) of the Plaintiff, United States of America, is Granted. All other motions are Denied as Moot.

IT IS SO ORDERED THIS 24th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RANDALL DEE LAMBORN and)
TERESA MARIE LAMBORN,)

Plaintiffs,)

vs.)

Case No. 97-CV-314-E

THE UNITED STATES OF AMERICA)
ex rel. Internal Revenue Service, and)
STATE OF OKLAHOMA, *ex rel.*)
Oklahoma Tax Commission,)

Defendants.)

ENTERED ON DOCKET
MAR 25 1999

ORDER DISMISSING CASE

NOW on this 23rd day of March, 1999, comes before me the Joint Motion to Dismiss Pursuant to Parties' Settlement Agreement filed by Plaintiffs, Randall Dee Lamborn and Teresa Marie Lamborn (hereinafter referred to as "Lamborns") as well as the State of Oklahoma, *ex rel.* Oklahoma Tax Commission.

Having considered the premises plead and the Joint Motion to Dismiss, the Court does find that just cause does exist to dismiss this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this case be dismissed with prejudice.



JUDGE OF THE DISTRICT COURT

10

FILED

MAR 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Gilbert L Worden)
)
 Plaintiff(s),)
)
 vs.)
)
 Oklahoma Department of HS)
)
 Defendants(s).)

Case # 98-C-424-C

ENTERED ON DOCKET
DATE MAR 25 1999

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by 4-30-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismisses with prejudice.

IT IS SO ORDERED this 27th day of March, 19 99.

[Signature]
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VATANA PHAISAL ENGINEERING)
COMPANY, LTD., a corporation,)
)
Plaintiff,)
)
vs.)
)
BORN, INC., a corporation,)
SIDNEY BORN, an individual,)
and HAROLD BORN, an)
individual,)
)
Defendants.)

Case No. 98-CV-323-BU ✓

ENTERED ON DOCKET
DATE MAR 25 1999

ORDER

This matter came before the Court for hearing on March 22, 1999 and March 23, 1999 on Defendants' Motion to Dismiss. Having reviewed the parties' submissions and having heard the arguments of counsel, the Court ORDERS as follows:

1. Defendants' Motion to Dismiss (Docket Entry #35) is GRANTED to the extent it seeks to dismiss the Fifth Cause of Action in the Second Amended Complaint (Civil RICO claim). As stated at the hearing, Plaintiff has failed to allege a racketeering enterprise separate and distinct from the named Defendants. Richmond v. Nationwide Cassel, L.P., 52 F.3d 640, 646-647 (7th Cir. 1995); Board of County Com'rs of San Juan County v. Liberty Group, 965 F.2d 879, 885 (10th Cir.), cert. denied, 506 U.S. 918 (1992). Plaintiff has also failed to sufficiently allege predicate acts which constitute racketeering activity. However, Plaintiff is granted leave to amend its Second Amended Complaint to plead a claim under RICO. Plaintiff shall file any amendment within ten

(10) days from March 23, 1999.

2. Defendants' Motion to Dismiss (Docket Entry #35) is DENIED to the extent it seeks to dismiss Plaintiff's piercing the corporate veil claim against Defendants, Sidney Born and Harold Born.

3. Defendants' Motion to Dismiss (Docket Entry #35) is DENIED as to the Second, Third and Fourth Causes of Action for the reasons stated in the Court's January 27, 1999 Order.

ENTERED this 24th day of March, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 24 1999 *st*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN DALE DUBUC,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 96-CV-430-BU (M) ENTERED ON DOCKET

DATE MAR 25 1999

JUDGMENT

This matter came before the Court upon Defendants' motions to dismiss and/or for summary judgment. Having previously dismissed Defendant Ron Isman based on Plaintiff's failure to effect service and having dismissed Defendants Satayabama C. Johnson, Roseanne Rodriguez and Linda Russell, the Court considered and granted summary judgment on all claims against the remaining Defendants.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants¹ Stanley Glanz, Doyle Edge, Earl E. McClafin, Jane Cook, Arthur E. Martain (Martin), Zachary J. Vierheller, Officer Warren (Warren Crittenden), Officer Shawn (Robert S. Cartner), and Wencesleo Aguila, and against Plaintiff and that Plaintiff take nothing by his claims.

SO ORDERED THIS 24th day of March, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹Complete names of certain Defendants, as determined from pleadings filed by counsel for Defendants, are indicated in parentheses.

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

FILED

MAR 24 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN DALE DUBUC,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

No. 96-CV-430-BU (M)

ENTERED ON DOCKET
DATE MAR 25 1999

ORDER

It has come to the Court's attention that Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, failed to effect service of process on one of the named defendants in this action brought pursuant to 42 U.S.C. § 1983. Plaintiff filed his original civil rights complaint on May 15, 1996, identifying thirteen (13) defendants, including "Ron Isman, medical administrator." On June 25, 1996, the Court received an unexecuted return of service as to Defendant Ron Isman. The U.S. Marshal form was marked "refused service, incorrect name 6/17/96." Nothing in the record indicates Plaintiff ever again attempted to effect proper service on Defendant Isman, even though more than 2 ½ years have elapsed since the date of the unexecuted return of service. Plaintiff's lack of diligence in pursuing his claims against Defendant Isman and the prejudice to Defendant Isman resulting from the delay lead the Court to conclude that it would be inappropriate to allow Plaintiff additional time to effect service. Therefore, pursuant to Fed. R. Civ. P. 4(m), the Court finds Plaintiff's claims against Defendant Isman should be dismissed without prejudice for failure to effect service of process within 120 days of the filing of the complaint.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's claims against Defendant Ron Isman are dismissed without prejudice for failure to effect service of process.

SO ORDERED THIS 24th day of March, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 22 1999 *FL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SILICONE SPECIALTIES, INC.,

Plaintiff,

vs.

Case No. 98-CV-65-H(M) ✓

WATSON-BOWMAN ACME
CORPORATION, a corporation and
HARRIS SPECIALTY CHEMICAL, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAR 24 1999

REPORT AND RECOMMENDATION

The parties' cross-motions for summary judgment¹ in this patent infringement action are before the undersigned United States Magistrate Judge for report and recommendation. A hearing on the motions was held on December 18, 1998.

I.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue

¹ Defendants' Motion for Summary Judgment [Dkt. 51]; Plaintiff's Motion for Partial Summary Judgment on Validity [Dkt. 54, filed under seal]; and Plaintiff's Motion for Partial Summary Judgment on Infringement [Dkt. 56, filed under seal].

KS

of material fact" and "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, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986). However, the factual record and reasonable inferences to be drawn therefrom must be construed in the light most favorable to the non-movant. *Gullickson v. Southwest Airlines Pilots' Ass'n.*, 87 F.3d 1176, 1183 (10th Cir. 1996).

II. PATENT CLAIMS AT ISSUE

Plaintiff, Silicone Specialties, Inc. (SSI) is the assignee of United States Patent No. 5,190,395 ('395 patent). The invention disclosed by the '395 patent is an expansion joint system for use on roadways, bridges, and parking structures where adjacent roadway slabs are subject to movement yet a flexible seal is required in the gap between adjacent slabs. SSI alleges that an expansion joint system marketed by Defendant Watson-Bowman Acme Corporation (WBA) infringes the '395 patent.

Specifically, Claims 1 and 6 of the '395 patent are at issue. Those claims are set out below in their entirety with the material areas of dispute concerning the alleged infringement highlighted.²

1. A method to produce an expansion joint for adjacent roadway slabs having a gap therebetween, which comprises:

² The parties have raised questions about other aspects of the patent. As to Claim 1, subparagraph (c), there is a question whether the primer Defendants apply to the roadway recesses inhibits rust and corrosion as specified in the patent. As to Claim 6, subparagraph (a), the parties dispute whether Defendants primer is an epoxy. However, infringement requires that every limitation of a claim be present in the accused device. Therefore, in view of the court's interpretation of the patent, these questions are not material and will not be addressed.

- a. cutting or forming a recess into the surface of each of said adjacent roadway slabs to form a pair of recesses parallel to and adjacent said gap;
- b. cleaning said recesses to a sound and rust-free surface;
- c. coating each recess with a slightly resilient polymer primer to inhibit rust and corrosion and to form a bonding surface;
- d. installing a mortar mixture of *said slightly resilient polymer* and aggregate into each recess to form a pair of parallel nosings adjacent to said gap said nosings bonded to said roadway slabs;
- e. sandblasting and then ~~priming~~ *opposed surfaces of said nosings with a silicone primer*;
- f. inserting a temporary backing between said nosings in said gap;
- g. installing an initially liquid silicone sealant between said nosings and on top of said temporary backing which will cure to form a flexible seal.

6. A roadway expansion joint system for adjacent roadway slabs having a gap therebetween, which system comprises:
- a. epoxy primer to coat and adhere to a recess cut or formed into the surface of each of said adjacent roadway slabs forming a pair of recesses parallel to and adjacent said gap;
 - b. a nosing to fill each of said recesses, said nosings formed of a mortar mixture of epoxy and aggregate which will bond with and adhere to said epoxy primer;
 - c. ~~silicone primer to~~ *opposed surfaces of said nosings*;
 - d. a temporary backing inserted between said nosings in said gap; and
 - e. an initially flowable silicone sealant between said nosings and on top of said temporary backing which will cure to form a flexible seal.

['395 Patent attached hereto as Exhibit A; col. 5, 6].

A patent grants the holder the right to exclude others from making, using, offering for sale, selling, or importing the patented invention in exchange for full disclosure of an invention. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384, 1387, 134 L.Ed.2d 577 (1996). The patentee is required to describe the exact scope of an invention and its manufacture in order to secure patent

protection and to advise the public of what is still open to them. *Id.* The scope of a patent is described in its "claims." These claims particularly point out and distinctly claim the subject matter which the patent applicant regards as his invention. 35 U.S.C. § 112.

"Victory in an infringement suit requires a finding that the patent claim 'covers the alleged infringer's product or process,' which in turn necessitates a determination of 'what the words in the claim mean.'" *Id.* at 1388, quoting *H. Schwartz, Patent Law and Practice* 80 (2d ed. 1995). Thus, patent infringement analysis involves two steps. First, the patent claim must be properly construed to determine its scope and meaning; second, the claims as properly construed must be compared to the accused device or process. *Abtox, Inc. v. Exitron Corporation*, 122 F.3d 1019, 1023 (Fed. Cir. 1997); *Carroll Touch, Inc., v. Electro Mechanical Systems, Inc.*, 15 F.3d 1573, 1576 (Fed. Cir. 1993). Construction of a patent, including the terms used within its claims, is question of law within the exclusive province of the court and is therefore amenable to summary judgment. *See, Markham; Intellical, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384, 1387 (Fed. Cir. 1992).

III. CLAIM ONE

A. INTERPRETATION OF CLAIM 1

1. Subparagraph (d).

In the present case, the parties disagree over the meaning of subparagraph (d) in Claim 1 which requires:

d. installing a mortar mixture of said slightly resilient polymer and aggregate into each recess to form a pair of nosings . . .

[emphasis supplied]. Defendants argue that use of the word "said" in the phrase "said slightly resilient polymer" of subparagraph (d) means that the polymer used to form the mortar mixture must be the same slightly resilient polymer referred to in subparagraph: (c) "coating each recess with a slightly resilient polymer primer. . . ." SSI asserts that the subparagraph (c) language "coating each recess with a slightly resilient polymer primer" indicates only that the primer must be of a type that will bond with the slightly resilient polymer which is used to form the mortar mixture of subparagraph (d) "installing a mortar mixture of said slightly resilient polymer and aggregate." Thus, according to SSI, Claim 1 does not require use of the same slightly resilient polymer to prime the recesses as is used to form the aggregate.

The court's interpretation of a patent claim is guided by the principal that the words of a claim are given their ordinary and accustomed meaning to one skilled in the art unless it appears from the specification and file history that they were used differently by the inventor. *Carroll Touch, Inc., v. Electro Mechanical Systems, Inc.*, 15 F.3d 1573, 1577 (Fed. Cir. 1993). Any uncommon meaning must be set out in some manner within the patent disclosure. *Intellical*, 952 F.2d at 1387-88. It is therefore appropriate for the court to use the patent specification which consists of the drawings and description of the invention to interpret claim language. *Carroll Touch, Inc.*, 15 F.3d at 1577. The Federal Circuit has recently instructed: "[t]he construction that stays true to the claim language and most naturally aligns with the

patent's description of the invention will be, in the end, the correct construction." *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998). Further, "[a] claim construction is persuasive, not because it follows a certain rule, but because it defines terms in the context of the whole patent." *Id.*

The court has reviewed the patent specification and finds that the inventor did not assign an uncommon meaning to the word "said." The word "said" is used a number of times throughout claim 1 and in each instance it is used to refer to a previously mentioned item: "said adjacent roadway slab"; "said gap"; "said recess"; "said nosing"; and "said temporary backing." This usage is consistent with the dictionary definition of "said," which is "aforementioned." *Webster's Ninth New Collegiate Dictionary*, p. 1036.

Furthermore, other aspects of the patent specification support the conclusion that the mortar mixture uses the same polymer used to prime the recesses cut in the roadway slab. In the section of the patent entitled "Summary Of The Invention," it is explained:

The sidewalls and face of each recess are next primed with a slightly resilient polymer primer. After the recesses have been coated with the primer, *an additional quantity of the slightly resilient polymer* will be combined with an aggregate to form a mortar mixture.

[Ex. A, Col. 2, lines 27-32] [emphasis supplied]. Likewise, the detailed descriptions of the invention's preferred embodiment indicate that the same slightly resilient polymer is used to prime the recesses as is used to form the mortar mixture:

The sidewalls and face of each recess are next primed with a slightly resilient polymer primer . . .

* * *

After the recesses have been coated with the epoxy primer, *an additional quantity of the slightly resilient polymer* will be combined with an aggregate, such as crushed stone or flint, to form a mortar mixture.

[Ex. A, Col. 3, lines 49-50; 62-65] [emphasis supplied]. And:

The sidewalls and base of the recess are then coated with an epoxy primer in undiluted or neat form. . . . Thereafter, *an additional quantity of epoxy* will be combined with an aggregate to form a mortar mixture which will be poured to form nosings

[Ex. A, Col. 4, lines 48-54] [emphasis supplied].

To support its interpretation of subparagraph (d), SSI relies on the doctrine of claim differentiation, which presumes that there is a difference in scope among the claims in a patent. SSI argues that the language of Claim 2 supports its interpretation of Claim 1. According to SSI, the language of Claim 2, "[a] method . . . wherein said slightly resilient polymer primer and slightly resilient polymer for said mortar mixture are liquid, coal tar based epoxy and compatible with silicone," adds the limitation that both the primer and the polymer are formed from the same material. Since Claim 2 adds this limitation, SSI contends that limitation should not be read into Claim 1. The court rejects SSI's claim differentiation analysis. The doctrine of claim differentiation cannot broaden claims beyond the scope supported by the patent specification. *ATD Corporation v. Lydall, Inc.*, 159 F.3d 534, 541 (Fed. Cir. 1998); *Multiform Desiccants, Inc. v. Medzam, Inc.*, 133 F.3d 1473, 1479 (Fed. Cir. 1998). Nothing within the patent specification supports SSI's interpretation.

Neither party presented any evidence that the particular phraseology used in subparagraphs (c) and (d) convey an uncommon meaning for the term "said." Absent such evidence, and in view of the ordinary meaning of the words used, and the information contained in the specification, the court concludes that the language in subparagraph (d) "said slightly resilient polymer" refers to the same slightly resilient polymer used in subparagraph (c) to coat the surfaces of the recesses.³

2. Subparagraph (e).

The parties also disagree about the meaning of subparagraph (e) of Claim 1, which requires:

- e. sandblasting and then ~~priming~~ **priming** opposed surfaces of said nosing with a silicone primer;

[Ex. A, Col. 5, lines 38-39] [emphasis supplied]. Defendants argue that the term "priming" has a well-understood meaning in the industry. "Priming" is a preliminary or preparatory operation that is completed prior to another step in the process. Thus, according to Defendants, the term "priming" signifies a step whereby a product, a "primer," is applied to the nosing surfaces following sandblasting and preceding the installation of a temporary backing and the initially liquid silicone sealant.

SSI maintains that the patent does not specify that the priming must occur before the application of the silicone sealant. According to SSI, the only limitation on priming contained in the patent is that it must occur before the end of the curing of

³ SSI's own expert, Charles A. Cox, testified that he construes the language of subparagraph (d) in this same manner. [Dkt. 79, Tab F, p. 144-45].

the initially liquid silicone sealant. Citing the *Standard Guide for the Use of Elastomeric Joint Sealants* (ASTM Guide), SSI states that a primer can be anything used to "improve the adhesion of a sealant to a substrate." [Dkt. 78, p. 14, and Appendix J]. Given this definition, SSI maintains that, to those skilled in the art, subparagraph (e) only requires the presence of some type of "adhesion promoter" to enable the silicone sealant to bond with the nosings and does not necessarily require application of a primer coat before application of the silicone sealant.

Section 7.1 of the ASTM Guide, cited by SSI, states "[t]he purpose of a primer is to improve the adhesion of a sealant to a substrate." [Dkt. 78, Appendix J, p. 185]. Although the ASTM Guide clearly states the purpose of the primer, a fair reading of section 7.1, and the one preceding it, does not support SSI's contention that in the sealant industry a primer is anything used to improve adhesion. Section 6.1 deals with substrates and addresses matters to be considered in preparing substrates for application of sealants. This section advises that some proprietary treatments on concrete and masonry may inhibit bonding which requires special consideration to determine "suitable joint preparation methods and what primers should be used *before joint materials are applied.*" [ASTM Guide §6.1, Dkt. 78, Appendix J] [emphasis supplied]. Thus, §6.1 uses the term primer to signify that a substance is applied before application of a joint sealant. The text of §7.1 contains a similar usage of the term primer:

Many sealants require primers on all substrates, some on only certain substrates or on none at all. . . . Another application problem relates to the length of time a primer

must cure *before the sealant can be applied*. With some primers, a sealant can be applied almost immediately, while with others a lengthy cure time is required. Many sealants require a primer for maximum adhesion to concrete and masonry surfaces.

Id. [emphasis supplied].

Other sources provided by SSI likewise fail to confirm that in the industry the term "primer" refers to anything which promotes adhesion. For instance, SSI supplied the ASTM Standard Definitions of Terms Relating to Building Seals and Sealants which defines primer, as follows: "**primer- *in building construction***, a compatible coating designed to enhance adhesion." [Dkt. 59, Appendix F] [bold and italics in original]. This definition confirms the purpose of a primer is to promote adhesion, but identifies it as a "compatible coating" which again suggests that a primer is a substance applied separately from the materials one is seeking to adhere together.

This usage in the industry is confirmed by the deposition testimony of several witnesses. Joe Ray Cathey, co-inventor of the patent in issue, testified that an adhesion promoter can be internal or external, with an external adhesion promoter being one that is applied as a prime coat. [Dkt. 60, Exhibit 9, p. 100]. He said: "[B]asically, when you talk in the construction vernacular, the term 'primer' is if you do something prior to the application of a subsequent product, everybody calls that a primer." *Id.* at 101. Daniel Nee of Dow Corning testified that any primer could be referred to as an adhesion promoter. [Dkt. 79, Exhibit A, p. 17]. He also testified that a primer is going to have a different definition for every industry. "In the sealant industry, a primer, the definition of a primer is to enhance adhesion." *Id.* at 44. "A

primer, I believe, is generally used as a product before the main product." *Id.* at 45. In his deposition Stephen Clarson, Ph.D., expert witness for SSI, agreed that the term primer is reserved for adhesion promoters that are actually applied to the substrate, as opposed to being applied to the sealant. [Dkt. 79, Exhibit L, p. 71-72]. The court finds that in the sealant industry, a primer is a preliminary or preparatory operation that is completed prior to another step in the process. Within the patent specification, there is no indication that the inventor intended the word "priming" to differ from this accustomed meaning.

Based on the clear evidence of sealant industry usage of the term "primer," and the absence of a contrary meaning within the patent specification, the court concludes that the phrase in subparagraph (e) "and then priming opposed surfaces of said nosings with a silicone primer," is properly construed to require the separate application of a primer after sandblasting and before the eventual application of an initially liquid silicone sealant.

B. LITERAL INFRINGEMENT OF CLAIM 1

Infringement requires that every limitation of a claim be met literally, or by a substantial equivalent. *Carroll Touch, Inc.*, 15 F.3d at 1579; *Intellicall, Inc.*, 952 F.2d at 1389. Literal infringement exists when every limitation of the claim is found in the accused device. *Strattec Sec. Corp. v. General Automotive Specialty Co.*, 126 F.3d 1411, 1418 (Fed. Cir. 1997).

The accused device does not use a mortar mixture of the same slightly resilient polymer as is used to coat the roadway recesses as required by subparagraphs (c) and

(d) of Claim 1. Further, in the accused device no separate substance is applied to the nosings to prime them before application of the initially liquid silicone sealant, as required by subparagraph (e) of Claim 1. Therefore, the court concludes that the accused device does not literally infringe Claim 1.

C. INFRINGEMENT OF CLAIM 1 UNDER THE DOCTRINE OF EQUIVALENTS

Even though a patent is not infringed literally, "[i]nfringement may be found under the doctrine of equivalents if every limitation of the asserted claim, or its 'equivalent,' is found in the accused subject matter, where an 'equivalent' differs from the claimed limitation only insubstantially." *Ethicon Endo-Surgery, Inc., v. United States Surgical Corp.*, 149 F.3d 1309, 1315 (Fed.Cir. 1998). "An equivalent under the doctrine of equivalents results from an insubstantial change which, from the perspective of one of ordinary skill in the art, adds nothing of significance to the claimed invention." *Valmont Industries, Inc., v. Reinke Mfg. Co., Inc.*, 983 F.2d 1039, 1043 (Fed.Cir. 1993).

The doctrine of equivalents analysis often involves a three-part inquiry: whether the accused device performs substantially the same overall function or work, in substantially the same way, to obtain the same overall result as the claimed invention. *Id.* However, the Federal Circuit has acknowledged that this so-called "function, way, result test" is not the sole test for equivalency. Other objective evidence may be relevant to the determination whether the differences between an accused product or process and the claimed invention are insubstantial. *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1566 (Fed. Cir. 1996). The Supreme Court has

stated that "the particular linguistic framework used is less important than whether the test is probative of the essential inquiry: Does the accused product or process contain elements identical or equivalent to each claimed element of the patented invention?" *Warner-Jenkinson Co., Inc., v. Hilton Davis Chemical Co.*, 520 U.S. 17, 117 S.Ct. 1040, 1054, 137 L.Ed.2d 146 (1997). However, the Supreme Court has cautioned that "[i]t is important to ensure that the application of the doctrine [of equivalents], even as to an individual element [limitation], is not allowed such broad play as to effectively eliminate that element in its entirety." *Id.* 117 S.Ct. at 1049.

In order to prevent the doctrine of equivalents from effectively eliminating limitations of a claim on which the public is entitled to rely in avoiding infringement, a patentee is required to provide particularized testimony as to the insubstantiality of the differences between the accused device or process and the claimed invention; or he must provide such testimony as to the function, way, result test. *Texas Instruments*, 90 F.3d at 1566-67. And, such evidence must be presented on a limitation-by-limitation basis. Generalized testimony as to the overall similarity between the claims and the accused product or process will not suffice to prove infringement under the doctrine of equivalents. *Id.*

Whether an accused device infringes is a question of fact, normally for the jury. However, a triable issue of fact exists only if the evidence is such that a reasonable jury could resolve the question in favor of the patentee. *Dawn Equipment Co., v. Kentucky Farms Inc.*, 140 F.3d 1009, 1017 (Fed.Cir. 1998). If the evidence is lacking, the court should order judgment for the defendant. *Id.* See also *Warner*

Jenkinson, 117 S.Ct. at 1053 n.8. (Where the evidence is such that no reasonable jury could determine two elements to be equivalent, district courts are obliged to grant partial or complete summary judgment).

Defendants seek summary judgment on the basis that the accused device does not contain an equivalent of the priming step of subparagraph (e) of Claim 1. Thus, the question is whether the element, or limitation, of "priming opposed surfaces of said nosing with a silicone primer" is equivalently present in the accused device. SSI asserts that although Defendants do not use a separate primer, they use the equivalent of a silicone primer because their silicone formulation includes an adhesion promoter. Defendants deny that the silicone formulation they employ includes an adhesion promoter. A fact question exists as to whether the Defendants' silicone sealant includes an adhesion promoter. Evidence directed toward proof of that question is lacking because the formulation of Defendants' silicone sealant has not been fully disclosed to SSI by the non-party manufacturer, Crafc0. However, the existence of this question is not an impediment to summary judgment because throughout the equivalents discussion the court will assume, *arguendo*, that Defendants' silicone sealant includes an adhesion promoter.

The evidence establishes that the purpose of using a silicone primer before application of a silicone sealant is to enhance adhesion of the silicone to the substrate. The evidentiary record is silent as to whether an internal adhesion promoter, one included in a silicone sealant, enhances adhesion of the silicone to the substrate in the same way that a silicone primer coat does. Further, distinguishing "evidence" from

attorney argument, the court notes SSI has not forwarded any evidence that elimination of the priming step is an insubstantial change to the method disclosed by the '395 patent. There is, however, evidence that inclusion of the priming step is a disadvantage because application of the primer and waiting for it to dry requires additional time. And, improper application of the silicone primer, or failure to wait for it to dry properly may cause the joint to fail. [Dkt. 60, Tab 3, ¶18 (Richard J. Baker declaration); Tab 5, ¶¶ 11-14 (Chehovits declaration); Tab 15, p. 15 (Dale W. Baker deposition)]. In addition, the patent itself discloses that time savings and durability are substantial considerations in expansion joint fabrication:

In remedial applications, however, time is a critical factor so that down time is minimized particularly where vehicular traffic has to be returned before all of the components have cured.

* * *

Accordingly, it is a principal object and purpose of the present invention to provide an expansion joint system for both new construction and remedial applications which may be installed quickly yet is extremely durable.

[Ex. A, Col 1, In 36-40; Col 2, In 3-7].

SSI has not provided particularized testimony as to the insubstantiality of the differences between the accused device or process and the claimed invention, nor has it provided testimony demonstrating that an internal adhesion promoter performs the same function, in the same way, to achieve the same result as a silicone primer coating. Thus, the record contains no evidence from which a jury could determine that an internal adhesion promoter is equivalent to "priming opposed surfaces of said nosing with a silicone primer." Accordingly, the undersigned concludes that summary

judgment for Defendants is appropriate on the issue of infringement of Claim 1 under the doctrine of equivalents.

IV.
CLAIM 6

A. INTERPRETATION OF CLAIM 6

The parties disagree over the meaning of subparagraph (c) of Claim 6. As relevant to this dispute, Claim 6 includes:

6. A roadway expansion joint system for adjacent roadway slabs having a gap ~~therebetween~~, which system comprises:

* * *

c. silicone primer to coat opposed surfaces of said nosings;

[Ex. A, Col. 6]. The parties' positions concerning the meaning of this limitation are the same as their positions with respect to subparagraph (e) of Claim 1 which required "priming opposed surfaces of said nosings with a silicone primer." The court's conclusion as to the meaning is also the same. "[S]ilicone primer to coat opposed surfaces of said nosings" requires the application of a separate primer product to the nosings before the application of an initially flowable silicone sealant.

B. LITERAL INFRINGEMENT OF CLAIM 6

SSI has acknowledged that Defendants should be granted summary judgment on the issue of literal infringement of Claim 6. [Dkt. 78, p. 19, 24].

C. INFRINGEMENT OF CLAIM 6 UNDER THE DOCTRINE OF EQUIVALENTS

The question of equivalents as to Claim 6 is whether the limitation of "silicone primer to coat opposed surfaces of said nosings" is equivalently present in the accused

device. SSI's allegation that Defendants infringe Claim 6 under the doctrine of equivalents is subject to the same infirmity as its equivalents argument with regard to Claim 1. The record contains no evidence from which a jury could determine that an internal adhesion promoter is equivalent to coating the opposed surfaces of the nosings with a silicone primer or that elimination of the primer is insubstantial. Therefore, summary judgment is appropriate for Defendants on the issue of infringement of Claim 6 under the doctrine of equivalents.

V.
PATENT VALIDITY

Since the court has found no infringement of the patent, it must decide whether to address patent validity. In *Cardinal Chem. Co. v. Int'l, Inc.*, 508 U.S. 83, 113 S.Ct. 1967, 124 L.Ed.2d 1 (1993), the Supreme Court addressed the Federal Circuit's practice of routinely vacating, as moot, patent validity judgments entered by district courts in cases where it affirmed district court findings of noninfringement. The Court held that the Federal Circuit's affirmance of a finding that a patent has not been infringed is not per se a sufficient reason for vacating, a declaratory judgment holding the patent invalid. However, the Court drew a distinction between invalidity asserted as an affirmative defense and as a counterclaim for declaratory judgment, stating: "An unnecessary ruling on an affirmative defense is not the same as the necessary resolution of a counterclaim for a declaratory judgment." *Id.* at 1973. The Court did not discuss whether district courts had an obligation to decide the issue of validity when the dispute between the parties was disposed of on other grounds, and the

Federal Circuit has not imposed such an obligation. *Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1481 (Fed.Cir. 1998).

It is usually considered to be the better practice for the district court to decide validity questions, rather than dispose of suits on the grounds of noninfringement. *Sinclair & Carroll Co. v. Interchemical Corporation*, 325 U.S. 327, 65 S.Ct. 1143, 89 L.Ed. 1644 (1945). However, in view of the finding that Defendants are entitled to summary judgment on patent infringement, and since Defendants have asserted invalidity only as an affirmative defense to infringement, and not as a counterclaim,⁴ a decision on the validity of the patent is unnecessary. The undersigned therefore recommends that the court decline to reach the issue of patent validity, as having been mooted by the decision on infringement.

VI. UNFAIR COMPETITION

SSI has alleged Defendants have violated §43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and have engaged in deceptive trade practices under the New Mexico Deceptive Trade Practice Act, N.M.S.A. § 57-12-1, *et seq.* Defendants seek summary judgment on these claims.

SSI claims that the Defendants' sale and use of the accused product is likely to cause and has caused confusion with its patented product and method. In particular, SSI claims that Defendants have exactly copied SSI's colors (grey and black) and the

⁴ Defendants have filed a motion to amend their answer to include a counterclaim for declaratory judgment that the '395 Patent be adjudged invalid. [Dkt. 39]. That motion was filed after the deadline for amendments to pleadings and has been denied by separate order.

striped arrangement of its product, which SSI argues is "sufficient to infringe Plaintiff's image." [Dkt. 78, p. 23]. According to Joe Ray Cathey, co-inventor of the '395 patent, the following acts constitute unfair competition:

They're coming in, copying our system right down to the color; going back to the states and using the specifications that we have spent years and a tremendous amount of money developing, and are being allowed in certain cases to bid their product against ours. Untested, I might add.

* * *

Watson Bowman has sold their product against our specifications. They have—how do I say this? They have put a product in the market that, to an untrained person or even myself at some distance, cannot be discerned between our product and theirs. You can't tell the difference. So they're not only using our specifications; they're putting a product out that, in certain cases, has confused the end user as to whose product is actually being installed.

[Dkt. 78, Appendix G, pp. 25-26]. SSI has identified "at least three instances of confusion surrounding the installation of the accused product as being SSI's product."

[Dkt. 78, p. 23]. Mr. Cathey testified:

As an example, I received a call from engineers in Santa Fe, New Mexico, complaining about the poor performance of our product. And in fact it was Watson Bowman. They had gone against our specification and installed a project against our work and basically, you know, our literature and the state spec, and it had failed. And the engineer was calling us, wanting to know why we had such a crappy product.

* * *

We had a contractor call us from San Antone [sic] saying that we had a bad job, and very poorly-installed project, and was upset; that we would allow the quality of work. And when we investigated it, it was Watson Bowman.

* * *

We had another contractor call about a project north of Waco. . . . Waco, Texas. Told us our product was failing

on a bunch of joints on Interstate 35. And they were
Watson Bowman.

[Dkt. 78, Appendix G, p. 26; Dkt. 119, p. 27].

Defendants seek summary judgment on SSI's unfair competition and deceptive trade practices claims. According to Defendants, SSI's complaint fails to even allege facts sufficient to support any viable theory of relief under either the Lanham Act or corresponding state law. Further, Defendants maintain that Plaintiff will be unable to produce evidence to support these claims at trial.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides a federal cause of action for unprivileged imitation, including trade dress infringement. Trade dress features are those which comprise a product's look or image. In a trade dress infringement case, the plaintiff must make two showings: (1) either (a) that its product's trade dress features are inherently distinctive because those features "almost automatically tell a customer that they refer to a brand," or (b) that the trade dress has become distinctive through acquisition of secondary meaning, so that its primary significance in the minds of potential consumers is no longer as an indicator of something about the product, but as an indicator of its source or brand; and (2) that potential customers are likely to be confused by the defendant's trade dress into thinking that the defendant is affiliated, connected or associated with the plaintiff, or that the defendant's goods originated with, or are sponsored or approved by, the plaintiff. *Vornado Air Circulation Systems, Inc., v. Duracraft Corp.*, 58 F.3d 1498, 1502-03 (10th Cir. 1995).

The nosings of SSI's expansion joint are black. The silicone sealant which lies between the two parallel black nosings is gray, which creates a black-gray-black striped appearance. Although SSI has produced Mr. Cathey's deposition testimony relating instances of customer confusion,⁵ it has failed to come forward with any evidence which would tend to establish that the color and striped pattern of its expansion joint is inherently distinctive, or that it has acquired a secondary meaning. Without such evidence, SSI cannot prevail. Consequently, summary judgment should be granted to Defendants on SSI's Lanham Act claim.

The New Mexico Supreme Court has stated that four elements must be established to invoke the New Mexico Unfair Practices Act:

First, the complaining party must show that the party charged made an "oral or written statement, visual description or other representation" that was either false or misleading. Second, the false or misleading representation must have been "knowingly made in connection with the sale, lease, rental or loan of goods or services or . . . collection of debts." Third, the conduct complained of must have occurred in the regular course of the represented's trade or commerce. Fourth the representation must have been of the type that "may, tends to or does, deceive or mislead any person." [internal citations omitted].

Stevenson v. Louis Drefus Corp., 811 P.2d 1308, 1311 (N.M. 1991)(quoting *Ashlock v. Sunwest Bank of Roswell, N.A.*, 753 P.2d 346, 347 (N.M. 1988)). The gravamen of an unfair trade practice under New Mexico law is a misleading, false, or deceptive

⁵ Mr. Cathey's deposition testimony concerning customer confusion is hearsay, which cannot defeat a motion for summary judgment. *Wright-Simmons v. The City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998); *Scosche Industries, Inc. v. Visor Gear, Inc.*, 121 F.3d 675, 681 (Fed.Cir. 1997).

statement made knowingly in connection with the sale of goods or services. *Diversey Corp., v. Chem-Source Corp.*, 965 P.2d 332, 338 (N.M. App. 1998).

SSI has not identified any misleading statement or representation attributable to Defendants which was made in connection with the sale of its expansion joint system. SSI has thus failed to demonstrate the existence of a material fact question sufficient to overcome Defendants' motion for summary judgment.

VII. CONCLUSION

In accordance with the foregoing, the undersigned United States Magistrate Judge recommends that the following orders disposing of the suit be entered:

(1) Defendants' Motion For Summary Judgment [Dkt. 51] is GRANTED in part and DENIED in part. Summary judgment is GRANTED for Defendants on the issues of noninfringement of U.S. Patent No. 3,190,395, either literally or under the doctrine of equivalents; and on the Lanham Act and New Mexico Unfair Trade Practices Act claims. Summary judgment on the issue of patent invalidity is DENIED AS MOOT.

(2) Defendants' Application For Leave To Supplement The Record On Summary Judgment [Dkt. 129] is DENIED.

(3) Plaintiff's Motion For Partial Summary Judgment on Validity Of U.S. Patent No. 5,190,395 [Dkt. 54] is DENIED AS MOOT.

(4) Plaintiff's Motion For Partial Summary Judgment On The Issue Of Infringement [Dkt. 56] is DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 22nd Day of March, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24 Day of March, 1999.



US005190395A

United States Patent [19]

[11] Patent Number: **5,190,395**

Cathey et al.

[45] Date of Patent: **Mar. 2, 1993**

- [54] **EXPANSION JOINT METHOD AND SYSTEM**
- [75] Inventors: **Joe R. Cathey, Claremore; Dale W. Baker, Owasso, both of Okla.**
- [73] Assignee: **Silicone Specialties, Inc., Tulsa, Okla.**
- [21] Appl. No.: **835,239**
- [22] Filed: **Feb. 12, 1992**
- [51] Int. Cl.⁵ **E01C 11/06; E01C 11/10**
- [52] U.S. Cl. **404/74; 404/48; 404/64; 404/67; 404/69**
- [58] Field of Search **404/48-50, 404/51, 67-69, 74; 52/396, 403**

4,699,540	10/1987	Gibbon et al.	404/49
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4,784,516	11/1988	Cox	404/69
4,824,283	4/1989	Belangie	404/64
4,861,043	8/1989	Anderson et al.	277/1
4,871,809	10/1989	Szarka	525/131
4,927,291	5/1990	Belangie	404/64
4,936,704	6/1990	Killmeyer	404/74
4,956,500	9/1990	Vermillion	525/54.5
4,963,056	10/1990	Cihal	404/69
4,968,178	11/1990	Koster et al.	404/49
5,007,765	4/1991	Dietlein et al.	404/74
5,088,256	2/1992	Face, Jr.	404/74 X

Primary Examiner—Stephen J. Novosad
Attorney, Agent, or Firm—Head & Johnson

[56] **References Cited**
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3,538,820	11/1970	Tonjes	404/74
3,702,093	11/1972	Van de Loock et al.	404/62
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4,279,533	7/1981	Peterson et al.	404/68
4,332,504	6/1982	Arai	404/68
4,362,430	12/1982	Ceintrey	404/68
4,403,067	9/1983	Uffner	525/54.5
4,447,172	5/1984	Galbreath	404/68
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4,601,604	7/1986	Clark et al.	404/74 X
4,616,954	10/1986	Taga	404/74

[57] **ABSTRACT**
A method to produce an expansion joint for adjacent roadway slabs having a gap therebetween. A recess is cut or formed into the surface of each adjacent roadway slab to form a pair of recesses parallel to and adjacent to the gap. The recesses are cleaned to a sound, dust-free and rust-free surface. Each recess is coated with a slightly resilient polymer primer to inhibit rusting and corrosion and to form a bonding surface. A mortar mixture of a slightly resilient polymer and aggregate is installed in each recess to form a pair of parallel nosings adjacent to the gap, the nosings being bonded to the roadway slabs. Opposed surfaces of the nosings are primed with a silicone primer. A temporary backing is inserted in the gap between the nosings. An initially liquid silicone sealant is installed between the nosings and on top of the temporary backing which will cure to form a flexible seal.

10 Claims, 3 Drawing Sheets

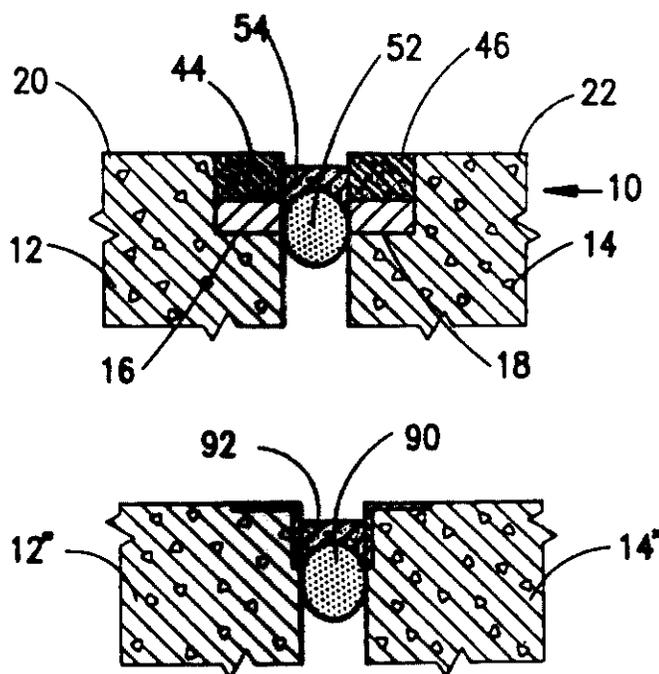


Exhibit A

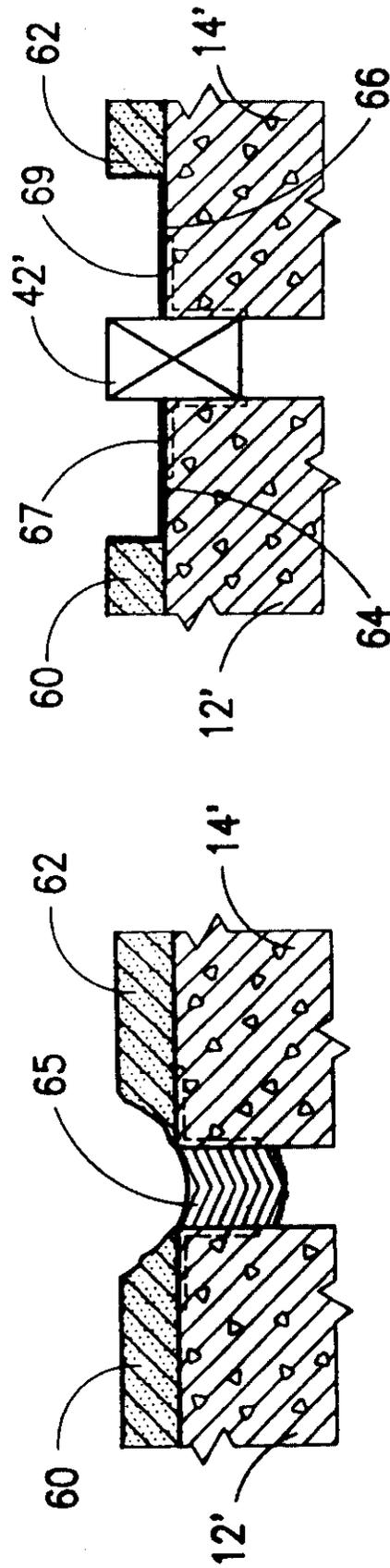


Fig. 6

Fig. 5

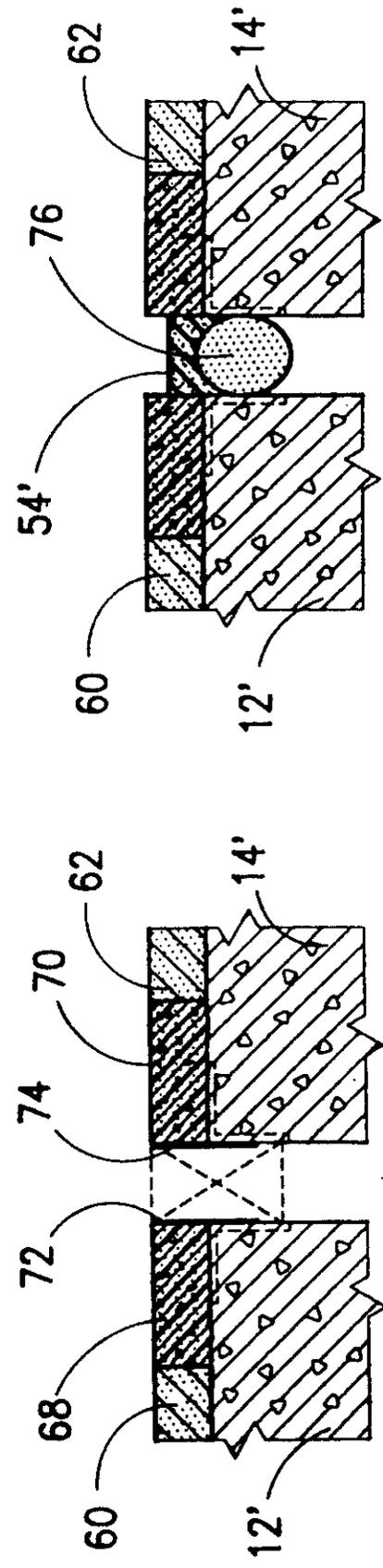


Fig. 8

Fig. 7

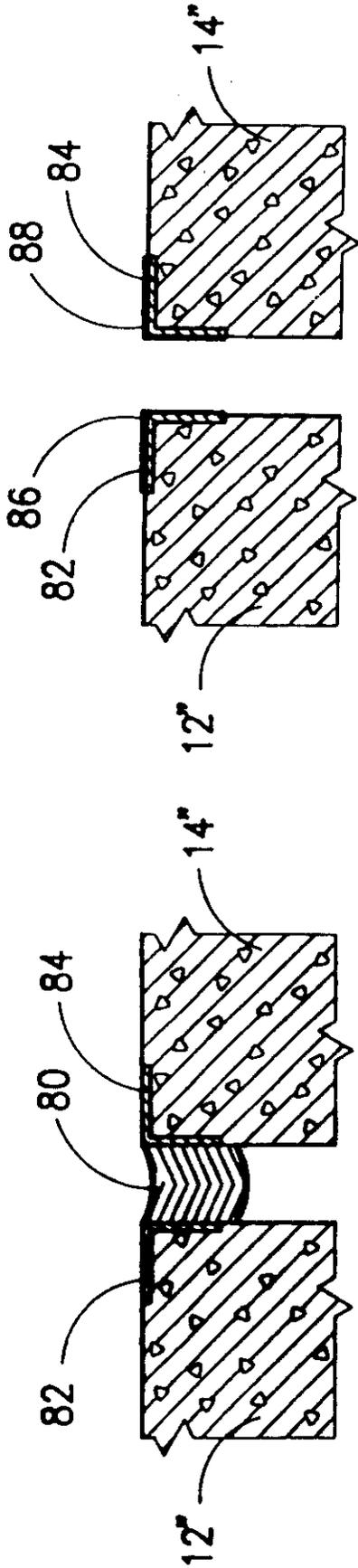


Fig. 10

Fig. 9

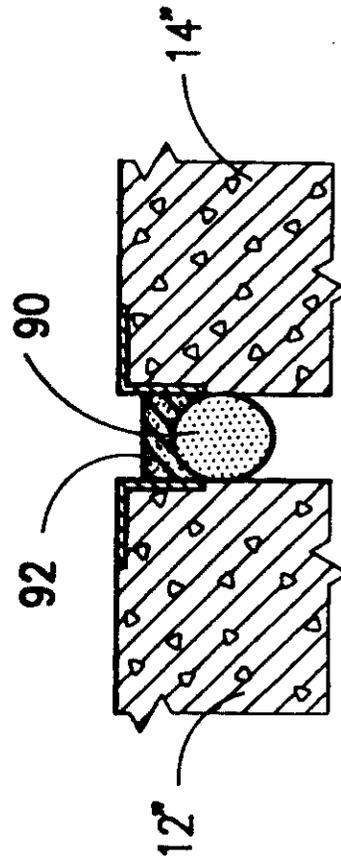


Fig. 11

EXPANSION JOINT METHOD AND SYSTEM

BACKGROUND OF THE INVENTION

1 Field of the Invention

The present invention is directed to an expansion joint system for bridges, roadways, parking structures and the like wherein adjacent roadway slabs are subject to movement yet a flexible seal is required in the gap between adjacent slabs.

2 Prior Art

Roadways, bridges and parking structures are customarily built of sections or slabs arranged with an expansion gap between adjacent slabs. It is known that the slabs will expand and contract in response to temperature changes. In many applications, such as bridges and parking structures, loading due to vehicular traffic also causes vertical movement of the slabs.

Notwithstanding the movement of the slabs, a flexible joint which will retain a water tight seal is highly desirable. A water tight seal will prevent water from getting beneath the slabs and rusting bridges or parking structure components. In freezing conditions, the water will cause damage because of heaving. Additionally, road salts are highly corrosive to bridges. A seal in the expansion joint will also prevent debris from lodging in the joint and causing problems.

Many materials in various arrangements have heretofore been used to seal roadway, bridge and parking structure expansion joints. Some of the materials lose their adhesion and quickly require replacement. In applications with an asphalt overlay, the seal might hold but the asphalt may crumble away.

In new roadway, bridge and parking structure construction, time may not be a critical factor in installation of the joint seal. In remedial applications, however, time is a critical factor so that down time is minimized particularly, where vehicular traffic has to be returned before all of the components have cured.

Various expansion joints have heretofore been proposed. As an example, Gibbon (U.S. Pat. No. 4,699,540) discloses an expansion joint system where a preformed longitudinal resilient tube of heat cured silicone is installed in the recess. An initially flowable adhesive silicone is then injected into the recess on both sides of the tube.

Galbreath (U.S. Pat. No. 4,447,172) discloses a flexible elastomeric membrane wherein adhesive may be utilized to assist in holding the membrane to the side rails.

Cihal (U.S. Pat. No. 4,963,056) provides layers of plastic concrete compound which are cast in the recess. An adhesive coating of an epoxy resin is coated on top of the second layer to assist in retaining a pad which spans the gap.

Belangie (U.S. Pat. No. 4,824,283 and 4,927,291) provides a preformed strip of silicone which floats or is embedded in a silicone adhesive.

Peterson et al. (U.S. Pat. No. 4,279,533) discloses an expansion joint system wherein a metal plate secured to one concrete section bridges the expansion slot. The remainder of the recess is filled with a premolded elastomeric slab surrounded by edge portions which are molded on the job site.

Watson (U.S. Pat. No. 4,080,086) discloses a joint sealing apparatus having a pair of elongated elastomeric pads embedded with crushed rock which are secured to

the concrete slabs by studs and nuts. A flexible resilient elongated member extends between the pads.

Accordingly, it is a principal object and purpose of the present invention to provide an expansion joint system for both new construction and remedial applications which may be installed quickly yet is extremely durable.

It is a further object and purpose of the present invention to provide an expansion joint system which combines a capability of adhering to both concrete and steel as well as acting as a primer for adhesion to a silicone sealant.

SUMMARY OF THE INVENTION

An expansion joint system is provided in the present invention to be used for roadways, bridges, parking structures and like. Adjacent roadway slabs are provided with an expansion gap therebetween for thermal expansion and dynamic loading. A recess is provided or is cut into each adjacent roadway section. The base of each recess is parallel to the surface of the roadway. The sidewall of each recess is parallel to the gap between adjacent slabs. The walls and base of the recesses will be cleaned or sandblasted to remove all rust, corrosion and foreign materials.

A temporary form will be installed in the gap between the concrete slabs. The sidewalls and face of each recess are next primed with a slightly resilient polymer primer. After the recesses have been coated with the primer, an additional quantity of the slightly resilient polymer will be combined with an aggregate to form a mortar mixture. A temporary form is inserted in the gap having a top flush with the surface of the roadway. This mixture is then poured into the recesses with enough mortar mixture to fill the recesses to the surface of the road. After the mortar mixture has cured, solid nosings are formed.

The temporary form is removed and the opposed faces of the nosings are sandblasted and then coated with a silicone primer. A preformed backer rod is inserted and wedged in the gap between the nosings to form a shelf. A silicone sealant, initially in liquid form, is then poured or inserted in the gap on top of the backing rod in order to form a water-tight seal.

BRIEF DESCRIPTION OF THE DRAWINGS

FIGS. 1 through 4 illustrate sectional views showing the installation sequence of an expansion joint system of the present invention in a remedial application having a strip seal joint retained by parallel plates;

FIGS. 5 through 8 illustrate sectional views showing the installation sequence of an expansion joint system of the present invention in a remedial application having concrete slabs with an asphalt overlay; and

FIGS. 9 through 11 illustrate sectional views showing the installation sequence of an expansion joint system of the present invention in a remedial application having metal plate nosings with a flexible compression seal.

DETAILED DESCRIPTION OF THE PREFERRED EMBODIMENT

Referring to the drawings in detail, FIGS. 1 through 4 illustrate the installation sequence of an expansion joint system 10 of the present invention in a remedial application. The expansion joint system 10 is shown in repair of a failed or damaged strip seal joint on a roadway.

It will be understood that the use of the expansion joint system 10 of the present invention may be used for roadways, bridges, parking structures and the like. In each instance, adjacent roadway slabs are provided with an expansion gap therebetween. A discussion of the use of the expansion joint system in one application will, therefore, be applicable to other uses.

As seen in FIG. 1, a pair of adjacent concrete roadway slabs 12 and 14 are shown in sectional view prior to introduction of the present invention. An expansion gap is provided between the adjacent roadway slabs 12 and 14 to allow for thermal expansion and dynamic movement. A recess 16 and 18, respectively, is provided in each adjacent roadway sections 12 and 14. The base of the recesses 16 and 18 are parallel to the surface of the roadway 20 and 22. The sidewall of the recess is parallel to the gap between the adjacent slabs. An elastomeric strip 30 extends across the gap and provides a seal in the joint. The elastomeric strip 30 is held in place in recess 16 by a lower steel plate 32 and an upper steel plate 34 which is held in place by a bolt 36.

The strip seal 30 is secured to concrete section 14 by a lower steel plate 38, an upper steel plate (which has broken off) and a bolt 40, a part of which is broken off.

In the condition illustrated in FIG. 1, strip seal 30 will eventually fall off and the seal will fail. An additional problem encountered with the strip seal joint is that it is recessed significantly from the surface of the roadway resulting in a rough ride and increase in stress on the joint.

FIG. 2 illustrates the initial installation steps of the expansion joint system. The remaining top plate 34 is removed as well as the strip seal 30 itself. If the lower plates are sound and secure, they may be left in place. If not, the lower plates may be removed as well.

The walls and base of the recesses 16 and 18 must be cleaned, dry, rust-proof and sound. The top surface of the metal plates 32 and 38 will be cleaned or sandblasted to a white metal to remove all rust and corrosion. The walls of the recess will likewise be cleaned or sandblasted.

A temporary form 42 will be installed in the gap between the concrete slabs 12 and 14 flush with the riding surface of the roadway. Styrofoam or other lightweight material that may be compressed slightly will be used for this purpose. The temporary form may also be covered with a layer of tape bond-breaker to facilitate removal of the form.

The sidewalls and face of each recess are next primed with a slightly resilient polymer primer as illustrated by heavy lines 43 and 45. A coal tar liquid epoxy has been found to be desirable for this application. One coal tar liquid epoxy which has been found acceptable for this purpose is manufactured under the name SILSPEC 900 PNS and is a two-component-type coal tar liquid epoxy which adheres to concrete, asphalt and steel. The use of the coal tar epoxy in neat or undiluted form provides an excellent seal for the metal surface to prevent rusting or corrosion.

If the metal surface is allowed to rust, the bond with the nosings may be broken.

After the recesses have been coated with the epoxy primer, an additional quantity of the slightly resilient polymer will be combined with an aggregate, such as crushed stone or flint, to form a mortar mixture. As best seen in FIG. 3, this mixture is then poured into the recesses 16 and 18 with enough mortar mixture to fill the recesses up to the surface of the road.

After the mortar mixture has cured, solid nosings 44 and 46 are formed. The nosings have excellent adhering quality to the primer in the recesses and are extremely strong and durable. Additionally, the slightly resilient polymer component will absorb some of the impact from traffic. Once the nosings have cured, the temporary form 42 is removed as seen in FIG. 3.

After removal of the temporary form, the opposed faces of the nosings are sandblasted and then coated with a silicone primer. The silicone primer is illustrated in FIG. 3 by the heavy dark lines 48 and 50. One silicone primer, which is acceptable for this purpose, is manufactured under the name DOW CORNING 1205 primer. Once the primer 48 and 50 has dried, a preformed backing rod 52 is inserted and wedged in the gap between the nosings. The backing rod 52 may be cylindrical and composed of a closed cell polyethylene rubber or other similar materials. The backing rod is used solely as a shelf to receive the silicone sealant and is thereafter unimportant in the expansion joint system. A silicone sealant 54 which is initially in liquid form is poured or inserted in the gap on top of the backing rod as best seen in FIG. 4.

A one-part silicone such as DOW CORNING 890 SL or a two-part rapid-cure self-levelling silicone such as DOW CORNING 002 RCS has proved acceptable for this purpose. A two-part silicone is preferred in remedial applications because it cures quicker resulting in less down time.

FIGS. 5 through 8 illustrate the use of the present expansion joint system to provide an expansion joint for concrete slabs 12' and 14', which have been overlaid with an asphalt overlay 60 and 62.

FIG. 5 illustrates a sectional view of the adjacent slabs 12' and 14' wherein the asphalt overlay 60 and 62 is crumbling away due to traffic, weather conditions or movement.

The existing joint seal 65 will be removed to start installation of the present joint system. The asphalt overlay is saw cut parallel with the gap and a minimum of six inches back from the gap to form recesses 64 and 66. The saw cut will be deep enough to reach the concrete deck beneath the asphalt overlay. Surfaces of the recesses 64 and 66 must be sandblasted, dry, clean and sound.

A temporary form 42' is inserted in the gap between the concrete slabs 12' and 14' flush with the roadway surface. The sidewalls and base of the recess are then coated with an epoxy primer in undiluted or neat form. The epoxy primer is illustrated by the heavy dark lines 67 and 69 in FIG. 6.

Thereafter, an additional quantity of epoxy will be combined with an aggregate to form a mortar mixture which will be poured to form nosings 68 and 70, as best seen in FIG. 7.

After curing of the nosings 68 and 70, the temporary form 42' (shown by dashed lines in FIG. 7), is removed. The opposed faces of the nosings 68 and 70 are sandblasted and then coated with a silicone primer (shown by heavy dark lines 72 and 74).

As shown in FIG. 8, a preformed backing rod 76 is wedged in the gap between the nosings. A silicone sealant 54' is poured in the gap on top of the backing rod as best seen in FIG. 8.

FIGS. 9 through 11 illustrate the use of the present invention with concrete slabs 12'' and 14'' having existing steel nosings affixed to the corners adjacent the expansion gap. The existing seal 80, shown in FIG. 9,

will be removed before installation of the present system. Although recesses may be cut into the roadway as previously described, an alternate procedure may be employed.

The steel nosings 82 and 84 will be sandblasted to white metal and then coated with epoxy primer 86 and 88 (shown by heavy lines as seen in FIG. 10) and allowed to cure.

The opposed faces of the steel nosings 82 and 84 are thereafter coated with a silicone primer and allowed to dry. Thereafter, a backing rod 90 is wedged between the concrete slabs to act as a shelf.

Finally, a silicone sealant 92 is poured in the gap on top of the backing rod 90 to form a water tight seal.

Whereas, the present invention has been described in relation to the drawings attached hereto, it should be understood that other and further modifications, apart from those shown or suggested herein, may be made within the spirit and scope of this invention.

What is claimed is:

1. A method to produce an expansion joint for adjacent roadway slabs having a gap therebetween, which comprises:

- a. cutting or forming a recess into the surface of each of said adjacent roadway slabs to form a pair of recesses parallel to and adjacent said gap;
- b. cleaning said recesses to a sound and rust-free surface;
- c. coating each recess with a slightly resilient polymer primer to inhibit rust and corrosion and to form a bonding surface;
- d. installing a mortar mixture of said slightly resilient polymer and aggregate into each recess to form a pair of parallel nosings adjacent to said gap, said nosings bonded to said roadway slabs;
- e. sandblasting and then priming opposed surfaces of said nosings with a silicone primer;
- f. inserting a temporary backing between said nosings in said gap;
- g. installing an initially liquid silicone sealant between said nosings and on top of said temporary backing which will cure to form a flexible seal.

2. A method to produce an expansion joint for adjacent roadway slabs as set forth in claim 1 wherein said slightly resilient polymer primer and said slightly resilient polymer for said mortar mixture are liquid, coal tar based epoxy and compatible with silicone.

3. A method to produce an expansion joint for adjacent roadway slabs as set forth in claim 1 wherein said aggregate is crushed stone or flint.

4. A method to produce an expansion joint for adjacent roadway slabs as set forth in claim 1 wherein said

silicone sealant is a two-part sealant curing by reaction with moisture in the air.

5. A method to produce an expansion joint for adjacent roadway slabs as set forth in claim 1 including installing a form spanning said gap before installation of said mortar mixture wherein said form is removed after said mortar has cured.

6. A roadway expansion joint system for adjacent roadway slabs having a gap therebetween, which system comprises:

- a. epoxy primer to coat and adhere to a recess cut or formed into the surface of each of said adjacent roadway slabs forming a pair of recesses parallel to and adjacent said gap;
- b. a nosing to fill each of said recesses, said nosings formed of a mortar mixture of epoxy and aggregate which will bond with and adhere to said epoxy primer;
- c. silicone primer to coat opposed surfaces of said nosings;
- d. a temporary backing inserted between said nosings in said gap; and
- e. an initially flowable silicone sealant between said nosings and on top of said temporary backing which will cure to form a flexible seal.

7. A roadway expansion joint system as set forth in claim 6 wherein said epoxy primer and said epoxy in said mortar mixture is a coal tar based liquid epoxy compatible with silicone.

8. A roadway expansion joint system as set forth in claim 6 wherein the base of each recess is parallel with said roadway surface and each of said recesses is at least six inches in width.

9. A roadway expansion joint system as set forth in claim 6 including a form spanning said gap which is inserted in said gap flush with the surface of said roadway before installation of said mortar mixture wherein said form is removed after said mortar has cured.

10. A method to produce an expansion joint for adjacent roadway slabs having a gap therebetween and opposed to metal nosings adjacent said gap, which method comprises:

- a. cleaning said opposed metal nosings to a sound, rust-free and dust-free surface;
- b. coating each said metal nosing with a slightly resilient polymer primer to inhibit rust and corrosion and to form a bonding surface;
- c. coating opposed surfaces of said metal nosings with a silicone primer;
- d. inserting a temporary backing between said metal nosings in said gap; and
- e. installing an initially liquid silicone sealant between said nosings and on top of said temporary backing which will cure to form a flexible seal.

• • • • •

Law

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

FILED

MAR 24 1999

Thompson, Clerk

TERESA HARNAR and)
CHARLES TANNER,)

Plaintiffs,)

vs.)

Case No. 97-CV-362-BU (E)

DANEK MEDICAL, INC.,)

Defendant.)

ENTERED ON DOCKET

DATE 3/24/99

STIPULATION FOR DISMISSAL WITH PREJUDICE
OF CLAIMS BY TERESA HARNAR

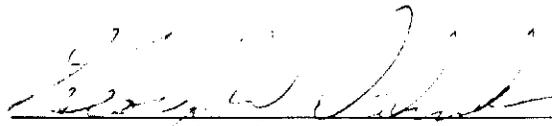
Pursuant to Rule 41(a)(1) F.R.CIV.P, Plaintiff, Teresa Harnar, and Defendant hereby stipulate that all claims asserted in this action by Teresa Harnar, are hereby dismissed with prejudice.

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

FILED

TERESA HARNAR and)
CHARLES TANNER,)

MAR 24 1999

Plaintiffs,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

vs.)

Case No. 97-CV-362-BU (E)

DANEK MEDICAL, INC.,)

ENTERED ON DOCKET

Defendant.)

DATE 3/24/99

STIPULATION FOR DISMISSAL WITH PREJUDICE
OF CLAIMS BY CHARLES TANNER

Pursuant to Rule 41(a)(1) F.R.CIV.P, Plaintiff, Charles Tanner, and Defendant hereby stipulate that all claims asserted in this action by Charles Tanner, are hereby dismissed with prejudice.

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FILED

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

MAR 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROL SUSIE CLARK,)
)
 Plaintiff,)
)
 v.)
)
 SOUTHWESTERN BELL TELEPHONE)
 COMPANY, a Missouri Corporation,)
)
 Defendant.)

Case No. 97CV-949K(M) L
Judge Kern

ENTERED ON DOCKET
DATE 3/24/99

AGREED STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice with each party bearing its own costs and attorney's fees incurred.

Respectfully submitted,

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
JUDD TOOL SYSTEMS,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR 24 1999

No. 98-CV-146-KV

F I L E D

MAR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Having reviewed all submitted pleadings and evidence in this case, the Court finds in favor of the Plaintiff, the United States of America, and against the Defendant, Judd Tool Systems, on this claim which arose out of a breach of a government contract.

IT IS THEREFORE ORDERED, ADJUDGED, DECREED that the Plaintiff United States recover of the Defendant Judd Tool Systems the sum of \$8,460.63, plus administrative charges in the amount of \$910.41, with interest thereon at the rate of 6.75% per annum.

ORDERED this 23 day of MARCH, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

32

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JUDD TOOL SYSTEMS,)
)
 Defendant.)

ENTERED ON DOCKET
DATE MAR 24 1999

No. 98-CV-146-K ✓

FILED

MAR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant Judd Tool Systems' Motions for Summary Judgment (#4, #16, #21), as well as the Plaintiff United State's Motions for Summary Judgment (#7, #8). In resolving these motions, the Court will also address the Defendant's Motion to Decide Questions of Law by Jury (#14), and Defendant's Motion to Add Additional Time Costs to Counterclaim (#15).

I. Brief History of the Case:

The United States filed its Complaint in this matter on February 23, 1998 seeking excess procurement costs from the Defendant. The basis of the Complaint is that the Defendant contracted with the United States to produce a product; the Defendant did not produce the product and the United States had to incur additional costs to obtain the product from an alternative source because of Judd's noncompliance. The Complaint had a Certificate of Indebtedness attached to it that contained a supporting declaration under oath pursuant to 28 U.S.C. §1746.

The Defendant filed its first Motion for Summary Judgment on June 3, 1998. The

Defendant's primary argument was that the Certificate of Indebtedness filed with the Complaint in this matter was inadmissible evidence and that the statute of limitations had passed. The United States filed its own Motion for Summary Judgment and Response in opposition to Defendant's Motion for Summary Judgment on June 18, 1998.

The Defendant filed a Second and **Separate** Motion for Summary Judgment on July 22, 1998. Defendant's second motion argued that the **United States** was responsible for Defendant's financial hardship, thereby causing the Defendant to **breach** the contract. The Defendant did not produce any evidence to support its assertions. The United States responded to the Defendant's Second and Separate Motion for Summary Judgment on August 3, 1998.

Now, the Defendant has filed a **third** motion for summary judgment, Defendant's Amended First Motion for Summary Judgment. This motion, filed August 4, 1998, is essentially a repetition of the first motion, in that Defendant argues that the statute of limitations has run and that the United State's Certificate of Indebtedness is **inadmissible** evidence. The Defendant has not submitted any evidence with its Amended First Motion for Summary Judgment. The Court will address the Defendant's arguments in turn.

II. Summary Judgment Standard:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the

nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

III. Discussion:

Defendant's first argument, laid out in its Motion for Summary Judgment and relumed in its First Amended Motion for Summary Judgment, alleges that the Complaint does not provide a ground for which relief can be granted and that it contained "insufficient evidence to sustain a jury verdict." The Defendant argues that the Plaintiff has not met the "burden of production and persuasion."

The purpose and requirement of the Complaint is to simply give notice to the opposing party of what the case is about so that the opposing party can defend itself. New Home Appliance Center v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957). Fed.R.Civ.P. 8(a)(2) provides: "A pleading which sets forth a claim for relief ... shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of 'fact pleading' is to give the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the Complaint is filed and the parties have opportunity for discovery. Evans v. McDonald's Corporation, 936 F.2d 1087 (10th Cir. 1991).

Having reviewed the Plaintiff's Complaint, the Court finds that it satisfied the requirements set out by the Federal Rules of Civil Procedure. The Complaint stated the cause of action, the

amount in which the Defendant was indebted to the Plaintiff, as well as the applicable interest rate accruing on the debt. The Certificate of Indebtedness, which was attached to the Complaint, states in part: "The claim arose as a result of excess procurement costs on the termination for default of Department of Air Force Contract F09603-87-C-3073." The Plaintiff's Complaint satisfies the requirements set out by the Federal Rules, and Defendant's argument must fail.

Secondly, the Defendant contends that the Certificate of Indebtedness was inadmissible as evidence and was not made under oath. A federal court has held that "[T]his court considers the Certificate of Indebtedness to constitute admissible evidence of default pursuant to Rule 803(8) of the Federal Rules of Evidence." US v. Wright, 850 F.Supp. 965 (D.Ut. 1993); see also US v Karr, 1991 WL 40296 (9th Cir. 1991). The Defendant has produced no case to the contrary. Additionally, the Certificate filed with the original Complaint states: "CERTIFICATION: Pursuant to 28 U.S.C. §1746, I certify under penalty of perjury that the foregoing is true and correct." It was signed and dated. This certification complies with the sworn declaration requirement of 28 U.S.C. §1746.

Next, the Defendant contends that the Plaintiff's action was not filed within the applicable statute of limitations. 28 U.S.C. §2415 (1998) provides that the statute of limitations for the United States to bring an action founded upon a written contract shall be filed within six years after the right of actions accrues. The Contract Disputes Act, 41 U.S.C. §605 (1998) provides that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."

The Contract Disputes Act essentially requires that all government contract disputes shall be submitted to a contracting officer for decision. On October 24, 1989, a Contracting Officer initially notified Judd Tool Systems of its default in delivery under the terms of the contract. On this same

date the Defendant was notified that it could potentially incur excess reprourement costs. Judd Tool Systems appealed the government's notice of default. This appeal was subsequently dismissed without prejudice upon motion of Defendant. Thereafter, the appeal was never pursued again.

Later, the Defendant was notified on March 25, 1991, that demand for payment of excess reprourement costs was being made but that it was not a final decision of the Contracting Officer. On April 30, 1992, the Defendant was notified that excess reprourement costs were assessed and payment was demanded due to its default under the terms of the contract. On this same date the Defendant was notified that the "Findings of Fact and Notice of Assessment of Excess Costs" was a final decision by the Contracting Officer.

The applicable statute of limitations is six years from that final decision date, and therefore, the filing of the Complaint in February 1998 was within the limitations period. Crown Coat Front Co. v. United States, 386 U.S. 503, 87 S.Ct. 1177 (1967), holding that "when administrative proceedings subject to the dispute clause in a government contract extend beyond the completion of the contract, the contractor's right of action accrues when the administrative action is final, and not before."

Additionally, the Defendant argues that the Plaintiff's delay in bringing this action has denied him due process. This is the equivalent of a laches argument and laches is not a viable defense against the United States in a contract action. The Tenth Circuit has long recognized and upheld the legal principle that the defense of laches is unavailable when the United States is acting in its sovereign capacity to enforce a public right or protect the public interest. Federal Deposit Insurance Corporation v. Hulsey, 22 F.3d 1472, 1490 (10th Cir. 1994) (citing United States v. Summerline, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020 (1940)). The Defendant's argument is without merit.

The Defendant contends, further, that the Court lacks jurisdiction over the claim because the value of the controversy is under \$50,000.00. This argument, too, is without merit.

28 U.S.C. §1345 provides: “Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.” The United States is the Plaintiff in this matter and, therefore the Court has jurisdiction. US v Beggerly, 118 S.Ct. 1862, 524 U.S. 38 (1998); see also United States v. Commonwealth of Puerto Rico, 551 F. Supp. 864, 865 (1982).¹

Defendant’s final argument, presented in its Second and Separate Motion for Summary Judgment, alleges that the United States caused the Defendant to suffer financial hardship which resulted in the Defendant’s breach. Defendant’s claim centers around the allegation that the government forced certain lending institutions out of business, thus cutting off the Defendant’s line of credit, and giving rise to the default. The Defendant has not presented any evidence or valid legal precedent in support of this theory. The Court finds that this claim, though inventive, is entirely devoid of a legitimate legal foundation and does not entitle the Defendant to summary judgment.

Throughout the parties’ motions for summary judgment, both sides have reiterated that there exists no genuine issue of material fact for trial. The evidence of a contract entered into between the Plaintiff and the Defendant is clear. The appropriate procedural hurdles required to provide notice to the Defendant and institute this action were satisfied. The Plaintiff’s submitted Certificate of Indebtedness, which lays out the total excess procurement costs, has not been disputed by the

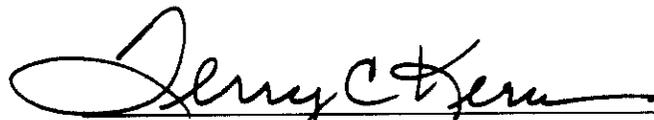
¹Because the United States is the Plaintiff, it is not required to show the existence of a federal question. Federal Home Loan Bank Board, Washington, D.C. v. Empie, 778 F.2d 1447, 1449 (10th Cir. 1985).

Defendant.² The Court finds that there is no genuine issue of material fact for trial. The Defendant's attempt to succeed on its dispositive motion on procedural grounds has failed, as has its argument that the government is to blame for its breach. The Plaintiff is entitled to summary judgment as a matter of law.

IV. Conclusion:

It is the Order of the Court that the Plaintiff's Motion for Summary Judgment (#7) is hereby GRANTED against the Defendant. The Defendant Judd Tool Systems' Second and Separate Motion for Summary Judgment (#16), and Amended First Motion for Summary Judgment (#21) are hereby DENIED. The remaining motions, Defendant's Motion for Summary Judgment (#4), Defendant's Motion to Decide Questions of Law by Jury (#14), and Defendant's Motion to Add Additional Time Costs to Counterclaim (#15) are hereby DENIED as moot.

ORDERED this 23 day of March, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

²The Court has addressed its admission as an evidentiary matter, but points out that the Defendant has not disputed the content or substance of that Certificate.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KIRBY BRUCE HARRAGARRA,)
)
 Petitioner,)
)
 v.)
)
 TWYLA SNIDER,)
 WARDEN, et al.,)
)
 Respondents.)

Case No. 99-CV-0043-K (E)

ENTERED ON DOCKET

DATE MAR 24 1999

REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 2254, petitioner Kirby Bruce Harragarra filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the 32- year sentence he received after pleading *nolo contendere* to assault with a deadly weapon after former conviction of a felony in violation of Okla. Stat. tit. 21, § 645 (1991). He alleges that his trial counsel was ineffective in two ways: (1) he states that his trial counsel failed to object to the trial court’s denial of a Motion to Suppress In-Court Identification and Motion to Compel a Lineup (the “identification” issue); and (2) he states that his trial counsel failed to advise him that the victim would be allowed to take the stand and testify against him after the plea was entered and before the judgment was entered by the trial court (the “testimony” issue).¹

Respondent filed a motion to dismiss for failure to exhaust state court remedies (Docket # 7), arguing that petitioner presented the latter claim to the Oklahoma Court of Criminal Appeals

¹ As part of this issue, petitioner also argues that he was deprived of effective assistance of counsel at the Motion to Withdraw Plea hearing of February 6, 1997, because he was not provided with a different lawyer to represent him at the hearing, thus creating a conflict of interest.

("OCCA"), but not the former claim. Petitioner contends that he presented his ineffective assistance of counsel claim to the OCCA, but it is apparent from reading his petition and his Objection to Motion to Dismiss (Docket # 10) that he does not differentiate between the identification issue and the testimony issue. Petitioner filed his Petition for Writ of Habeas Corpus two days after the limitations period ran, but he filed a Motion to Construe Pleading as Timely Filed (Docket # 5), respondents did not file an objection, and, for good cause shown, the undersigned granted the motion by Order dated February 17, 1999 (Docket # 9). For the reasons set forth below, the undersigned recommends that the Court **GRANT** respondent's motion to dismiss (Docket # 7), but hold in abeyance the petition containing his exhausted claim (the ineffective assistance of counsel claim as to the testimony issue) for a period of thirty (30) days in which petitioner may amend his petition to withdraw his unexhausted claim (the ineffective assistance of counsel claim as to the identification issue).

BACKGROUND AND PROCEDURAL HISTORY

Petitioner was charged by amended information in Tulsa County, Case Number CRF-96-3058, with assault and battery with a dangerous weapon, after former conviction of a felony in violation of Okla. Stat. tit. 21, § 645. The underlying facts in the record are vague, but it appears that petitioner cut the throat of a man while petitioner was a guest in the home of the victim's girlfriend. Petitioner was represented at the trial court level by an assistant public defender. A preliminary hearing was held on September 26, 1996, and petitioner was held over for arraignment. Prosecutors filed an amended information alleging Assault and Battery with a Deadly Weapon, After Former Conviction of One Felony, in violation of Okla. Stat. tit. 21, § 645 (1991), and the trial court denied petitioner's Motion to Suppress In Court Identification and Motion to Compel a Lineup.

On the day that the jury trial was scheduled to begin, February 4, 1997, petitioner entered a “blind” *nolo contendere* plea to the charge. The trial court proceeded to accept testimony from the victim before sentencing petitioner. The trial court then sentenced petitioner to thirty-two (32) years in prison and ordered him to pay \$500 fine and \$9,000 in restitution. Petitioner filed a Motion to Withdraw Guilty Plea on February 5, 1997. The trial court held a hearing on February 6, 1997 and denied that motion. Petitioner was not represented by separate counsel at the hearing.

Petitioner filed a direct appeal in which he was represented by an assistant public defender who was not his trial counsel. On January 12, 1998, the OCCA affirmed the order of the trial court denying petitioner’s motion to withdraw a plea of guilty. As to the testimony issue, the OCCA denied petitioner’s ineffective assistance of counsel claim on the merits. Petitioner, or, more appropriately, his appellate counsel, did not raise petitioner’s ineffective assistance of counsel claim as to the identification issue (see Brief of Petitioner on Petition for Writ of Certiorari, attached as Exhibit A to respondent’s Brief in Support of Motion to Dismiss Petition for Writ of Habeas Corpus, Docket # 8). Petitioner himself did not raise the issue in the hand-written *pro se* Motion to Withdraw Guilty Plea he filed on February 5, 1997 (attached to the Petition for Writ of Habeas Corpus, Docket # 1), nor did he file an application for post-conviction relief claiming ineffective assistance of appellate or trial counsel relating to the identification issue. Thus, the Oklahoma courts have never been presented with the identification issue, or any ineffective assistance of counsel claims related to it, and they have never ruled upon it in any form.

DISCUSSION AND LEGAL ANALYSIS

Federal courts are prohibited from issuing writs of habeas corpus on behalf of a prisoner in state custody unless the prisoner has exhausted available state court remedies if “state corrective process” is available and if circumstances do not exist that render the process “ineffective” to protect the prisoner’s rights. 28 U.S.C. § 2254(b)(1); Demarest v. Price, 130 F.3d 922, 932 (10th Cir. 1997). A state prisoner bringing a federal habeas corpus action bears the burden of showing that he has exhausted all available state remedies. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir.), cert. denied, 506 U.S. 924 (1992). To exhaust a claim, petitioner must have “fairly presented” the facts and legal theory supporting a specific claim to the highest state court. See Picard v. Conner, 404 U.S. 270, 275-76 (1971); Demarest, 130 F.3d at 932. In Oklahoma, the highest state court for criminal matters is the OCCA. The doctrine of exhaustion reflects the policies of comity and federalism. Requiring exhaustion “serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.” Duckworth v. Serrano, 454 U.S. 1, 3 (1981); see also Coleman v. Thompson, 501 U.S. 722, 730 (1991); Demarest, 130 F.3d at 932.

In this matter, petitioner did not fairly present both of his ineffective assistance of counsel claims to the highest state court. Petitioner’s ineffective assistance of counsel claim as to the identification issue is, therefore, not exhausted. Because petitioner submitted a “mixed petition,” his action leaves at least four options for judicial consideration. The District Court may (1) dismiss the petition, leaving petitioner with an opportunity to return to state court or to amend his petition

to withdraw the unexhausted claim, Rose v. Lundy, 455 U.S. 509, 510 (1982);² (2) permit petitioner to amend his petition to withdraw the unexhausted claim, but hold the amended petition in abeyance pending exhaustion in state court of his unexhausted claim, Calderon v. United States District Court for the Northern District of California, 134 F.3d 981 (9th Cir. 1998); (3) hold the unexhausted claim procedurally barred for purposes of federal habeas review if "it is obvious that the unexhausted claim would be procedurally barred in state court," Steele v. Young, 11 F.3d 1518, 1523 (10th Cir. 1993) (citations omitted); or (4) deny the petition on the merits, 28 U.S.C. § 2254(b)(2); Hoxsie v. Kerby, 108 F.3d 1239, 1242-43 (10th Cir.), cert. denied, 118 S. Ct. 126, 139 L. Ed.2d 77 (1997).

The third and fourth options are not advisable because it is not obvious that the unexhausted claim would be procedurally barred in state court, nor is it clear that petitioner's exhausted claim should be denied on the merits, especially since respondent has not briefed these options. The second option would be attractive, but for the fact that the Tenth Circuit has not endorsed the procedure outlined by Calderon court, and petitioner has an insurmountable statute of limitations problem.

Petitioner filed his Petition for Writ of Habeas Corpus two days late, but the Court granted his Motion to Construe Petition as Timely Filed because he submitted documents with his motion indicating that he submitted the petition for mailing by the correctional facility where he is incarcerated, with ample time to meet the statute of limitations deadline. Nonetheless, petitioner has

² To the extent Rose v. Lundy mandated that "mixed" petitions containing both exhausted and unexhausted claims be dismissed, it has been superseded by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). See, e.g., Loving v. O'Keefe, 960 F. Supp. 46 (S.D.N.Y. 1997); Duarte v. Hershberger, 947 F. Supp. 146 (D.N.J. 1996). The AEDPA provides: "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254 (b)(2).

no time left within which to file another habeas petition. See 28 U.S.C. § 2254(d)(1). The AEDPA provides for tolling of the limitations period for time “during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending,” (28 U.S.C. § 2254(d)(2)), but it will be impossible for petitioner to refile for federal habeas relief within the limitations period if the Court dismisses his petition.

Given this predicament, the undersigned recommends the first option set forth above, the withdrawal and amendment option, and the undersigned finds the opinion of Parker v. Johnson, 988 F. Supp. 1474 (N.D. Ga. 1998), particularly well-reasoned, helpful and persuasive in this regard. The petitioner in that matter, similar to petitioner here, filed a “mixed application” for habeas review on the last permissible day for filing his application. He also requested that the court hold his entire application in abeyance pending exhaustion of his claims. The court acknowledged that it could not grant his request absent extraordinary, unusual or exceptional circumstances. Id. at 1476 (citing United States v. Ortiz, 136 F.3d 161 (D.C. Cir. 1998); Christy v. Horn, 115 F.3d 201 (3d Cir. 1997); Victor v. Hopkins, 90 F.3d 276 (8th Cir. 1996), cert. denied, 519 U.S. 1153 (1997)); see also O’Guinn v. Dutton, 88 F.3d 1409 (6th Cir. 1996), cert. denied, 117 S. Ct. 742, 136 L. Ed. 2d 681 (1997) and 117 S. Ct. 754, 136 L. Ed. 2d 690 (1997). A statute of limitations problem does not appear to present an extraordinary, unusual or exceptional circumstance.

The Parker court reasoned that it would be unduly harsh to force a petitioner to forfeit his exhausted claims because petitioner had presented unexhausted claims in a petition that could not be refiled in federal court, after state court review, because the statute of limitations had run. However, the Parker court acknowledged that holding the entirety of a petition in abeyance until completion of state review would thwart the congressional intent behind the AEDPA to expedite and

streamline the process of habeas review. 988 F. Supp. at 1477. Consequently, the Parker court opted for a limited period of abeyance in which the petitioner could amend his complaint to delete his unexhausted claims (as permitted by Rose v. Lundy, 455 U.S. at 520).³ The court recognized that such a procedure would bar federal habeas review of the unexhausted claims that petitioner subsequently elected to pursue in state court, but found that “the interests of justice are best served by ordering [the] petition to be held in abeyance as to only those grounds that have been exhausted.” Parker, 988 F. Supp. at 1477.

The undersigned recommends the same finding by this Court. It is true that use of this procedure will mean that petitioner has effectively forfeited federal review of his unexhausted claim, but he will not have lost his opportunity to present his exhausted claim, which may have merit, simply because he added a claim that the state courts never had a chance to review.

CONCLUSION

For the reasons set forth herein, the undersigned proposes findings that petitioner’s ineffective assistance of counsel claim is not exhausted, but the statute of limitations will have run if the petition is dismissed. Accordingly, the undersigned recommends that the Court **GRANT** respondent’s Motion to Dismiss Petition for Writ of Habeas Corpus (Docket # 7), but hold in abeyance the petition containing his exhausted claim (the ineffective assistance of counsel claim as to the testimony issue) for a period of thirty (30) days in which petitioner may amend his petition to withdraw his unexhausted claim (the ineffective assistance of counsel claim as to the identification

³ The undersigned also notes that Rule 15(a) of the Federal Rules of Civil Procedure, which is applicable to habeas petitions pursuant to 28 U.S.C. § 2242, gives petitioners the chance to amend their petition once as a matter of course. Id.

issue). The undersigned further recommends that the Court, pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C., foll. § 2254, direct respondent to furnish transcripts of the trial court proceedings with its answer in the event the petitioner chooses to amend his petition. **Petitioner should be aware that, if the Court adopts this Report and Recommendation and he fails to amend his petition to withdraw his unexhausted claim, his petition will be dismissed in its entirety, and he will have forfeited any opportunity for the Court to review his exhausted claim.**

OBJECTIONS

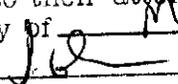
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and § 2254, Rules 8, 10. **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See *Thomas v. Arn*, 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

Dated this 23rd day of March, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

COPIES OF THIS DOCUMENT
The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24 Day of March, 1999.



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

FILED

MAR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMER E. OWENS,
SSN: 420-58-5330,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security
Administration,

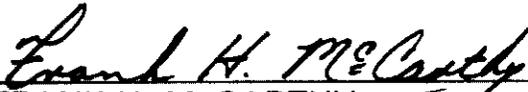
Defendant.

CASE NO. 97-CV-839-M

ENTERED ON DOCKET
DATE MAR 24 1999

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 23rd day of MARCH, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILMER E. OWENS,)
SSN: 420-58-5330,)
)
PLAINTIFF,)
)
vs.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,)
)
DEFENDANT.)

CASE NO. 97-CV-839-M

ENTERED ON DOCKET

DATE MAR 24 1999

ORDER

Plaintiff, Wilmer E. Owens, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

The role of the Court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

¹ Plaintiff's August 2, 1994 application for disability benefits and August 12, 1994 application for SSI benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held December 19, 1995. By decision dated March 12, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 8, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 29, 1943 and was 52 years old at the time of the hearing. [R. 38, 405]. He claims to have been unable to work since March 29, 1994 due to heart disease with recurring chest pains and shortness of breath. [R. 102, 417].

The ALJ determined that Plaintiff has severe impairments consisting of coronary artery disease, chronic obstructive pulmonary disease and hypertension and that he is unable to return to his past relevant work (PRW) as a truck driver. He found that Plaintiff retained the residual functional capacity (RFC) to perform other sedentary and light work and, based upon the testimony of a vocational expert (VE) determined that jobs exist in the economy in significant numbers which Plaintiff can perform with his RFC. [R.23]. He found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's decision is not supported by substantial evidence. Specifically, Plaintiff contends the ALJ: 1) improperly reviewed the medical evidence; 2) applied incorrect legal standards in his pain analysis; 3) failed to present the vocational expert with an appropriate hypothetical; 4) improperly ignored VE and medical expert (ME) testimony; and 5) failed to properly consider all evidence of nonexertional impairments at Step Five.

The response brief filed by counsel on behalf of the Commissioner was of such poor quality and contained such factual inaccuracies, that it was of no use to the Court in deciding this case.² As a result, Defendant's attempt to narrate Plaintiff's condition, treatment and progress under medical supervision in chronological sequence while citing to the record for support of that narration in such a haphazard manner, undermines his argument and hampers, rather than benefits the Court in its resolution of the issues before it. The Commissioner is admonished to take care in preparation of his brief so as to prevent future submission of such poor work product on the Commissioner's behalf.

² Some examples of such inaccuracies are: Counsel for the Commissioner cited pages 154 and 352 to support his statement: "Thus, Dr. Schneider released plaintiff to return to full work." This statement is the final sentence in a paragraph describing Plaintiff's noncompliance with doctors' orders from his first follow-up visit in May 1994 through August 1994. However, page 154 contains notes from the earlier April 26, 1994 office visit, when Dr. Schneider did indeed release Plaintiff to return to work, but before Plaintiff's follow-up visits where the treatment advice was given. Page 352 is a letter forwarding the results of a thallium stress test and a statement by Dr. Schneider declining to evaluate Plaintiff's disabilities. While discussing Plaintiff's condition in May 1995, counsel for the Commissioner cited to a page which contains a coronary angiography diagram for support of a statement he claims a physician made, R. 292, and office visit notes from 1994, not May 1995, R. 356. In the next paragraph, referring to the time period around July 1995, counsel for the Commissioner cited pages 154-5 of the record to support his statement that "Dr. Schneider noted mild recurrent chest discomfort, but concluded that plaintiff was doing well." Again, pages 154 and 155 of the record are office visit notes recording Plaintiff's condition and treatment April 7, 1994 through May 3, 1994, not 1995.

Plaintiff's First Assignment of Error

Plaintiff claims the ALJ ignored "the total clinical diagnoses provided by the treating physicians as well as the disabilities found and/or confirmed by other physicians of record." [Plaintiff's Brief, p. 1].

Plaintiff was hospitalized March 29, 1994 to March 31, 1994 for angioplasty after having reported to the emergency room with chest pain. [R. 127]. His treating physician, M. Steve Schneider, M.D., advised him to discontinue smoking and instituted a "stop smoking class." *Id.* At his one month check-up, Dr. Schneider noted Plaintiff had returned to work, "started lifting again and had severe retrosternal chest discomfort with left arm radiation and shortness of breath." [R. 144]. He was scheduled for observation at Hillcrest Medical Center "for consideration of further invasive procedures." [R. 145]. During this treatment period, Dr. Schneider's office notes reflect continued encouragement by the doctor to Plaintiff to quit smoking, lose weight and attend out patient cardiac and pulmonary rehabilitation and smoking cessation classes. [R. 153]. On August 11, 1994, Dr. Schneider scheduled an outpatient thallium stress test: "[r]esults of this will decide whether he is to be working or not." [R. 153]. On August 23, 1994, Dr. Schneider declined to perform a disability evaluation. [R. 352].

Beau Jennings, D.O., a general practitioner, wrote Plaintiff's employer on October 6, 1994, that he had been treating Plaintiff "since the beginning of 1994", that his diagnosis was COPD (Chronic Obstructive Pulmonary Disease) and that Plaintiff "can continue driving a truck but the heavy lifting and or heavy exertion

should be discontinued." [R. 167]. On November 14, 1994, Dr. Jennings repeated that opinion to Plaintiff's employer. [R. 371].

A Pulmonary Consultation report was written by Jerry Plost, M.D., on January 11, 1995. [R. 345-346]. Dr. Plost assessed mild COPD which did not explain Plaintiff's shortness of breath. *Id.*

Plaintiff was readmitted to the hospital on January 16, 1995, for another angioplasty by Dr. Schneider. [R. 285-286]. After a treadmill test, conducted May 18, 1995 an angiography as an outpatient was recommended. [R. 353]. The May 30, 1995 angiography revealed "wide patency of previous PTCA site with mild plaquing in the left coronary system." [R. 391-392]. The recommendation was "medical management." [R. 392]. A Handicapped Parking Privilege Application signed by Beau Jennings, D.O. on June 5, 1995, indicated that Plaintiff cannot walk two hundred feet without stopping to rest and has functional limitations due to Angina. Disability was checked as "permanent." [R. 369]. Ernest Pickering, D.O., wrote Dr. Jennings on June 27, 1995, that Plaintiff continued to complain of chest pain and shortness of breath. [R. 367-368]. He reported the May 1995 treadmill test was abnormal, that a pulmonary physician reported some exertional shortness of breath and a mild amount of chronic obstructive pulmonary disease. *Id.* Dr. Pickering recommended a stress-rest thallium study, review of the May 1995 "films", increasing the dosage of Cardizem,³ and leaving off the nitroglycerin patch which he had been wearing constantly for 6 to

³ Cardizem is indicated for treatment of hypertension and for management of chronic stable angina. *Physician's Desk Reference*, 49th Ed. (1995) p. 1400.

8 hours a day. *Id.* A treadmill test was again performed July 7, 1995 which, when compared with the August 22, 1994 test, revealed no significantly different results. [R. 159, 366].

After review of the medical evidence, the ALJ concluded that Plaintiff's allegations of "a degree of chest pain, edema and swelling of the lower extremities and shortness of breath" were credible and assessed Plaintiff's residual functional capacity (RFC) accordingly. [R. 20]. He determined, however, based upon the medical evidence and other evidence in the record, that Plaintiff is not incapable of all work activity. *Id.*

In addition to the medical evidence, the ALJ explained his determination that Plaintiff can do alternative light and sedentary work was based in part upon Plaintiff's reported daily activities, including driving [R. 409-410], feeding and taking care of his 50 chickens [R. 407-408, 413-415], riding the lawn mower on his acre and a half yard [R. 415], working in his flower bed [R. 415], walking around his place (two and a half acres) [R. 416], and for a limited amount of time, going grocery shopping and attending an auction [R. 412, 413, 428-429]. His decision also reflects that he considered Plaintiff's testimony that nitroglycerin affords him relief even after performing activity as strenuous as "driving a fence post." [R. 418-420]. Plaintiff admitted he had received no more medical treatment other than an increase in the dosage of his medication since July 1995. [R. 19, 421]. Furthermore, he testified that his heart "flutters" are triggered by any unusual exertion. [R. 421].

Plaintiff's own testimony regarding his ability to lift 16 or 17 pounds [R. 425-426, 432], to carry that weight across a room [R. 432], to walk up to 200 yards [R.

423], and "stalk a mile" [R. 424] lends support to the ALJ's finding that he could do sedentary and light work. Plaintiff testified that he could sit for only 20 to 30 minutes without getting stiff and experiencing pain in his back but that he hadn't sought or received any medical treatment for his back. He testified that it was only the mild COPD and heart problems that kept him from working [R. 422-425]. Plaintiff also acknowledged his failure to follow doctors' treatment advice to stop smoking. [R. 409]. He claimed taking nitroglycerin causes headache for which he takes tylenol and lays down for a couple hours. [R. 430]. Yet, in all of the medical reports, no doctor has recorded Plaintiff's complaints of incapacitating headache pain or, for that matter, pain on a continuous basis so disabling as to render Plaintiff unable to perform any gainful activity.

Also testifying at the hearing was Dr. Subramaniam Krishnamurthi. [R. 433-441]. Based upon his review of the medical records and, after hearing Plaintiff's testimony, Dr. Krishnamurthi opined that, without cardiac rehab, he thought Plaintiff could still perform 50 to 75% of his former work activities. [R. 436]. He assessed Plaintiff's RFC as limited to lifting 25 pounds occasionally, five to ten pounds frequently, walking two hours within a full day and no standing and sitting limitations. [R. 437-438].

Contrary to Plaintiff contention, the ALJ did not ignore the clinical diagnoses of Plaintiff's treating physicians. The RFC determination set forth in the ALJ's decision clearly accounted for Plaintiff's inability to lift heavy objects or walk over 30 minutes at a time. The Court finds there is no conflict between the clinical diagnoses provided

by Plaintiff's treating physicians and confirmed by other physicians of record and the ALJ's RFC determination.

Plaintiff's Second Assignment of Error

Plaintiff contends the ALJ did not provide proper rationale in his analysis of Plaintiff's claim of pain and other non-exertional impairments. However, it is clear from the ALJ's discussion of the medical evidence and Plaintiff's reported activities, that the ALJ weighed all of the evidence in the record as well as Plaintiff's credibility in determining whether he was capable of performing other work in the national economy. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). There is substantial evidence in the record to support the ALJ's RFC assessment that Plaintiff's impairments did not preclude him from engaging in other work. The determination is supported by substantial evidence in the record. The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 95-5p and appropriately applied the evidence to those guidelines. The Court finds the ALJ adequately evaluated the record, Plaintiff's credibility and allegations of debilitating chest pain and shortness of breath in accordance with the correct legal standards established by the Commissioner and the courts.

Plaintiff's Third and Fourth Assignments of Error

Plaintiff contends that the ALJ did not include specific limitations shown by the medical evidence in his hypothetical questions to the Vocational Expert (VE) and that he ignored the testimony of the VE that Plaintiff could not engage in substantial gainful activity. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The vocational expert testified that a person of Plaintiff's age, education, sex, background training and experience, with limitations of lifting 35 pounds occasionally,⁴ five to ten pounds frequently, walking 30 minutes at a time and one to two hours total in an eight hour work day, could perform assembly jobs, sedentary and unskilled inspector jobs, office helper at sedentary and light levels and assembly at the light level with a 50% reduction. [R. 443-444]. He testified as to the availability of those jobs in the economy. Therefore, the Court finds that the hypothetical question asked of the vocational expert and relied upon by the ALJ was proper.

⁴ The Court notes that, although the ME initially testified he thought Plaintiff capable of lifting 25 pounds occasionally, [R. 437], the ALJ apparently understood, and later confirmed with the ME, that Plaintiff's weight lifting limitation was "about 35 pounds" occasionally, [R. 438]. That is the limit he used in his hypothetical question to the VE, [R. 443], and in his decision, [R. 21]. Since the Social Security regulations define light work as "involv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b), this slight inconsistency is inconsequential in this case.

After presenting several scenarios offering varying degrees of limitations, the ALJ asked a final question of the VE which assumed all Plaintiff's testimony to be fully credible, to which the VE responded that no jobs would be available. [R. 63]. According to the Plaintiff, the ALJ improperly ignored the answer to the final hypothetical. It is clear, however, that the ALJ did not accept as true that Plaintiff suffered insufficient stamina to be able to work at any job eight hours a day, five days a week. As discussed above, the ALJ's credibility findings are supported by the record. Therefore, the Court finds that the ALJ was not required to rely upon the VE's answer to his final hypothetical question.

Plaintiff's Fifth Assignment of Error

Plaintiff's final challenge to the ALJ's decision is unclear. Plaintiff states that, because the ALJ ignored and discounted relevant evidence supporting Plaintiff's [allegation of] disability, he failed in his duty at step five to prove Plaintiff could perform any work on a sustained basis. This statement is not further discussed in Plaintiff's brief. In light of the Court's conclusion that the ALJ's determination as to Plaintiff's RFC, credibility and availability of alternative jobs is supported by substantial evidence, the Court finds the ALJ's step five decision was proper and in accordance with the correct legal standards established by the Commissioner and the courts.

Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retains the capacity for light and sedentary work. The record as a whole contains substantial evidence to

support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 23rd day of MARCH, 1999.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

MAR 22 1999 *A*

JENNIFER LYNN SHAW,)
an individual,)
)
Plaintiff,)
vs.)
)
TOTAL DISTRIBUTORS SUPPLY)
CORPORATION, a corporation,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-643-BU

ENTERED ON DOCKET
DATE MAR 23 1999

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 proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

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, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 22nd day of March, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

TEAM TIRES PLUS, LTD.,)
)
Plaintiff,)
)
vs.)
)
TIRE PLUS, INC., d/b/a TIRE)
PLUS+,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR 23 1999

No. 98-CV-449-K ✓

F I L E D

MAR 22 1999 *PL*

ADMINISTRATIVE CLOSING ORDER Phil Lombardi, Clerk
U.S. DISTRICT COURT

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 22 day of March, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

F I L E

MAR 22 1999

Phil Lombardi, C
U.S. DISTRICT CO

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

MARIE A. BRADLEY,)
)
Plaintiff,)
)
vs.)
)
GEAR PRODUCTS, INC.,)
)
Defendant.)

No. 97-C-741-K ✓

ENTERED ON DOCKET
DATE MAR 23 1999

ORDER

Before the Court are the two motions of the defendant for summary judgment. Plaintiff commenced this action by the filing of a complaint on August 15, 1997. The complaint alleges two causes of action: violation of the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act ("EPA"). On February 17, 1998, the parties submitted a joint case management plan, signed by counsel for both parties. Under "summary of claims", the joint case management plan lists violation of the ADEA, EPA, and Title VII. Subsequently, defendant moved for summary judgment as to the ADEA and EPA claims, and contended that no Title VII claim should be countenanced because it did not appear in the complaint. By order filed October 9, 1998, the Court ruled that plaintiff had asserted a Title VII claim, and that additional discovery could be undertaken as to that claim. Defendant has now filed a second motion for summary judgment, addressing the Title VII claim.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)

135

F.R.Cv.P. The factual record and reasonable inferences therefrom are examined in the light most favorable to the party opposing summary judgment. Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10th Cir.1998).

In February, 1981, defendant hired plaintiff to work as a drill press operator at age forty-seven. Plaintiff remained in this position for approximately three weeks until she transferred to the position of mill operator in the gear box area of the manufacturing plant. She remained in that position until her discharge on November 8, 1996.

To establish a prima facie case under the EPA, plaintiff has the burden of proving that (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances. Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1364 (10th Cir.1997).

Plaintiff has only focused upon one "comparator", i.e., a co-employee of the opposite sex used for wage comparison purposes. (Plaintiff's response brief at 10-11). Use of a single comparator is permissible, unless an appropriate comparator is wrongly excluded from comparison with the plaintiff. Hein v. Oregon College of Educ., 718 F.2d 910, 918 (9th Cir.1983). Plaintiff's chosen comparator, Don Van Bibber, was hired January 25, 1984. During plaintiff's tenure, the defendant began a changeover from manual mill machines to the CNC machine, a device which required special training and advanced knowledge because it was computerized.

First, defendant argues that plaintiff cannot establish the first element of a prima facie case, because the difference in machines used renders her work and Van Bibber's work not "substantially equal." In her deposition, plaintiff testified that she had no training on the CNC machine.

(Plaintiff's deposition at p. 194, ll. 1-14). However, accompanying her response brief is a statement under penalty of perjury executed by plaintiff. In that document, she states that defendant denied her CNC training because she was a woman. She further states that, on her own, she took a CNC course at Tulsa County Vo-Tech and was therefore qualified to operate the CNC machine. Plaintiff has also attached what purports to be a grade card from Tulsa County Vo-Tech giving her a "B" grade in the course. Defendant correctly notes that the plaintiff's affidavit is diametrically opposed to her deposition testimony; this does not mean that the Court may disregard it. The affidavit creates a genuine issue of material fact as to the first element of the prima facie case.

Plaintiff's claim does fail on the third element, as defendant also argues. The record establishes that at the time of plaintiff's discharge, she was earning \$12.64 per hour and Van Bibber was earning \$12.50 per hour. (Defendant's Exhibit B; Defendant's Exhibit E). To this, plaintiff responds that her "testimony" shows that Van Bibber "was, in fact, paid more than she." (Plaintiff's response brief at 11). By this, she apparently means her assertion in her affidavit (again executed after her deposition) that Van Bibber "revealed" to her that his salary was \$12.87 per hour. This hearsay statement, even if it occurred, is insufficient to overcome the payroll records which have been submitted in evidence. Van Bibber could have been deposed and salary records requested of him. Plaintiff no doubt had access to defendant's payroll records during the discovery process, and bears the burden of submitting them to establish her prima facie case. The Court concludes summary judgment is appropriate as to plaintiff's EPA claim.

The elements of a prima facie case in both ADEA and Title VII cases "closely parallel" each other. Sanchez v. Denver Public Schools, 164 F.3d 527, 531 (10th Cir.1998). In either case the plaintiff must show: (1) she is a member of the class protected by the statute; (2) she suffered an

adverse employment action; (3) she was qualified for the position at issue; (4) she was treated less favorably than others not in the protected class. Id. Other Tenth Circuit decisions have phrased the fourth element as requiring plaintiff be “replaced by a younger person.” Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir.1995).

Defendant focuses on this fourth element, arguing that plaintiff was not “replaced” by Mark Overman, who was undisputedly younger than plaintiff. Defendant asserts that since Overman was hired months before plaintiff’s discharge, his assumption of her duties after her discharge does not constitute “replacement” for purposes of a prima facie case. The authority defendant cites is a district court decision from New York. In the absence of circuit authority, let alone Tenth Circuit authority, the Court finds that plaintiff has established a prima facie case of age discrimination.

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the action. If the defendant does so, the plaintiff must show the defendant’s proffered reasons are pretextual. Sanchez, 164 F.3d at 531. In the “termination memorandum” dated November 7, 1996, (Defendant’s Exhibit Q), it is stated that plaintiff is being discharged for “conduct detrimental to the employees and the company”. The specific items listed are (1) harassing fellow employees, (2) “tampering with set ups” (apparently, not leaving her tools out for the next worker to use, and (3) plaintiff has discussed company work outside of the company and has not been truthful. In its brief, defendant states that item (3) refers to plaintiff contacting one of the company’s vendors and making false statements regarding defendant’s operations. (Defendant’s brief at 8). The Court finds defendant has stated a legitimate nondiscriminatory reason for discharge.

Plaintiff wholly fails to raise an inference that the reasons given by defendant are pretextual.

Asked in her deposition “Do you have any evidence that [the company’s proffered reason] wasn’t the reason you were fired?”, defendant answered “No, I don’t.” (Plaintiff’s deposition at 206, ll. 19-21). Summary judgment is granted as to plaintiff’s ADEA claim.

Much the same analysis applies to plaintiff’s Title VII claim. Asked in her deposition if she believed defendant discharged her because of her gender, she replied “I don’t know.” (Plaintiff’s deposition at pg. 100 ll.6-8). Thus, even if plaintiff has established a prima facie case, she has made no showing that the reason proffered by defendant for her discharge was a pretext for sexual discrimination.

In her EEOC charge filed in this case, plaintiff has also raised claims of salary discrimination because of gender and harassment because of gender. First, defendant correctly argues that plaintiff’s claim regarding salary, which is based exclusively on her assertion that she was denied overtime pay in contrast to men, is barred by the limitations period under Title VII. Plaintiff testified in her deposition that she first believed she was denied overtime because of her gender in 1990. (Plaintiff’s deposition at pg. 82, ll.4-19). Under Title VII, a complainant is required to file a charge of discrimination within 300 days of the alleged unlawful employment practice. 42 U.S.C. §20003-5(e); Martin v. Nannie and the Newborns, 3 F.3d 1410, 1414 n.4 (10th Cir.1993). Plaintiff did not file her EEOC charge until 1997, seven years after she first perceived discrimination. Plaintiff attempts to rely upon the “continuing violation” doctrine, but defendant points out its inapplicability. As recently discussed in Ingram v. Pre-Paid Legal Services, Inc., 4 F.Supp.2d 1303 (E.D.Okla.1998), a plaintiff may not avail herself of the doctrine when she knew or should have known of the need to act to assert her rights. Id. at 1311. Plaintiff has admitted that she believed she was the victim of salary discrimination in 1990, and thus her claim is barred.

Even considering the claim on the merits, the Court finds summary judgment appropriate. The record is undisputed that plaintiff worked a considerable amount of overtime during her tenure with defendant. The fact, if it is a fact, that a single male co-worker worked more overtime hours than plaintiff does not establish that plaintiff was denied overtime hours because of her gender. The most plaintiff will assert in her response brief is that on occasion she requested overtime and was denied by defendant. Defendant's response is that accommodating plaintiff's requests was not always possible, simply because another employee was scheduled to work the next shift and utilize plaintiff's machine. Plaintiff has failed to raise an inference that this reason was pretextual.

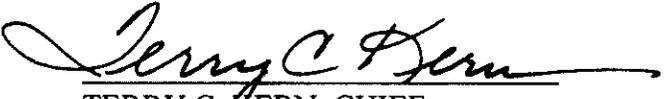
Finally, plaintiff's claim of a hostile work environment fails as well. Sexual harassment is actionable under a hostile work environment theory when the harassing conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The conduct must be both objectively and subjectively abusive. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1071 (10th Cir.1998). Plaintiff has made no such showing. She has not refuted defendant's assertions that (1) she was unaware whether males who failed to leave their work tools out were reprimanded; (2) she does not know whether the male employee who verbally threatened her on one occasion was disciplined or whether the comment was gender-related; (3) when she complained to management after a single incident in which a non-managerial employee dropped some water coolant on plaintiff's back, the conduct stopped and did not reoccur. The Court finds that the incidents related do not rise to the level of severe or pervasive harassment based on gender.

Also before the Court is the motion of the defendant to strike sworn statements. In response to defendant's motion for summary judgment as to Title VII, plaintiff has accompanied her brief with sworn statements by Scheryl Gonazalez, Jack Emery and Mark Overman, former co-employees of

plaintiff. Defendant asks that the statements be stricken because plaintiff has not provided the addresses of these individuals and defendant was unable to depose them regarding their statements. The Court finds defendant's objection well-taken. However, the statements as they stand consist largely of hearsay or broad generalizations as to the affiants' perceptions.. They do not create a genuine issue of material fact as to plaintiff's situation.

It is the Order of the Court that the motions of the defendant for summary judgment (##13, 28) are hereby GRANTED. The motion of the defendant to strike sworn statements (#30) is hereby DENIED as moot.

IT IS SO ORDERED THIS 22 DAY OF MARCH, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED
MAR 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATRICK BRAUN,

Plaintiff,

vs.

HAROLD BERRY, et al.

Defendants.

No. 96-CV-480-B ✓

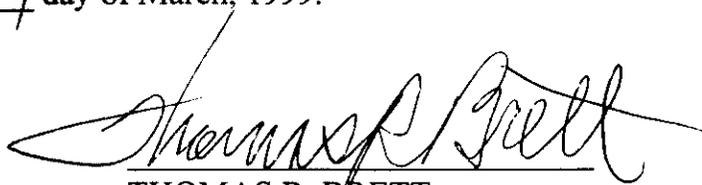
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DATE MAR 23 1999

JUDGMENT

Judgment is hereby entered for the Defendants and against the Plaintiff. The action is hereby dismissed on the merits and the Defendants shall recover of Plaintiff their costs of action upon timely application pursuant to N.D. LR 54.1. Each party shall pay its own attorney fees.

Dated at Tulsa, Oklahoma this 19th day of March, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

MAR 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PATRICK BRAUN,

Plaintiff,

vs.

HAROLD BERRY, et al.,

Defendants.

Case No. 96-CV-480-B

ENTERED ON DOCKET

MAR 23 1999

ORDER

The Motions for Summary Judgment of Plaintiff [Dkt. 32] and of Defendant Klatt [Dkt. 30] have been fully briefed and are before the court for disposition.

BACKGROUND

Plaintiff Patrick Braun, an inmate currently incarcerated at the Oklahoma State Penitentiary, proceeding pro se and in forma pauperis, brings this action pursuant to 42 U.S.C. § 1983, alleging that the defendants have violated his constitutional rights while he was held as a pre-trial detainee at the Mayes County Jail.¹ On April 2, 1998, the court granted summary judgment as to all defendants in the action except George Klatt. [Dkt. 23]. The court found that the record was insufficient to determine if a question of fact existed as to whether Defendant Klatt was deliberately indifferent to Plaintiff's serious medical needs.

The court ordered the officials responsible for the Mayes County Jail to file a supplemental special report which fully addresses Plaintiff's allegations of inadequate medical care. The supplemental report and Defendant Klatt's supplemental motion for

¹Plaintiff alleged Defendants failed to protect him from physical violence at the hands of other prisoners; that he was denied medical treatment for injuries received at the hands of other inmates; that he was sprayed with pepper spray; and that food preparation at the jail is unsanitary.

summary judgment have been filed. Plaintiff was directed to file a response on or before March 18, 1999. [Dkt. 39]. No response was filed.

II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "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, 106 S.Ct. 1348, 1455-56 (1986).

III. DISCUSSION

A. Plaintiff's Motion For Summary Judgment.

Plaintiff's summary judgment motion asserts that he is entitled to judgment on the issue of liability because the supplemental special report was not filed within the time allotted by the court. The record reflects that upon the Defendant's application, the assigned magistrate judge extended the filing deadline. [Dkt. 27]. The court finds there is no basis for entering judgment against the Defendant as requested by Plaintiff and therefore, Plaintiff's Motion for Summary Judgment [Dkt. 32] is DENIED.

B. Defendant Klatt's Supplemental Motion For Summary Judgment.

On summary judgment, the court may treat a special report filed in accordance with court order, as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. *See Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, and not to resolve material factual issues. *Id.* at 1109. The court must also construe the plaintiff's pro se pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. *Hall*, 935 F.2d at 1110.

In considering Defendants' motion for summary judgment, the Court has examined the special report. Plaintiff has presented no evidence to refute the facts in Defendants' motion and the special report. Because Plaintiff has not presented conflicting evidence, the Court accepts the factual findings of the special report. *See Hall*, 935 F.2d at 1111.

Plaintiff was a pretrial detainee and not a convicted prisoner at the time of Defendant's alleged actions, therefore this claim is governed by the Due Process Clause of the Fourteenth Amendment. *City of Revere v. Massachusetts Gen. Hosp.* 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983). However, under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates

under the Eighth Amendment. *Frohman v. Wayne*, 958 F.2d 1024 (10th Cir. 1992) (citing *Martin v. Board of County Com'rs of County of Pueblo*, 909 F.2d 402 (10th Cir. 1990)). The Supreme Court has held in the context of a §1983 action, only "deliberate indifference to serious medical needs" of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 785 (1976). Thus, the question in this case is whether Defendant Klatt was deliberately indifferent to Plaintiff's serious medical needs.

The two-pronged *Estelle* standard requires deliberate indifference on the part of prison officials and it requires the prisoner's medical needs to be serious. A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980). Accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute deliberate indifference under the Eighth Amendment. Further, a mere difference of opinion between the prison's medical staff and the inmate as to the diagnosis or treatment which the inmate receives does not support a claim of cruel and unusual punishment. *Id.*

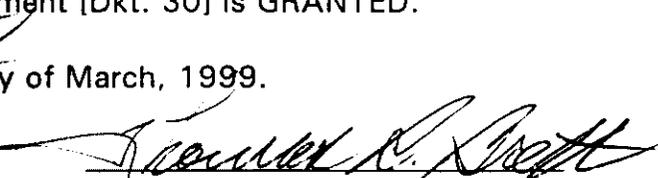
The undisputed facts demonstrate that Plaintiff was involved in an altercation in the Mayes County Jail bullpen on October 22, 1995. Following the altercation he was removed from the area. Defendant Klatt examined his injuries and determined that the wounds did not require medical treatment. Plaintiff claims his face and eyes were severely swollen. He was permitted to wash his face and was given antiseptic to apply to his contusions. On or about November 4, 1995, Plaintiff was seen by the jail nurse. She determined that Plaintiff sustained a conjunctival hemorrhage and referred Plaintiff for examination by an eye doctor. On November 6, 1995, Plaintiff was seen by Dr. Lynn. Dr. Lynn found that Plaintiff had a subconjunctival hemorrhage for which no treatment was prescribed. Plaintiff was instructed to report any flashing lights, floatus, or curtain over vision, and to return to the office if he noticed any problems. Dr. Lynn noted that Plaintiff had access to a phone. Plaintiff had no further contact with Dr. Lynn's office.

Taking Plaintiff's allegations that his face and eyes were swollen as true, he has not demonstrated the existence of a serious medical need as required to impose liability under § 1983. Therefore, Defendant Klatt is entitled to summary judgment.

CONCLUSION

Plaintiff's motion for summary judgment [Dkt. 32] is DENIED. Defendant Klatt's supplemental motion for summary judgment [Dkt. 30] is GRANTED.

SO ORDERED THIS 19th Day of March, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

Warrant of Arrest and Notice *In Rem* was issued on the 25th day of March 1997, by this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and contents therein and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the defendant real property and contents therein are located, and further providing that the United States Marshals Service personally serve the defendant real property and contents therein and all known potential owners thereof with a copy of the Complaint for Forfeiture *In Rem* and Warrant of Arrest and Notice *In Rem*, and that immediately upon the arrest and seizure of the defendant real property and contents therein the United States Marshals Service take custody of the defendant real property and contents therein and retain the same in its possession until the further order of this Court.

On the 11th day of July 1997, the United States Marshals Service served a copy of the Complaint for Forfeiture *In Rem*, the Warrant of Arrest and Notice *In Rem*, and the Order on the defendant real property and contents therein.

Bettina Frisby, Willie Frisby, Tulsa County Treasurer and Bankers Trust Company of California, N.A. as Trustee for Vendee Mortgage Trust, Series 1993-2 ("Banker's Trust") were determined to be the only potential claimants in this action with possible standing to file a claim to the defendant real property and contents therein. The United States Marshals Service served Bettina Frisby and Willie Frisby with a copy of the Complaint for Forfeiture *In Rem*, the Warrant of Arrest and Notice *In Rem*, and the Order on the

defendant real property and contents therein on July 11, 1997. Bettina Frisby and Willie Frisby filed their claim as to the defendant real property and contents therein, on July 21, 1997. The United States Marshals Service served the Tulsa County Treasurer's office with a copy of the Complaint for Forfeiture *In Rem*, the Warrant of Arrest and Notice *In Rem*, and the Order on the defendant real property and contents therein on July 11, 1997. The Tulsa County Treasurer's office filed its answer and claimed a tax lien in the total amount of \$24.00 against the defendant real property on July 24, 1997.

Bankers Trust filed its Waiver of Service of summons herein on December 14, 1998.

USMS 285 reflecting the service upon the defendant real property and contents, the above known potential claimants and the Waiver of Service of Summons are on file herein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant real property and contents therein are located, on October 16, 23 and 30, 1997. Proof of Publication was filed December 2, 1997.

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

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

No other claims in respect to the defendant real property and contents therein have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said defendant real property and contents therein, and the time for presenting claims and answers, or other pleadings, has expired.

The plaintiff, the United States of America, and the claimants, Bettina Frisby and Willie Frisby, entered into a Stipulation for Forfeiture of the defendant real property and contents therein. Pursuant to the Stipulation, Bettina Frisby and Willie Frisby agreed that the defendant real property and contents are subject to forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(A) and (C) since they are properties involved in transactions or attempted transactions in violation of 18 U.S.C. § 1956, or properties traceable thereto, and because they are properties which constitute or are derived from proceeds traceable to a violation of 18 U.S.C. § 1344. The Stipulation was filed September 26, 1997.

Claimants Bettina Frisby and Willie Frisby executed and delivered their Quit Claim Deed to the United States of America on the 25th day of September, 1997. The Quit Claim Deed is recorded in the Office of the County Clerk of Tulsa County in Book 5962 at Page 0152.

Claimant Tulsa County Treasurer filed its claim, which the Government has stipulated and agreed is a valid tax lien in the amount of \$22.00.

Claimant Banker's Trust and the victim of the criminal offense, PMC Homes, executed a Stipulation of Settlement of Claim of Banker's Trust which was filed on March 1, 1999, whereby Banker's Trust agreed to release its claim upon payment by PMC Homes of the sum of Forty-Seven Thousand Five Hundred Dollars (\$47,500.00).

The United States Department of Justice has granted the administrative petition of the victim, PMC Homes, for the real property. Accordingly, subsequent to entry of this Judgment of Forfeiture, the United States will convey the property to the victim, PMC Homes.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real property and contents therein:

LOT NINE (9), BLOCK FOUR (4), KENDALWOOD IV, AN ADDITION TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF, a/k/a 1180 EAST 137TH PLACE SOUTH, GLENPOOL, OKLAHOMA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON AND THE CONTENTS THEREIN WHICH ARE PROCEEDS OF THEIR SCHEME, INCLUDING, BUT NOT LIMITED TO THE CONTENTS LISTED ON EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE;

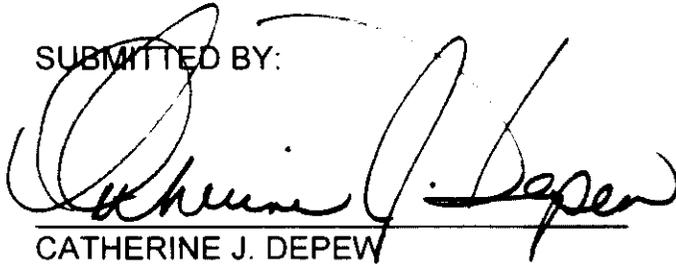
be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 22nd day of March 1999.



MICHAEL BURRAGE
Judge of the United States District Court for the Northern
District of Oklahoma

SUBMITTED BY:

A handwritten signature in black ink, appearing to read "Catherine J. DePew". The signature is written in a cursive style with a large, looping initial "C".

CATHERINE J. DEPEW
Assistant United States Attorney

N:\udd\lpeaden\forfeitu\frisby\Judgment of Forfeiture

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

FILED

MAR 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TYRONE LAMONT JOHNSON

Petitioner,

vs.

Case No. 99-CV-107-Bu(M)

BOBBY BOONE

Respondent.

ENTERED ON DOCKET
DATE MAR 22 1999

ORDER

Petitioner's Motion to Dismiss Without Prejudice, filed March 17, 1999, is before the Court. Petitioner's motion is filed before the respondent has served either an answer or motion for summary judgment. The Court finds that dismissal is appropriate under Fed.R.Civ.P. 41(a).

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Petitioner's motion to dismiss is GRANTED. This action is dismissed without prejudice to refiling.

SO ORDERED this 22nd Day of March, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DANIEL L. BURKS,)
SSN: 446-72-2873)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner)
of Social Security Administration,)
)
)
Defendant.)

FILED

MAR 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-281-J

ENTERED ON DOCKET

DATE MAR 22 1999

ORDER^{1/}

Plaintiff, Daniel L. Burks, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} The ALJ denied "childrens benefits" to Plaintiff, but granted Plaintiff disability benefits as of April 5, 1995. Plaintiff appeals the decision of the Commissioner which denied Plaintiff child's insurance benefits. Plaintiff asserts that he was disabled beginning in October 1973 until January 16, 1983, at which time Plaintiff attained 22 years of age.

Plaintiff asserts that the Commissioner erred because (1) the ALJ failed to fully and fairly develop the record, (2) the ALJ's finding that Plaintiff did not have a mental

^{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/} Administrative Law Judge Jeffrey S. Wolfe (hereafter "ALJ") concluded that Plaintiff was not disabled prior to January 16, 1983 (Plaintiff's application for child benefits), but was disabled as of April 5, 1995. [R. at 10]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 6, 1998. [R. at 6].

or other nonexertional impairment prior to January 16, 1983 (when Plaintiff attained the age of 22) was not supported by substantial evidence, (3) the ALJ ignored Plaintiff's subjective complaints and did not properly evaluate Plaintiff's credibility, and (4) the ALJ's finding that Plaintiff could perform his past relevant work prior to January 16, 1983, was not supported by substantial evidence. For the reasons discussed below, the Court **REVERSES AND REMANDS** the decision of the Commissioner.

I. PLAINTIFF'S BACKGROUND

Plaintiff testified that he was hospitalized in 1973 and 1977 for high blood sugar. [R. at 38]. Plaintiff testified that his main complaints included his problems associated with diabetes, hypertension, carpal tunnel syndrome in his wrist, pain in his left shoulder and wrist, stomach problems, back pain, and high blood pressure. [R. at 41-45, 57]. According to Plaintiff, he could lift approximately 20 pounds with his left arm and 50 pounds with his right arm; he could sit for approximately three to four hours; he could stand for thirty minutes. [R. at 54-56]. Plaintiff testified that he has good and bad days. Plaintiff stated that on bad days he feels "like crap," and would be unable to work. [R. at 59-60].

On October 5, 1973, Plaintiff was admitted to the hospital with acute diabetes. [R. at 235]. Plaintiff's records indicated that he was slow to accept his diabetes. The report indicated Plaintiff's diabetes was slowly brought under control and that by the time of discharge Plaintiff was able to administer his own shots. [R. at 247]. Plaintiff

additionally suffered from depression. [R. at 238]. Plaintiff was discharged on October 19, 1973. [R. at 235].

Plaintiff was admitted to Hillcrest Hospital in April of 1977 and was discharged in June. [R. at 212]. Plaintiff was sixteen years old at the time of his admission. Plaintiff was reported as behaving irresponsibly and refusing to administer insulin to himself. Plaintiff progressed during his hospitalization and at the time of discharge was reported as controlling his insulin and giving himself appropriate shots. [R. at 212]. Plaintiff's doctor noted that Plaintiff still had psychological problems.

Plaintiff was admitted on January 7, 1978 for psychological problems associated with a recent break-up with a girlfriend. [R. at 227]. Plaintiff was reported as being depressed. [R. at 227].

On July 13, 1995, Plaintiff was examined by Angelo Dalessandro, D.O. Plaintiff reported that he had had difficulty controlling his glucose level for the past three years. Plaintiff informed Dr. Dalessandro that he was diagnosed in 1973 and was hospitalized. Dr. Dalessandro reported that Plaintiff was placed on insulin "and did fairly well. He was re-hospitalized at 16 years of age due to uncontrolled glucose levels and he apparently has done well since." [R. at 180].

In what appears to be an application for a drivers' licence, dated June 7, 1993, Plaintiff's doctor reported that Plaintiff had had no trouble since an insulin reaction in July of 1992. [R. at 233].

By letter dated May 23, 1995, Fred C. LeMaster, D.O., reported that he had seen Plaintiff on only one occasion (April 17, 1995), and that current lab work showed

Plaintiff in fair to good diabetic management status. "These 20 + years of IDDM are now producing early end stage changes, *i.e.* fatigue, weakness and early neuropathies, and retinal changes. It is our recommendation he be granted disability status primarily because of progressing upper extremity dysfunctions and early paresis in the lower extremities." [R. at 186].

At the request of one of Plaintiff's attorneys, Plaintiff was examined by Richard Hastings, D.O. on March 22, 1996. [R. at 187]. Dr. Hastings noted that Plaintiff had been on insulin since 1972, that Plaintiff reported repeated episodes of insulin reactions, and that Plaintiff also reported neck and shoulder pain. [R. at 187]. In Dr. Hastings' opinion, Plaintiff suffered from diabetes, hypertension, diabetic retinopathy, depression, cervical injury and chronic bursitis of the left shoulder. [R. at 189]. He concluded that Plaintiff had end-stage diabetes mellitus, "with the end-stage vascular changes consistent with injuries to both kidneys including diabetic nephropathy and porphyrinuria, injuries to the vascular system of his eyes, with retinal damage resulting in decreased vision, and accelerated hypertension not controlled at this time. In addition, the patient has significant depression and orthopedic problems. . . ." [R. at 189]. The doctor noted that, in his opinion, Plaintiff was 100% disabled. [R. at 190].

James D. Harris, D.O., reported on April 2, 1996, that Plaintiff complained of neck pain, left arm pain, and numbness which began when Plaintiff installed a vanity sink for his mother and attempted to hook up the water lines. [R. at 192].

Plaintiff testified that on approximately four occasions his diabetes had been uncontrolled to the point of pushing him into a diabetic coma which required

assistance of an ambulance. [R. at 41]. The record contains EMSA ambulance reports from July 20, 1996, and May 1, 1992, indicating that Plaintiff was in a diabetic coma when the ambulance arrived. [R. at 203, 207].

Fred C. LeMaster, D.O., wrote, on August 2, 1996, that Plaintiff was a diabetic who had been under his care since Plaintiff was 13. [R. at 211]. "Because of his easy fatiguing chronic pain and muscle weakness in my opinion he is not able to be gainfully employed and is not at this time, a candidate for vocational retraining. I feel he is totally and permanently disabled as defined by Oklahoma Statute." [R. at 211].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

^{3/} 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).

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^{4/} 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

The ALJ noted that Plaintiff was born January 16, 1961, and attained age 22 on January 16, 1983. [R. at 16]. The ALJ concluded that Plaintiff's mental disorders as a juvenile did not result in marked restriction of activities of daily living, marked difficulties in maintaining social functioning, deficiencies of concentration, or repeated episodes of deterioration. [R. at 18]. The ALJ noted that Plaintiff was able to attend

^{4/} 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."

school through the 10th grade, that he worked for ten months in 1978, that he obtained his GED in 1981, and that he completed a heating and air-conditioning course in 1982-1983. [R. at 18]. The ALJ concluded that Plaintiff had the residual functional capacity for unskilled medium work, compatible with the demands of Plaintiff's past relevant work, prior to January 16, 1983, at which time Plaintiff was 18. [R. at 19]. The ALJ noted that the vocational expert testified that Plaintiff's past relevant work was "light work" and was classified as "unskilled." The ALJ therefore concluded that Plaintiff could perform his past relevant work prior to attaining the age of 22. [R. at 22].

The ALJ additionally concluded that as of April 5, 1995, Plaintiff's symptoms and limitations had increased in severity to the point that Plaintiff was no longer able to perform his past relevant work. [R. at 19]. As of April 5, 1995, the ALJ determined that Plaintiff had the RFC to perform medium work, but that Plaintiff would experience two to three incapacitating days each week and three to four days each month. [R. at 21]. The ALJ found that Plaintiff was therefore disabled as of April 5, 1995.

IV. REVIEW

Part of the confusion created in this case is due to the nature of Plaintiff's disability application. Plaintiff's request essentially constitutes two separate applications. Plaintiff requests disability for a period of time during which Plaintiff was classified as a child – from October 1973 until January 16, 1983. Plaintiff additionally requests benefits from the date of his application as an adult -- April 5, 1995. The

ALJ denied Plaintiff's request for child's benefits, but found that Plaintiff was disabled as of April 5, 1995. Plaintiff therefore appeals only the decision by the ALJ with respect to Plaintiff's request for child's benefits.

STANDARD APPLICABLE TO CHILD BENEFITS CASES

Prior to the amendment of the Act in 1996, child's disability benefits decisions followed procedures similar to the adult disability analysis.^{5/} See 42 U.S.C. § 1382c(a)(3)(A)(1994); 20 C.F.R. § 416.924(b)(1994). Congress amended this Act prior to the decision of the ALJ.^{6/}

Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act. Pub. L. No. 104-193, 110 Stat. 2105. This Act amended the substantive standards for the evaluation of children's disability claims. The statute currently reads:

An individual under the age of 18 shall be considered disabled for the purpose of this subchapter if that individual had a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has

^{5/} Evaluation of the disability of a child followed a four-step process. First, the Commissioner determined whether the minor was engaged in substantial gainful activity. If he is, the minor was considered not disabled. If the minor was not engaged in substantial gainful activity, the Commissioner then determined whether the minor's impairment was severe. If the impairment was not severe, the minor was considered not disabled. If the minor's impairment was severe, the Commissioner then determined whether the minor had an impairment that met or equaled the severity of one of the impairments listed at 20 C.F.R. Pt. 404, Subpt. P., App. 1 ("the Listings"). If the minor's impairment was of Listing severity, the minor was considered presumptively disabled. If the minor's impairment was not of Listing severity, the Commissioner was required to determine whether the impairment was of "comparable severity" to an impairment that would disable an adult. 20 C.F.R. § 416.924(b)-(f).

^{6/} The effective date of the Act is August 22, 1996. The ALJ's decision was issued September 25, 1996.

lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. 1382c(a)(3)(C)(i). The notes following the Act provide that this new standard for the evaluation of children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act (August 22, 1996). This includes cases in which a request for judicial review is pending. Consequently, this new standard applies to the Plaintiff's case. Gertrude Brown for Khilarney Wallace v. Callahan, 120 F.3d 1133 (10th Cir. 1997) (applying new standards to a children's disability appeal). See also Celkis v. Apfel, 987 F. Supp. 1069 (N.D. Ill. 1997).

In evaluating a child's disability application, the regulations provide different rules depending upon the child's age.

(e) If you attain age 18 after you file your disability application but before we make a determination or decision. For the period during which you are under age 18, we will evaluate whether you are disabled using the rules in this section. For the period starting with the day you attain age 18, we will evaluate whether you are disabled using the disability rules we use for adults filing new claims, in § 416.920.

20 C.F.R. § 416.924a(e) (italics in original).

The record seems to indicate that Plaintiff filed his application for child's benefits after he attained the age of 18. Therefore, for Plaintiff's application for benefits related to the time period during which Plaintiff was age 13 to age 18, the applicable regulations are located in 20 C.F.R. § 416.920. Those regulations provide:

(d) *Your impairment(s) must meet, medically equal, or functionally equal in severity a listed impairment in appendix 1.* An impairment(s) causes marked and severe functional limitations if it meets or medically equals in severity the set of criteria for an impairment listed in the Listing of Impairments in appendix 1 of subpart P of part 404 of this chapter, or if it is functionally equal in severity to a listed impairment.

(1) Therefore, if you have an impairment(s) that is listed in appendix 1, or is medically equal in severity to a listed impairment, and that meets the duration requirement, we will find you disabled.

(2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal in severity a listed impairment, we will find that you are not disabled.

20 C.F.R. § 416.924. Consequently, based on the applicable statutes and regulations, Plaintiff is disabled in relation to Plaintiff's claim for disability from age 13 to attainment of age 18, only if Plaintiff can establish that he meets a Listing.⁷¹ See also Gertrude Brown for Khilarney Wallace v. Callahan, 1997 WL 459780 (Aug. 13, 1997 10th Cir.) ("In reviewing the Commissioner's decision, therefore, we do not concern ourselves with his findings at step four of the analysis; we ask only whether his findings concerning the first three steps are supported by substantial evidence.").

In relation to Plaintiff's application for disability benefits after Plaintiff attained age 18 and until Plaintiff attained age 22, 20 C.F.R. § 416.924a(e) provides that the

⁷¹ At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

claim should be evaluated in accordance with the disability rules which are applied to adults located in 20 C.F.R. § 416.920. Therefore, with respect to Plaintiff's disability claim from the time period when Plaintiff was 18 until Plaintiff attained the age of 22, the Court shall apply the "standard" five step sequential evaluation.

AGE 13 TO ATTAINMENT OF AGE 18

Based on the amendment to the statutes and regulations, Plaintiff cannot qualify for disability, for this time period, unless Plaintiff meets a Listing. In Plaintiff's brief on appeal, Plaintiff does not discuss what Listing he meets or how the ALJ erred in not finding that he qualified for Listing level severity.

The ALJ did specifically discuss the Listings in his decision.

1. While he had mild diabetic retinopathy with blurred vision, this condition does not approach the level of severity contemplated by Section 2.01 special sense category of the Listings.
2. Accordingly, the undersigned finds that claimant's diabetes does not rise to the level described in Section 9.08.

[R. at 17].

However, neither party specifically addresses these issues in their briefs on appeal. The Court concludes that the case must be reversed for other reasons. Therefore, the Court declines to address whether or not the ALJ's discussion and analysis of the Listings are sufficient to support a finding of non-disability with regard to the applicable regulations. See also Clifton v. Chater, 79 F.3d 1007 (10th Cir.

1996). On remand, Plaintiff should specify and the ALJ should address any applicable Listings.

AGE 18 UNTIL ATTAINMENT OF 22

The regulations provide that for the "period starting with the day you attain age 18" the standards generally applicable to adults apply. Plaintiff urges the Court to reverse the decision of the ALJ for four reasons.

Development of the Record

Plaintiff asserts that the Commissioner has the responsibility to develop a complete medical history for the 12 month period prior to the Plaintiff's attainment of 22 years of age. Plaintiff states that he was 22 in January 1983, but the record contains nothing for the five years prior to that date.

The record contains the following discussion between the ALJ and Plaintiff's attorney.

ALJ: [W]e are missing a number of medical records that we're going to need to have in the record: Dr. Binstock, Dr. Craig, the OU Adult Medicine Clinic, Dr. Orr, if at all possible.

Witness: Excuse me. We have tried to get some of those from Dr. Orr, and from Dr. Craig.

Claimant: After they retired.

Witness: They're - both of those retired, and - and we've tried, but they're just - they're gone.

ALJ: Okay. It's going to be very difficult to try to -

Witness: I don't know if they were disposed of, or -

ALJ: Because the medical records that we do have from his childhood are obviously sporadic, and don't support the testimony that he's given with respect to his constant, sick illness.

Attorney: The Hillcrest Hospital's weren't - their records weren't in their entirety because they wouldn't give me the rest of them. They claimed the doctor wouldn't release them.

* * * *

ALJ: But Dr. Craig and Dr. Orr are both retired, and at least, we ought to make some effort to see if their records are being maintained anywhere. Have you all determined that?

Witness: Well, Danny was doing most of the checking, but Dr. Craig, it was like, he just kind of vanished. I guess he - we were told he retired, but his records were destroyed, I guess, and Dr. Orr, I don't know what he did with his. I don't know if he passed them to another physician, or -

ALJ: And then, obviously, we still need Dr. Binstock in OU Adult Medicine Clinic.

[R. at 82-83].

Although a claimant has the general duty to prove disability, a social security disability hearing is a non-adversarial proceeding and an ALJ has a duty to develop the factual record. See Musgrave v. Sullivan, 996 F.2d 1371, 1374 (10th Cir. 1992). In this case Plaintiff was represented by counsel at the hearing before the ALJ. Plaintiff, on appeal, asserts that the ALJ should have subpoenaed the medical records from the doctors who refused to provide the records. Defendant points out that some records were destroyed, and Plaintiff has provided no information with regard to the other records to suggest that they are relevant.

Certainly an ALJ cannot be expected to subpoena or otherwise obtain records which have been destroyed or do not exist. In addition, when a claimant is represented by an attorney, the attorney certainly could specifically ask for the assistance of the ALJ by requesting the issuance of a subpoena. Regardless, the

Court has concluded that this action should be remanded to the Commissioner. On remand, the ALJ and Plaintiff's attorney shall, in accordance with their respective duties under applicable law, gather any additional relevant medical records. See also 63 Federal Register 41404, Rules and Regulations Social Security Administration, 1998 WL 435717 (August 4, 1998) (discussing new regulations for claimant representative to assist with gathering of records).

Mental and other Nonexertional Impairments

Plaintiff asserts that the record contains substantial evidence that Plaintiff suffered from a nonexertional impairment. Plaintiff notes that he has "good and bad days," and that he was unable to work on bad days. Plaintiff additionally asserts that he had a mental impairment prior to attaining the age of 22, but that the ALJ improperly failed to find that Plaintiff had a mental impairment.

With regard to Plaintiff's alleged mental impairment, Defendant asserts that the ALJ did find that Plaintiff had a "severe" mental impairment, and notes that the ALJ completed a Psychiatric Review Technique Form. Defendant additionally refers to several portions of the ALJ's record which refer to Plaintiff's "mental" impairment. Defendant asserts that Plaintiff's argument that the ALJ concluded that Plaintiff did not have a severe mental impairment are therefore unfounded.

In his decision, the ALJ notes that he completed a Psychiatric Review Technique Form ("PRTF") and attached it to his opinion in accordance with the regulations. The ALJ does not indicate and the form does not otherwise provide the dates for which the completed PRTF apply. The ALJ does state, in his opinion, that the record does not

indicate that Plaintiff suffered, as a juvenile, from marked restrictions of daily living or marked difficulties in maintaining social functioning, or repeated episodes of deterioration. However, the ALJ's opinion does not state whether or not, as a juvenile, Plaintiff had "moderate," "slight," or "none," restrictions of daily living or difficulties in maintaining social functioning, or restrictions related to decompensation in work or work like settings.

The ALJ notes that an electroencephalogram indicated abnormal tracings, that Plaintiff was diagnosed with secondary depression, that Plaintiff was hospitalized in April 1977 for emotional problems, that Plaintiff was withdrawn and uncooperative, and that Plaintiff was hospitalized in January 1978 with depression. [R. at 18].

The ALJ additionally concluded that, prior to age 22 (January 16, 1983), Plaintiff had a RFC for lifting up to 50 pounds occasionally, carrying up to 25 pounds frequently, walking/standing six hours out of an eight hour day, and performing no more than unskilled work activity. The RFC outlined by the ALJ contains nothing related to Plaintiff's alleged mental impairment although, according to the Defendant, the ALJ concluded that Plaintiff had more than a "severe" mental impairment.

The ALJ examined Plaintiff's past relevant work which the ALJ concluded, based on the testimony of a vocational expert, was "light work" which was "unskilled." [R. at 21]. The ALJ noted that because Plaintiff had the RFC to perform unskilled medium work on or before the age of 22, that Plaintiff could perform his past relevant work. [R. at 22]. The ALJ concludes that Plaintiff has the ability to perform

the "physical and mental" demands of his past relevant work, but the ALJ never specifies or discusses the "mental" demands.

By concluding that Plaintiff had a "severe" mental impairment,^{8/} the ALJ found that Plaintiff had an impairment or combination of impairments which "significantly limits" his "physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1520(c), 1521.^{9/} However, as noted above, the ALJ does not discuss the mental aspects in his RFC. In addition, as noted, the ALJ attached one PRTF, but the PRTF does not specify the time period to which the PRTF relates.

The Court believes that part of the difficulty in this action is created simply because Plaintiff's request essentially involves disability requests for two separate time periods, and is, basically, two separate requests. Attempting to isolate the portions of the ALJ's decision which address Plaintiff's request for child's benefits from that portion which is the request for benefits after 1995 is difficult.

After reviewing the decision of the ALJ, and the record, the Court concludes that this action must be reversed and remanded to the Commissioner. On remand, the ALJ should articulate in his decision the impact of any mental impairments on the Plaintiff's ability to perform his past relevant work prior to attaining the age of 22. In addition, as outlined above, the regulations seem to indicate that separate regulations apply to the evaluation of Plaintiff's claim prior to attainment of age 18 and after

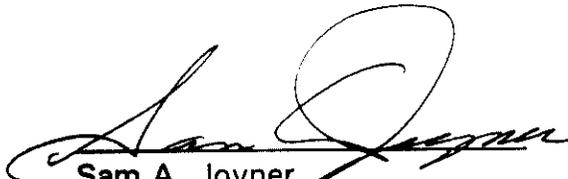
^{8/} Defendant, in Defendant's brief characterizes the ALJ as concluding that Plaintiff had a "severe" mental disability prior to his 22nd birthday.

^{9/} The courts have interpreted the "severity" requirement as being a *de minimis* standard. See Williams, 844 F.2d 748, 751 (10th Cir. 1988); Bowen v. Yuckert, 482 U.S. 137, 153 (1987).

attainment of age 18. Further, to reduce confusion, the Court recommends that the ALJ complete separate PRTF's for the separate time periods involved.

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

Dated this 19 day of March 1999.


Sam A. Joyner
United States Magistrate Judge

FILED
MAR 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 FRED D. GREESON, JR.,)
)
 Defendant.)

Case No. 98-CV-773-B

ENTERED ON DOCKET
MAR 22 1999
DATE _____

J U D G M E N T

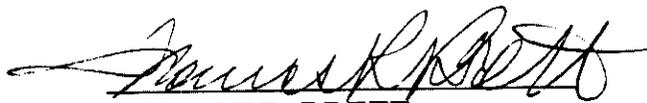
This action came on for hearing before the Court on Plaintiff United States of America's Motion for Summary Judgment and Application to Enter Summary Judgment, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff, United States of America, recover of the Defendant, Fred D. Greeson, Jr., the sum of \$14, 395.48 plus accrued interest in the amount of \$3,807.51 as of August 20, 1998, plus interest at the rate of 8% per annum until judgment plus interest after judgment at the legal rate of 4.918%, and that the Plaintiff, United States of America, recover of Defendant its costs of action upon

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timely application pursuant to N.D. LR 54.1. Each party shall pay its own attorney fees.

Dated at Tulsa, Oklahoma this 19 day of March, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written in a cursive style.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAR 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 FRED D. GREESON, JR.,)
)
 Defendant.)

Case No. 98-CV-773-B

ENTERED ON DOCKET
DATE MAR 22 1999

ORDER

Comes on for consideration Plaintiff United States of America's ("USA") Motion for Summary Judgment (Docket # 3) and Application to Enter Summary Judgment (Docket # 6) and the Court finds both motions should be granted.

This is an action to recover repayment on a defaulted federally-insured student loan. Plaintiff filed its motion for summary judgment on January 28, 1999. Response was due February 15, 1999. On February 4, 1999, case management conference was held before the undersigned at which Defendant failed to appear. Counsel for Plaintiff was ordered to send Defendant a copy of the Case Management Scheduling Order and to remind Defendant that he must respond to the motion for summary judgment on or before February 15, 1999. Counsel for Plaintiff complied with the Court's direction on February 9, 1999 by mailing to two addresses which Plaintiff had for Defendant. Both mailings were by first class mail. No response to the motion has been filed nor has Defendant

requested an extension of time within which to file response. Plaintiff therefore filed Application to Enter Summary Judgment on March 16, 1999, one month and a day following date on which the response brief was due, asking this Court to grant its requested relief.

Plaintiff is deemed to have confessed the motion for summary judgment pursuant to N.D. LR 7.1.C., thereby entitling USA to prevail on its application to enter summary judgment. Nevertheless, this Court reviews the motion on its merits and finds the motion should be granted.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

Statement of Undisputed Material Facts

The undisputed material facts are:

1. On or about April 30, 1991, Defendant executed promissory notes to secure loans of \$4,426.00 and \$7,500.00 from Norwest Bank South Dakota, Sioux Falls, South

Dakota at 8 percent per annum. These loan obligations were guaranteed by the Norstar Guarantee, Inc., and then reinsured by the Department of Education under loan guarantee programs authorized under Title IV-B of the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 et seq. (34 CFR. Part 682). The holder demanded payment according to the terms of the notes. The borrower defaulted on the obligation on May 1, 1995 and the holder filed a claim on the guarantee.

2. Due to the default, the guaranty agency paid a claim in the amount of \$14,395.48 to the holder. The guarantor was then reimbursed for that claim payment by the Department of Education under its reinsurance agreement. The guarantor attempted to collect the debt from the Defendant but was unable to collect the full amount due and on March 6, 1997, the guarantor assigned its right and title to the loans to the Department of Education.

3. Since assignment of the loans, the Department has not received payments from any sources, including Treasury Department offsets. As of August 20, 1998, Defendant owes a total of \$18,202.99 which consists of principal in the amount of \$14,395.48 and accrued interest in the amount of \$3,807.51 on the student loan. Interest is accruing on the student loans at the rates of 8% per annum.

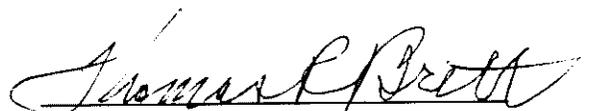
Conclusion

Based upon the undisputed facts presented the Court finds the Plaintiff USA is entitled to entry of summary judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff

United States of America's Motion for Summary Judgment (Docket # 3) and Application to Enter Summary Judgment (Docket # 6) shall be granted. Plaintiff is awarded its court costs upon timely application pursuant to N.D.LR 54.1. Each party is to pay its own attorney fees.

DONE THIS *19th* DAY OF MARCH, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE