

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

**FILED**

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS GILL,

Defendant.

ENTERED ON DOCKET

DATE 5-28-99

MAY 26 1999 *VR*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CR-176-C

**99CV04130**

**(E)**

**JUDGMENT**

This matter came before the Court for consideration of defendant Marcus Gill's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. The motion having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for plaintiff, the United States of America, and against defendant, Gill, on his challenge to the legality of his conviction and sentence.

IT IS SO ORDERED this 25<sup>th</sup> day of May, 1999.



H. Dale Cook  
United States District Judge

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

FILED

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS GILL,

Defendant.

ENTERED ON DOCKET

DATE 5.28.99

Case No. 97-CR-176-C

99CV04130 (E)

ORDER

Before the Court is defendant, Marcus Gill's, pro se motion seeking resentencing under F.R.Cr.P. 12(b)(2)<sup>1</sup> and 32(c)(1). However, because Gill is collaterally attacking his conviction and sentence and since 28 U.S.C. § 2255 is the exclusive remedy for a prisoner in federal custody who asserts such claims, the Court will treat Gill's present application as a motion brought pursuant to § 2255.

In January 1998, Gill was named in a forty-two Count Superseding Indictment, charging him with conspiracy, armed robbery, and firearm violations. On February 27, 1998, Gill waived jury trial and entered a plea of guilty to Counts 34 and 42, pursuant to a plea agreement. On May 6, 1998, the Court sentenced Gill to 60 months' imprisonment on Count 34 and a consecutive 240 months' imprisonment on Count 42, for a total of 300 months' imprisonment. The Court further ordered Gill to pay \$15,954.02 in restitution. Gill did not file a direct appeal following entry of judgment. Gill

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<sup>1</sup> Rule 12(b)(2) provides that objections to jurisdiction shall be noticed by the Court at "any time during the pendency of the proceedings." (emphasis added). It is clear, however, that the proceedings herein have concluded, and that they are therefore no longer pending. Gill has been convicted and sentenced, and his judgment of conviction is final. As such, Rule 12(b)(2) has no application here. However, jurisdictional issues are never waived and can be raised on collateral attack, in a § 2255 motion. United States v. Cook, 997 F.2d 1312, 1320 (10<sup>th</sup> Cir. 1993).

timely submitted the present motion on May 10, 1999, and the Court notes that this is his first such motion.

The Court notes at the outset the **well-settled** principle that “§ 2255 is not available to test the legality of matters which should have **been raised** on appeal.” U.S. v. Walling, 982 F.2d 447, 448 (10th Cir.1992). A failure to raise an issue on direct appeal thus acts as a bar to raising the issue in a § 2255 motion unless Gill can show **cause and** actual prejudice or can show that a fundamental miscarriage of justice will result if his claim is not addressed.<sup>2</sup> U.S. v. Allen, 16 F.3d 377, 378 (10th Cir.1994). This procedural bar applies to **collateral** attacks on a defendant’s sentence, as well as his conviction. Id.

Gill first argues that this Court **had no jurisdiction** over the acts for which he was convicted, and he asserts that the Court further **lacked jurisdiction** to sentence him. Gill claims that the conviction and sentence must be dismissed **for lack of jurisdiction**. This claim is frivolous. Clearly, this Court has jurisdiction over those acts **which** Congress has proscribed. See 18 U.S.C. § 3231 (United States District Courts shall have **original** and exclusive jurisdiction of all offenses against the laws of the United States). The Counts to which Gill pled guilty alleged two separate violations of 18 U.S.C. §§ 924(c) and 2. Because **these Counts** alleged offenses against the laws of the United States, this Court properly had **jurisdiction over this matter**.

Gill next argues that the Court **adopted the factual findings** and guideline recommendations in the presentence report **notwithstanding the fact** that Counts 34 and 42 alleged the same offense. Because Gill failed to appeal this issue **and further** failed to demonstrate cause and prejudice, this issue is procedurally barred. However, **even considering** the issue, the Court finds that it must be

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<sup>2</sup> Gill does not allege **ineffective assistance of counsel**.

overruled. Count 34 charges that on or about October 29, 1997, Gill committed armed robbery, and during and in relation to that offense, Gill knowingly used and carried a firearm, in violation of 18 U.S.C. §§ 924(c) and 2. Count 42 charges that on or about November 19, 1997, Gill committed armed robbery, and during and in relation to that offense, Gill knowingly used and carried a firearm, in violation of 18 U.S.C. §§ 924(c) and 2. Clearly, Counts 34 and 42 do not charge the same conduct. Moreover, Gill did not object to the factual accuracy of the presentence report, and he filed no objection to the report whatsoever. Further, during the sentencing hearing, the Court gave Gill, and his counsel, adequate opportunity to object to, and contest, any factual and legal matter appearing in the presentence report. Having heard no objections from Gill or his counsel, the Court was satisfied that Gill and his counsel accepted the accuracy of the report. The Court thus satisfied the requirements of Rule 32(c)(1) during the sentencing hearing.

Accordingly, Gill's motion pursuant to § 2255 is hereby DENIED.

IT IS SO ORDERED this <sup>27</sup>~~25~~ day of May, 1999.

  
H. DALE COOK  
United States District Judge

ENTERED ON DOCKET

DATE **MAY 28 1999**

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

PAUL TUCKER,  
Plaintiff,

Case No. 99 CV 246H (J)

UNUM LIFE INSURANCE COMPANY OF  
AMERICA, and EARLE M. JORGENSEN  
COMPANY,  
Defendants.

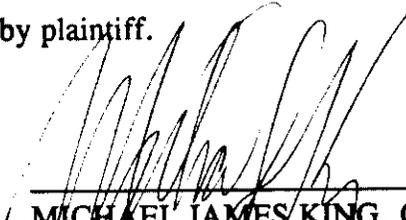
**F I L E D**

MAY 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATED DISMISSAL OF ACTION  
WITHOUT PREJUDICE**

Plaintiff, PAUL TUCKER, and Defendants, UNUM LIFE INSURANCE COMPANY OF AMERICA and EARLE M. JORGENSEN COMPANY, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, stipulate their dismissal of the above-entitled action without prejudice to the re-filing of the same. All costs to be paid by plaintiff.

  
MICHAEL JAMES KING, OBA #5036  
M. JEAN HOLMES, OBA #13507  
WINTERS, KING & ASSOCIATES, INC.  
2448 E 81ST STREET SUITE 5900  
TULSA OK 74137-4259  
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ATTORNEYS FOR PLAINTIFF

  
TIMOTHY A. CARNEY, OBA #11784  
GABLE & GOTWALS  
15 West Sixth Street, Suite 2000  
TULSA OK 74119-5447  
918-582-9201  
ATTORNEYS FOR DEFENDANTS

CLT

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

**F I L E D**

MAY 26 1999 *ML*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERRI LYNN WELCH and  
ROBERT M. WELCH,

Plaintiffs,

vs.

MEDICAL ENGINEERING CORPORATION, a  
Delaware corporation; SURGITEK, INC., a  
Wisconsin corporation and a subsidiary of  
BRISTOL-MYERS SQUIBB AND COMPANY, a  
Delaware corporation; MARK M RESOURCES,  
INC. f/k/a MARKHAM MEDICAL  
INTERNATIONAL, INC., a California corporation,  
NATURAL Y SURGICAL SPECIALTIES, INC., a  
Delaware corporation and APPLIED SILICONE  
CORPORATION, a California corporation, DOW  
CORNING CORPORATION, a Michigan  
corporation, DOW CORNING WRIGHT  
CORPORATION, a Tennessee corporation, THE  
DOW CHEMICAL COMPANY, a Delaware  
corporation, CORNING INCORPORATED, a New  
York corporation; THE COOPER COMPANIES,  
INC., f/k/a COOPERVISION, INC., a Delaware  
corporation, COOPER SURGICAL, INC., a  
Delaware corporation and division of THE COOPER  
COMPANIES, AESTHETECH CORPORATION, a  
California corporation, and a wholly-owned  
subsidiary of THE COOPER COMPANIES, INC.,

Defendants.

Civil Action No.: ~~CJ 903-04832-~~  
93-C-1077-B(J) ✓

FILED ON DOCKET  
MAY 28 1999

**ORDER OF DISMISSAL**

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41 (a)(1), it is hereby

ORDERED AND ADJUDGED that plaintiffs Terri Lynn Welch and Robert M.

Welch's claims against defendants Medical Engineering Corporation, Surgitek, Inc., Bristol-Myers

Squibb and Company, Mark M Resources, Inc., f/k/a Markham Medical International, Inc., Natural  
Y Surgical Specialties, Inc., The Cooper Companies, Inc., f/k/a Coopervision, Inc., Cooper Surgical,  
Inc., The Cooper Companies, Aesthetech Corporation, and The Cooper Companies, Inc. be  
dismissed with prejudice, each party to bear its own costs.

DATE: 5-26-99

  
~~CLERK OF THE COURT~~  
JUDGE

Copies to Counsel as follows:

Mark B. Hutton  
HUTTON & HUTTON  
8100 East 22nd Street North  
Building 1200  
Wichita, KS 67226-2312

**ATTORNEY FOR PLAINTIFFS**

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**ATTORNEYS FOR DEFENDANT  
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**ATTORNEYS FOR DEFENDANTS  
DOW CORNING CORPORATION  
and DOW CORNING WRIGHT  
CORPORATION**

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**ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
SURGITEK, INC., BRISTOL-MYERS SQUIBB  
AND COMPANY, MARK M RESOURCES,  
INC., F/K/A MARKHAM MEDICAL  
INTERNATIONAL, INC., NATURAL Y  
SURGICAL SPECIALTIES, INC., THE COOPER  
COMPANIES, INC., F/K/A COOPERVISION,  
INC., COOPER SURGICAL, INC., THE COOPER  
COMPANIES, AESTHETECH CORPORATION,  
AND THE COOPER COMPANIES, INC.**

Lyman Harris  
Judy Evans  
HARRIS, EVANS, BERG, MORRIS  
& ROGERS  
2007 Third Avenue North  
Birmingham, AL 35203

**ATTORNEYS FOR DEFENDANT  
APPLIED SILICONE CORPORATION**

C. William Threlkeld  
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One Leadership Square  
211 North Robinson - Ste. 800  
Oklahoma City, OK 73102

**ATTORNEYS FOR DEFENDANT  
CORNING INCORPORATED**

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

**F I L E D**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DENISE HESS,

Plaintiff,

vs.

Civil Action No.: 97CV1048C(W)

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 28 1999

**ORDER OF DISMISSAL WITH PREJUDICE**

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby  
ORDERED AND ADJUDGED that plaintiff Denise Hess and defendants Medical  
Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol  
Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice  
against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp.  
and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 5-26-99

*Phil Lombardi*  
CLERK OF THE COURT

*Dr. U.S. Dist. Court*

Copies to Counsel as follows:

Mark B. Hutton  
Hutton & Hutton  
8100 East 22nd Street North  
Building 1200  
Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan  
J. Margaret Tretbar  
SHOOK, HARDY & BACON L.L.P.  
One Kansas City Place  
1200 Main Street  
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

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

**F I L E D**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TRACY CHARLTON,

Plaintiff,

vs.

Civil Action No. 97CV 887 B (M)

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET  
MAY 28 1999

**ORDER OF DISMISSAL WITH PREJUDICE**

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby  
ORDERED AND ADJUDGED that plaintiff Tracy Charlton and defendants Medical  
Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol  
Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice  
against Medical Engineering Corporation individually and d/b/a Surgitek/Medical Engineering Corp.  
and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 5-26-99

  
CLERK OF THE COURT  
Judge

9

2

Copies to Counsel as follows:

Mark B. Hutton  
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ATTORNEY FOR PLAINTIFF

Matthew D. Keenan  
J. Margaret Tretbar  
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One Kansas City Place  
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Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

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

**FILED**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REZONA A. KELLY,

Plaintiff,

vs.

Civil Action No.: 97CV883 B(J)

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET  
DATE MAY 28 1999

**ORDER OF DISMISSAL WITH PREJUDICE**

Upon stipulation of the parties, pursuant to Fed. R. Civ. P. 41(a)(1), it is hereby  
ORDERED AND ADJUDGED that plaintiff Rezona A. Kelly and defendants  
Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and  
Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with  
prejudice against Medical Engineering Corporation individually and d/b/a Surgitek/Medical  
Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

DATE: 5-26-99



~~CLERK~~ OF THE COURT

JUDGE

Copies to Counsel as follows:

Mark B. Hutton  
HUTTON & HUTTON  
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Wichita, KS 67226-2312

ATTORNEY FOR PLAINTIFF

Matthew D. Keenan  
J. Margaret Tretbar  
SHOOK, HARDY & BACON L.L.P.  
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1200 Main Street  
Kansas City, MO 64105

ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

**FILED**

**MAY 27 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JUBE O. OGISI,

Defendant.

Case No. 99CV0205B(E)

ENTERED ON DOCKET  
DATE **MAY 28 1999**

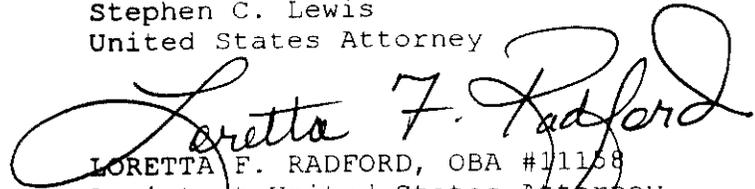
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 27<sup>th</sup> day of May, 1999.

UNITED STATES OF AMERICA

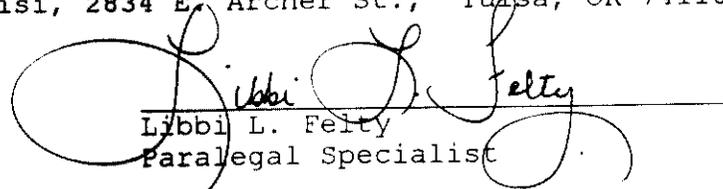
Stephen C. Lewis  
United States Attorney



LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 27<sup>th</sup> day of May, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jube O. Ogisi, 2834 E. Archer St., Tulsa, OK 74110.



Libbi L. Felty  
Paralegal Specialist

KL

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 27 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CLAUDE D. KIRK, )  
 )  
 Defendant. )

Case No. 98CV0970B(J)

ENTERED ON DOCKET

DATE MAY 28 1999

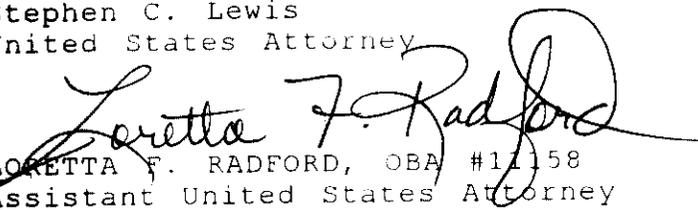
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 27<sup>th</sup> day of May, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 27<sup>th</sup> day of May, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Claude D. Kirk, 4965 E. 26<sup>th</sup> St., Tulsa, OK 74114.

  
Libbi L. Felty  
Paralegal Specialist

C15

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

**F I L E D**

SUSAN C. NICHOLSON, )  
SSN:411-76-4889, )

MAY 27 1999 *SA*

Plaintiff, )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v. )

CASE NO. 98-CV-500-M ✓

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

ENTERED ON DOCKET

Defendant. )

DATE MAY 28 1999

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 27<sup>th</sup> day of MAY, 1999.

*Frank H. McCarthy*  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

MAY 26 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SUSAN C. NICHOLSON,  
411-76-4889

Plaintiff,

vs.

Case No. 98-CV-500-M ✓

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAY 28 1999

**ORDER**

Plaintiff, Susan C. Nicholson, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's April 10, 1996, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 14, 1997. By decision dated May 9, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 12, 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 & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born October 8, 1962, and was 34 years old at the time of the hearing. She claims to have been unable to work since December 4, 1992, when she sustained right elbow and right hip fractures in a work-related accident. The ALJ determined that Plaintiff retains the residual functional capacity to perform a full range of medium work, which includes the full range of light and sedentary work. Based on the testimony of a vocational expert, the ALJ found that Plaintiff's past work as a shift manager, horticultural worker, airport attendant, and sandblaster were skilled and semi-skilled work performed at the light and medium exertional levels, and were not precluded by her limitations. The ALJ made an alternative finding that there are a sufficient number of jobs in the national economy that Plaintiff could perform. Thus, the ALJ determined that Plaintiff is not disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five step evaluation sequence in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) made an erroneous residual

functional capacity (RFC) determination; and (2) failed to perform a correct analysis comparing Plaintiff's abilities to the requirements of her past work. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

The medical record supports the ALJ's RFC determination. On December 4, 1992, Plaintiff fell from a roof and fractured her right elbow and right hip. Both fractures required open reduction and internal fixation. The elbow pins were removed in February 1993. [R. 84]. On July 16, 1993, Plaintiff was examined for workers compensation rating purposes by Dr. Griffith C. Miller. She complained of an inability to lift more than 5 to 10 pounds. [R. 82]. His examination revealed reduced range of motion in both Plaintiff's right hip and elbow. [R. 83].

The internal hardware was removed from Plaintiff's hip in August 1993. [R. 96]. On September 24, 1993, one month after the last hip surgery, Plaintiff was seen by Dr. Cash, her orthopedic surgeon. She reported having no pain and that she was happy with the result. She was released to full duty at that time. [R. 96]. On November 23, 1993, Plaintiff was seen again by Dr. Cash. He reported minimal deficits in the range of motion of Plaintiff's right hip and elbow. [R. 96].

On May 8, 1996, Plaintiff was examined by consultative examiner, Dr. Steven Y.M. Lee. He found mild limitations in Plaintiff's wrists, mild thumb stiffness, and that she lacked 15% complete extension of her right elbow, but had normal flexion and was able to pronate and supinate the right hand without difficulty. [R. 89]. Hip range of motion was normal. Straight leg raising to 90 degrees was normal on both sides

and Plaintiff was able to walk without difficulty. Dr. Lee also recorded Plaintiff had the ability to manipulate small objects as well as common tools. [R. 90].

On June 13, 1996, Plaintiff returned to Dr. Cash, complaining of having an aching pain in her right elbow. He noted that x-rays show mild degenerative changes in her right elbow, but that she has good range of motion, full flexion, good strength in flexion, extension and rotation and lacks only a couple of degrees of full extension. He also found that her elbow stability was good. [R. 95].

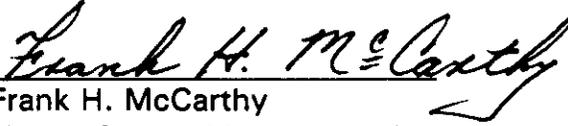
The record does not support Plaintiff's contention that the ALJ failed to take her limitations into account. Contrary to Plaintiff's assertion, no physician found that Plaintiff was unable to carry more than five to ten pounds without pain. That entry was the worker's compensation consultative physician's recordation of Plaintiff's complaint. [R. 81]. Further, the ALJ appropriately accorded greater weight to the findings of Dr. Cash, because he had a treatment relationship with Plaintiff. See 20 C.F.R. §§ 404.1527 (d).

Plaintiff argues that the case should be remanded because the ALJ failed to conduct an appropriate analysis of her past relevant work, as required by *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996). However, Plaintiff does not challenge the ALJ's alternative step-five finding of no disability. The ALJ's step-five finding is a sufficient basis for denial of benefits, and eliminates the necessity of addressing Plaintiff's challenges to step-four. See *Berna v. Chater*, 101 F.3d 631, 633 (10th Cir. 1996)(if claimant challenges only one of two alternative rationales supporting a disposition, success on appeal is foreclosed, regardless of merits of arguments related

to challenged alternative); *Murrell v. Shalala* 43 F.3d 1388, 1390 (10th Cir. 1994)(same).

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 26<sup>th</sup> Day of May, 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**

MAY 27 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PAMELA S. PILGRIM,  
440-56-8791

Plaintiff,

vs.

Case No. 95-CV-543-M

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

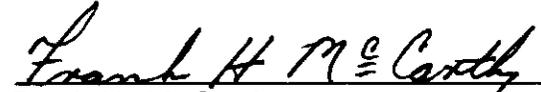
Defendant.

ENTERED ON DOCKET  
MAY 28 1999

DATE \_\_\_\_\_

**JUDGMENT**

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this  
27<sup>th</sup> Day of May, 1999.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

MAY 27 1999 

PAMELA S. PILGRIM,  
440-56-8791

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 95-CV-543-M 

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

ENTERED ON DOCKET  
DATE MAY 28 1999

**ORDER**

Plaintiff, Pamela S. Pilgrim, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> 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

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<sup>1</sup> Plaintiff's April 3, 1992, application for benefits was denied by the Commissioner and has previously been appealed to the district court. Due to loss of the Social Security hearing tape, the case was remanded pursuant to sentence six of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). On remand a hearing before an Administrative Law Judge ("ALJ") was held September 11, 1996. By decision dated October 25, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 1, 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.

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 would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born January 24, 1951, and was 44 years old at the time of the hearing. She has a 12 grade education and formerly worked as a custodian, an assembler, and an office manager. She claims to have been unable to work since March 1, 1991, as a result of bilateral carpal tunnel syndrome, fibromyalgia, and depression.

A carpal tunnel release was performed on Plaintiff's right hand on April 12, 1991. Her surgeon, Dr. Vosburgh released her to return to work on August 12, 1991. [R. 131]. Dr. Letcher performed a carpal tunnel release on her left hand on August 28, 1991. On September 21, 1991, she was released to return to full-time unrestricted activity. [R. 141]. In November 1991, Plaintiff was treated by hand surgeon, Dr. Clendenin, who evaluated Plaintiff's continuing complaints of hand pain. He found basal joint arthritis in both thumbs to be limiting Plaintiff's recovery. Dr. Clendenin sent Plaintiff to a work hardening program. Following work hardening, on May 13,

1992, Dr. Clendenin found Plaintiff to have residual pain and discomfort. Taking that into account, Dr. Clendenin stated Plaintiff was capable of "performing job activities which do not require lifting, pulling or pushing of more than 5 to 10 pounds with either hand. Repetitive line work should also be avoided. I feel that she is well adapted to do light or sedentary work." [R. 150].

On March 30, 1992, Dr. Farrar examined Plaintiff for workers' compensation purposes. He expressed the opinion that Plaintiff was not able to return to her former work, and that vocational rehabilitation and aptitude testing would be necessary to replace her in the work force. [R. 173]. Subsequently, Dr. Farrar reported that Plaintiff had become his patient. His office notes reflect a visit on October 20, 1992, wherein Plaintiff complained of continuing pain, radiating up into her upper extremities. Dr. Farrar found the pain to be of a "fibromyalgic basis" and prescribed Amitriptyline to be taken at bedtime and Trilisate, a nonsteroidal anti-inflammatory. [R. 169]. When Plaintiff was re-examined on November 4, 1992, she reported not having nearly as much pain and that she was sleeping better at night. *Id.* On January 27, 1993, Plaintiff was overall doing fairly well. She reported that she was still having difficulties with pain and that the medications are of benefit. [R. 168].

On March 3, 1993, Plaintiff underwent a psychiatric consultative examination. The examiner found Plaintiff to have a mild dysthymic disorder. [R. 176]. A consultative physical examination was performed on October 11, 1993 by Dr. Sutton. He found no objective evidence of disability on his examination. [R. 181]. Another examination was performed on October 12, 1993, by Dr. Miller. He found markedly

decreased range of motion and positive Tinel's and Phalan's test<sup>2</sup> bilaterally; there was no muscle spasm present in the back; and range of motion was normal. [R. 198]. Dr. Miller concluded that Plaintiff was "temporarily totally impaired from February 27, 1990 until the date of exam, July 30, 1993. [R. 199].

On August 18, 1993, Plaintiff reported to Dr. Farrar that she had good days and bad days, more bad than good, and that she had become depressed. Dr. Farrar changed her medication, included Zoloft and prescribed wrist splints. [R. 244]. On September 24 and October 22, 1993, Plaintiff reported being pleased with her improvement. *Id.* On December 17, 1993, she reported headaches, Dr. Farrar noted musculoligamentous spasm. [R. 243]. On August 25, 1994, Dr. Farrar noted evidence of fibromyalgia. *Id.* On April 13, 1995, inflammatory reactions were noted and on October 11, 1995, she continued to show fibrositis and fibromyalgia complex. [R. 242]. On August 26, 1996, Dr. Farrar's records show that Plaintiff presented for recheck and for a refill on her medications. He noted HEENT were normal and her lungs were clear. [R. 241]. By letter dated September 4, 1996, Dr. Farrar stated that Plaintiff's symptomatology includes a fibromyalgia complex throughout her neck and shoulders as well as overutilization to her right and left hands with a chronic tendonitis. He opined that Plaintiff was 100% permanently disabled. [R. 248].

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<sup>2</sup> Tinel's sign is a "cutaneous tingling sensation produced by pressing on or tapping the nerve trunk that has been damaged or is regenerating following trauma." *Tabors Cyclopedic Medical Dictionary*, 17th Edition 1999-2000. Phalan's maneuver is a test for the detection of carpal tunnel syndrome. *Dorland's Illustrated Medical Dictionary* 985 (28th ed. 1994).

The ALJ determined that Plaintiff has the residual functional capacity to perform the requirements of work, except for lifting over 10 pounds frequently or 20 pounds occasionally, constant repetitive work with her hands, or continuous grasping. Based on the testimony of the 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. Specifically, Plaintiff argues that the ALJ: (1) relied on a conclusory consultative examination; (2) failed to give proper weight to the opinion of the treating physician; (3) failed to perform an appropriate pain and credibility analysis; and (4) failed to include all impairments in the hypothetical question asked of the vocational expert. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

Plaintiff argues that the denial decision should be reversed because the ALJ relied on an inadequate and conclusory consultative examination. According to Plaintiff, the consultative examination performed on October 11, 1993, by Dr. Sutton is infirm because Dr. Sutton did not specifically state that he looked for tenderness, muscle spasms, trigger points, or whether signs of hand dysfunction were present as did Dr. Miller who examined Plaintiff the very next day. Dr. Sutton's report reflects

that he did complete range of motion testing, and found essentially normal range of motion, except for a minor restriction in the wrists. He also found normal bilateral grip strength, good finger/thumb approximation, and that Plaintiff was able to button clothing, tie shoes and operate her zipper without difficulty. [R. 181-182]. Dr. Sutton's findings are not consistent with those recorded on October 12, 1993 by Dr. Miller whom Plaintiff consulted for Workers Compensation purposes. [R. 196-200]. However, his findings are consistent with those of several treating physicians, Drs. Vosburgh [R. 131], Letcher [R. 138-142], and Clendenin [R. 150-152]. It is within the province of the ALJ to resolve conflicting medical evidence. *Eggleston v. Bowen*, 851 F.2d 1244, 1247 (10th Cir. 1994). The ALJ appropriately resolved the conflicting medical evidence.

Plaintiff argues that the case should be reversed because the ALJ failed to accord appropriate weight to the opinion of Dr. Farrar. It is well established that the Commissioner must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ.

*Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984).

On January 12, 1994, Dr. Farrar stated his opinion that Plaintiff was 100% permanently and totally disabled. [R. 195]. On September 4, 1996, Dr. Farrar again expressed the opinion that Plaintiff was disabled. [R. 248]. The ALJ stated that Dr. Farrar's treatment records do not document any limitation that would cause Plaintiff to be 100% permanently disabled. [R. 25]. Further, the ALJ noted that Plaintiff's treating specialists differed with Dr. Farrar's opinion. The court finds that specific, legitimate reasons were given for the ALJ's rejection of Dr. Farrar's opinion.

The court finds no support for Plaintiff's assertion that the ALJ ignored "the fact that Plaintiff has any meaningful impairment in her hands." [Dkt. 17, p. 3]. While the ALJ did not mention Dr. Farrar's diagnosis of chronic tendonitis, he included hand limitations in the RFC assessment. The ALJ found Plaintiff had lifting limitations; limitations on her ability to perform constant repetitive work with her hands; and limitations on her ability to perform continuous grasping. [R. 23].

There is also no merit to Plaintiff's contention that the ALJ disregarded her complaints of pain and depression. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20

C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 96-7p and appropriately applied the evidence to those guidelines. He noted Plaintiff's testimony concerning her daily activities, the medicine she takes, that she has no side effects from her medications, and that none of her physicians have documented significant restrictions of her abilities. The court finds that the ALJ sufficiently set forth reasons, supported by evidence in the record, for his pain and credibility determinations.

Concerning Plaintiff's alleged depression, the ALJ noted that until the consultative psychiatric examination on March 3, 1993, there was no mention of depression in the medical record. During the examination Plaintiff stated she was depressed due to financial hardship, but denied panic attacks and stated that she had never sought psychiatric care. She was not on any antidepressant at the time, denied social isolation and enjoyed the company of other people. The court finds that the ALJ's conclusion that Plaintiff's alleged depression was "mild and situational and would not have any effect" [R. 25] on her ability to work is supported by substantial evidence.

Plaintiff claims that the hypothetical question posed to the vocational expert was incomplete in that it failed to include all of her limitations. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an 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 ALJ accounted for Plaintiff's hand limitations by finding that she was limited in her ability to perform lifting, perform constant repetitive work with her hands, and to perform continuous grasping. [R. 23]. The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. Therefore the court finds that the ALJ's hypothetical questions to the vocational expert and his reliance upon the vocational expert's testimony in his decision were proper and in accordance with established legal standards.

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

SO ORDERED this 27<sup>th</sup> Day of May, 1999.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

ROBERTA FARLEY, )  
)  
Plaintiff, )  
)  
v. )  
)  
MEDICAL ENGINEERING CORPORATION, )  
individually and d/b/a SURGITEK/MEDICAL )  
ENGINEERING CORP. and BRISTOL MYERS )  
SQUIBB COMPANY, INC., )  
)  
Defendants. )

ENTERED ON DOCKET

DATE MAY 28 1999

No. 97-CV-888-K ✓

**F I L E D**

MAY 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

Upon stipulation of the parties, pursuant to Fed. R.Civ.P. 41(a)(1) it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiff Roberta Farley and Defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

ORDERED this 26 day of May, 1999.



TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

DON SIGMON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
COMMUNITYCARE HMO, et al., )  
)  
Defendants. )

No. 97-CV-845-K

ENTERED ON DOCKET  
DATE MAY 28 1999

**FILED**

MAY 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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 26 day of May, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAY 28 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GARY D. EVANS,

Plaintiff,

v.

AMOCO CORPORATION,

Defendant.

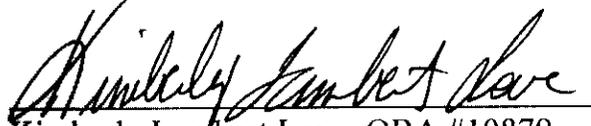
Case No. 98-CV-0448H

ENTERED ON DOCKET  
DATE MAY 28 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case.

Respectfully submitted



Kimberly Lambert Love, OBA #10879  
Mary L. Lohrke, OBA #15806  
Boone, Smith, Davis, Hurst & Dickman  
500 ONEOK Plaza  
100 West 5th Street  
Tulsa, Oklahoma 74103  
Telephone: (918)587-0000  
Telecopier: (918)599-9417

OF COUNSEL:

Gregory Alvarez  
Amoco Corporation  
P.O. Box 3092  
Houston, TX 77253-3092

Attorneys for Defendant, Amoco Corporation

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Jeff Nix  
Petroleum Club Building  
601 South Boulder, Suite 610  
Tulsa, Oklahoma 74119  
Attorney for Plaintiff, Gary D. Evans

KK

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 27 1999 *SR*

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JEANNIE L. BREAD, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99CV0200H (M)

ENTERED ON DOCKET  
DATE MAY 28 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis,  
United States Attorney for the Northern District of Oklahoma, Plaintiff  
herein, through Loretta F. Radford, Assistant United States Attorney,  
and hereby gives notice of its dismissal, pursuant to Rule 41, Federal  
Rules of Civil Procedure, of this action without prejudice.

Dated this 27<sup>th</sup> day of May, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Loretta F. Radford*  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 27<sup>th</sup> day of May, 1999, a  
true and correct copy of the foregoing was mailed, postage prepaid  
thereon, to: Jeannie L. Bread, 5134 S. Peoria Ave., Tulsa, OK  
74105-5623.

*Libbi L. Felty*  
Libbi L. Felty  
Paralegal Specialist

CIT

KK

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 27 1999 SA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOWARD L. BOONE, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99CV0146H(J) ✓

ENTERED ON DOCKET

DATE MAY 28 1999

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 27<sup>th</sup> day of May, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Loretta F. Radford*  
LORETTA F. RADFORD, OBA #111158  
Assistant United States Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 27<sup>th</sup> day of May, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Howard L. Boone, P. O. Box 1792, Claremore, OK 74018.

*Libbi L. Felty*  
-----  
Libbi L. Felty  
Paralegal Specialist

C/S

MT

DISTRICT COURT  
**FILED**

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

MAY 24 1999

SHELL & TUBE, INC., an  
Oklahoma corporation,

Plaintiff,

vs.

DANBURY SALES, INC., a  
foreign corporation,

Defendant.

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

Case No. 98 CV 408 H (M)

ENTERED ON DOCKET

DATE MAY 28 1999

**FILED**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

COME NOW the parties herein and would hereby mutually stipulate that the above-styled matter should be dismissed with prejudice. The parties further agree that this decision has been reached of their own free will, after consultation with legal counsel. The parties further stipulate that no inference should be drawn as to the merits of the Plaintiff's claim against the Defendant as a result of this dismissal with prejudice.

IT IS THEREFORE the request of the parties that the above-styled matter should be dismissed with prejudice to its being re-filed, and this Court enter an Order accordingly.

Respectfully submitted,

SHELL & TUBE, INC.  
an Oklahoma corporation

By: John F. Slagle  
John F. Slagle, President  
PLAINTIFF

~~FILED~~  
~~MAY 28 1999~~  
SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

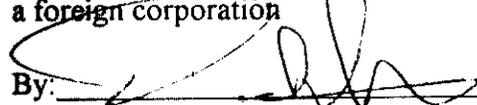


Jack L. Brown, OBA #10742  
C. Michael Copeland, OBA #13261  
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9 East 4th Street, Suite 300  
Tulsa, Oklahoma 74103  
Telephone: (918) 582-7236

ATTORNEYS FOR PLAINTIFF

DANBURY SALES, INC.  
a foreign corporation



By: \_\_\_\_\_  
David Orden, President

DEFENDANT



Richard L. Hathcoat, OBA #14539  
Anthony J. Jorgenson, OBA #17074  
STAUFFER, RAINEY, GUDGEL & HATHCOAT  
1100 Petroleum Club Building  
601 South Boulder  
Tulsa, OK 74119  
ATTORNEYS FOR DEFENDANT  
DANBURY SALES, INC.

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

FILED

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DONALD DRUSKY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES CONGRESS, et al., )  
 )  
 Defendants. )

No. 99-C-131-C ✓

ENTERED ON RECORD  
MAY 27 1999  
DATE \_\_\_\_\_

**ORDER**

On February 16, 1999, Donald Drusky filed a pro se complaint along with a motion to proceed in forma pauperis (IFP). Since the IFP motion was unintelligible and did not conform to the standard IFP motion which this Court utilizes, the Court entered a Minute Order on March 29, 1999, denying Drusky's motion and further directing the Clerk to provide him with the proper IFP documents. The Court additionally provided in the Minute Order that if Drusky failed to either submit the proper materials or pay the appropriate filing fee within 30 days of the date that the Clerk forwarded the IFP materials to him, the present case shall be dismissed.

Because of Drusky's failure to comply with the Court's Minute Order by either paying the filing fee or submitting the appropriate IFP papers, the present action is hereby DISMISSED.<sup>1</sup>

IT IS SO ORDERED this 25<sup>th</sup> day of May, 1999.

  
H. DALE COOK  
Senior United States District Judge

<sup>1</sup> The Court additionally notes that, from a review of the complaint filed herein, the Court would have dismissed the present action as frivolous in any event.

**FILED**

**MAY 26 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

U.S.A., )  
 )  
 Plaintiff(s), )  
 )  
 vs. )  
 )  
 STATE OF OKLAHOMA, et al, )  
 )  
 Defendant(s). )

Case No. 98-C-521-B ✓

ENTERED ON DOCKET

MAY 27 1999

ADMINISTRATIVE CLOSING ORDER

The Parties having advised the Court of their agreement to stay this case pending final adjudication of Case No. CIV-98-221-W, Fent v. State of OK, et al, U.S.D.C. for Western District of Oklahoma or if pending legislation does not moot the dispute, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication in the above referenced case or legislation resolving the issues, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 26<sup>th</sup> day of May, 1999.



THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

6

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

SHARON K. McDONALD, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PRINCIPAL MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE MAY 27 1999

No. 98-CV-718-K

**F I L E D**

MAY 26 1999

**ORDER**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**I. Brief Statement of the Case:**

The Plaintiff and beneficiary in this case, Sharon McDonald, filed this lawsuit claiming that she should have been paid the full face amount of a policy of term insurance covering her husband, Larry T. McDonald. Mr. McDonald killed himself on October 30, 1997. On the date of his death a Term Life Policy, issued by the Defendant Principal Life on February 12, 1996, had been in force and effect less than two years. Pursuant to the "Suicide Clause" contained in this contract, Principal Life was obligated only to return premiums with interest.

The parties have filed cross motions for summary judgment pursuant to *Fed.R.Civ.P. 56(c)*, on the grounds that there is no material issue of fact for trial and the case must be decided as a matter of law. The Plaintiff contends, first, that her husband had been insured by Principal Life since his purchase of an Adjustable Life Insurance Policy in 1995. Although Mr. McDonald let the Adjustable Life Insurance Policy expire, at which time he purchased a Term Life Policy, Plaintiff argues that the first policy converted or continued into the second policy. Therefore, Principal Life's obligation to the decedent began to run in 1995, which means that Mr. McDonald had been insured

for more than two years at the time of his **suicide**, entitling Plaintiff to the full value of the Term Policy, which is \$500,000. Alternately, **Plaintiff** argues that the Notice to Applicants Regarding Replacement of Life Insurance or an Annuity (**hereinafter "Notice"**) of the Term Policy in effect at the time of her husband's suicide **contains terms** which contradict the Policy. Therefore, the insurance contract is ambiguous as a matter of law and must be construed in favor of the Plaintiff.

The Defendant contends that **Mr. McDonald's** Adjustable Life Policy was terminated, and he applied for coverage to start anew under a **Term Life Policy** which had been in full force and effect less than two years at the time of his **death**, thus precluding coverage pursuant to the "Suicide Clause." The Defendant also maintains that the Adjustable Life Policy contained no right of conversion, and **Mr. McDonald explicitly demonstrated** knowledge of this fact by signing the Notice. Additionally, the Defendant asserts that the **Term Life Policy** was not ambiguous as a matter of law, and the conflicting term regarding coverage in the case of suicide was contained in the Notice, and was, therefore, not a part of the insurance contract. Therefore, summary judgment must be entered in favor of the Defendant.

## **II. Factual Summary:**

Effective April 18, 1995, Defendant issued its life insurance policy number 4-411-385 in the amount of \$500,000 insuring the life of **Larry Tilson McDonald**. This was an Adjustable Life Policy. That policy lapsed on **March 18, 1996**, and was not in full force and effect on **October 30, 1997**, the date of **Mr. McDonald's death by suicide**. The Adjustable Life Policy did not contain a conversion clause giving the insured the **right to convert** this policy to a new and different policy of insurance.

On February 9, 1996, Mr. McDonald applied for a policy of term insurance with a face amount of \$500,000 and on February 12, 1996, Policy No. 4-444-657 was issued to Mr. McDonald.

The Term Policy provided, in relevant part:

This policy's death proceeds will not be paid if the insured dies by suicide, while sane or insane, within 2 years of the effective date. Instead, we will return all premiums paid less any dividends paid. This amount will be paid to the beneficiary. (Hereinafter the "Suicide Clause").

As part of the application process for Policy No. 4-444-657, Mr. McDonald signed a Notice to Applicants Regarding Replacement of Life Insurance or an Annuity on February 8, 1996. The Notice contained in relevant part the following language:

**NOTICE TO APPLICANTS  
REGARDING REPLACEMENT OF LIFE INSURANCE OR AN ANNUITY  
THIS NOTICE IS FOR YOUR BENEFIT AND IS REQUIRED BY LAW**

2. It may not be advantageous to drop or change existing life insurance in favor of new life insurance, whether issued by the same or a different insurance company. Some of the disadvantages are:

c. The incontestible and suicide clauses begin anew in a new policy. This could result in a claim under a new policy being denied by the company which would have been paid under the old policy.

I hereby acknowledge that I have received the above "Notice to Applicants Regarding Replacement of Life Insurance or an Annuity" before I signed the application for the proposed new insurance.

I have read the "NOTICE TO APPLICANTS REGARDING REPLACEMENT OF LIFE INSURANCE OR AN ANNUITY" which was furnished to me by the agent taking the application for this policy.

The Notice also contained a section containing definitions that were not policy specific. The Definitions portion of the Notice included this definition:

Suicide Clause: This says that if you commit suicide after being insured for less than one year, your beneficiaries will receive only a refund of the premiums that were

paid.

On March 11, 1996, Mr. McDonald **acknowledged** that the Term Policy had been delivered to him by signing the appropriate receipt.

Larry's wife, Plaintiff, Sharon K. McDonald, was the beneficiary under both policies. After Mr. McDonald's death, the Defendant issued to the Plaintiff a check for \$2,072.51 for the return of all premiums paid on Policy No. 4-444-657, with interest, in full payment of all claims pursuant to the terms and conditions of the Term Policy.

### **III. 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).

#### **IV. Discussion:**

##### ***A. Continuation or Conversion of Coverage***

Plaintiff argues, first, that the **Adjustable Life Policy** and the **Term Life Policy** are but a single, continuing contract of insurance and that, accordingly, the suicide clause in the **Term Life Policy** commenced to run as to the insured on **April 18, 1995**, the date that Mr. McDonald was issued a **Certificate of Insurance** for the **Adjustable Life Policy**. The Defendant contends, in the contrary, that the **Adjustable Life Policy** and the **Term Life Policy** are separate and distinct contracts, and that the suicide clause in the **Term Life Policy** by its own terms commenced to run on the date of issuance of the **Term Life Policy**, namely **February 12, 1996**. The pivotal question for this Court then, is at what point the suicide clause commenced to run.

Although the Tenth Circuit has not decided a case with identical facts, this Court finds that their holding in Binkley v. Manufacturers Life Ins. Co., 471 F.2d 889 (10<sup>th</sup> Cir. 1973), *cert. denied*, 414 U.S. 877 (1973) is instructive. In Binkley, the Court was faced with the issue of when a suicide provision in a policy of life insurance began to run. In that case, the trial court found, and the Tenth Circuit affirmed, that the individual policy issued to the decedent differed from the general terms of the initial group policy. The Court rejected the beneficiary's position that there was but a single continuing contract of insurance and that the one-year suicide clause should be found to run from 1966 when the insured became covered under the group policy.

As an initial matter, this Court finds that there are significant differences between the case at hand and Binkley. Although the Binkley Court found that the second policy purchased by the decedent was not a continuation of the first, the Court's determination was due, in large part, to the fact that the two policies were vastly different in their terms. In that case, the group policy contained

no suicide clause, whereas the individual policy did. Additionally, the group policy coverage afforded the insured only \$12,000, whereas the coverage afforded under the individual policy was \$15,000. There were additional dissimilarities between the two policies.

Such is not the case here. Both policies purchased by Mr. McDonald were life policies, insuring Mr. McDonald's life, for the same amount of coverage (\$500,000), issued at the same age (43), and with the same beneficiary (Sharon McDonald). The policies at issue in this case are substantially similar. Although the Defendant attempts to distinguish the Adjustable Life Policy and the Term Policy, this Court finds that they are, in essence, virtually indistinguishable.

However, the existence of the conversion clause in Binkley, and the absence of such a clause in this case, is dispositive on the issue of continuation of coverage. In Binkley, the Tenth Circuit directed their analysis towards the fact that the first policy contained a conversion clause. It was the existence of the conversion clause which urged the Court to consider whether the insured had intended to convert his group policy into an individual policy. At that point the Court examined the terms of the two policies to determine whether they were substantially similar. Here there was no such conversion clause contained in the Adjustable Life Policy. The insured in this case recognized the absence of that term through his termination of his Adjustable Life Policy and re-application for the Term Life Policy. Under the terms of the Adjustable Life Policy, the insured never had the option of conversion or continuation of coverage. In fact, Mr. McDonald signed the Notice which explicitly declared that he may be forfeiting valuable rights held in the Adjustable Life Policy by terminating that policy and purchasing a new policy.<sup>1</sup> The language of the Notice, in fact, explicitly

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<sup>1</sup>The Notice reads:

advised Mr. McDonald that the Term Life Policy was a "new policy" and, among other things, this meant the suicide provision was to start anew.

Despite the fact that the Plaintiff attempts to distinguish the facts of this case from the Tenth Circuit's holding in Binkley, this Court finds Binkley to be controlling. Although the Adjustable Life Policy and the Term Life Policy certainly contained substantial similarities, Mr. McDonald did not have a right of conversion from one to another. Furthermore, any doubt which might remain as to the insured's intent at the time of his termination of the Adjustable Life Policy, was clarified by his explicit demonstration that he understood the advantages and disadvantages of changing insurance policies, and signed the Notice demonstrating as much. This Court finds that the insured had no right of conversion, and the suicide clause commenced to run on February 12, 1996, the date of the issuance of the Term Life Policy.

### *B. Ambiguous as a Matter of Law*

Secondly, the Plaintiff argues that the terms of the insurance contract are ambiguous as a matter of law. The insurance contract itself embodies a "Suicide Clause" stating that coverage will be denied in the case of suicide if the insured dies before two years from the date of issuance of the contract. However, the Notice provision of the contract contains a definition of "suicide" stating that

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2. It may not be advantageous to drop or change existing life insurance in favor of new life insurance, whether issued by the same or a different insurance company. Some of the disadvantages are:

c. The incontestable and suicide clauses begin anew in a new policy. This could result in a claim under a new policy being denied by the company which would have been paid under the old policy.

coverage will be denied if the insured dies by suicide within one year from the date of issuance. Plaintiff contends this renders the insurance contract ambiguous, and it must be construed against the insurance company, in the favor of coverage for the beneficiary.

Insurance policies are contracts. Littlefield v. State Farm Fire and Cas., 857 P.2d 65, 69 (Okla. 1993). 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).

As with any other contract, the presence of ambiguity in a term of an insurance contract 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). 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.

The essential task before the Court is to determine whether the contract is ambiguous as a matter of law. The contract states clearly and concisely that there will be no coverage under the Policy if the insured kills him/herself within 2 years from the date of issuance.<sup>2</sup> There is absolutely nothing ambiguous about the "Suicide Clause" in and of itself. The language is clear and concise, and the terms adequately state what is required for the beneficiary to recover in the case of a suicide.

However, as the Plaintiff points out, included with the contract was a separate form, the Notice. The Definitions portion of the Notice included this definition:

Suicide Clause: This says that if you commit suicide after being insured for less than one year, your beneficiaries will receive only a refund of the premiums that were paid.

The Court must take into consideration the fact that the Notice contains a definition of suicide which is in contravention to the "Suicide Clause" in the contract.

The Defendant argues that the Notice is separate and distinct from the insurance contract and may not be used to alter or redefine the contractual terms.<sup>3</sup> It appears to the Court that the Defendant seeks to rely on the Notice on the issue of whether the insured knowingly gave up all rights of conversion or continuation of coverage, but urges the Court to ignore the controlling authority of the

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<sup>2</sup>The contract reads:

"This policy's death proceeds will not be paid if the insured dies by suicide, while sane or insane, within 2 years of the effective date. Instead, we will return all premiums paid less any dividends paid. This amount will be paid to the beneficiary."

<sup>3</sup>In support of this proposition, the Defendant cites McClain v. Ricks Exploration, Co., 894 P.2d 422 (Okla.App. 1994). Although McClain held that the intent of the parties must be determined from the four corners of the instrument where it is clear and unambiguous, the facts differed substantially from those in this case. In McClain, there was only one instrument at issue, not a contract accompanied by another document, as is the case here.

Notice in that it contains a crucial definition which is inconsistent with the terms of the Term Life Policy.

At Defendant's urging, this Court has taken the Notice into consideration in determining whether the insured acknowledged the possible consequences of terminating coverage under the Adjustable Life Policy, and reinstating coverage pursuant to the Term Life Policy. Accordingly, the Court must take the Notice into account when determining whether the insurance contract is ambiguous as a matter of law. The Court finds that the suicide definition in the Notice contract is different from the "Suicide Clause" contained in the contract; therefore, the circumstances giving rise to coverage in the case of a suicide is susceptible to two possible constructions, and the contract is ambiguous as a matter of law. Max True Plastering v. U.S. Fidelity & Guaranty Co., 912 P.2d 861 (Okla. 1996); Littlefield v. State Farm Fire and Casualty Co., 857 P.2d 65, 69 (Okla. 1993).

Although 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.,<sup>4</sup> it is virtually impossible to reconstruct intent in this case, as the insured is no longer living. The general rule, however, is well established in Oklahoma: "If the insurance policy language is doubtful and susceptible to two constructions, without resort to and following application of the rules of construction, then a *genuine ambiguity* exists, and the contract will be interpreted, consistent with the parties' intentions, most favorably to the insured and against the insurance carrier." Dodson v. St. Paul Ins. Co., 812 P.2d 372, 376-77 (Okla. 1991) (emphasis in original).

Although reconstructing intent at this stage is impracticable, it is conceivable, if not likely,

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<sup>4</sup>645 P.2d 1042, 1044 (Okla.Ct.App.1982).

that the insured relied on the one year suicide provision in the Notice when terminating his Adjustable Life Policy and purchasing a Term Life Policy. Not only does the Notice contain the one year suicide provision, but it also contains the statement that the insured was fully aware of rights he might be foregoing by changing policies. If the Court finds, as it has, that the insured was fully aware that he was waiving rights to continued coverage by signing the Notice provision, then it must also find that the terms contained therein played a role in his decision to terminate and re-apply for life insurance coverage.

Therefore, having found an ambiguity exists as a matter of law regarding the suicide provision of the Term Life Policy, the Court must construe that ambiguity consistent with the parties' intent, and favorably to the insured. Given the strong language contained in the Notice regarding the rights that Mr. McDonald was aware he was relinquishing by changing policies, the Court finds that the Notice term regarding applicable coverage in the case of suicide was very likely relied upon by Mr. McDonald in deciding to change policies. Construing the ambiguity in favor of the insured, therefore, the Court finds that the Term Life Policy, in full force and effect at the time of Mr. McDonald's death, must be read to include the one year suicide term as it is defined in the Notice. Therefore, Mr. McDonald's death by suicide occurred more than one year from the date of issuance of the Term Life Policy, and summary judgment must be entered in favor of the Plaintiff and beneficiary, Sharon K. McDonald.

#### **V. Conclusion**

Pursuant to *Fed.R.Civ.P. 56(c)*, the Court finds that there is no genuine issue of material fact for trial, and finds in favor of the Plaintiff and beneficiary, Sharon K. McDonald, and against the Defendant, Principal Mutual Life. The Plaintiff's Motion for Summary Judgment is hereby GRANTED (#11) and the Defendant's Motion for Summary Judgment (~~#12~~<sup>13</sup>) is hereby DENIED.

ORDERED this 25 day of May, 1999.



**TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE**

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

**FILED**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RAE CORPORATION, )

Plaintiff, )

vs. )

CSI, INC., )

Defendant. )

No. 98-C-723-B(E) /

ENTERED ON DOCKET  
MAY 27 1999  
DATE \_\_\_\_\_

**ORDER**

Before the Court are the cross-motions for partial summary judgment filed by plaintiff RAE Corporation ("RAE") (Docket No. 10) and defendant CSI, Inc. ("CSI") (Docket No. 12). The parties seek the Court's determination of their obligations under a written contract, entitled "Manufacturer's Representative Agreement" (the "Agreement").

On March 16, 1996, RAE and CSI entered into the Agreement by which CSI became the exclusive sales representative for certain refrigeration equipment manufactured by RAE in a defined territory. On September 14, 1998, RAE delivered written notice to CSI that the Agreement would be terminated on September 14, 1999, twelve months after CSI received notice and 3 ½ years after the Agreement was executed. Although the parties do not dispute RAE's contractual right to terminate the business relationship under the Agreement, the parties disagree about which provision

under Paragraph 10 of the Agreement sets forth RAE's obligation to CSI as a result of the termination.

Paragraph 10 of the Agreement, entitled Termination of the Agreement, provides in pertinent part the following:

The Agreement may be terminated by the parties hereto only as follows:

- (c) By Century.<sup>1</sup>
- (i) Termination of the Agreement by Century during the initial two (2) year term of the Agreement. Century may terminate the Agreement at any time, for any reason, with or without cause, during the initial two (2) year term of the Agreement upon sixty (60) days written notice to CSI and the payment to CSI of an amount equal to the total commissions payable to CSI on purchase orders on sales originating from the Territory, or from outside the Territory if a particular order or account is approved by Century, during the preceding eighteen (18) months. Such amount shall be payable, along with 10% interest on the unpaid balance, in eighteen (18) equal installments due on the first of each month following the service of the notice of termination.
  - (ii) Termination of the Agreement by Century during the first one (1) year term after the initial term has expired. Century may terminate the Agreement at any time, for any reason, with or without cause, during the first one (1) year term after the expiration of the initial two (2) year term upon sixty (60) days written notice to CSI and the payment to CSI of an amount equal to the total commissions payable to CSI on purchase orders on sales originating from the Territory, or from outside the Territory if a particular order or account is approved by Century, during the preceding twelve (12) months. Such amount shall be payable, along with 10% interest on the unpaid balance, in twelve (12) equal installments due on the first of each month following the service of the notice of termination.

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<sup>1</sup> The Agreement refers to RAE Corporation, an Oklahoma corporation doing business as Century Refrigeration Division, as "RAE" or "Century."

- (iii) Termination by Century after three (3) years. Century may terminate the Agreement at any time, for any reason, with or without cause, after the first three (3) years of this Agreement (i.e., after the expiration of the initial two (2) year term and the first one (1) year additional term) upon twelve (12) months written notice to CSI. No payment to CSI is required.

RAE argues it has no obligation to make payments to CSI upon termination of the Agreement as it provided CSI the twelve-month written notice required by Paragraph 10(c)(iii) “after the first three (3) years of this Agreement.” CSI contends Paragraph 10(c)(iii) “establish[es] that notice of termination under that provision may only be served **following the expiration** of three years from the effective date, and CSI’s work would then cease **after** the twelve month notice period (i.e., at least four years from the contract’s effective date). *CSI’s Response Brief*, p. 10. CSI cites Paragraph 3(c) of the Agreement<sup>2</sup> in support of its position that the date of notice of termination and not the date of termination determines RAE’s obligation under Paragraph 10(c) and the date of notice was during the first year after the initial two-year term. Thus, Paragraph 10(c)(ii) applies and RAE is obligated to make twelve monthly payments to CSI based on past commissions.

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where “there is no

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<sup>2</sup> Paragraph 3(c) pertains to the removal of regions from the territory: Century may, at any time, for any reason, remove one or more Region(s) from the Territory only in accordance with the notice and payment provisions of this paragraph. Removal of all Regions from the Territory shall be deemed a termination of the Agreement and shall be governed by Paragraph 10 below. If removal or termination occurs under Paragraphs 3 or 10, the applicable termination provisions of Paragraphs 3 or 10 will be those in effect on the date of notice of removal or termination.

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, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court 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.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

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. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

*Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the

nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Both parties agree the issue for determination is one of contract interpretation and thus an issue of law properly before the Court on summary judgment.<sup>3</sup> The Agreement is governed by Oklahoma law; therefore, the Court is guided by the applicable rules of contract construction set forth in Chapter 3 of Title 15 of the Oklahoma Statutes. Specifically, as the pertinent provisions of the Agreement are “clear and explicit,” the Court ascertains the intent of the parties at the time of contracting from the unambiguous language of the Agreement. 15 O.S. §§ 151 *et seq.*

Based on the plain language of the Agreement, the Court concludes the parties intended to permit RAE to terminate its business relationship with CSI at any time after a three-year period upon twelve months written notice without any obligation to pay CSI. Therefore, RAE had a right to terminate the Agreement pursuant to Paragraph 10(c)(iii) on September 14, 1999, at the end of the twelve-month notice period and over three years from the execution of the Agreement without incurring any obligation to make termination payments to CSI.

Accordingly, the Court grants RAE’s motion for partial summary judgment (Docket No. 10) and denies CSI’s motion for partial summary judgment (Docket No. 12).

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<sup>3</sup> The cross-motions are for partial summary judgment as they do not address CSI’s breach of contract counterclaim based on RAE’s alleged failure to pay commissions.

IT IS SO ORDERED, THIS 25<sup>th</sup> DAY OF MAY, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

12  
**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**FILED**

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff, )

vs. )

Case No. 99-CV-0138-B (J)

RCN CORPORATION, )  
a Delaware corporation, )  
and TEC AIR, INC., )  
a Delaware corporation, )

Defendants. )

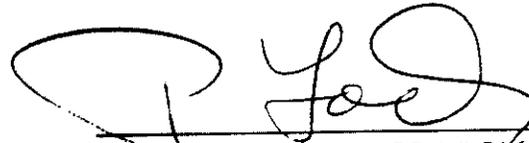
ENTERED ON DOCKET

MAY 27 1999

**NOTICE OF DISMISSAL**

Plaintiff, BizJet International Sales & Support, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses its claims against defendant, RCN Corporation, without prejudice to the refiling of same.

Respectfully submitted,



Thomas M. Ladner, OBA# 5161

Angela R. Freeman, OBA# 17283

NORMAN WOHLGEMUTH CHANDLER & DOWDELL

2900 Mid-Continent Tower

Tulsa, Oklahoma 74103

(918) 583-7571

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

015

**CERTIFICATE OF MAILING**

I hereby certify that on the 26<sup>th</sup> day of May, 1999, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

T. Lane Wilson, Esq.  
HALL, ESTILL, HARDWICK, GABLE, GOLDEN  
& NELSON, P.C.  
320 South Boston Avenue, Suite 400  
Tulsa, OK 74103

Charles J. Vinicombe, Esq.  
DRINKER BIDDLE & REATH, LLP  
105 College Road East, Suite 300  
Princeton, NJ 08542



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**Thomas M. Ladner**

FILED

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

VALERIE GRAMM, )

Plaintiff, )

vs. )

FLEMING COMPANIES, INC., )

Defendant. )

No. 99-C-113-B(J) ✓

FILED ON DOCKET  
MAY 27 1999

**ORDER**

Comes on for consideration Defendant's Motion to Dismiss (Docket #6) and the Court, being fully advised, finds as follows:

Defendant urges dismissal of Plaintiff's claims on the ground that the EEOC had no jurisdiction or authority to re-open Plaintiff's administrative proceedings following this Court's dismissal of Plaintiff's previously filed complaint in December, 1998. That dismissal was based upon the omission of required language in the Notice of Right-to-Sue letter which provides justification for circumventing the administrative process. Defendant also asserts Oklahoma's Anti-Discrimination Act does not provide a private cause of action or damages remedy for gender discrimination.

In its motion to dismiss the first action, Defendant complained that it did not have an opportunity to address Plaintiff's claim through the administrative process. It now urges dismissal because the EEOC's "reconsideration" of Plaintiff's charge, following

dismissal of the first complaint, came too late. Should the Court adopt Defendant's argument, Plaintiff will be caught in a Catch 22, and left with no remedy against the alleged discriminator.<sup>1</sup> The Court based the prior dismissal in part upon the fact that Defendant had been denied an opportunity to avoid litigation and resolve this dispute through the reconciliation process, a primary purpose behind Congress making this administrative procedure available through the EEOC. However, the foremost purpose of the process, eradicating discriminatory practices in the workforce, must not be lost in the process.

Congress provided a vehicle by which Plaintiff's counsel can legally circumvent the administrative process by enacting 29 C.F.R. §1601.28(a)(2). Its purpose is to allow Plaintiffs to go forward when the administrative system becomes clogged and unable to expeditiously process a charge within 180 days. A built-in safety net, restricting the use of the provision, is the requirement that the EEOC certify by an attached writing that "it is probable that the Commission will be unable to complete the administrative processing of the charge within 180 days from the filing of the charge."<sup>2</sup>

There is no question that Plaintiff's counsel desired to bypass the administrative process and proceed to litigation by requesting a Right-to-Sue letter contemporaneously

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<sup>1</sup> Under this scenario, the only remedy available to Plaintiff would be an action against her legal counsel for failing to obtain the certification as required within 90 days of issuance of the letter.

<sup>2</sup>No such certification is required if 180 days has already expired. See 29 C.F.R. §1601.28(a)(1).

with filing the charge of discrimination. The request was repeated and the area director responded, although ineffectively.<sup>3</sup>

Defendant urges the EEOC lost jurisdiction to re-open or reconsider its decision within 90 days of the issuance of the first Notice of Right-to-Sue, dated 4/22/98. Plaintiff's complaint was filed on 7/7/98. Ninety days would have run on or around 7/22/98. Defendant filed its motion to dismiss the first complaint in November, well after expiration of that time.<sup>4</sup>

Defendant cites to *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980) and *Trujillo v. General Electric Co.*, 621 F.2d 1084 (10th Cir. 1980) to support the proposition that reconsideration must commence before the expiration of the ninety days.<sup>5</sup> In each of the cases cited however, there was a valid Right-to-Sue letter issued. In this case, the Right-to-Sue notice was invalid and void and should therefore be considered as if never issued.<sup>6</sup> The Court therefore considers the Notice of Right-to-Sue

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<sup>3</sup>While plaintiff counsel's motives appear to be aimed at circumventing the administrative process, there is nothing in the record indicating the area director's response was based upon pressure or collusion by counsel.

<sup>4</sup>Defendant acknowledges that the Court's December 28, 1998 Order was approximately 250 days from the first Right-to-Sue Notice.

<sup>5</sup>Defendants actually argue the converse of the *Trujillo* ruling, which upheld filing a lawsuit within 90 days of a second Notice of Right-to-Sue where the EEOC had commenced reconsideration before the expiration of the 90 days following the initial notice.

<sup>6</sup>Requiring a strict compliance with the 90 day rule where dismissal is based upon an invalid notice would allow defendants to manipulate the process by waiting beyond the 90 days to file its motion to dismiss and leave plaintiffs with no recourse. The Court makes no finding that occurred in this case. In contrast, Plaintiff's attempt to circumvent the process is controlled

letter issued in February, 1999 as if it were the first.

Additionally, the Tenth Circuit in *Trujillo* based its decision in part upon the fact that both parties had been given notice of the decision to reconsider. Although Defendant initially took the position that it was not notified that this case was being reopened after dismissal, the record does not support that assertion. Further, sending the case back to the EEOC is exactly the intended result for which Defendant argued, and on which it prevailed, in its original motion to dismiss. While it is noted that Defendant has still not had an opportunity to avail itself of the prescribed administrative remedies, the denial was authorized by Congress in its enactment of 29 C.F.R. §1601.28(a)(1). Under this provision, no certification is necessary if 180 days has elapsed since the filing of the initial charge.<sup>7</sup> Clearly, the 180 days had passed in this case.<sup>8</sup>

Next, the Court addresses the issue of whether Plaintiff has a private cause of action or damages remedy for gender discrimination under the Oklahoma Anti-Discrimination Act, Okla. Stat. tit. 25 §1901. The Court concludes no right to a private

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by the EEOC.

<sup>7</sup>The EEOC determined reconsideration was appropriate in view of the letter stating it was reopening the investigation and revoking the April 1998 notice and the inclusion of §1601.28(a)(2) certification language even though the second notice indicates more than 180 days have passed. It appears this was done in an abundance of caution.

<sup>8</sup>Alternatively, the Court finds equitable tolling should apply where the harm which would come to Plaintiff originated from the very agency established to protect those alleging discrimination. See *Salamat v. Village Inn Pancake Houses, Inc.*, 757 F.Supp. 1318 (W.D.Okla.1991). This is distinguishable from cases cited by Defendant in that Plaintiff filed her suit within 90 days of the first notice. See *Davidson v. Service Corp. Int'l.*, 943 F. Supp. 734 (S.D. Tex.1996).

cause of action was intended for gender-based discrimination. In reaching this conclusion, the Court agrees with the reasoning applied to a reverse gender discrimination case filed in the Western District of Oklahoma before the Honorable David Russell, *White v. The State of Oklahoma, et al.*, Case No. CIV-97-1777-R. Judge Russell denied a request for certification to the Oklahoma Supreme Court in that case and found that application of the three-pronged test of *Holbert v. Echeverria.*, 744 P.2d 960 (Okla.1996) “dictates that no private right of action be implied as Plaintiff suggests.” This Court does not find the dicta of *Marshall v. OK Rental and Leasing, Inc.*, 939 P.2d 1116 (Okla.1997), persuasive in reaching a different result. Further, in another case from the Western District of Oklahoma, *Sims v. Haliburton Co. Inc.*, Case No. CIV-97-1778-C, Judge Robin Cauthron similarly denied certification and determined that the only private right of action created by the Oklahoma Anti-Discrimination Act is for disability discrimination, not age discrimination which was the issue before the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant’s Motion to Dismiss (Docket #6) is denied in part and granted in part as set forth herein.

DATED THIS 26<sup>th</sup> DAY OF MAY, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAY 26 1999

Phil [unclear] Clerk  
U.S. DISTRICT COURT

REBECCA CLIFTON,  
SSN: 572-23-0833,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-0641-EA

ENTERED ON DOCKET

DATE MAY 27 1999

**JUDGMENT**

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

It is so ordered this 26<sup>th</sup> day of May 1999.

*Claire V. Eagan*

CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REBECCA CLIFTON,  
SSN: 572-23-0833,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,<sup>1</sup>

Defendant.

Case No. 97-CV-0641-EA

ENTERED ON DOCKET

DATE MAY 27 1999

**ORDER**

Claimant, Rebecca Clifton, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.<sup>2</sup> In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

<sup>2</sup> On July 18, 1994, claimant applied for disability benefits under Title II (42 U.S.C. § 401 *et seq.*), and she protectively filed for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 *et seq.*) on January 9, 1995. Claimant's application for Title II benefits was denied in its entirety initially (August 10, 1994), and on reconsideration (January 10, 1995). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held September 12, 1995, in Tulsa, Oklahoma. By decision dated November 30, 1995, the ALJ found that claimant was not disabled at any time through the date of the decision. On May 8, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner's decision.

### **I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW**

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 her “physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work in the national economy . . . .” *Id.*, § 423(d)(2)(A). Social Security regulations implement a **five-step** sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.<sup>3</sup>

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to **two** inquiries: first, whether the decision was supported

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<sup>3</sup> Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment, or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account her age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

## **II. CLAIMANT’S BACKGROUND**

Claimant was born on December 29, 1950, and was 44 years old at the time of the administrative hearing in this matter. She has a seventh-grade education. Claimant has worked as a hospital housekeeper, cashier, groundskeeper, janitor, telephone answering service operator, telephone solicitor, and an appointment clerk for a funeral home. Claimant sustained a back injury on August 13, 1993, but she continued to work until November 10, 1993. She also worked during a brief period in Spring 1994. The claimant alleges inability to work due to problems with her back, shoulder, leg, and hand, as well as headaches, depression, limited mobility and pain as a consequence of her back injury.

## **III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work except for work involving frequent or repeated overhead work or work requiring more than superficial interaction

with the public, coworkers or supervisors. He also found that she could return to her past relevant work as a cashier, janitor, telephone solicitor, or telephone answering service operator. (R. 20-31)

#### **IV. REVIEW**

Claimant asserts as error that the ALJ (1) failed to perform a proper step four analysis and improperly relied upon the testimony of the vocational expert; and (2) failed to take her mental impairments into account. Claimant specifically contends that the Dictionary of Occupational Titles describes her past relevant work as requiring interaction with the public, and, since the ALJ found that she could not interact with the public, he erred in finding that claimant could do her past relevant work. Claimant also faults the ALJ for not including any mental limitations in the hypothetical question he posed to the vocational expert.

#### **Step Four Analysis**

In making his determination at the fourth step of the sequential evaluation process, an ALJ is required to: (1) assess the nature and extent of claimant's physical and mental limitations to determine claimant's RFC for work activity on a regular and continuing basis, supported by substantial evidence from the record; (2) make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on medically established limitations; and (3) make findings about claimant's ability to meet the physical and mental demands of that past relevant work. Winfrey v. Chater, 92 F.3d 1017, 1023-26

(10th Cir. 1996).<sup>4</sup> The ALJ must also “obtain a precise description of the particular job duties which are likely to produce tension and anxiety . . . ,” where a mental impairment is involved. *Id.* at 1024 (quoting S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv. 809, 812 (West 1983)).

The ALJ failed to meet these requirements. The ALJ thoroughly reviewed and summarized the medical evidence, or lack thereof, regarding claimant’s alleged physical and mental limitations. (R. 21-29) Thus, he did assess the nature and extent of claimant’s physical and mental limitations. However, he failed to make findings regarding the physical and mental demands of claimant’s past relevant work or about claimant’s ability to meet the demands of that past relevant work. Nor did he obtain a precise description of the particular job duties which are likely to produce tension and anxiety. Since the ALJ found that claimant had the residual functional capacity (RFC) to perform light work except for work involving frequent or repeated overhead work or work requiring more than superficial interaction with the public, coworkers or supervisors, his omissions constitute reversible error.

As to the physical demands of claimant’s past relevant work, the ALJ stated that claimant’s past work as a cashier, telephone solicitor or telephone answering service operator did not require claimant to work overhead nor to lift over 20 pounds at a time. (R. 25) He made no findings or statements as to the physical demands of claimant’s past work as a janitor. He asked the vocational expert to describe the claimant’s past relevant work activities, including the physical as well as mental requirements, but the vocational expert only recited the skill, exertional levels, and specific

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<sup>4</sup> Although the ALJ issued his decision in 1995, and *Winfrey* was not decided until 1996, *Winfrey* was a restatement of existing law, incorporating Social Security regulations and rulings, and the Tenth Circuit decisions in *Henrie v. U.S. Dep’t of Health & Human Servs.*, 13 F.3d 359 (10th Cir. 1993), and *Washington v. Shalala*, 37 F.3d 1437 (10th Cir. 1994).

vocational preparation (SVP) required for **claimant's** past relevant work. (R. 84-85) As part of a step four analysis, a vocational expert may **supply** information to the ALJ about the demands of claimant's past relevant work, and it is **not error** for the ALJ to rely on this information from the vocational expert as long as the ALJ **proceeds to make** the required findings on the record, including his own evaluation of claimant's ability to **perform** her past relevant work. Winfrey, 92 F.3d at 1025. This the ALJ did not do.

The ALJ obtained information from **the** vocational expert as to the physical demands of the claimant's past relevant work and **relied upon that** information, but he did not obtain information as to the mental demands of claimant's **past relevant** work or make the required findings on the record. He did reference the vocational expert's **testimony** as it relates to his conclusion that claimant could perform her past relevant work (R. 30), **but his** November 30, 1995 decision includes no separate discussion of the physical demands of **claimant's** past relevant work as a janitor. Nor did it include any discussion of the mental demands of **claimant's** past relevant work or a precise description of the particular job duties which are likely to **produce** tension and anxiety.

Defendant admits that the ALJ **did not specifically** describe the physical and mental demands of [claimant's] past relevant work." (Def. Br., Docket # 12, at 3.) However, he argues that the ALJ can take administrative and **judicial notice** of the descriptions of claimant's past relevant work activities as described in the Dictionary of Occupational Titles, Employment and Training Admin., U.S. Dep't of Labor (4th Ed. 1991) ("DOT"). This argument runs counter to the plain language of Winfrey and Social Security Regulations **requiring** a step four denial of benefits to include findings of fact as to the physical and mental **demands of the** past relevant work. Winfrey, 92 F.3d at 1024; S.S.R. 82-62, 1975-1982 Rulings, Soc. Sec. Rep. Serv. 809, 813 (West 1983)). The ALJ failed to

make findings regarding the physical and mental demands of claimant's past relevant work (either as claimant actually performed that work or as is customarily performed in national economy), based on factual information regarding those work demands which bear on the medically established limitations that the ALJ specifically found.

Since the ALJ did not make the necessary findings regarding the physical and mental demands of claimant's past relevant work, he was unable to make the necessary findings as to claimant's ability to meet the physical and mental demands of that past relevant work. Defendant argues that claimant never challenged the ALJ's finding that claimant could return to her past relevant work as a janitor, although claimant challenged his findings regarding her past jobs as a cashier, telephone answering service operator and telephone solicitor. (Def. Br., Docket # 12, at 5.) Defendant points out that a janitor position does not require significant interaction with people, and thus, substantial evidence supports the ALJ's finding that claimant could return to her past relevant work as a janitor. Defendant concludes that claimant's failure to object to this finding constitutes waiver. (Id. at 4-5.)

Defendant relies on Murrell v. Shalala, 43 F.3d 1388, 1390 (10th Cir. 1994), for his waiver position. The Tenth Circuit there rejected the claimant's contention that the Commissioner cannot offer alternative dispositions based on what would have been the conclusion at a subsequent step in the process. Id. at 1389. The claimant in that matter challenged the ALJ's step four determination, but not his alternative determination at step five. The court recognized that an unchallenged step-five finding of no disability is, by itself, sufficient basis for denial of benefits, thus foreclosing the claimant's success on appeal, but the court nonetheless affirmed the ALJ's step four determination of nondisability. Id. at 1390.

Here, the ALJ made no alternative **step five** determination that claimant failed to challenge. Murrell is inapposite. Further, defendant's position ignores the ALJ's failure to make any findings regarding the physical and mental demands of claimant's past relevant work as a janitor. The ALJ's failure to perform a proper step four analysis necessitates a remand.

### **Mental Impairments**

The ALJ's failure to perform a proper **step four** analysis is related, in large part, to his failure to properly assess the effect of his finding regarding claimant's mental impairments. The Tenth Circuit requires an ALJ to follow the **procedures** in 20 C.F.R. § 404.1520a (and 20 C.F.R. § 416.920a for Supplemental Security Income) when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey, 92 F.3d at 1024; Cruse v. United States Dep't of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or **absence** of certain medical findings pertaining to claimant's ability to work. Next, the ALJ is to evaluate the **degree** of functional loss resulting from claimant's impairment. The ALJ must then complete a **Psychiatric Review Technique** ("PRT") form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington, 37 F.3d at 1442.

The ALJ followed these **procedures**. He thoroughly discussed all of the medical and non-medical evidence submitted before, during, and after the hearing in this matter. (R. 28-29) He also completed a PRT form and attached it to **his** decision. In the PRT form, he noted that claimant manifested no functional limitations (R. 34), although she evidences symptoms of affective and personality disorders. (R. 32) He **concluded** that claimant's "moderate symptoms in social and

occupational areas” did not preclude her “from engaging in all forms of substantial gainful activity.” (R. 29) Nonetheless, he found that she did not have the RFC to perform jobs requiring more than superficial public interaction or more than superficial interaction with coworkers or supervisors. (R. 31) Unfortunately, he never linked this finding to her past relevant work, nor did he include it in his hypothetical question to the vocational expert.

Claimant contends that the DOT describes her past relevant work as requiring interaction with the public, and, since the ALJ found that she could not interact with the public, he erred in finding that claimant could do her past relevant work. The ALJ did not find that she could not interact with the public; he found that she could not perform jobs requiring more than superficial interaction with the public, coworkers or supervisors. Further development of the record is necessary to determine if claimant’s past relevant work required more than superficial interaction. Such further development may include revised questions to a vocational expert.

#### **Vocational Expert Testimony**

The ALJ posed two hypothetical questions to the vocational expert, the first of which involved assumptions that an individual could perform medium, light and sedentary work although the individual suffered from “mild to moderate to occasionally chronic pain” and she took medication “for relief from her symptomatology.” (R. 85) Given those assumptions, among others that described claimant’s age, education, and abilities, the vocational expert testified that the hypothetical individual could return to her past work as a hospital housekeeper, cashier, grounds-keeper, janitor, answering service operator, and telephone solicitor. (R. 86)

The ALJ then altered the hypothetical “to assume that the testimony of the claimant as given at the hearing today is found to be credible and substantially verified by third-party medical evidence

which is a part of the record, without any **significant** contradictions.” (Id.) Given the assumptions of this hypothetical question, the vocational **expert** testified that the individual could not perform any of her past relevant work in part because of **her alleged** depression and migraine headaches. (Id.)

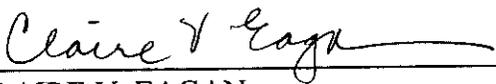
In forming a hypothetical to a vocational **expert**, the ALJ need only include impairments if the record contains substantial evidence to **support their** inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). However, “testimony elicited 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, 945 F.2d at 1492 (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). In the first hypothetical to the vocational expert, upon which he apparently **relied**, the ALJ included no mention of claimant’s mental impairments or the social interaction **limitations** that are set forth in his decision denying disability benefits to claimant. Since the testimony **elicited** by the question does not relate with precision all of claimant’s impairments, the ALJ’s **decision is not** supported by substantial evidence. ALJ found that claimant could not perform work that **required** more than superficial interaction with the public, coworkers and supervisors, but he **failed to include** that limitation in his hypothetical question to the vocational expert.

## **V. CONCLUSION**

The ALJ’s opinion was a thorough **analysis**, but it was not based on substantial evidence, and the correct legal standards were not **applied**. Specifically, the ALJ failed to perform a proper step four analysis because his decision does **not contain** a finding of fact as to the mental demands of claimant’s past relevant work. Further, **he relied** upon the vocational expert’s response to a hypothetical question which did not **include his** findings as to claimant’s mental limitations. If the

Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 26<sup>th</sup> day of May, 1999.

  
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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CURTIS JOHNSON, )  
)  
Plaintiff, )  
)  
v. )  
)  
STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE COMPANY, )  
)  
Defendant. )

Case No. 98-CV-0699-EA

ENTERED ON DOCKET  
DATE MAY 27 1999

**ORDER**

This matter comes before the Court on Defendant State Farm's Motion for Partial Summary Judgment on the Issues of Bad Faith and Punitive Damages (Docket #16). Defendant contends that it is entitled to summary judgment as a matter of law on plaintiff's bad faith claim. Plaintiff brought an action in state court on July 14, 1998, alleging breach of contract and bad faith against State Farm. Plaintiff alleges that he was insured by State Farm for uninsured motorist coverage, that State Farm has refused or neglected to pay his claim, and that State Farm breached its duty to deal fairly and act in good faith with him by failure to pay his claim. State Farm timely removed the action to this Court. For the reasons stated herein, the Court finds that State Farm's Motion for Partial Summary Judgment should be GRANTED.

**FACTS**

1. On or about July 20, 1996, the plaintiff, Curtis Johnson, was involved in an automobile accident where plaintiff's vehicle temporarily ran off the road to avoid an oncoming vehicle. This other vehicle did not stop. Plaintiff's vehicle went into a ditch and then back up onto the roadway. Plaintiff's head may have struck the windshield; the windshield was cracked during the accident.

2. State Farm issued a policy to the plaintiff. The policy was in effect on the date of the accident. The policy provided uninsured/underinsured motorist ("UM") coverage pursuant to Okla. Stat. tit. 36, § 3636. Two or three days after the accident, plaintiff notified his insurance agent of the accident.

3. A week or so after the accident, the plaintiff first started feeling some neck and back pain. On July 26, 1996, he saw his family doctor, Charles Gebetsberger, M.D., for neck pain, and he was given a prescription for Naprelan.

4. In a recorded statement of plaintiff taken by State Farm on July 31, 1996, plaintiff stated that the pain in his neck "seems to go on down my back area."

5. On September 27, 1996, plaintiff saw Dr. Gebetsberger for neck and shoulder (interscapular) soreness. He was given a prescription for pain medication. Dr. Gebetsberger did not see the plaintiff again until November 1996, four months after the accident, when plaintiff was seen for "chronic back pain for 1-2 weeks, no known injury . . . . Gait is normal." There were no complaints of uneven gait. According to Dr. Gebetsberger, this low back pain started 1-2 weeks prior to November 1996, with no known cause. Dr. Gebetsberger had previously treated the plaintiff for low back problems in March 1992.

6. As of February 3, 1997, State Farm had received \$143 in medical bills related to plaintiff's neck pain. State Farm offered to settle the UM claim for \$343 on February 3, 1997. Plaintiff rejected the offer on April 3, 1997 because, as the State Farm notes reflect, "he continued to experience pain in his back."

7. In September 1997, plaintiff went to see a chiropractor, F.J. Husky, D.C., for "low back pain." Dr. Husky gave him electrical stimulation and manipulated his back. All of the treatment was for "low back."

8. On October 2, 1997, State Farm wrote to plaintiff questioning the relationship between his complaints and the accident and requesting a second medical opinion.

9. Dr. Husky had sent plaintiff to physical therapy at Physical Rehabilitation Center of Tulsa. Plaintiff complained of a limp, and the physical therapist referred plaintiff to Samuel H. Park, M.D., a neurologist. Dr. Park was the first doctor plaintiff saw for an "uneven gait" ("spastic ataxia") problem, almost a year and six months after the accident. Dr. Park performed some tests and could not determine the cause of plaintiff's uneven gait. Dr. Park reported on December 18, 1997, that the uneven gait came on gradually over a one-year period after the accident. Further, it was his opinion that the uneven gait was of "undetermined etiology." Dr. Park testified that there are many possible causes for spastic ataxia, including stroke, brain tumor, multiple sclerosis, infection of the brain, or a severe trauma to the brain or spinal cord. Dr. Park ordered an MRI scan of plaintiff's head and cervical spine which showed no abnormality other than some degenerative disc disease in the cervical area. In Dr. Park's opinion, there was nothing in plaintiff's brain or cervical spine that could produce these symptoms. Dr. Park also ordered various lab tests which all came back normal. A lumbar MRI showed some degenerative changes but nothing that would cause spastic ataxia. Dr. Park stated he might want to do further testing to see if plaintiff has multiple sclerosis or some lower limb abnormality that might cause an uneven gait. None of the tests show a cause for the spastic ataxia. In Dr. Park's opinion, the whiplash and light head injuries complained of by plaintiff after the accident

are not severe enough to cause spastic ataxia. A blow to the head would have to be severe to cause spastic ataxia.

10. State Farm requested that plaintiff be examined by A.I. Jabbour, M.D., an independent medical examiner. Plaintiff was examined by Dr. Jabbour on December 22, 1997, and Dr. Jabbour confirmed the "uneven gait" diagnosed as spastic ataxia and recommended a full neurologic work-up with a possible MRI of plaintiff's central nervous system. State Farm wrote to plaintiff on February 6, 1998, again questioning whether plaintiff's injuries and complaints were caused by the accident.

11. Plaintiff first saw Patrick J. Fahey, M.D., for treatment of his uneven gait in March, 1998. Dr. Fahey reported on July 27, 1998, that plaintiff's uneven gait was first noted in July 1997. Dr. Fahey could find no medical cause for the uneven gait. However, Dr. Fahey wrote a follow-up report on August 13, 1998, which, for the first time, related the uneven gait to the accident of July 1996. In his deposition, Dr. Fahey stated that he believes that the accident caused the uneven gait, but he does so on the basis of the history that the plaintiff gave to him. In every case he has ever seen, trauma-induced spastic ataxia can be confirmed through objective tests that show damage to the spinal cord or the brain. No such damage can be seen in the plaintiff's case. Dr. Fahey admits that it is merely "possible" (rather than "probable") that the accident caused the spastic ataxia. Dr. Fahey stated that he does not know what caused the spastic ataxia.

12. In April 1998, almost two years after the accident, Dr. Gebetsberger first saw plaintiff for his uneven gait. This was the first time that the doctor was aware that plaintiff had any gait problems. He does not know what caused this uneven gait. In Dr. Gebetsberger's opinion, spastic ataxia can be caused by trauma but it must be "extensive trauma causing some true neurological problems from the onset or from the accident itself." In addition, the spastic ataxia would "manifest

itself soon [after the accident], perhaps a month, you would see some evidence of that happening.” However, the doctor saw no evidence of spastic ataxia during plaintiff’s November 1996 appointment, four months after the accident.

13. On June 25, 1998, State Farm wrote to Dr. Jabbour asking him to explain in writing why he recommended a full neurological work-up. State Farm further requested that Dr. Jabbour state whether the treatment plaintiff received prior to his examination was accident related, reasonable and necessary. On June 30, 1998, Dr. Jabbour responded in part as follows:

I recommended that patient obtain a full neurological work-up because he was having an uncoordinated ataxic type gait and I wanted to rule out myelopathy. The treatment that plaintiff received prior to my IME was reasonable and necessary.

14. On June 25, 1998, State Farm wrote to plaintiff and confirmed payments under his medical pay provision of \$1,451 to Radiology Consultants, \$2,375 to Dr. Husky, and \$1,031 to Physical Rehabilitation Center of Tulsa. With \$143 previously paid, State Farm indicated that the \$5,000 limits on his medical pay provision had been reached.

15. On July 23, 1998, State Farm evaluated plaintiff’s claim at a range of \$15,000 to policy limits of \$25,000, based on \$12,248.80 in medical bills. State Farm recently offered \$2,500 to plaintiff.

16. The plaintiff’s ex-wife testified that plaintiff was involved in an accident in 1990 when he ran an all terrain vehicle through a barbed wire fence. She testified that plaintiff hurt his knee, and developed an uneven gait that began getting worse after this 1990 accident.

## STANDARD OF REVIEW

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to 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); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993), cert. denied, 510 U.S. 1120 (1994).

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.

Celotex, 477 U.S. at 317.

“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Id. at 327. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). “There mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff. Anderson, 477 U.S. at 252.

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 250. In its review, the Court construes the record in the light most

favorable to the party opposing summary judgment. Boren v. Southern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

## **REVIEW**

### **State Farm is Entitled to Judgment as a Matter of Law on the Issues of Bad Faith and Punitive Damages**

On a motion for summary judgment in a “bad faith” case, the trial court must first determine, under the facts of the particular case and as a matter of law, whether insurer’s conduct may be reasonably perceived as tortious. Until the facts, construed most favorably against the insurer, have established what might reasonably be perceived as tortious conduct on the part of the insurer, the legal gate to submission of the issue to the jury remains closed. Oulds v. Principal Mut. Life Ins., 6 F.3d 1431, 1436-37 (10th Cir. 1993). Conflicting evidence as to reasonableness of conduct of the insurer is a jury question. Alsobrook v. National Travelers Life, 852 P.2d 768, 770 (Okla. Ct. App. 1992).

Numerous decisions have established governing principles under Oklahoma law to resolve requests for summary adjudication of bad faith claims. “The mere allegation that an insurer breached the duty of good faith and fair dealing does not automatically entitle a litigant to submit the issue to a jury for determination.” Oulds, 6 F.3d at 1436. “The insurer does not breach the duty of good faith by refusing to pay a claim or by litigating a dispute with its insured, if there is a ‘legitimate dispute’ as to coverage or amount of the claim, and the insurer’s position is ‘reasonable and legitimate.’” Thompson v. Shelter Mut. Ins., 875 F.2d 1460, 1462 (10th Cir. 1989) (quoting Manis v. Hartford Fire Ins. Co., 681 P.2d 760, 762 (Okla. 1984)).

The insurer will not be liable for the tort of bad faith if it “had a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding payment under the policy.” McCoy v. Oklahoma Farm Bureau Mut. Ins. Co., 841 P.2d 568, 572 (Okla. 1992). “To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances.’ . . . If the insurer fails to conduct an adequate investigation of a claim, its belief that the claim is insufficient may not be reasonable.” Willis v. Midland Risk Ins. Co., 42 F.3d 607, 612 (10th Cir. 1994) (quoting Buzzard v. Farmers Ins. Co., 824 P.2d 1105, 1109 (Okla. 1991)).

A legitimate dispute as to coverage will not act as an impenetrable shield against a valid claim of bad faith. An insured may pursue a claim of bad faith even where the insurer has a legitimate defense to coverage. However, in order to pursue such a claim, the insured must present sufficient “evidence reasonably tending to show bad faith.” Timberlake Const. Co. v. U.S. Fidelity and Guar. Co., 71 F.3d 335, 343 (10th Cir. 1995) (footnote omitted) (quoting Oulds, 6 F.3d at 1440)).

Here, State Farm has asserted certain facts which plaintiff has not disputed. The accident occurred in July 1996. Plaintiff was treated in July and September 1996 for neck pain. Plaintiff was treated for back pain in 1992; when he was treated for back pain in November 1996, there was no indication in the medical records that it was related to the accident. When State Farm evaluated the case in February 1997, there were medical bills of \$143 related to the neck pain, and it made an offer of \$343 to settle. There is reasonable evidence to support this evaluation.

Thereafter, plaintiff continued to be treated for lumbar pain and, eventually, his uneven gait. Most of the physicians, including treating physicians, believe it is unlikely that the lumbar pain or uneven gait were caused by the accident. There is also evidence of a prior knee injury causing uneven gait (1990) and evidence of prior back pain (1992).

Plaintiff specifically faults State Farm for not advising Dr. Jabbour that plaintiff complained of back pain in his recorded statement to a State Farm adjuster five days after the accident. However, this ignores the fact that claimant did not complain to his own doctor, Dr. Gebetsberger, about back pain six days after the accident. Nor does plaintiff explain what difference a specific reference to the recorded statement would have made, given that State Farm otherwise fully informed Dr. Jabbour about the accident, plaintiff's complaints of neck and back pain, and his subsequent medical treatment.

Plaintiff also complains that State Farm did not provide Dr. Jabbour with Dr. Park's neurological evaluation. State Farm sent its records to Dr. Jabbour on October 29, 1997, and Dr. Park did not perform his neurological evaluation until December 18, 1997. It is unclear when State Farm received Dr. Park's report. In any event, Dr. Jabbour asked for a neurological work-up, including an MRI, to rule out myelopathy. Dr. Park did a neurological work-up, and reported negative MRIs of the cervical, thoracic and lumbar spine. Plaintiff does not explain how State Farm's failure to send negative neurological test results to its independent medical examiner is evidence of bad faith. Dr. Park's opinion does not contradict Dr. Jabbour's opinion that the etiology of plaintiff's spastic ataxia is unknown. If anything, the neurological work-up provides a reasonable basis for State Farm to continue to dispute that the accident caused plaintiff's low back pain or uneven gait.

Finally, the fact that State Farm failed to inform plaintiff of its July 23, 1998 evaluation of Johnson's claim does not indicate bad faith on the part of State Farm. That evaluation was made after plaintiff filed suit, and it was produced during discovery. The evaluation states that it is based on "questionable medical." There is no legal requirement that an insurer offer an insured the total amount contained in an evaluation prepared by a claims representative, where the insurer questions

the amount of injury to the insured, and where the evaluation may be a “worst case scenario” if the insurer loses, as State Farm contends.

Although there is a disagreement **between** plaintiff and State Farm as to cause and amount of damages, State Farm’s position is **reasonable** given the facts presented. State Farm had reason to believe this was a light impact accident that caused little injury to plaintiff. State Farm also had reason to question whether the low back pain and the uneven gait were a result of the accident. The Court concludes there was at least a “legitimate dispute” as to coverage and amount and State Farm’s position was reasonable and legitimate. **There is, however, no genuine issue of material fact as to plaintiff’s bad faith and punitive damages claims.**

Summary judgment is appropriate **as to the bad faith claim**. Accordingly, an assessment of punitive damages for bad faith would **not be justified**, and summary judgment is also proper as to plaintiff’s punitive damages claim. **Defendant State Farm’s Motion for Partial Summary Judgment on the Issues of Bad Faith and Punitive Damages (Docket #16) is hereby GRANTED.**

Dated this 25<sup>th</sup> day of May, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, )  
Plaintiff, )  
vs. )  
LOUIS W. GRANT, JR., CHARLES B. )  
GRANT, J. LAWRENCE MILLS, JR., )  
KEITH R. GOLLUST, PAUL E. TIERNEY, )  
JR., EDWARD L. JACOBY, ROD L. )  
REPPE, and W.R. HAGSTROM, )  
Defendants. )

ENTERED ON DOCKET

DATE MAY 26 1999

CASE NO. 92-C-1043-HV

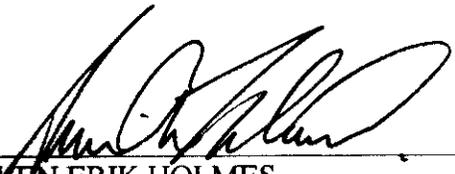
**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER DISMISSING WITH PREJUDICE FDIC CLAIMS AGAINST  
CHARLES B. GRANT AND LOUIS W. GRANT, JR. AND COUNTERCLAIM  
OF LOUIS W. GRANT, JR. AGAINST FDIC**

Upon consideration of the Joint Stipulation and Motion to Dismiss of the Federal Deposit Insurance Corporation ("FDIC"), Charles B. Grant and Louis W. Grant, Jr., IT IS HEREBY ORDERED that the claims of FDIC against Charles B. Grant and Louis W. Grant, Jr. and the counterclaim of Louis W. Grant, Jr. against FDIC are dismissed with prejudice and the parties shall each bear their own costs and attorney fees.

  
SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

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

FOSTER WHEELER USA CORP., a  
Delaware corporation,  
  
Plaintiff,  
v.  
  
VBF, INC. (f/k/a ELECTRICAL  
POWER SYSTEMS, INC.,  
an Oklahoma corporation; VERNON  
LAWSON; ADDISON FREDERICK SMITH;  
and WILLIAM C. CODAY,  
  
Defendants,  
v.  
  
BRAND EXPORT PACKAGING OF  
OKLAHOMA, INC., ROBERT AND PENNY  
DOWNING; AMERICAN PRESIDENT  
LINES, INC.; ROBBINS-FLEISIG  
FORWARDING, INC.; AND JOSE  
ESCOBAR,  
  
Third Party Defendants.

Case No. 96-C-390-H ✓

**F I L E D**

MAY 25 1999

Phill Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE **MAY 28 1999**

**ORDER OF DISMISSAL WITH PREJUDICE**

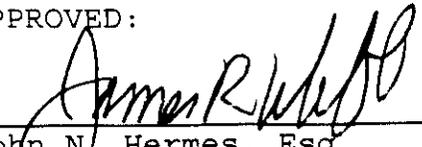
Upon the joint application for Stipulation of Dismissal With Prejudice, the Court finds that this entire action should be and it is hereby dismissed with prejudice to the filing of any future action. Each party shall bear its own attorneys' fees, costs and expenses.

IT IS SO ORDERED this 25<sup>TH</sup> day of May, 1999.

  
UNITED STATES DISTRICT JUDGE

117

APPROVED:

  
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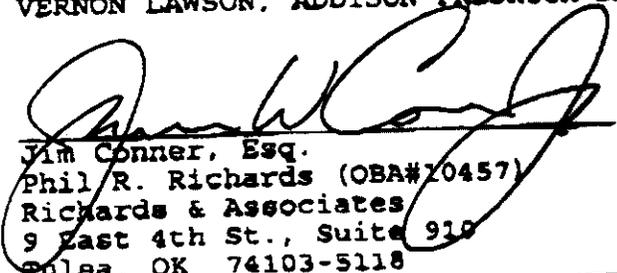
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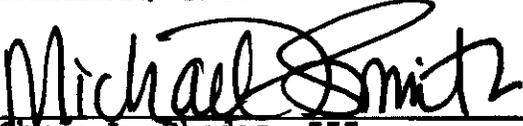
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INC. AND JOSE ESCOBAR

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**MAY 25 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LUKE ROBINSON, )  
)  
Petitioner, )  
)  
v. )  
)  
STEPHEN KAISER, Warden, )  
Davis Correctional Center, )  
)  
Respondent. )

Case No. 99-CV-0133-K (E)

ENTERED ON DOCKET  
DATE **MAY 26 1999**

**REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 2254, petitioner Luke Robinson filed a Petition for Writ of Habeas Corpus (Docket # 1). Acting *pro se*, petitioner challenges the 75-year sentence he received for robbery by force after two former felony convictions. Respondent filed a motion to dismiss (Docket # 3) with a supporting brief (Docket # 4), and petitioner responded (Docket # 6). Respondent claims that this action is time-barred by the applicable statute of limitations.

This case was referred to the undersigned for a report and recommendation. See 28 U.S.C. § 636, and 28 U.S.C. § 2254, Rules 8, 10. Based on a review of the record and the parties' briefs, the undersigned proposes findings that petitioner's claims are time-barred pursuant to 28 U.S.C. § 2244(d). For the reasons set forth below, the undersigned recommends that the respondent's Motion to Dismiss Time-Barred Petition (Docket # 3) be **GRANTED**, and the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**.

**BACKGROUND AND PROCEDURAL HISTORY**

As grounds for his petition, petitioner claims that: (1) the trial court failed to grant his motion for a continuance so that he could retain counsel or so that his counsel could adequately prepare for trial; (2) his counsel was ineffective at the trial and appellate levels; (3) the evidence was insufficient

to convict him; (4) the sentence was excessive; and (5) the trial court failed to exclude certain damaging testimony. Petitioner was convicted on January 12, 1993, after a jury trial in Tulsa County, Oklahoma. Petitioner sought a direct appeal of his conviction, and, on May 23, 1995, the Oklahoma Court of Criminal Appeals (“CCA”) affirmed his conviction.

Almost two years later, petitioner attempted to contemporaneously file an application for post-conviction relief in state court and a petition for writ of habeas corpus in federal court. His petition for habeas relief is file-stamped April 17, 1997; his application for post-conviction relief is file-stamped April 22, 1997.<sup>1</sup> On May 16, 1997, his federal petition was dismissed because some of his claims had not been exhausted in state court. However, the petition was dismissed without prejudice to refile after the exhaustion requirement is satisfied. Petitioner’s application for post-conviction relief was denied by the district court on November 25, 1997, and appealed to the CCA on December 23, 1997. On February 18, 1998, the CCA affirmed the district court’s denial. Petitioner filed the petition for writ of habeas corpus in this case on February 17, 1999.

## **DISCUSSION AND LEGAL ANALYSIS**

### **Statutory Tolling**

Habeas corpus actions requiring the review of state court judgments and sentences are governed by 28 U.S.C. § 2254. Section 2254 was amended by the Antiterrorism and Effective Death

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<sup>1</sup> A federal petition for writ of habeas corpus is deemed filed the day that a prisoner delivers it to prison authorities for forwarding to the court clerk. Houston v. Lack, 487 U.S. 266 (1988); Woody v. State, 833 P.2d 257, 259-60 (Okla. 1992). In this instance, however, petitioner’s attorney filed the petition in federal court on the same day that petitioner alleges he mailed his state application for post-conviction relief, on April 17, 1997. See Resp. Br., Docket # 6, at 2. The CCA has ruled that the prison mailbox rule does not apply to state criminal proceedings. Banks v. State, 953 P.2d 344, 345-47 (Okla. Crim. App. 1998); Hunnicuttt v. State, 952 P.2d 988, 989 (Okla. Crim. App. 1997). Thus, petitioner’s post-conviction application is deemed filed April 22, 1997, the date it was received and file-stamped.

Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, tit. I, § 104 (1996). The AEDPA's amendments to 28 U.S.C. § 2254 became **effective** on April 24, 1996. Under the AEDPA,

(d)(1) A 1-year period of limitation **shall apply** to an application for a writ of habeas corpus by a person in custody pursuant to **the judgment** of a State court. The limitation period shall run from the latest of --

(A) the date on **which the judgment** became final by the conclusion of direct review or the expiration of **the time** for seeking such review;

(B) the date on **which the impediment** to filing an application created by State action in violation of the **Constitution** or laws of the United States is removed, if the applicant was prevented for **filing** by such State action;

(C) the date on **which the constitutional right** asserted was initially recognized by the Supreme Court, if **the right** has been newly recognized by the Supreme Court and made retroactively **applicable** to cases on collateral review; or

(D) the date on **which the factual predicate** of the claim or claims presented could have been discovered **through** the exercise of due diligence.

(2) The 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 shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244.

The amended version of the statute is **applicable** to this matter even though his conviction became final before April 24, 1996. See 28 U.S.C. § 2244(d); Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Under Hoggro, petitioners whose convictions became final before the enactment of the AEDPA have a one-year grace period from the effective date of the Act, or until April 24, 1997,<sup>2</sup> in which to file a petition for writ of habeas corpus in federal court. Id. at 1226. That period

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<sup>2</sup> Cases differ on whether the one year expires on April 23, 1997 or April 24, 1997. Compare, e.g., Haney v. Addison, No. 98-6255, 1999 WL 288295 (10th Cir. May 10, 1999); Wooten v. Boone, No. 97-7142, 1999 WL 92266 (10th Cir. Feb. 24, 1999); Gregory v. Palino, No. 98-1372, 1999 WL 92272 (10th Cir. Feb. 24, 1999); Harris v. Champion, No. 98-6318, 1999 WL 84476 (10th Cir., Feb. 22, 1999); Middleton v. Ray, No. 98-6349, 1999 WL 38178 (10th Cir. Jan. 29, 1999); Hernandez

is tolled during the time that a properly-filed application for post-conviction or other collateral review remains pending. Id.

Petitioner in this matter waited until April 22, 1997, to file his post-conviction application, thus leaving himself only one or two days within which to file his habeas petition after an unfavorable decision by the state's highest court. The Tulsa County District Court denied his application on November 25, 1997, and the CCA denied his post-conviction application on February 18, 1998. Petitioner could have used the period of time that his application was pending to draft preliminary alternate versions of his petition for writ of habeas corpus based upon possible scenarios of the way in which the CCA could have ruled. In that manner, petitioner could have been ready to file his petition for writ of habeas corpus the day after the CCA issued its decision. Petitioner could also have filed his petition and asked for an extension of time to file an amended petition if he felt that his original petition was too hastily drawn. Instead, he waited an additional year, or until February 17, 1999, before he filed his federal habeas petition. Petitioner apparently, mistakenly, and unfortunately believed that he had a year from the date that the CCA denied his post-conviction application within which to file his petition in this Court.

Petitioner argues that he did not have notice of the Tenth Circuit's current application of the one-year limitation of the AEDPA until Hoggro was decided on June 24, 1998, and that Hoggro cannot be applied retroactively. Petitioner cites Burns v. Morton, 134 F.3d 109 (3d Cir. 1998), for the proposition that prisoners are entitled to one full year *with notice* to file a habeas petition. Burns,

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v. LeMaster, No. 98-2042, 1999 WL 34809 (10th Cir. Jan. 28, 1999) (the period expires on April 23, 1997) with Osborne v. Boong, No. 99-7015, 1999 WL 203523 (10th Cir. Apr. 12, 1999); Villanueva v. Williams, No. 98-2196, 1999 WL 84082 (10th Cir. Feb. 22, 1999); Taylor v. Hargett, 98-6335, 1999 WL 68431 (10th Cir. Feb. 12, 1999) (the period expires on April 24, 1997).

however, is the Third Circuit equivalent of Hoggro, in that it stands for the proposition that prisoners whose convictions became final before the effective date of the AEDPA have one year from the effective date of the AEDPA in which to file a federal habeas petition. Burns, 134 F.3d at 111. Burns was decided on January 9, 1998, and, like Hoggro, after the one-year limitation period it imposed had passed. If Hoggro and Burns could not be applied retroactively, they could not be applied at all because they specifically address the window of opportunity prisoners like petitioner had in which to file their federal habeas petitions. Nothing in Burns indicates that the case itself, as opposed to the statute it interprets, cannot apply retroactively.

Petitioner argues that Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994), precludes retroactive application of the one-year limitation period announced in Hoggro. Landgraf held that provisions of the Civil Rights Act of 1991 did not apply retroactively to a Title VII case pending on appeal when the statute was enacted because the *ex post facto* clause of the United States Constitution prohibits retroactive application of penal legislation. Id. Resolution of this matter does not involve retroactive application of a statute, but of a case interpreting that statute. Landgraf is inapposite. The one-year grace period announced in Hoggro can be, and has been, applied retroactively. See, e.g., Barnett v. Lemaster, 167 F.3d 1321(10th Cir. 1999). In an analogous case, the Tenth Circuit, applying Third Circuit law, retroactively applied a case interpreting the limitations period for Rule 10b-5 of the Securities Exchange Act of 1934. Olcott v. Delaware Flood Co., 76 F.3d 1538, 1546-48 (10th Cir. 1996). The Tenth Circuit relied upon James A. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991),<sup>3</sup> and Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), for

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<sup>3</sup> Beam was subsequently superseded by an amendment to the Securities Exchange Act of 1934. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub.L. 102-242, § 476 (1991).

the principle that new rules developed in civil cases must be applied retroactively to all pending similar cases. This principle is also applicable to Hoggro and its application to petitioner in this matter.

Petitioner's argument essentially asks the Court to extend the applicable statute of limitations so that it gives prisoners a year from the date they exhaust their state court remedies within which to file their habeas petition. Such is not the law. For prisoners whose convictions became final before the effective date of the AEDPA, the Tenth Circuit allows prisoners a year from the effective date of the AEDPA -- not from the date their convictions became final -- in which to file a petition for writ of habeas corpus. Hoggro, 150 F.3d at 1226. That time limit may be further extended by the proper and timely filing of a post-conviction application. 28 U.S.C. §2244(d)(2). If a prisoner waits until the proverbial eleventh hour to file for post-conviction relief before the expiration of the statute of limitations, he or she must bear the consequences of having little or no time remaining within which to file a petition in federal court after the highest state court rules.

### **Equitable Tolling**

Alternately, petitioner asks the Court to equitably toll the applicable statute of limitations because he protectively filed his petition for habeas corpus relief in federal court. The limitations period of 28 U.S.C. § 2244(d) is not jurisdictional and may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S. Ct. 210, 142 L. Ed.2d 173 (1998), but petitioner has not shown that he is entitled to equitable relief. Equitable tolling has historically been limited to situations where the petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Department

of Veteran's Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). It can also be appropriate where a court or agency makes an incorrect representation that deceives the petitioner. See Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988).

It can hardly be claimed that petitioner *actively* pursued his judicial remedies where he waited almost two years after the CCA denied his direct appeal to file his application for post-conviction relief and his first petition for habeas corpus. Further, the federal court's prior dismissal for his failure to exhaust can hardly be deemed an incorrect misrepresentation. The United States Supreme Court held in 1982 that a federal district court must dismiss mixed habeas petitions containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509 (1982). Further, at least as of the effective date of the AEDPA, petitioner knew that his deadline for filing a petition for writ of habeas corpus had passed, or that he should make an argument that the Act could not be applied retroactively. Numerous prisoners made that argument, successfully, after the AEDPA was enacted. See, e.g., Burns, 134 F.3d 109 at 111.

Petitioner's protective filing argument would require the Court to announce yet another rule extending the time period in which prisoners may file petitions for writ of habeas corpus. It would also encourage premature filings. Finally, it would certainly allow prisoners to circumvent the AEDPA's statute of limitations and thwart the intent of Congress to limit the time in which prisoners may seek federal habeas review. Petitioner failed to file his petition for writ of habeas corpus in a timely manner or to present a valid excuse for his untimely filing.

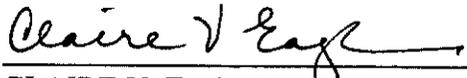
**CONCLUSION**

For the reasons cited herein, the undersigned recommends that the respondent's Motion to Dismiss (Docket #3) be **GRANTED**, and the Petition for Writ of Habeas Corpus (Docket # 1) be **DISMISSED**.

**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).

IT IS SO ORDERED this 25<sup>th</sup> day of May, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
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 26 Day of May, 1999.

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

DEBRA MANSKER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 CERTAIN UNDERWRITERS AT )  
 LLOYD'S, LONDON, by and through )  
 their lead underwriter, P.G. BUTLER, )  
 )  
 Defendant. )

Case No. 99-C-398-H

ENTERED ON DOCKET  
DATE MAY 26 1999

**FILED**

MAY 24 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court on Defendant's notice of removal filed May 21, 1999 (Docket # 1). Plaintiff Debra Mansker originally brought this action in the District Court of Tulsa County. Plaintiff's Petition alleges a causes of action under state law for breach of contract and the tort of bad faith, and alleges damages in excess of \$10,000.<sup>1</sup>

Defendant removed this action to this Court on the basis of diversity jurisdiction. The Defendant contends that diversity jurisdiction is properly invoked here because it is a foreign corporation with its principal place of business in London, England. Defendant further contends the federal jurisdictional amount in controversy is met, stating:

The amount in controversy exceeds the \$75,000 limit when viewed in the context of the language of the petition. The language includes a cause of action for failure to act in good faith and with fair dealing and a prayer for punitive damages.

<sup>1</sup>In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

Def. Notice of Removal, at 1 n.1 (Docket # 1).

Section 1447 requires that a case be **remanded** to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules **applied** when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant **clash about** jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is **ordinarily determined** by the allegations of the complaint, or, where they are not dispositive, **by the allegations** in the notice of removal. (citation omitted). The burden is on the **party requesting** removal to set forth, in the notice of removal itself, the **"underlying facts supporting** [the] assertion that the amount in controversy exceeds [\$75,000]." (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co.,

953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, "both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice." Laughlin, 50 F.3d at 873.<sup>2</sup> See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994) (finding defendant's conclusory statement that "the matter in controversy exceeds [\$75,000] exclusive of interest and costs" did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as

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<sup>2</sup> The Court observes that in its response to Defendant's notice of removal Plaintiff does not contest Defendant's statement of the amount in controversy. This admission, however, does not in any way establish that the jurisdictional amount has been satisfied. See Laughlin, 50 F.3d at 873 (holding that "[subject matter jurisdiction cannot be conferred or waived by consent, estoppel, or failure to challenge jurisdiction early in the proceedings" but instead where "the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter.")

of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In the instant case, in her Petition, Plaintiff has asserted only that the damages for her claim for relief exceed \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendant failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Instead, Defendant states merely:

This action is a suit of a civil nature, of which the District Court of the United States has jurisdiction, and has been brought and is now pending in the District Court of Tulsa County, State of Oklahoma; that this Petition for Removal is filed within thirty (30) days after service of summons upon said Defendant and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum of \$75,000.00.<sup>3</sup>

See Petition for Removal at 1. Accordingly, the Court finds that Defendant's conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it is not been established, either in Plaintiff's Petition or in Defendant's notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and

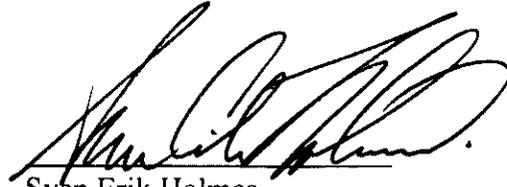
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<sup>3</sup>[Plaintiff's n.1] The amount in controversy exceeds the \$75,000 limit when viewed in the context of the language of the petition. The language includes a cause of action for failure to act in good faith and with fair dealing and a prayer for punitive damages.

lacks the power to hear this matter. As a **result**, the Court must remand this action to the District Court of Tulsa County. The Court hereby **orders** the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 24<sup>TH</sup> day of May, 1999.

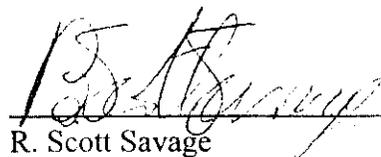
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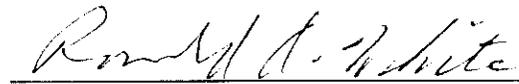
Sven Erik Holmes  
United States District Judge



  
Sam A. Joyner, United States Magistrate Judge

Approved As To Form:

  
R. Scott Savage  
Attorney for Plaintiff

  
Ronald W. White  
Attorney for Defendants

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

**FILED**

MAY 25 1999 *FE*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARL D. STRINGFELLOW,  
SSN: 550-84-4946,

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-702-BU ✓

ENTERED ON DOCKET

DATE MAY 26 1999

**JUDGMENT**

Pursuant to the Court's Order, judgment is hereby entered in favor of Defendant, Kenneth S. Apfel, Commissioner of the Social Security Administration, and against Plaintiff, Carl D. Stringfellow.

ENTERED this 25 day of May, 1999.

*Michael Burrage*  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

18

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

**FILED**

CARL D. STRINGFELLOW, )  
SSN: 550-84-4946, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
KENNETH S. APFEL, Commissioner, )  
Social Security Administration, )  
 )  
Defendant. )

MAY 25 1999 *SL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-702-BU

ENTERED ON DOCKET

DATE MAY 26 1999

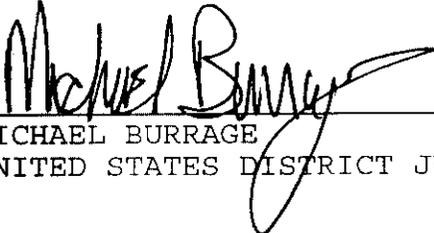
**ORDER**

This matter comes before this Court upon the Report and Recommendation issued by United States Magistrate Judge Claire V. Eagan on April 30, 1999. In the Report and Recommendation, Magistrate Judge Eagan recommended that the decision of Defendant, Kenneth S. Apfel, Commissioner of the Social Security Administration, denying Plaintiff, Carl D. Stringfellow's application for disability benefits under the Social Security Act be affirmed. The court file reflects that Plaintiff has not filed any written objections to Magistrate Judge Eagan's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). Because no written objections to the Report and Recommendation have been filed by Plaintiff, the Court accepts Magistrate Judge Eagan's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation (Docket Entry #16). The Court also AFFIRMS Defendant's decision denying Plaintiff's application for disability

benefits under the Social Security Act. Judgment in favor of  
Defendant shall issue forthwith.

ENTERED this 20 day of May, 1999.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

MT

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

TERRI LYNN WELCH and  
ROBERT M. WELCH,

Plaintiffs,

vs.

MEDICAL ENGINEERING CORPORATION, a  
Delaware corporation; SURGITEK, INC., a  
Wisconsin corporation and a subsidiary of  
BRISTOL-MYERS SQUIBB AND COMPANY, a  
Delaware corporation; MARK M RESOURCES,  
INC. f/k/a MARKHAM MEDICAL  
INTERNATIONAL, INC., a California corporation,  
NATURAL Y SURGICAL SPECIALTIES, INC., a  
Delaware corporation and APPLIED SILICONE  
CORPORATION, a California corporation, DOW  
CORNING CORPORATION, a Michigan  
corporation, DOW CORNING WRIGHT  
CORPORATION, a Tennessee corporation, THE  
DOW CHEMICAL COMPANY, a Delaware  
corporation, CORNING INCORPORATED, a New  
York corporation; THE COOPER COMPANIES,  
INC., f/k/a COOPERVISION, INC., a Delaware  
corporation, COOPER SURGICAL, INC., a  
Delaware corporation and division of THE COOPER  
COMPANIES, AESTHETECH CORPORATION, a  
California corporation, and a wholly-owned  
subsidiary of THE COOPER COMPANIES, INC.,

Defendants.

93-CV-1077-B(J)

Civil Action No.: ~~CJ 903-04832~~

**FILED**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

MAY 26 1999

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiffs Terri Lynn Welch and Robert M. Welch and defendants Medical Engineering Corporation, Surgitek, Inc., Bristol-Myers Squibb and Company, Mark M Resources, Inc., f/k/a Markham Medical International, Inc., Natural Y Surgical

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Specialties, Inc., The Cooper Companies, Inc., f/k/a Coopervision, Inc., Cooper Surgical, Inc., The Cooper Companies, Aesthetech Corporation, and The Cooper Companies, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, Surgitek, Inc., Bristol-Myers Squibb and Company, Mark M Resources, Inc., f/k/a Markham Medical International, Inc., Natural Y Surgical Specialties, Inc., The Cooper Companies, Inc., f/k/a Coopervision, Inc., Cooper Surgical, Inc., The Cooper Companies, Aesthetech Corporation, and The Cooper Companies, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, Surgitek, Inc., Bristol-Myers Squibb and Company, Mark M Resources, Inc., f/k/a Markham Medical International, Inc., Natural Y Surgical Specialties, Inc., The Cooper Companies, Inc., f/k/a Coopervision, Inc., Cooper Surgical, Inc., The Cooper Companies, Aesthetech Corporation, and The Cooper Companies, Inc.

HUTTON & HUTTON

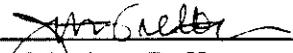
By 

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ROBERT M. WELCH

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
SURGITEK, INC., BRISTOL-MYERS SQUIBB  
AND COMPANY, MARK M RESOURCES, INC.  
f/k/a MARKHAM MEDICAL INTERNATIONAL,  
INC., NATURAL Y SURGICAL SPECIALTIES,  
INC., THE COOPER COMPANIES, INC., f/k/a  
COOPERVISION, INC., COOPER SURGICAL,  
INC., THE COOPER COMPANIES, AESTHETECH  
CORPORATION, and THE COOPER COMPANIES,  
INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the above and foregoing Stipulation for Dismissal With Prejudice was on this 21 day of May 1999, sent via U.S. Mail to:

Lyman Harris  
Judy Evans  
HARRIS, EVANS, BERG, MORRIS  
& ROGERS  
2007 Third Avenue North  
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Cincinnati, OH 45202-3172

ATTORNEYS FOR DEFENDANTS  
DOW CORNING CORPORATION  
and DOW CORNING WRIGHT  
CORPORATION

*M. J. Hutton Jr*

---

ATTORNEY FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
SURGITEK, INC., BRISTOL-MYERS SQUIBB  
AND COMPANY, MARK M RESOURCES, INC.  
f/k/a MARKHAM MEDICAL INTERNATIONAL,  
INC., NATURAL Y SURGICAL SPECIALTIES,  
INC., THE COOPER COMPANIES, INC., f/k/a  
COOPERVISION, INC., COOPER SURGICAL,  
INC., THE COOPER COMPANIES, AESTHETECH  
CORPORATION, and THE COOPER COMPANIES,  
INC.

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

**FILED**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ERWIN PEASE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
BURLINGTON COAT FACTORY, )  
)  
Defendants. )

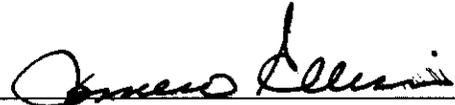
Case No. 99-C-115-E

ENTERED ON DOCKET  
DATE MAY 26 1999

ORDER

Pursuant to the Court's minute order of April 1, 1999, directing plaintiff to pay the filing fee within 45 days of the date of the order, this matter is dismissed for failure to pay the filing fee.

IT IS SO ORDERED THIS 25<sup>th</sup> DAY OF MAY, 1999.

  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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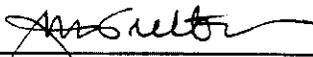


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ATTORNEY FOR PLAINTIFF  
CAROLYN LEE

SHOOK, HARDY & BACON L.L.P.

By

  
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J. Margaret Tretbar, Kansas Bar #18645

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

TRACY CHARLTON,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET  
MAY 26 1999

Civil Action No. 97CV 887 B (M) ✓

FILED

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Tracy Charlton and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By



Mark B. Hutton, Oklahoma Bar #12182

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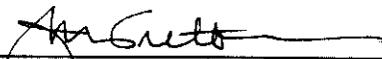
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FAX: (316) 686-1077

ATTORNEY FOR PLAINTIFF  
TRACY CHARLTON

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

REZONA A. KELLY,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET  
DATE **MAY 26 1999**

Civil Action No.: 97CV883 B(J)

**FILED**  
MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Rezona A. Kelly and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By 

Mark B. Hutton, Oklahoma Bar #12182

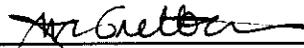
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J

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ATTORNEY FOR PLAINTIFF  
REZONA A. KELLY

SHOOK, HARDY & BACON L.L.P.

By   
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J. Margaret Tretbar, Kansas Bar #18645

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FAX: (816) 421-5547

ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

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

**F I L E D**

MAY 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MONSI K. L'GGRKE and LINDA L'GGRKE, )  
)  
Plaintiffs, )

vs. )

Case No. 99-C-182-E ✓

KEN SNITZ FAMILY TRUST, KEN SNITZ, )  
individually and in his capacity as Trustee, )  
GEORGE ELIAS, Trustee, GEORGE ELIAS, Jr., )  
individually, THE PHYLLIS ANN ELIAS )  
IRREVOCABLE FAMILY TRUST, CATHY L. )  
ELIAS, individually and in her capacity as Trustee, )  
RAY CATES, LINDA CATES, TIMOTHY PAUL )  
ELIAS, individually and in his capacity as Trustee, )  
and PREMIER PROPERTIES OF TULSA, INC., )

Defendants, )

vs. )

STILLWATER NATIONAL BANK AND TRUST )  
COMPANY, a national banking corporation, )

Intervenor, Cross-Claimant, )  
Counter-Claimant and )  
Third-Party Plaintiff, )

vs. )

TREASURER OF TULSA COUNTY, )  
OKLAHOMA, and the BOARD OF COUNTY )  
COMMISSIONERS OF TULSA COUNTY, )  
OKLAHOMA, )

Third-Party Defendants. )

ENTERED ON DOCKET  
DATE MAY 25 1999

ORDER

Now for the Court's consideration is the issue, raised by minute order of April 23, 1999,  
of the Court's jurisdiction in this matter. After the issue was raised by minute order of April 23,

12

1999, Motions to Remand were filed by Ray and Linda Cates (Docket # 5), Stillwater National Bank and Trust Company (Docket # 8 ), and Ken Snitz (Docket # 7).

This matter began as a dispute over title to or possession of certain property located in Tulsa County. The matter was initiated in State District court over eighteen months ago, and on November 28, 1998, a Tulsa County District Court Judge ruled that the L'GGrkes have no interest in the property. On December 18, 1998, Monsi L'GGrke filed a Petition in Bankruptcy. Subsequently, on February 5, 1999, he filed a notice of removal requesting that Case Nos. CJ-97-2829 and CJ-97-2847 pending in Tulsa County be removed, apparently based on the pending bankruptcy. When Ken Snitz filed an Application for Writ of Assistance on April 22, 1999, the Court questioned whether it would have jurisdiction over this matter and directed the parties to address the issue.

Pursuant to 28 U.S.C. §1452, "a party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." Pursuant to §1334, the district courts have jurisdiction over bankruptcy cases and proceedings. However, pursuant to 28 U.S.C. §1452(b), "the court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." In this case, remand is warranted because the state court has already decided many of the issues in this lawsuit, because the bankruptcy court has determined that the subject property is not property of the bankruptcy estate, and because the bankruptcy case was dismissed by Order filed May 6, 1999.

The Motions to Remand (Docket #'s 5, 7 and 8 ) are GRANTED.

DATED, THIS 24<sup>th</sup> DAY OF MAY, 1999.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

ROBERTA FARLEY,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE ~~MAY 2 1999~~

MAY 25 1999

Civil Action No.: 97CV888 K(W)

**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Roberta Farley and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By 

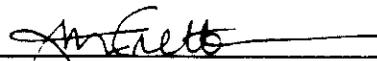
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ATTORNEY FOR PLAINTIFF  
ROBERTA FARLEY

SHOOK, HARDY & BACON L.L.P.

By



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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

SHIRLEY ANN ARMER,

Plaintiff,

vs.

HEYER-SCHULTE, a wholly owned subsidiary of  
BAXTER HEALTHCARE CORPORATION,  
McGHAN MEDICAL CORPORATION,  
DONALD K. McGHAN, individually, NUSIL  
TECHNOLOGY, f/k/a McGHAN NUSIL  
CORPORATION, INAMED CORPORATION,  
MINNESOTA MINING & MANUFACTURING  
COMPANY (3M), SURGITEK, INC., individually  
and d/b/a SURGITEK/MEDICAL ENGINEERING  
CORP., MEDICAL ENGINEERING  
CORPORATION, individually, and d/b/a  
SURGITEK/MEDICAL ENGINEERING CORP. and  
BRISTOL MYERS SQUIBB COMPANY, INC.,

Defendants.

Civil Action No. 97-CV-430-BUJ

**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAY 25 1999

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Shirley Ann Armer and defendants Bristol-Myers Squibb Company, Inc., Nusil Technology f/k/a McGhan Nusil Corporation, Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., and Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp., hereby stipulate that this action shall be dismissed with prejudice against Bristol-Myers Squibb Company, Inc., Nusil Technology f/k/a McGhan Nusil Corporation, Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., and Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp., with each party to bear its own costs.

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WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against all defendants.

HUTTON & HUTTON

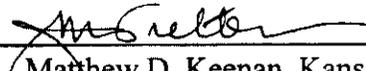
By 

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ATTORNEY FOR PLAINTIFF  
SHIRLEY ANN ARMER

SHOOK, HARDY & BACON L.L.P.

By 

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J. Margaret Tretbar, Kansas Bar #18645

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ATTORNEYS FOR DEFENDANTS  
BRISTOL-MYERS SQUIBB COMPANY, INC.,  
NUSIL TECHNOLOGY f/k/a McGHAN NUSIL  
CORPORATION, SURGITEK, INC., individually and  
d/b/a SURGITEK/MEDICAL ENGINEERING CORP.  
and MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the above and foregoing Stipulation for Dismissal With Prejudice was on this 21 day of May, 1999, sent via U.S. Mail to:

Charles E. Geister, III  
GEISTER & WHALEY  
First National Center  
120 N. Robinson, Ste. 2520  
Oklahoma City, OK 73102

B. J. Cooper  
COOPER & McALISTER  
124 N.W. Tenth  
P. O. Box 1336  
Oklahoma City, OK 73101

ATTORNEYS FOR DEFENDANTS  
BAXTER HEALTHCARE CORPORATION  
and HEYER-SCHULTE CORPORATION

ATTORNEYS FOR DEFENDANTS  
McGHAN MEDICAL CORPORATION,  
MINNESOTA MINING AND  
MANUFACTURING COMPANY, and  
INAMED CORPORATION



---

ATTORNEY FOR DEFENDANTS  
BRISTOL-MYERS SQUIBB COMPANY, INC.,  
NUSIL TECHNOLOGY f/k/a McGHAN NUSIL  
CORPORATION, SURGITEK, INC., individually and  
d/b/a SURGITEK/MEDICAL ENGINEERING CORP.  
and MEDICAL ENGINEERING CORPORATION  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP.

MTT

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

DENISE HESS,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No.: 97CV1048C(W) ✓

**F I L E D**

MAY 25 1999 *FL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Denise Hess and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

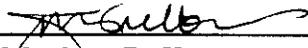
By 

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ATTORNEY FOR PLAINTIFF  
DENISE HESS

SHOOK, HARDY & BACON L.L.P.

By   
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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

VONDA DOBBS,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No.: 97 CV 1105K(M)

**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Vonda Dobbs and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By



Mark B. Hutton, Oklahoma Bar #12182

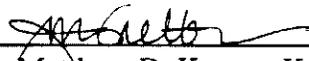
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ATTORNEY FOR PLAINTIFF  
VONDA DOBBS

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

SHARON DAVIES,

Plaintiff,

vs.

MEDICAL ENGINEERING  
CORPORATION, individually and d/b/a  
SURGITEK/MEDICAL ENGINEERING  
CORP. and BRISTOL MYERS SQUIBB  
COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No. 97CV 1106H(J)

**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Sharon Davies and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

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ATTORNEY FOR PLAINTIFF  
SHARON DAVIES

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

CAROLYN FRAMPTON,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No.: 97CV884 H(W) ✓

**F I L E D**

MAY 25 1999 *[Signature]*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Carolyn Frampton and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By

*[Signature]*

Mark B. Hutton, Oklahoma Bar #12182

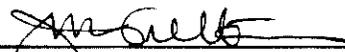
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ATTORNEY FOR PLAINTIFF  
CAROLYN FRAMPTON

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

SHIRLEY SANDS,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No.: 97CV885 H(M) ✓

**F I L E D**

MAY 25 1999 *SL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Shirley Sands and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By 

Mark B. Hutton, Oklahoma Bar #12182

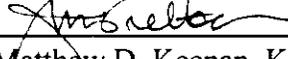
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ATTORNEY FOR PLAINTIFF  
SHIRLEY SANDS

SHOOK, HARDY & BACON L.L.P.

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OKLAHOMA

LINDA JEAN BARR,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

Civil Action No. 97 CV 886 J (W) ✓

**F I L E D**

MAY 25 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Linda Jean Barr and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

HUTTON & HUTTON

By



Mark B. Hutton, Oklahoma Bar #12182

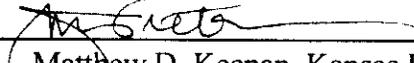
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ATTORNEY FOR PLAINTIFF  
LINDA JEAN BARR

SHOOK, HARDY & BACON L.L.P.

By   
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J. Margaret Tretbar, Kansas Bar #18645

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MIT

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

RAY KLINGE, Next of Kin and Surviving  
Spouse of Annette Klinge, Deceased,

Plaintiff,

vs.

MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.,

Defendants.

ENTERED ON DOCKET  
DATE MAY 25 1999

Civil Action No.: 97-CV-882-KE  
~~97-P-11710-S~~

**F I L E D**

MAY 25 1999 *SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Ray Klinge, Next of Kin and Surviving Spouse of Annette Klinge (Deceased) and defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

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HUTTON & HUTTON

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ATTORNEY FOR PLAINTIFF  
RAY KLINGE, NEXT OF KIN AND SURVIVING  
SPOUSE OF ANNETTE KLINGE, DECEASED

SHOOK, HARDY & BACON L.L.P.

By   
Matthew D. Keenan, Kansas Bar #12195  
J. Margaret Tretbar, Kansas Bar #18645

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ATTORNEYS FOR DEFENDANTS  
MEDICAL ENGINEERING CORPORATION,  
INDIVIDUALLY AND D/B/A SURGITEK/  
MEDICAL ENGINEERING CORP. AND  
BRISTOL MYERS SQUIBB COMPANY, INC.

MT

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

DEBBY DERNOVISH,

Plaintiff,

vs.

SURGITEK, INC., individually and d/b/a  
SURGITEK/MEDICAL ENGINEERING  
CORP., MEDICAL ENGINEERING  
CORPORATION, individually and d/b/a  
SURGITEK/MEDICAL ENGINEERING  
CORP. and BRISTOL MYERS SQUIBB  
COMPANY, INC.,

Defendants.

ENTERED ON DOCKET

DATE MAY 25 1999

Civil Action No.: 97CV 520 K(W) ✓

**F I L E D**

MAY 25 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

Pursuant to Fed. R. Civ. P. 41(a)(1), plaintiff Debby Dernovish and defendants Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc. hereby stipulate that this action shall be dismissed with prejudice against Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc., with each party to bear its own costs.

WHEREFORE, the parties respectfully request that the Court enter the attached proposed Order dismissing this action with prejudice against defendants Surgitek, Inc., individually and d/b/a Surgitek/Medical Engineering Corp., Medical Engineering Corporation, individually and d/b/a Surgitek/Medical Engineering Corp. and Bristol Myers Squibb Company, Inc.

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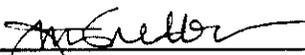
By 

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ATTORNEYS FOR DEFENDANTS  
SURGITEK, INC., individually and d/b/a  
SURGITEK/MEDICAL ENGINEERING CORP.,  
MEDICAL ENGINEERING CORPORATION,  
individually and d/b/a SURGITEK/MEDICAL  
ENGINEERING CORP. and BRISTOL MYERS  
SQUIBB COMPANY, INC.

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

**FILED**

MAY 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REGINALD EUGENE HAWKINS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JERRY PRATHER; PATRICK ABITBOL; )  
JOHN AKIN; and RAY HASSELMAN, )  
)  
Defendants )

No. 98-CV-627-BU (J) ✓

ENTERED ON DOCKET

DATE MAY 25 1999

**ORDER**

On August 17, 1998 Plaintiff, a state inmate appearing *pro se*, filed a 42 U.S.C. § 1983 civil rights complaint as well as a motion for leave to proceed *in forma pauperis*. Because Plaintiff's pleadings were deficient, he was ordered to amend both his complaint and his *in forma pauperis* motion. Plaintiff complied, and submitted an amended complaint (#6) and an amended *in forma pauperis* motion (#7). On December 29, 1998, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis*, as amended. At that time, Plaintiff was directed to submit an initial partial filing fee of \$4.87 on or before January 28, 1999. Plaintiff was advised that unless he either paid the initial partial filing fee or showed cause in writing for his failure to pay by the deadline, this action would be subject to dismissal without prejudice. After Plaintiff failed to submit the initial partial filing fee or to show cause for his failure to do so by the deadline, the Court entered its Order, dated March 16, 1999, dismissing this action without prejudice for failure to prosecute.

When Plaintiff filed his complaint, he was incarcerated as a pretrial detainee at the Rogers County Jail, Claremore, Oklahoma. On March 8, 1999, the Court received a Notice of Change of

Address from Plaintiff indicating his confinement at Lexington Assessment and Reception Center, Lexington, Oklahoma. On April 22, 1999, the Court received another Notice of Change of Address from Plaintiff indicating he is currently incarcerated at the Lawton Correctional Facility, Lawton, Oklahoma.

On May 10, 1999, Plaintiff wrote to the Court requesting that recently submitted money, a total of \$8.71, be accepted as his initial partial filing fee. In his letter, Plaintiff indicates that he had done "everything in [his] power" to ensure that the complaint filed in this case would be heard by the Court. Plaintiff implies he had difficulty in securing the initial partial filing fee from the Rogers County Jail officials. The Court liberally construes Plaintiff's letter as a motion to set aside the order of dismissal without prejudice (Docket #12). See Haines v. Kerner, 404 U.S. 519, 520 (1972).

Based on Plaintiff's representations and the record in this case, the Court finds Plaintiff has shown good cause for his failure to submit the initial partial filing fee by the January 28, 1999 deadline. Therefore, his motion to set aside order should be granted. As a result, the Court's Order, dated March 16, 1999, should be vacated and this action reinstated.

However, after reviewing Plaintiff's amended complaint, the Court finds that, for the reasons discussed below, Plaintiff's claims against Defendants Abitbol and Hasselman, both Assistant District Attorneys for Rogers County, should be dismissed as legally frivolous. Similarly, the relief sought by way of Plaintiff's claim against Defendant Prather, Rogers County Sheriff, and Defendant Akin, Rogers County Jail Administrator, is no longer appropriate and his claim should be dismissed as moot.

## **BACKGROUND**

As stated above, Plaintiff was a pretrial detainee at the time of the incidents giving rise to his complaint. In his amended complaint,<sup>1</sup> Plaintiff identifies four (4) counts with supporting facts as follows:

Count I: Denied due process of law by the office of the district attorney by not being called on court hearing. (Defendant Abitbol).

Supporting facts: Mr. Abitbol in motion for bond hearing didn't have me present at the hearing base (sic) on a illegal transfare (sic) to another county when I was to be present at hearing which lead to me filing a writ proof of such writ.

Count II: Mental anguish: detainee has suffered anguish by not being afforded the same rights as co-defendants. Along with this constant shipping of detainee near his scheduled court dates. Since the filing of this suit detainee has been stabbed in the face, due to miseducated. (Defendants Abitbol and Hasselman).

Supporting facts: On may 28<sup>th</sup>, this detainee filed a pro-se motion for bond reduction in the on going case, on there cases. I was denied for not being present, yet upon receiving court minutes, there was only one case filed on record.

Count III: Duress and cruel and unusual punishment. (Defendants Abitbol and Hasselman).

Supporting facts: this detainee has repeatedly been moved without cause from county to county. Causing hardships on attorney client relationship along with family members and self.

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<sup>1</sup>The amended complaint (#6) filed by Plaintiff supersedes and replaces the original complaint (#1). See Local Rule 9.3(C) (providing that each amended pleading must be "complete in itself including exhibits, without reference to the superseded pleading"). Therefore, the Court will not consider the claims as raised in the original complaint.

Count IV: Cruel and unusual punishment, Duress. (Defendants Prather and Akin).

Supporting facts: antiquated living facilities, unsanitary living conditions, lack of access to a law library, inadequate grievance procedures. Pretrial detainees are subject to duress because of the living conditions and the food service, which leads to them pleading out just to get out of this place. Detainees are subject to outside air only at the whims of those staff members that wish to buck the system. There is no grievance committee.

In his prayer for relief as to Counts I, II, and III, Plaintiff requests that "present charges be dismissed based on the actions of prejudice toward this detainee, along with compensation for the suffering of mental anguish plus a complete review of the bond setting of blacks in this county vs. whites." (#6 at 8). As to Count IV, Plaintiff requests that "there be an injunction placed upon this jail to correct the wrongs and to release those that have been subjected to this punishment longer than the 120 days, and a review of the bond setting of the court." (#6, attached handwritten page).

### ***ANALYSIS***

The Prison Litigation Reform Act of 1996 ("PLRA") added a new section to the *in forma pauperis statute* entitled "Screening." 28 U.S.C. § 1915A. The Screening section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed *in forma pauperis* "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. **See** 28 U.S.C. § 1915(e)(2)(B).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams,

490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes that, as discussed below, Plaintiff's allegations brought pursuant to 42 U.S.C. § 1983 either lack an arguable basis in law or have been rendered moot.

**A. Prosecutors entitled to immunity**

In his amended complaint, Plaintiff identifies Patrick Abitbol and Ray Hasselman, both Rogers County Assistant District Attorneys, as Defendants and asserts that those Defendants violated his rights during a bond reduction hearing. State prosecutors are entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Gagan v. Gale Norton, 35 F.3d 1473 (10th Cir. 1994) (quoted case omitted). Of course, "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (quoting Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2615 (1993)). The Tenth Circuit has repeatedly found investigative and administrative actions taken by the state prosecutors to be adequately protected by the doctrine

of qualified, rather than absolute immunity. Gagan, 35 F.3d at 1475.

In making the often “difficult distinction” between prosecutorial and non-prosecutorial activities (i.e., absolute and qualified immunity), we have held “the determinative factor is “advocacy” because that is the prosecutor’s main function.” Pfeiffer, 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); Spielman v. Hildebrand, 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating “the more distant a function is from the judicial process and the initiation and presentation of the State’s case, the less likely it is that absolute immunity will attach.” Pfeiffer, 929 F.2d at 1490 (citing Snell, 920 F.2d at 687).

Id. at 1476.

Applying these principles to the case at hand, the Court concludes that the prosecutor’s actions complained of in this case, allegedly affecting Plaintiff’s efforts to reduce his bond, constitute the type of conduct protected by absolute immunity. The actions of the prosecutors constitute advocacy functions sufficiently related to judicial proceedings to justify absolute immunity. Accordingly, Defendants Abitbol and Hasselman are immune from prosecution in this civil rights action and Plaintiff’s claims against them should be dismissed pursuant to 28 U.S.C. § 1915A as legally frivolous.

**B. No damages for “mental anguish” absent a showing of physical injury**

Under the PLRA, civil actions “brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury” are barred. 42 U.S.C. § 1997e. Although Plaintiff alleges he was “stabbed in the face,” he fails to assert any connection between Defendants’ conduct and the alleged stabbing. None of Plaintiff’s claims relates to the “stabbing” incident and Plaintiff has not alleged that any of the Defendants caused him to suffer a physical injury while confined at the Rogers

County Jail. Plaintiff's request for relief resulting from "mental anguish" is unrelated to any claim of physical injury. Therefore, in this case, the Court finds that Plaintiff's request for damages for "mental anguish" is barred by the PLRA.

**C. Dismissal of criminal charges inappropriate remedy in § 1983 action**

In his prayer for relief, Plaintiff requests that "present charges be dismissed based on the actions of prejudice toward this detainee." (#1 at 8). After reviewing the complaint, the Court finds Plaintiff is challenging the very fact of his imprisonment. In Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), the United States Supreme Court held that when a prisoner is challenging the very fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Accordingly, to the extent Plaintiff seeks habeas corpus relief, the Court finds this action should be dismissed. Plaintiff may pursue any allegations of constitutional violations which may have tainted his criminal conviction in a § 2254 petition for writ of habeas corpus, filed after exhaustion of state remedies, see § 2254(b), and before expiration of the one-year limitations period, see § 2244(d).

**D. Requests for injunctive relief and policy review are moot**

In Claim IV, Plaintiff complains of the conditions of confinement at the Rogers County Jail. As his remedy, Plaintiff seeks an injunction "to correct the wrongs" and a review of the bond setting policy of Rogers County District Court. However, since Plaintiff is currently incarcerated at Lawton Correctional Facility after being placed in the custody of the Oklahoma Department of Corrections,

he is no longer subject to the conditions of confinement at the Rogers County Jail on which his claims are based and his requests for an injunction and a review of policy have been rendered moot. See Green v. Branson, 108 F.3d 1296, 1300 (10<sup>th</sup> Cir. 1997); Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir.1985) (prisoner's claims for injunctive and declaratory relief concerning prison conditions were moot where prisoner had been moved to another prison unit); McKinnon v. Talladega County, 745 F.2d 1360, 1363 (11th Cir.1984) (holding that a prisoner's transfer to a different jail moots his claim for declaratory and injunctive relief even when prisoner argues that "there is no assurance that he will not be returned to the [first] jail"); Inmates v. Owens, 561 F.2d 560, 562 (4th Cir.1977) (when a prisoner is released from prison, there is no longer a substantial controversy between the former inmate and prison officials of sufficient immediacy and reality to warrant the issuance of either injunctive or declaratory relief). Because Plaintiff is not entitled to the injunctive relief requested and would no longer benefit from a policy review, his claim against Defendants Prather and Akin should be dismissed as moot.

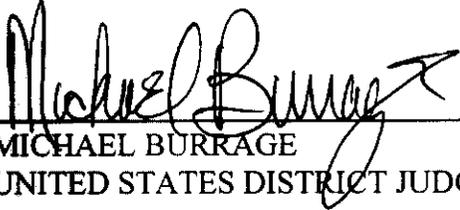
### ***CONCLUSION***

Based on good cause shown by Plaintiff, the Court's Order, dated March 16, 1999, dismissing this case without prejudice for lack of prosecution should be vacated and the case reopened. However, pursuant to 28 U.S.C. § 1915A, Plaintiff's amended civil rights complaint should be dismissed because Plaintiff's claims are either legally frivolous or moot.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Plaintiff's motion to set aside order of dismissal without prejudice (#12) is **granted**.
2. This Court's Order, dated March 16, 1999 (#10), is **vacated** and this case is **reopened**.
3. Plaintiff's amended civil rights complaint is **dismissed**.
4. This Order constitutes a final order **terminating** this action.

SO ORDERED this 24<sup>th</sup> day of May, 1999.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

MAY 24 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BULLSEYE DATABASE MARKETING, )  
INC., )  
 )  
Plaintiff, )  
vs. )  
 )  
SPS PAYMENT SYSTEMS, INC., )  
 )  
Defendant. )

Case No. 98-CV-917-BU ✓

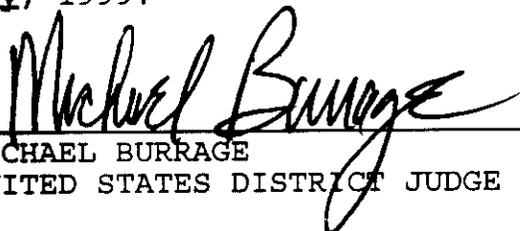
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DATE MAY 25 1999

**ORDER**

This matter comes before the Court upon the Dismissal With Prejudice filed by Plaintiff; Bullseye Database Marketing, Inc., which the Court construes as a Motion for Dismissal With Prejudice. Upon due consideration, the Court finds that the motion should be granted.

Accordingly, Plaintiff, Bullseye Database Marketing, Inc.'s Motion for Dismissal With Prejudice is GRANTED. The above-entitled action is DISMISSED WITH PREJUDICE. Each party shall bear its own costs and attorneys' fees.

ENTERED this 24 day of May, 1999.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

F. ROZIER SHARP, Regional Director for Region )  
Seventeen of the National Labor Relations Board, )  
for and on behalf of the NATIONAL LABOR )  
RELATIONS BOARD, )  
 )  
 )  
Petitioner, )  
 )  
v. )  
 )  
WEBCO INDUSTRIES, INC., )  
 )  
 )  
Respondent. )

**F I L E D**

MAY 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-352-H(M)

ENTERED ON DOCKET

DATE MAY 25 1999

**ORDER**

This matter comes on pursuant to this Court's Temporary Restraining Order entered at the hearing in this case on May 20, 1999. The Court failed to accompany its order with findings of fact and conclusions of law. Therefore, in accordance with F. R. Civ. P. 60(a), this omission is hereby corrected by the filing of this order.

This cause came before the Court on the verified petition of F. Rozier Sharp, Regional Director for the Seventeenth Region of the National Labor Relations Board (the "Board"), for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended (the "Act"), pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in the petition. Respondent Webco Industries, Inc., filed an answer to the petition.

At the hearing in this matter on May 20, 1999, all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issues, and to argue the evidence and the law. The Court has fully considered the Petition, answer,

evidence, arguments and briefs of counsel. Based upon a careful review of the record, the Court enters the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Petitioner is the Regional Director for Region 17 of the Board, an agency of the United States, and files this petition for and on behalf of the Board.
2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.
3. On October 8, 1998, the United Steelworkers of America, (the "Union"), pursuant to the provisions of the Act, filed a charge in Case 17-CA-19898 alleging that Respondent violated Section 8(a)(1) and (3) of the Act. On December 29, 1998, the Union filed an amended charge in Case 17-CA-19898, alleging that Respondent violated Sections 8(a)(1) and (3) of the Act. On March 3, 1999, the Union filed a second amended charge alleging that Respondent violated Sections 8(a)(1) and (3) of the Act.
4. The above charges were referred to the Petitioner for investigation.
5. Upon the basis of the investigation of said charges, the Petitioner has reasonable cause to believe that the same are true, and upon said charges, the General Counsel of the Board, on behalf of the Board, by the Regional Director, on March 8, 1999, issued a Complaint and Notice of Hearing in Case 17-CA-19898, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in unfair labor practices as charged within the meaning of Sections 8(a)(1) and (3) of the Act.
6. The affidavit of Jim Teague entered into evidence in this case states in part as follows:

- I have been involved in an organizing campaign involving employees of Webco Industries, Inc. (herein Webco) in Sand Springs, Oklahoma. The employees which the Union is organizing are production and maintenance employees, of which there are approximately 280.
- I became actively involved in the organizing campaign around mid-1997, around June. The campaign itself started when Gary Schooley (a former employee of Webco who was laid off in October 1998) who is my brother-in-law had contacted me about problems at Webco early in 1997 (around January, February or March). I did meet with Schooley and a few other employees around April 1997 to discuss the possibility of organizing. After that Merlin Andrews (another organizer) and some other Union organizers began working on the campaign. When I became actively involved in the campaign in mid-1997 the other organizer (Merlin Andrews) had obtained about 76 authorization cards from employees. I am not sure how many Union meetings he had conducted during his involvement in the campaign.
- When I became involved in the campaign an employee organizing committee had been formed. There were about 8 or 9 employees on the committee. Those who were on the committee were: Gary Schooley, Terry Ruckman, Roy Morris, Jerry Rogers, Brad Powell, Charlie Thorton, Richard Wilkerson, Shawn Wilson, Chris White.

- The employees on the committee have all signed cards. To my knowledge, none of them have asked for their Union cards back and none have asked to get off the committee.

7. The affidavit of Jerry D. Rogers states in part as follows:

- I began working for Webco on August 31, 1984. I was terminated from Webco on October 7, 1998. At the time of my termination I was a quality auditor. I earned \$10.30/hour. I worked Monday through Friday – 6:00 a.m. - 4:00 p.m. (Monday through Thursday) and 6:00 a.m. – 2:00 p.m. (Friday). I occasionally worked overtime. In the last six months of my employment I averaged about 16 hours per month of overtime. I have not yet located other employment. I am attempting to locate other employment and obtain additional schooling in order to get another job.
- During the time I was employed at Webco, there had not been a union which represents employees. There has been a union organizing drive, which started about 1-1/2 years ago. I was involved in that union organizing drive. I was called at home one night and asked if I would be interested in starting a union campaign – that was about 1-1/2 years ago. I said I would. I began attending union meetings. I signed a union card at the first union meeting I attended. In 1998 I have attended some union meetings – I think 2, maybe 3. The last meeting I attended was around Monday, October 12, 1998. The union meeting I attended before that was

about 4 months prior. I cannot recall any other union meetings in 1998, which I attended.

- I passed out and collected union cards from fellow employees in 1997, but I do not recall passing out union cards in 1998.
- I had a conversation or discussion with Charlie Conn around September 18, 1998. It was at 10:30 a.m. in my office. Present also was Roy Morris, another employee who holds the same position as me. Conn came in and locked the door and told us he wanted to have a little meeting with us. He said he wanted to let us know that this room is not a break room and that we do not need to be talking about union activities while we are in here – that is for the break room and break time only. He asked us if we were really serious about wanting a union. I do not remember what Morris said. I told him that I was tired of the way that people were being treated and that I did want a union. Conn said there was not a whole lot he can do about it. Conn asked what would make things better. I told him if the company would work with the people, instead of working against the people, the threat of a union coming in would probably go away. We went on to talk about other things besides the subject of the Union. That's all I can recall from our discussion.

8. The affidavit of Roy G. Morris states in part as follows:

- I began working for Webco on about March 17, 1994. I was terminated on October 7, 1998. At the time of my termination I was a quality assurance

auditor. I worked Monday through Friday. My hours were: 6:00 a.m. – 4:00 p.m. (Monday through Thursday) and 6:00 a.m. – 2:00 p.m. (Friday). I earned \$10.30/hour. I occasionally worked overtime. In the two months prior to my discharge, I estimate I worked a total of 8 hours overtime. Since my termination, I have not yet located other employment. I am searching for other employment.

- On a Friday, around September 18 or September 25, 1998, from about 10:00 a.m. to 11:00 a.m., Jerry Rogers, Charlie Conn, and I had a conversation. We were in the tinsel room. No one else was present. Rogers and I were working in there and it was about time for break (which is at 10:30 a.m.). Conn came in and asked if he can talk to us for a minute. Rogers and I said yeah. Conn shut the door and locked it. Conn sat down and said why don't we have a seat. Rogers and I sat down. Conn asked well, how do we feel about what is going on. I asked like what. Conn said well about everything, like the Hispanic program. I said well, it really don't matter – if they show up and work then fine; and if not, then we don't need them here. Rogers said he felt the same way. Rogers said that there is good workers in every race and there's bad workers. Conn said well, what about everything else. Rogers said what, like the union? Conn said well, yeah. Conn asked how we all felt about it, why do we want it. I said well, it's not really that we want it, it is just that we want something to get Webco so they can't take stuff away from us anymore. I said if they

start treating us better, then the union would go away – it was totally up to the Webers whether or not the Union comes in or not. [Bill and Dana Weber are the chairman and president of Webco.] I said every time they do something to somebody and they (employees) feel like that's not right and everybody else feels it's not right, that is just more people who want the union in; because the more they do to take advantage of us and take benefits away from us, from the way they are going, they are the union's best friends. Conn asked if I really felt that way and I said yes. Rogers said that is right, he felt the same way. Rogers said some other things, but I do not remember all that he said. Conn said well, it is getting better and there is a lot of companies in the Tulsa area that don't offer the same benefits, even companies that are a lot bigger, like Whirlpool. Conn said that Rogers and I eat lunch in the tinsel room, but that's not considered a break room and that it was alright for us to eat in there, but if we wanted to talk about that kind of stuff, we needed to do it in the break room. Conn said the tinsel room was a work center, so if we had any business other than Webco we needed to discuss it on break in the break room.

- Sometime in early 1997 (I do not remember the month), I heard that the United Steelworkers of America (herein referred to as the Union) was trying to organize at Webco. I began attending Union meetings around that time. In 1997 I attended approximately 6 or 7 Union meetings. In 1998 I attended 3 Union meetings – one sometime in early September

1998 and two other meetings after my termination. I do not think that there were any Union meetings in 1998 prior to the one I attended in early September.

- During the month of May 1997, I passed out Union cards at work in the break room during breaks. I do not think that any supervisors or managers saw me doing this. I have not passed out any Union cards since then.

9. The affidavit of Eric R. Martin states in part as follows:

- I began working at Webco on December 29, 1994. I was terminated on October 7, 1998. At the time of my termination I was a cutoff operator. I worked four 12-hour days, Monday through Thursday. I earned \$10.95/hour. I hardly ever worked overtime. I am not sure what, if any, overtime I may have worked in the last six months.
- I put a bumper sticker – Go Steelworkers – on the window of my truck sometime in 1997. I do not know what, if any, supervisors or managers may have seen the bumper sticker. About three weeks before October 7, 1998, (around September 16, 1998) a meeting was held for the mill bay employees. The meeting was held upstairs in the coordinators' offices by the lunchroom. All employees on four 12-hour days in the mill bay were present – I estimate that to be between 15 and 20 employees. J.D. Casey and Kenneth Deeds (shift business manager) were present. Deeds read from a piece of paper and said that we cannot speak or talk about the Union on employee time and the only place we can speak about the Union

is in the breakroom. I shook my head no and Deeds told me not to shake my head no. Deeds told us we could not pass Union literature throughout the shop and we cannot read Union literature out in the shop and we cannot pressure anyone into signing a Union card. Employees asked questions about the Employer's Hispanic program. I recall employees said that they would have liked to vote on the program before the Employer did it and Deeds said that it was above his head. That's all I recall from that meeting.

10. The affidavit of Gary Schooley states in part as follows:

- I began working for Webco on August 3, 1993. I was terminated on October 7, 1998. At the time of my termination I was a draw bench operator. I worked four 12-hour days – Monday through Thursday, from 6:00 a.m. to 6:00 p.m. I worked overtime every weekend, usually two days a week. On the average I worked 70 hours a week. My rate of pay was \$10.00/hour. During the time of my employment, I have had zero points in the last year and a half (points assessed for coming in late, leaving early or missing work). In the years prior to that I had accumulated very few points. I have had no injuries on the job. I was asked by Bill Nance (shift business manager) if I would consider a trainer job, which is a lead position. This was about 3 months ago. I told him I was interested. Later, about 6 weeks before my termination, I was told by Bill Nance that Bill Obermark and Jene Harmon (both vice presidents)

liked the way that I conducted myself and they felt I had leadership abilities. Nance said they were trying to make a position for me. My evaluations have been excellent. I had the second highest evaluation of the 20 people on my crew in May 1998. I was qualified to run all of the machines in my department. I was heavily involved in assisting in the team concept implemented by the Employer.

- The Union began an organizing campaign at Webco approximately two years ago. I do not really know the exact date or month when the campaign began. I was involved in that organizing campaign from the beginning. Jim Teague, an organizer for United Steelworkers of America, is my brother-in-law. His wife and my wife are sisters.
- Sometime the week of Labor Day (week of September 6, 1998), I don't recall the exact date, Jene Harmon called me at home. It was around 7:00 or 7:30 p.m. He asked if he was interrupting dinner or anything. I said no, I was just watching T.V. He said he just wanted to kind of talk to me a little bit. We talked about the Hispanic program. Harmon asked me out on the floor what was the attitude of the people about the Hispanic program. I told him everything was fine. He asked me what was going on with the Union. I told him I did not have any idea. I told him at this time I did not know what was going on, that I was trying to stay out of it. Harmon said for me not to worry about what had happened in the past and that they were trying to move on and forget about everything, that they

were trying to become a stronger company. That's all there was to our conversation.

- Duane Blevins (shipping supervisor) and I went to school together and we have been good friends. Blevins works in a different area than me. On about September 22, 1998, around 9:00 or 9:30 a.m. I went over to the shipping department to talk to Blevins. No one else was present. (I had heard that Webco was having management meetings at 5:00 in the morning.) I asked Blevins if these meetings were anti-union meetings. Blevins told me they were. I asked him if during these meetings my name had been mentioned. He said no, there had been no names mentioned, but that I should know how they are, they don't forget. He told me they were watching the people out on the floor. He said I was out of my work area by being there talking to him and I could be terminated for that. He told me I better watch out who I was talking to. He told me they were looking to make an example out of somebody. I returned to my work area.

11. The affidavit of Andrew T. Stephenson, Jr. states in part as follows:

- I began working for Webco on August 3, 1992. I was laid off on October 7, 1998. At the time of my layoff, I was working in cold draw tooling (in tool and die). [I made the tooling for the machines Webco ran.] Webco makes steel tubing. My rate of pay was \$10.40/hour. I worked day shift, Sunday through Wednesday. My hours were 6:00 a.m. to 6:00 p.m. I only

worked overtime if I was needed. In the last six months, I have worked about 8 hours of overtime total.

- My immediate supervisor [sic] Monty Pratt. At Sand Springs, there are around 400 employees. There were 4 (including me) cold draw tooling employees, 2 on days and 2 on night shift. Three of the 4 cold draw tooling employees were laid off: myself, Christ White, and Mark MacKenzie. Russell Holcomb was not laid off. Holcomb was third of the 4 cold draw tooling employees, in terms of seniority.
- Around September 1998, sometime around Labor Day, I went into Pratt's office to talk to him. It was in the morning. I asked where we were at on my expert pay. He said he will sit down with me after lunch and let me know. Shortly after 1:00 p.m. Pratt called me into the office. Only Pratt and I were present. Pratt went over the skill-based requirements. [The Employer has skill-based pay - there are six grades of pay and each grade has three different levels (minimum, proficient, and expert)]. I got mad and I asked him why other departments were making and getting their upgrades and our department wasn't. Pratt told me what I needed to get to expert level. He told me to go back to work and for me to tell Micah Wise to come up to his office, which I did. Later in the day, Pratt called me and Wise back to his office. Just the three of us were present. It was between 3 and 4:00 p.m. Pratt read off the requirements that we each did not have in order to qualify for expert. Pratt told me all I needed to do was work

two days in the weld mill tooling department. I said that sounds fair to me. Pratt went over Wise's with him and Wise agreed to do it. Pratt said not to let this get back to Gary Schooley or they would have the union problem or union organizing going again. He said this as we were walking out of the office. (Gary Schooley is an employee and Jim Teague's brother-in-law. Jim Teague is the Union organizer.) Also as we were leaving, I recall Pratt told me that I can go home and tell my wife that he is a jerk like I have.

12. The affidavit of Robert L. Leasman, Jr. states in part as follows:

- I began working for Webco through a temporary service in July 1998. After two weeks working through the temporary service, I was hired by Webco as a full-time employee. This was around the law week in July 1998. I was terminated on Monday, August 31, 1998. At the time of my termination I ran the pointer machine. I earned \$7.00/hour and worked Monday through Thursday from 6:00 a.m. to 6:00 p.m. I do not recall that I worked any overtime other than the required 8 hours overtime, this is included with the regular shift hours.
- I attended one union meeting which was about a week before I was fired. I think it was on a Thursday, either August 27 or August 20, 1998. I do not know if any supervisors or managers were present at the meeting because I did not know the people at Webco that well. The day of the Union meeting there [sic] a union representative handing out flyers on the

road outside the entrance to the parking lot. The entrance to the parking lot is right in front of the offices of Webco. I was one of the last employees to leave the parking lot. I stopped by the union person handing out the flyers and talked to him about 1 minute, took a flyer, and then drove off. A couple of cars ahead of me also stopped briefly to talk to the union person. That flyer was for a union meeting that night, which was the union meeting I attended. I drive a truck which has my name on it on the back, so it would have been easy for any guard, supervisor, or manager to know who was stopping to take the flyer from the union person.

13. The affidavit of Shawn Wilson states in part as follows:

- I began working for Webco around March 20, 1996. I was terminated on October 7, 1998. At the time of my termination, I held the position of finish floor rotater. I worked first shift, four 12-hour days from 6:00 a.m. to 6:00 p.m. I worked Monday through Thursday. I occasionally worked overtime. In the last six months, I estimate I worked a total of 120 hours of overtime.
- Sometime around February 1997 I learned that the United Steelworkers of America (herein referred to as the Union) was organizing employees of Webco. A co-worker gave me a map of where the Steelworkers Union hall was in Sand Springs and I attended my first Union meeting in about February 1997. I went to a couple of Union meetings before I signed a Union card. I attended 10 or 12 Union meetings in 1997. In 1998 I

attended a Union meeting around August or September 1998 and since my termination I have attended meetings with the Union. I do not think there were any other Union meetings in 1998 prior to August or September.

14. The affidavit of Larry O'Brien states in part as follows:

- I was employed at Webco from June, 1993 to November, 1998. My job was Manager of Quality Assurance. I reported to Tom Lewis, VP and General Manager or Bill Obermark, also VP and General Manager. Initially I was Manager of QA and Charlie Conn, Inspection Manager worked below me. For about three years I was General Business Manager over the Weld Mill Dept. I was in that job when the first NLRB case arose involving Charlie Thornton and others. The last year I was there I was Manager of QA again. All the General Business Managers were told to report any kind of union activity and to give names and what activity the employees were involved in. That was told directly to me by Bill Obermark in 1997. That was the same directive in 1998 and we knew that came down from Bill and Dana Weber.
- As a result, a list of pro-union employees was generated which went up the chain of command to Robin Robinette, Dana Weber and Bill Weber. The ones I knew to be on the list were Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, Richard Teague (because his brother is Jim Teague, union organizer), Eric Martin, Mike Leslie, Don Greenfield, Rick Hake, Bob Leasman. There was a white board in the meeting room. On

that board we would write the names of who in our department we thought was pro-union. I assume that board went to Corporate and Robin Robinette. That is the list I am referring to.

- We had staff meetings every morning at 9am. These consisted of all general business managers and Directors who reported directly to Obermark. Obermark was in the meetings also. In 1997, we discussed who was involved in the union activity that was going on. That is when most of the names mentioned above first came up. In 1998, there was rumor of more union activity during the Summer. This was again raising the same names as in the past except that Bob Leasman and Richard Teague were particularly troublesome. Once Robin Robinette found out about those two and that they were related to the union organizer, Jim Teague, she started asking how they could ever get hired at Webco. That was mentioned in the staff meetings and it seemed to be coming from Robinette. It could have been raised by the Webers but Robinette seemed to be the spearhead for Corporate. The two did not work for me so I was not directly involved.
- In 1998, Jerry Rogers and Roy Morris worked for me. Both were satisfactory employees. The company kept Jared Johnson and laid off Rogers and Morris. Johnson was an acceptable employee who was neutral. Morris and Rogers were tied to the Union. Both had more seniority than Johnson, and had good attendance and good work ethics. I

was not at the meeting when they were selected but based on the Company position regarding unions I assume they were laid off because of their union sentiments. As noted above they were on the list of pro-union employees kept by the Company.

- It was stated in our meetings that a lot of people in Tool and Die, Maintenance and Cold Draw were pro-union. Among the employees who got laid off and worked in those departments were: Charlie Casey, maintenance, Terry Ruckman and Andy Stephenson, Tool and Die, School in Cold Draw. That was generally stated as to which departments were the pro-union ones.

15. The affidavit of Harvey Whittenburg states in part as follows:

- I was employed from 1973 to October 26, 1996 by Webco. When I left the company I was a Corporate Director. I reported directly to Dana Weber, President of Webco. In my capacity, I was eyewitness to the Company's opinions of Unions. In that regard, I recall the following statements and events.
- There were several attempts to bring unions into the Webco plant during my time there. Bill Weber, CEO, stated to everyone that he would shut the plant down before he would ever allow a Union [sic] come in. He told the people that he could give them more than what a Union could provide. He stated that he owned the company and he would not allow anyone to

tell him how to operate it. I heard that from Weber from day one of my employment until I left Webco.

- Dana Weber had the same philosophy as her father. She stated that she would never allow a Union to come in to Webco.
- When there was talk of a Union going on, Bill Weber would send Don Holder, safety manager in Sand Springs, to the parking lot wherever the Union meeting was being held. Weber told Holder to find out who was attending those meetings. Holder would know because he recognized vehicles and could determine who was in attendance. I recall specifically that in the mid to late 1980's Holder heard of a Steelworkers union meeting and went to the parking lot then. He got the names of those in attendance. He returned with their names. I was present when Holder reported to Weber the names of the people. Also present was Tom Lewis, [sic] Bill Obermark. He told us that he had the names and cars. He told us how long the men spent at the meeting. As a result those employees in attendance became a part of Weber's hit list. Within a few months there was a layoff at Webco. I was present for the discussion of who to layoff. Tom Lewis, Bill Weber, Don Holder, me and any of the middle managers involved met to discuss who to layoff [sic]. At the outset, Weber would say that business was bad and we had poor cashflow so we needed to cut the work force. He would name a number and then the discussion would go to who was to be laid off. When names were selected, the ones who

attended union meetings were always part of the layoff list. It was understood that they were to go because Weber would not tolerate pro-union employees. That was so long ago that I can't recall the names but that was the procedure we went through.

- There was another occasion like that. Robin Robinette was in Human Resources. The Union appeared in the driveway at the Plant and I was Plant Manager at the time. The Union handbillers tried to hand Bill Weber a handbill. The handbilling went on for a couple of days. We watched to see who took the literature from the Union people, who kept the literature. Once again it was the Steelworkers or at least whatever union represented the Sheffield Steel employees. Weber held meetings with the employees. He said that he would not tolerate a Union, if one came in he would shut the plant down and everyone would lose their jobs. He told them that anyone involved with the Union would lose their jobs. He said no solicitation would be allowed in the plant. He told the employees that they could not speak with one another. I was present at the meetings which were held for all employees throughout the company. Weber killed the Union activity with his threats. This was in 1992 or 1993.

16. The affidavit of Chris White states in part as follows:

- I began working at Webco Industries, Inc. (herein referred to as the Employer or Webco) around December 28, 1992. I was terminated on

October 7, 1998. At the time of my termination, I worked in tool and die. I was in cold draw tooling. My rate of pay was \$9.40/hour. I worked Wednesday through Saturday, from 6:00 a.m. to 6:00 p.m. I worked an average of 8 hours of overtime per month.

- Around June 1997 (I don't recall the exact date), I attended a meeting at Webco in the training trailer. Present at the meeting were the employees in cold draw south bay on day shift, about 18-19 employees. The managers or supervisors who were present were Dan Marris (shift business manager), Patty Jordan (general business manager at the time), Joe Spencer (supervisor), and Bobby Jones (trainer). Marris conducted the meeting. Marris told us it was pretty much known that there was union activity going on, that there were meetings being held. Marris told us there were a lot of people that were very worried about their jobs and that by trying to get a union in the company that we were not only messing with our own jobs, that we were worrying and messing with a lot of other peoples' jobs. He said that we would not gain anything from having a union and that we would lose everything that we had. Marris said some other things having to do with what we would lose and why we did not want a union in there – I do not remember the specifics of what he said. Jordan started discussing how the company had an open-door policy and that we really were working for a very good company and that the company had realized that there were some things they needed to change

as far as their pay and that if we would stop and look we would realize that the company had made changes and that we were making more money now and that they were still looking at changes to be made. Jordan pointed out an employee (Margaret Boundy) and how she was making more money now and that that was a result of some of the changes that the company was making. I raised my hand and asked if I could make a comment relating to what she just said. Jordan said yes, go ahead. I looked at Boundy and said to Boundy to tell everybody how long she had been at this company. Boundy said how long she'd been there (13 or 14 years). I asked her how much money did she make an hour and Boundy said how much she made. I said now, is that actually that much money compared to how long she had been here. Boundy said no. Jordan said that they realize that there were some changes that needed to be made and the company was working on getting some changes made. Marrs then started talking about Bill Weber (owner) and asked us how far we thought Weber would go to keep a union out of that company. Marrs explained how Weber started from next to nowhere just like us and has worked his way up to where he is at and now he is being threatened with a union, that Weber's own opinion of a union was that they were the direct reason why a lot of steel factories and big companies went under in Oil City, Pennsylvania where he was born and raised. Marrs said don't we think that Bill Weber, knowing how strong a person he is and how strong-willed

he is, don't we think that he would go so far as to shut this company down to keep a union out. One of the employees (Terry Ruckman) told Dan Marrs that his dad has worked in a union for 15 to 20 years and that he could not believe all of the bad things Marrs was saying about a union because of how well treated and well paid his dad was where he worked. Ruckman told Marrs how much his dad made and Marrs responded with that sounds like a really good company asked where that is and said he would like to work there. Marrs said my name and asked me why would Bill Weber pay me \$12 or \$13 an hour, or \$14, or however much, to run that draw bench when he could pull somebody off the street to run it for \$9 an hour. That's all I remember from the meeting.

- Later the same day, around 5:00 to 5:30 p.m., Marrs passed out our paychecks and while he passed out the checks he told me and my brother, Shawn White, how if we were involved in the Union that we needed to really think about what we were doing, about the decisions that we were making and the repercussions of what we were doing. He said if we felt at any time that we were being intimidated or harassed or if we had signed a card and wanted to rescind our card, that we could come to him at any time for his help. Shawn White, Marrs, and I were in front of the pointer machine when Marrs made these comments to us.

17. The affidavit of Robert A. Kewett states in part as follows:

- I was Manager of Human Resources, known as Manager of Personnel Services for the Southwest Tube Division of Webco Industries, Inc., the plant which is involved in this unfair labor practice proceeding. I hired in around January, 1997. I reported to Bill Obermark, VP of Operations for Southwest Tube. The Employer terminated me around the end of October, 1998.
- I was terminated by Dana Weber, President of Webco. She told me at that time that I was not a Webco type person. She did not explain.
- I am aware of the Company decision making with regard to the termination of certain employees. Specifically, with regard to Richard Teague, my knowledge is as follows:
- I had an HR coordinator below me, a recruiter, who gathered applications and interviewed shop people. His name was Jim Richey. Richey interviewed Richard Teague. He checked his references and set him up to be hired. It passed over my desk and I did not think anything of it. Teague went to work. Several weeks later, 6 to 8 weeks, I heard from several guys out in the shop that Richard Teague was related to Jim Teague, Union organizer for the steelworkers.
- As a result, Robin Robinette, Corporate Director of Personnel Services, demanded that I verify whether Richard was related to Jim Teague or not. She sent someone to get his personnel file from my department.

(Robinette works in the corporate offices a couple of buildings away from the Southwest Tube facility).

- We did find out that **Richard** was related to Jim. Robinette told me we should find a way to **get rid** of Richard because of that. Robinette said that Dana and Bill Weber **wanted** Teague gone. They were concerned that he was a Union plant. We discussed whether to transfer Teague to Fintube, a small operation on North Utica in Tulsa, or just terminate him. Robinette told me to **terminate** Teague because the Company was concerned that because he was Jim Teague's brother he was there as a Union plant to try and initiate another Union organizational drive.
- Jene Harmon was **plant manager** during that period. Harmon spoke with me about this in his **office**. We both felt it was wrong to get rid of Teague. We discussed how **shitty** it was to fire somebody because of who they were related to. Harmon told me he had argued against this several times at the Corporate level **but** he was told it had to be done. (He also argued against my termination.)
- I was in the room **while** Harmon spoke to Frank Casey, Teague's immediate supervisor. Harmon told Casey it was because Teague was related to the Union **organizer**. Casey said it was a crock of shit but Teague was **terminated** regardless.
- Teague could have **been** grouped in with the October 7, 1998 layoff but I know he was **terminated** because he was related to the Union organizer,

Jim Teague. (Harmon was Acting Plant Manager from August to October, 1998 when Tom Lewis was brought in from the Company's Pennsylvania plant).

- With regard to the selection of people for the October 7, 1998 layoff, I know a list was generated at Corporate and a meeting was held with the management team at Southwest Tube, the senior managers. The list was presented to the department managers. They were asked if they had any major heartburn with any of the people on the list. A couple of the managers questioned people on the list and why they were on it. They got no response. One of the manager's said, "Come on you know as well as I do why he's on the list, he's a union sympathizer." (That was in regard to either Gary Schooley or Brian O'Connell). Robin Robinette smiled at that. I was not present at the meeting but have been told about it by several fellow managers.
- I knew who some of the Union sympathizers were in the plant. I knew that from the last go around in the 1997 trial. I knew Mike Leslie was, also, Gary Schooley who was known to be Jim Teague, Steelworker organizer's brother-in-law. Jerry Rogers was seen to be a disgruntled employee who was promoted to supervisor and then reduced. He was also known to be a union sympathizer. Chris Buchanan was known to be pro-union. Terry Ruckman, like Schooley, gave testimony at the first NLRB

trial and was seen by management to be a union sympathizer. Eric Martin was pro-union as far as we knew. Rick Hake was a union sympathizer.

- We had a number of management meetings. We met every morning at 9 am. On occasion after the production meetings, the General Business Managers and I would be asked to say. Robin Robinette, on occasion, and most often Bill Obermark, would ask what we had heard around the plant about union activity and who was involved. These meetings about union activity took place whenever there was work that the union organizing was going on. That was definitely discussed in the Summer of 1998 because there were rumors of union activity in the plant. During those meetings with Obermark, various employees were named as being pro-union in the plant. I have listed above the ones I knew to be pro-union and named in the meeting.

18. Based upon a careful review of the record in this case, the Court finds that there is reasonable cause to believe that:

(a) At all material times Respondent, a corporation, with an office and place of business in Sand Springs, Oklahoma, has been engaged in the manufacture and distribution of steel tubing.

(b) During the 12-month period ending February 28, 1999, Respondent, in conducting its business operations described above purchased and received at its Sand Springs facility goods valued in excess of \$50,000 directly from points outside the State of Oklahoma.

(c) During the 12-month period ending February 28, 1999, Respondent, in conducting its business operations described above sold and shipped from its Sand Springs facility goods valued in excess of \$50,000 directly to points outside the State of Oklahoma.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

(e) At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(f) At all material times the following named individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Monty Pratt	Machine Shop and Tooling Manager
Jene Harmon	Director of Production Planning
Charlie Conn	QA Inspection Coordinator
Dennis Coldiron	Supervisor
Kenneth Deeds	Shift Business Manager
Dewayne Blevins	Team Leader/Shipping
John Bayliss	Maintenance & Tool-Die Manager
Ted Dye	Supervisor
Ronnie Ryker	Supervisor
Mark McIlwain	Cold Draw Shop Business Manager
J.D. Casey	Supervisor

(g) On or about September 1998, Respondent, by Monty Pratt, at Respondent's Sand Springs facility, prohibited its employees from discussing their terms and conditions of employment with employees who support the Union, thereby discouraging union activities by its employees.

(h) On or about September 6, 1998, Respondent, by Jene Harmon, in a telephone conversations, interrogated employees concerning their union activities.

(i) On or about September 16, 1998, Respondent, by J.D. Casey and Kenneth Deeds, at Respondent's Sand Springs facility, promulgated and since then has maintained a rule prohibiting employees from speaking about the Union on employee time, and stating that the only place they can talk about the Union is in the break room, and that they cannot distribute or read Union literature in the shop, while permitting employees to talk about non-Union subjects while working.

(j) On or about September 18, 1998, Respondent, by Charlie Conn, at Respondent's Sand Springs facility, interrogated its employees about their union activities and promulgated and since then has maintained a rule prohibiting employees from discussing the Union except in the break room and on break times.

(k) On or about September 22, 1998, Respondent, by Dewayne Blevins, at Respondent's Sand Springs facility, threatened its employees with unspecified reprisals if they engage in union activities, and implied that their union activities were under surveillance by Respondent.

(l) On or about August 31, 1998, Respondent terminated its employee Bob Leasman.

(m) On or about October 7, 1998, Respondent laid off and terminated its employees Gary Schooley, Jerry Rogers, Roy Morris, Shawn Wilson, and Terry Ruckman.

(n) Respondent engaged in the conduct described above because the named employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities.

(o) The acts and conduct set forth above have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to, and do lead to, the burdening and obstructing of commerce and the free flow of commerce.

19. The Court concludes that, based on the record in this case, it might be fairly anticipated that unless enjoined, Respondent will continue its aforesaid unlawful acts and conduct, or similar or like acts and conduct.

### **CONCLUSIONS OF LAW**

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding, and under Section 10(j) of the Act is empowered to grant injunctive relief.

2. There is, and Petitioner has, reasonable cause to believe that:

(a) Respondent is an employer within the meaning of Section 2(2) of the Act.

(b) Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these unfair labor practices will impair the policies of the Act as set forth in Section 10(b) thereof.

3. The acts of Respondent satisfy the two-part test set forth in Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967). Specifically, the Court finds that (1) there exists reasonable cause to believe that Respondent has engaged in unfair labor practices, and (2) temporary injunctive relief would be just and proper given the nature and extent of Respondent's unfair labor practices. Angle, 382 F.2d at 658, 660; see also Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371-72 (11th Cir. 1992).

4. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just, and proper that, pending final disposition of the matters herein involved before the Board, Respondent, its officers, representatives, agents, servants, employees, attorneys, successors and assigns and all persons acting in concert or participation with it or them, be enjoined as set forth in the Order Granting Temporary Injunction entered by the Court on May 20, 1999.

IT IS SO ORDERED.

This 25<sup>TH</sup> day of May, 1999.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

ENTERED ON DOCKET

BOBBY GENE CHRISTIAN )  
Plaintiff, )  
 )  
vs. )  
 )  
BALL-FOSTER GLASS CONTAINER )  
CO., LLC, )  
Defendant, )

DATE MAY 25 1999

Case No. 97-CV-1016-K(J)

**FILED**

MAY 24 1999 *AL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE**

Now on this 21 day of May 1999, the Court has for its consideration the parties' joint stipulation that the above captioned matter **should be dismissed with prejudice** to the refiling thereof. For good cause shown, the Court finds that the stipulation is in good order, is well taken, and that it should result in the entry of an order of **dismissal** with prejudice.

IT IS, THEREFORE, THE ORDER AND JUDGMENT OF THIS COURT that this case should be, and is hereby, dismissed with **prejudice** to the refiling hereof and that each of the parties should bear his own costs and attorney's fees.

  
TERRY C. KERN, CHIEF UNITED STATES  
DISTRICT JUDGE

**HOLDEN, GLENDENING, PACKEL  
SACRA & MCKENNA**  
Bruce A. McKenna, OBA # 6021  
200 Reunion Center  
Nine East Fourth Street  
Tulsa, Oklahoma 74136  
(918) 295-8888 TELEPHONE  
(918) 295-8889 FACSIMILE

**FILED**

IN THE UNITED STATES DISTRICT COURT FOR THE **MAY 21 1999**  
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

C.D. MITCHELL, et al, )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
RANDY BAXTER, et al, )  
 )  
Defendant(s). )

Case No. 98-C-252-B

ENTERED ON DOCKET

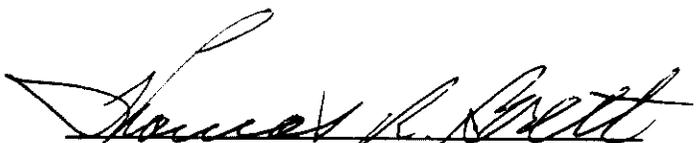
ADMINISTRATIVE CLOSING ORDER

~~MAY 24 1999~~

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

IF, within 60 days of a final adjudication of the bankruptcy proceedings re: the settlement approval or a lifting of the stay, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 21<sup>st</sup> day of May, 1999.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

How  
5/20/99

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

**FILED**

MAY 21 1999

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THOMAS O. MERRITT, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 99CV0177E (M)

ENTERED ON DOCKET

DATE **MAY 24 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 \$4,222.15, plus accrued interest of \$1,323.15 , plus interest thereafter at the rate of 6.79% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate 4.727 until paid, plus costs of this action, until paid in full.

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 Thomas O. Merritt 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 June, 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 \$250.00, 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 his financial situation or ability to pay, and of any change in his 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 his assets, income and expenditures (including, but not limited to his 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.

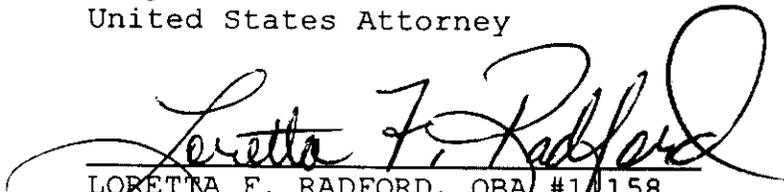
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Thomas

O. Merritt, in the principal amount of \$4,222.15, plus accrued interest in the amount of \$1,323.15, plus interest at the rate of 6.79 until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.727 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 #14158  
Assistant United States Attorney

  
THOMAS O. MERRITT

LEFR/11f

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

CLIFFORD D. CLEMMER,  
SSN: 430-98-3500

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

MAY 21 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 98-CV-598-J ✓

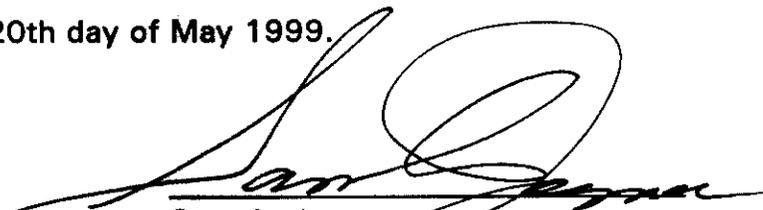
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DATE MAY 24 1999

JUDGMENT

This action has come before the Court for consideration and an Order reversing the Commissioner's decision 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 20th day of May 1999.



Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

CLIFFORD D. CLEMMER, )  
SSN: 430-98-3500 )

Plaintiff, )

v. )

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

Defendant. )

MAY 21 1999 *FL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 98-CV-598-J ✓

ENTERED ON DOCKET

DATE MAY 24 1999

**ORDER**<sup>1/</sup>

Plaintiff, Clifford D. Clemmer, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ did not fully discuss his findings with regard to Plaintiff's credibility, and (2) the ALJ did not address Plaintiff's mental impairment. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

Plaintiff's is insured for the purpose of social security disability only through March 31, 1993. [R. at 20]. In his disability report, Plaintiff claimed he was disabled

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<sup>1/</sup> 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.

<sup>2/</sup> Administrative Law Judge R.J. Payne (hereafter "ALJ") concluded that Plaintiff was not disabled by Decision dated November 19, 1996. [R. at 20]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 12, 1998. [R. at 6].

due to a back injury, and an inability to tolerate lifting, standing, stooping, bending, or walking. [R. at 78]. Plaintiff completed high school and attended a few college classes. [R. at 372]. Plaintiff was born December 29, 1953. [R. at 24]. Plaintiff testified that he could sit for approximately one-half hour, and stand for approximately one-half hour. [R. at 372]. Plaintiff believed that he could walk approximately six blocks and lift five to ten pounds. [R. at 385].

Plaintiff had surgery on his right knee for a torn right medial meniscus July 12, 1984. [R. at 110]. Plaintiff was injured at work in April of 1986 while moving, with a dolly, several cases of soda. [R. at 112]. Plaintiff additionally suffered from an injury to his right arm and had surgery for carpal tunnel syndrome. [R. at 112, 123]. Plaintiff reported a loss of grip strength in his right hand and forearm. [R. at 146-47]. Plaintiff visited several doctors in regard to his back pain. [R. at 116, 118, 140]. X-rays taken on July 6, 1988 indicated that the L5-S1 disc space was slightly narrowed but otherwise normal. [R. at 143]. Plaintiff had back surgery in January of 1994. [R. at 204].

On February 18, 1987, Plaintiff was cautioned by his doctor about the possible overuse of Codeine. [R. at 117]. One of Plaintiff's doctors indicated that Plaintiff would benefit from vocational rehabilitation for a lighter duty form of employment on February 8, 1989. [R. at 149].

Plaintiff was admitted on February 27, 1990 and discharged on March 29, 1990 for treatment due to Plaintiff's overuse of narcotics. [R. at 276]. Plaintiff was again admitted on July 24, 1996 for the overuse of narcotics and depression. [R. at 310].

Plaintiff had a triple bypass in November of 1995. [R. at 101, 211]. Plaintiff was hospitalized for cellulitis on June 11, 1996. [R. at 101, 211].

On March 12, 1996, Plaintiff was prescribed Trazadone for depression. [R. at 93, 108]. A Psychiatric Review Technique form, completed May 23, 1996, noted that the record contained "insufficient medical evidence" for a conclusion. [R. at 97]. In March of 1990 Plaintiff had denied any major psychological problems. [R. at 278].

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>3/</sup> 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

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<sup>3/</sup> 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).

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<sup>4/</sup> 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

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<sup>4/</sup> 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."

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 he found Plaintiff's allegations not fully credible, and discounted Plaintiff's complaints of pain. The ALJ concluded that Plaintiff had the residual functional capacity to perform a wide range of light work involving no repetitive pushing or pulling of arm or leg controls, only occasional stooping, crouching, or bending, only occasional climbing of ramps or stairs, no climbing of ladders or scaffolds, no repetitive overhead work, and no repetitive right hand motion. The ALJ initially concluded that, based on the testimony of a vocational expert the Plaintiff could return to his past relevant work. The ALJ alternatively determined that Plaintiff could perform other work in the national economy.

#### IV. REVIEW

Plaintiff's first alleged error is that the ALJ did not fully evaluate the evidence related to Plaintiff's credibility and his complaints of pain. Plaintiff specifically refers to Plaintiff's explanations for his lack of severe pain medication and the frequency of his doctor's visits.

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).

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions.

Id.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

390-91. The Court specifically noted that the ALJ should consider such factors as:

the 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.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

In this case, the ALJ noted that he found Plaintiff's allegations not fully credible due to the lack of objective findings by Plaintiff's physicians, the lack of medication for severe pain, the frequency of treatments by physicians, and the lack of discomfort at the hearing. The ALJ additionally noted that Plaintiff did not visit a doctor from 1991 until March 1993. [R. at 25].

Although the ALJ refers to Plaintiff's lack of medication for severe pain, the record indicates that Plaintiff was prescribed various pain medicines by his doctors. In addition, Plaintiff was warned, on several occasions, as to his overuse of pain medication. Plaintiff was admitted for approximately one month for treatment for drug dependence in 1990. [R. at 276]. Plaintiff was additionally treated in 1996, after the expiration of his insured status, for drug dependency. The record reflects that Plaintiff took sufficient medications to develop a dependency which required treatment. In addition, Plaintiff noted that he was concerned with taking additional pain medications after his treatment for dependency in 1990 because he did not want to again become dependent upon the medication. The ALJ does not address Plaintiff's explanation for his attempt to decrease the amount of drugs he took. The ALJ cannot simply ignore

explanations provided by a Plaintiff or evidence in the record which is contrary to the ALJ's conclusion. The ALJ should address such explanations and provide his reasons for discounting the evidence presented.

Plaintiff additionally acknowledges that a gap exists in his treatment record. Plaintiff suggests that he had a "fear of surgery." [R. at 106]. The ALJ does not address Plaintiff's proffered explanation for his failure to visit doctors during this time period. Defendant, in Defendant's brief, addresses the Plaintiff's explanation. However, the explanations must appear in the ALJ's decision for this Court to properly review the determination of the ALJ.

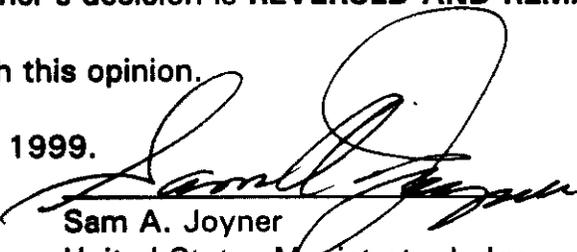
The ALJ additionally identifies "the objective findings, or the lack thereof, by treating and examining physicians. . . ." as a reason for discounting Plaintiff's credibility. [R. at 26]. However, the ALJ does not refer to any specific "findings or lack thereof" in his decision. The record contains some suggestion that Plaintiff had a slight bulge or narrowing of disc space, and that Plaintiff had severe back problems. In addition, some of Plaintiff's physicians indicated his "disability" lasted only one week, and/or that Plaintiff could be retrained to light work. However, in order for this Court to properly review the ALJ's decision, the ALJ must specify or indicate the physician's opinions to which he refers. A vague reference to "treating and examining physicians' findings or lack thereof" is insufficient.

On remand, the ALJ should evaluate Plaintiff's credibility and provide specific reasons for either accepting or discounting Plaintiff's complaints of pain.

Plaintiff additionally alleges that the ALJ erred in failing to evaluate Plaintiff's mental impairment. Although Plaintiff completed several disability forms, Plaintiff never specified that he had a mental impairment in any of his forms. In addition, Plaintiff's alleged mental impairment was not discussed at the hearing before the ALJ. Plaintiff's attorney did submit, after the hearing before the ALJ, records from 1996 indicating that Plaintiff was being treated for depression and that Plaintiff's GAF score was 45. The mere submission of such records, without more, is hardly sufficient to apprise the ALJ of Plaintiff's assertion of a mental impairment. Plaintiff should specify in Plaintiff's application for disability, and/or Plaintiff should state at the hearing that Plaintiff has a mental impairment. However, because the Court is remanding the action for further proceedings, Plaintiff should bring any alleged mental impairment to the attention of the ALJ on remand.

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

Dated this 20 day of May 1999.

  
Sam A. Joyner  
United States Magistrate Judge

KR  
5-8-99

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

**FILED**

MAY 21 1999



Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 98-CV-146-K ✓

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

ENTERED ON DOCKET

DATE MAY 24 1999

**CONSENT JUDGMENT**

Upon review of the file and the settlement agreement between the Plaintiff United States and Defendant Judd Tool Systems (hereinafter the "Parties") entered into by the Parties the Court herewith makes the following findings and orders:

1. The Parties agree and the Court finds that this Court has jurisdiction over the Parties and subject matter of this matter.

2. The Parties agree and the Court finds that for purposes of this Consent Judgment Paul Judd d/b/a Judd Tool Systems is indebted to the United States in the amount of \$2,700.00.

3. The Parties agree and the Court finds that the Parties have reached a valid and enforceable settlement agreement, the terms of which are detailed and memorialized in a separate written settlement agreement.

4. The Parties agree and the Court finds that each party will pay their own costs and attorneys fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court has jurisdiction over the Parties and subject matter of this matter;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Paul Judd d/b/a Judd Tool Systems is indebted to the United States in the amount of \$2,700.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Parties have reached a valid and enforceable settlement agreement, the terms of which are detailed and memorialized in a separate written settlement agreement; and,

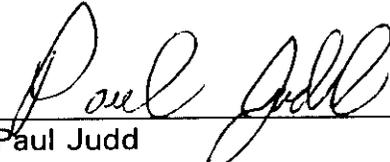
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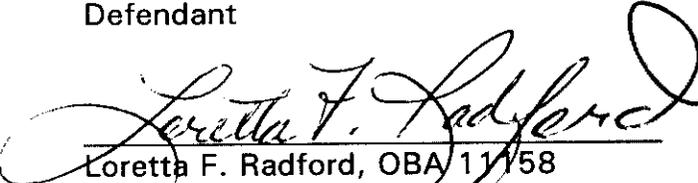
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case is concluded and each party will pay its own costs, expenses and attorneys fees in this matter.

IT IS SO ORDERED ON May 20, 1999.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
Paul Judd  
For Judd Tool Systems  
501 - B North Redbud Avenue  
Broken Arrow, OK 74012  
918-251-3163  
Defendant

  
Loretta F. Radford, OBA 11158  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, OK 74103  
918-581-7463  
Attorney for the Plaintiff

judd.consent judgment.wpd(collection forms)

PK

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

**FILED**

MAY 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Sharon G. Kercheval, individually, and )  
on behalf of all others similarly situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
KERR GLASS MANUFACTURING, )  
CORPORATION, an Oklahoma Corporation;) )  
THE KERR GROUP, INC. RETIREMENT )  
COMMITTEE; AND KERR GROUP, INC., )  
 )  
Defendants. )

Case No.: ~~CIV-98-1163-L~~

99-CV-221-K

ENTERED ON DOCKET

DATE MAY 21 1999

**DISMISSAL WITHOUT PREJUDICE**

COME NOW, Plaintiffs, by and through counsel, and without objection by  
counsel of Defendants, and hereby dismiss their causes of action against Defendants,  
without prejudice to refileing of same.

Respectfully submitted,



E. TAYLOR POSTON OBA #15069  
ARMSTRONG, HENSLEY & LOWE  
1401 S. CHEYENNE  
Tulsa, OK 74119  
(918) 582-2500

ATTORNEY FOR PLAINTIFFS

**CERTIFICATE OF MAILING**

I, E. Taylor Poston, do hereby certify that on the 20<sup>th</sup> day of May, 1999, I mailed  
a true and correct copy of the above and foregoing instrument with postage thereon fully  
prepaid, addressed to: C. William Threlkeld, Esq., 211 N. Robinson, Ste. 800 N.  
Oklahoma City, OK 73102; Raoul D. Kennedy, Esq., Four Embarcadero Center, San  
Francisco, CA 94111-4144.

  
E. TAYLOR POSTON OBA #15069

ETS

Free

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

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, )  
Plaintiff, )  
 )  
vs. )  
 )  
LOUIS W. GRANT, JR., CHARLES B. )  
GRANT, J. LAWRENCE MILLS, JR., )  
KEITH R. GOLLUST, PAUL E. TIERNEY, )  
JR., EDWARD L. JACOBY, ROD L. )  
REPPE, and W.R. HAGSTROM, )  
Defendants. )

ENTERED ON DOCKET  
DATE MAY 21 1999

CASE NO. 92-C-1043-H ✓

**F I L E D**

MAY 19 1999 ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

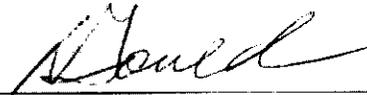
**JOINT STIPULATION AND MOTION TO DISMISS**

The Federal Deposit Insurance Corporation ("FDIC"), Charles B. Grant and Louis W. Grant, Jr. (collectively "Defendants"), jointly stipulate and move the court for an order dismissing with prejudice the claims of FDIC against said Defendants and the counterclaim of Louis W. Grant, Jr. against FDIC and in support thereof state the following:

The FDIC and Defendants have entered into settlement and release agreements which provide, in part, that the FDIC dismiss with prejudice the claims against Defendants, that Louis W. Grant, Jr. dismiss with prejudice his counterclaim against FDIC and that the parties agree to bear their individual costs and attorneys fees in defending the litigation.

WHEREFORE, the FDIC and Defendants respectfully request that the court dismiss with prejudice all claims FDIC has against the defendants Charles B. Grant and Louis W. Grant, Jr. and dismiss with prejudice the counterclaim Louis W. Grant, Jr. has against FDIC and the parties shall bear their own costs and attorneys fees in defending the litigation.

Respectfully submitted and stipulated,



---

Douglas N. Gould OBA #3500  
GOULD & COMPANY  
1717 City Place  
204 N. Robinson  
Oklahoma City, OK 73102  
(405) 319-1717  
(405) 319-1720 FAX

David Thomas  
THOMAS, NIX & MCINTYRE  
2010 Bank One Center  
100 N. Broadway  
Oklahoma City, OK 73102  
(405) 235-0490  
(405) 235-0835 FAX

Of Counsel:  
Jeffrey Ross Williams  
Federal Deposit Insurance Corporation  
1717 H. Street, N.W.  
Washington, D.C. 20006  
(202) 736-0648

*ATTORNEYS FOR PLAINTIFF FEDERAL DEPOSIT  
INSURANCE CORPORATION*



---

Jon E. Brightmire, OBA No. 11623  
Sam P. Daniel, OBA No. 2153  
DOERNER, SAUNDERS, DANIEL &  
ANDERSON, L.L.P.  
320 South Boston, Suite 500  
Tulsa, OK 74103-7325  
(918) 582-1211  
(918) 591-5362 (Fax)

*ATTORNEYS FOR DEFENDANTS CHARLES B. GRANT  
AND LOUIS W. GRANT, JR.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17 day of ~~February~~ <sup>the month</sup> May, 1999, a true and correct copy of the foregoing was mailed, postage fully prepaid thereon, to the following:

Tony M. Graham  
FELDMAN, FRANDEN, WOODARD,  
FARRIS & TAYLOR  
525 South Main, Suite 1400  
Tulsa, OK 74103-4523

Jonathan I. Blackman  
CLEARY, GOTTLIEB, STEEN & HAMILTON  
One Liberty Plaza  
New York, NY 10006

Edward L. Jacoby  
2605 East 47<sup>th</sup> Street  
Tulsa, OK 74105

Jon E. Brightmire  
Sam P. Daniel  
DOERNER, SAUNDERS, DANIEL & ANDERSON  
320 South Boston, Suite 500  
Tulsa, OK 74103

Ted J. Nelson  
JOYCE & POLLARD  
515 S. Main St., Suite 300  
Tulsa, OK 74103

Roy D. Johnson  
EPPERSON & JOHNSON  
201 West Fifth  
Suite 501  
Tulsa, OK 74103-4277



---

Douglas N. Gould

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAY 19 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALFREDA ATKINS,  
SSN: 511-62-9746,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-0628-EA

ENTERED ON DOCKET

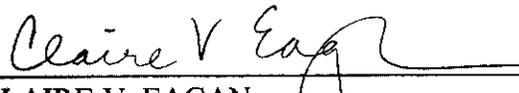
MAY 21 1999

DATE \_\_\_\_\_

**JUDGMENT**

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

It is so ordered this 19<sup>th</sup> day of May 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**MAY 19 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALFREDA ATKINS )  
SSN: 511-62-9746, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, Commissioner, )  
Social Security Administration,<sup>1</sup> )  
 )  
Defendant. )

Case No. 97-CV-628-EA

ENTERED ON DOCKET

DATE MAY 21 1999

**ORDER**

Claimant, Alfreda Atkins, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.<sup>2</sup> In accordance with 28

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<sup>1</sup> Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

<sup>2</sup> On October 25, 1991, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (March 26, 1992), and on reconsideration (July 30, 1992). A hearing before Administrative Law Judge (ALJ) John M. Slater was held December 10, 1992, in Tulsa, Oklahoma. By decision dated January 19, 1993, ALJ Slater found that claimant was not disabled at any time through the date of the decision. On November 22, 1993, the Appeals Council denied review of ALJ Slater's findings. Claimant filed an action for review in this District, and on September 19, 1994, the case was remanded for further administrative proceedings. A supplemental hearing was held by ALJ Richard J. Kallsnick on February 2, 1995, in Tulsa, Oklahoma. By decision dated May 31, 1995, ALJ Kallsnick found that claimant was not disabled at any time through the date of the decision. The Appeals Council assumed jurisdiction because it disagreed with the basis for ALJ Kallsnick's decision; however, by decision issued September 19, 1996, the Council also found that claimant was not disabled at any time of ALJ Kallsnick's decision. 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.

U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

Claimant appeals the decision of the Appeals Council and asserts that the Commissioner erred because the Appeals Council incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner's decision.

### **I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW**

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 her “physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .” *Id.*, § 423(d)(2)(A).

Social Security regulations implement a five-step sequential process to evaluate a disability claim. Step one requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment, or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that she does not retain

the residual functional capacity (RFC) to **perform** her past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy **which claimant--taking into account her age, education, work experience, and RFC--can perform.** Disability benefits are denied if the Commissioner shows that the impairment which precluded the **performance** of past relevant work does not preclude alternative work. See 20 C.F.R. §§ 404.1520, 416.920; Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988).

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to **two inquiries**: first, whether the decision was supported by substantial evidence; and, second, **whether the correct legal standards were applied.** Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991). The term substantial evidence has been interpreted by the U.S. Supreme Court to require "**more than a mere scintilla.** It means such relevant evidence as a reasonable mind might accept as **adequate to support a conclusion.**" Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not **allow the court** to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "**the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.**" Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

## **II. CLAIMANT'S BACKGROUND**

Claimant was born on July 24, 1955. She was 37 years old at the time of the first administrative hearing in this matter and **39 years old** at the time of the second administrative hearing. The record indicates several **different accounts** of her educational background. At various

times, and to various individuals, she has **stated** that she dropped out of school, but the time period is unclear. Her statements indicate that it was sometime between the eighth and eleventh grades. (R. 99, 138, 140, 201, 224, 245, 271-72) She also stated that she repeated both the 9th and 10th grades in Special Education. Later, she **attempted** GED classes, but was unable to complete them. (R. 138) She also completed a **cosmetology** course, but was unable to pass the state licensing examination. (R. 99, 272, 289 )

Claimant has held some 14 jobs over a **nine-year** period, including work as a day care center attendant and owner/operator, a cook or **cook's helper**, waitress, envelope stuffer, and a bus driver. (R. 91, 303) The date she was last insured, for purposes of Title II, was December 30, 1990. She alleges an inability to work beginning **December 15, 1986** (R. 65, 69) due to the combined effects of mental retardation and associated **personality and/or psychotic disorder** (R. 95). In 1988, claimant had a verbal IQ score of 61; a performance IQ score of 70; and a full-scale IQ score of 64. (R. 136) In 1992, claimant was evaluated again. Her IQ scores rose to a verbal score of 70; a performance score of 83; and a full-scale score of 75. (R. 141)

### **III. THE DECISIONS OF THE ADMINISTRATION**

ALJ Kallsnick made his decision at the **second** step of the sequential evaluation process. He found that claimant has a **histrionic personality disorder** and functions in the middle of the borderline range of intelligence, but that she does not **have** a severe impairment, and thus, she was not disabled under the Social Security Act at any time **through** the date of the decision. (R. 182-83)

The Appeals Council concurred **with the ALJ's conclusion** but not the basis for his decision. (R. 156-61) It adopted the ALJ's **statements** regarding the Social Security Administration Regulations, the facts and issues in the **case**, but it found at step two that claimant's borderline

intellectual functioning constitutes a **severe impairment** which prevents her from performing complex tasks and jobs requiring more than **simple instruction**. At step three, it found claimant did not have a listed impairment. At step five, **the Council** concluded that claimant can perform the simple, unskilled jobs identified by the vocational expert, such as jobs in assembly, office cleaning, or the fast food industry. (R. 160).

In reaching its conclusion, the **Council** analyzed whether claimant met the Listing of Impairments at 20 C.F.R. part 404, Subpart P, app. 1, pt. A, §§ 12.05C and D. To meet the listing at section 12.05C, a claimant must have a “**valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function.**” To meet the listing at section 12.05D, claimant must have a “**valid verbal, performance or full scale IQ of 60 through 70 . . . resulting in two of the following:**

1. **Marked restriction of activities of daily living; or**
2. **Marked difficulties in maintaining social functioning; or**
3. **Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or**
4. **Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).**

20 C.F.R. part 404, Subpart P, app. 1, pt. A, § 12.05D.

The Appeals Council found that **claimant** met the first prong of Listing 12.05C and D (that claimant had a valid verbal, performance, or full scale IQ of 60 through 70) but not the second. When the Appeals Council reverses the **decision** of the ALJ, the task of the judiciary is to review the decision of the Appeals Council and **consider** whether the findings of the Appeals Council are supported by substantial evidence. Fierro v. Bowen, 798 F.2d 1351, 1355 (10th Cir. 1986).

#### **IV. REVIEW**

Claimant asserts as error that, with regard to the Listing of Impairments at step three, the Appeals Council (1) did not accord the appropriate weight to the findings and opinions of claimant's examining physicians; and (2) substituted its own opinion for medical evidence when evaluating the significance of claimant's 1996 episode of schizophrenic decompensation. Claimant also asserts that the Council's denial of benefits to claimant at step five of the sequential evaluation process is contrary to law and not supported by substantial evidence because (3) the Council failed to properly shift the burden to the Commissioner to prove claimant had no additional mental limitations; (4) the Council ignored evidence establishing the existence of numerous vocational limitations and failed to obtain additional medical opinion in light of claimant's 1996 hospitalization; and (5) the testimony of the vocational expert was elicited by a hypothetical which did not reflect claimant's true limitations. (Memo. Br., Docket # 9, at 3.) Claimant specifically challenges the Appeals Council's finding that claimant did not meet the second prong of 20 C.F.R. part 404, Subpart P, app. 1, pt. A, § 12.05C. Although claimant does not specifically reference section 12.05D, it appears that claimant also challenges the Appeals Council's decision that claimant did not meet the second prong of that subsection.

#### **The Listing**

If claimant has an impairment, or a combination of impairments, which meets or equals an impairment in the Listing of Impairments (20 C.F.R. pt. 404, subpt. P, app. 1), the claimant is disabled *per se*. 20 C.F.R. §§ 404.1511(a); 404.1520(d); 416.911(a); 416.920(d). Equivalence is determined "on medical evidence only." *Id.* §§ 404.1526(b); 416.926(b). Claimant asserts that she meets or equals the listing relating to mental retardation. "Mental retardation refers to a significantly

sub-average general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). . . .” 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.05. The required level of severity for mental retardation is met by reference to the subsections of section 12.05, and, in this instance, specifically by reference to subsections C and D. As set forth above, claimant established that she has an IQ of 60 through 70; however, the Appeals Council determined that she did not meet the second prong of either section C or D.

The second prong of section 12.05C requires that the claimant have “a physical or other mental impairment imposing additional and significant work-related limitation of function.” Although the regulations do not define “significant,” courts have held that a “significant limitation of function” has more than a slight or minimal effect on the claimant’s ability to perform basic work. Hinkle v. Apfel, 132 F.3d 1349, 1352 (10th Cir. 1997) (citing Warren v. Shalala, 29 F.3d 1287, 1291 (8th Cir. 1994)). “The second prong ‘need not be disabling in and of itself.’” Id. (citing Branham v. Heckler, 775 F.2d 1271, 1273 (4th Cir. 1985)).<sup>3</sup>

Claimant asserts that her personality and/or psychotic disorder is a “second prong” impairment. The Appeals Council reviewed the reports of examining physicians and found that the her disorder(s) did not impose an additional and significant work-related limitation of function. (R. 157) A psychological evaluation of claimant in 1988 indicates a clinical impression that claimant

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<sup>3</sup> Claimant has also claimed to suffer from a learning disability and illiteracy. (Complaint, Docket # 1, at 2) Such alleged impairments do not satisfy the second prong of the section 12.05C test because they do not represent “additional” work-related limitation of function. Instead, they are the result of decreased intellectual function, and not of some other mental or physical impairment. The “significant limitation” language of section 12.05C requires evidence that “the claimant suffers from a severe physical or other mental impairment, as defined at step two of the disability analysis, *apart from the decreased intellectual function.*” Hinkle, 132 F.3d at 1352 (emphasis added). The Hinkle court specifically refused to address any deterioration of mental abilities because the claimant did not allege any mental impairment unrelated to his intellectual functioning which might meet the second prong of § 12.05C. Id. at 1353 n. 5.

had a “histrionic personality disorder.” (R. 138) The evaluation also noted certain occupations that claimant should avoid, but it did not indicate that claimant could not work. (R. 137-38)

A 1992 evaluation performed by Allen W. Sweet, Ph.D., indicates that claimant was functioning in the middle of the borderline range of intellectual functioning. Dr. Sweet opined that she is able to manage any benefit payments in her own interest and that “while she may have difficulty with ordinary supervision . . . she appears able to handle at least simple concrete type job situations. (R. 141) He qualified his opinion, however, by stating that “[t]he nature of her psychiatric disturbance simply is not clear” because of her inconsistent recounting of her history. (R. 142)

In December 1994, claimant was taken to Parkside Community Hospital after an psychotic episode in her home in which she threw furniture and attacked the police officer who came to take her to Parkside. (R. 212, 218, 224) At Parkside, she threatened to stab herself and required sedation and seclusion to control her irrational and aggressive behavior. The staff at Parkside immediately sent her to Eastern State Hospital in Vinita, Oklahoma. Her Global Assessment of Functioning (GAF) rating upon admission was 21. It improved to 55 upon discharge ten days later. (R. 209) The staff at Eastern State Hospital noted that she had a history of amphetamine abuse, and they suspected that her psychotic episode may have been triggered by withdrawal from diet pills. (R. 210) She was discharged with a good prognosis, prescribed no medication, and referred for outpatient follow-up treatment at Star Community Health Center in Owasso, Oklahoma. (R. 211)

In January 1995, Thomas A. Goodman, M.D., a psychiatrist, examined claimant, noting that she had a “very marked histrionic and dramatic aspect to her presentation” but her history was “not convincingly either psychotic” nor did she have “a significant history of a mood disturbance.” (R. 202-03) He diagnosed her as having a psychotic disorder “not otherwise specified, by history, not

confirmed on the examination today, provisional” although she embellished her symptoms, and he suspected that she was malingering. (R. 203) He also diagnosed her as having a personality disorder “not otherwise specified, with histrionic and other cluster B features.” (Id.) He concluded:

The claimant today revealed a retention of her basic intellectual abilities. Although she is not highly educated, I see no reason why she could not do simple work type activities. She also appears to me to be capable of managing her own funds. Because of the inconsistency of her history and vagueness of reporting, it is impossible to give a clear diagnostic impression.

(R. 204; see also R. 205-06)

At the administrative hearing in March 1995, Minor Gordon, Ph.D., a psychologist, testified that claimant had “hysterical” personality disorder but that it was not severe enough to preclude performance of “some type of routine or repetitive tasks” or otherwise impose a significant work-related limitation. (R. 294-95) He also testified that personality disorders were not “episodic.” (R. 295)

In January 1996, claimant appeared at the Star Community Mental Health Center in Owasso, Oklahoma, claiming that she was “hearing voices” and “seeing little things around me.” (R. 244) Richard A. Luc, M.D., diagnosed her with “episodic schizophrenia, disorganized type, episodic with interepisode residual symptoms.” (R. 247) She attended a few outpatient counseling sessions through February 1996. The Star Community Mental Health Center records do not address whether or how claimant’s mental problems affect her ability to work.

Claimant contends that the Appeals Council substituted its own opinion for medical evidence when evaluating the significance of claimant’s 1996 episode of schizophrenic decompensation, and that it failed to obtain additional medical opinion in light of claimant’s 1996 hospitalization. New evidence submitted to the Appeals Council upon review of an ALJ’s decision becomes part of the

administrative record to be considered **when** evaluating the decision of the Commissioner for substantial evidence. O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). The Council noted that the treatment claimant received in 1994 and 1996 reflected brief “episodic” incidents that did not meet the duration requirements of the Social Security Act. (R. 157). Apparently, the Council relied on Dr. Goodman’s 1995 opinion to discount claimant’s 1994 episode. (Id.) Dr. Goodman qualified his opinion, however, by stating that it was **impossible** to give a clear diagnostic impression due to the inconsistency of claimant’s history and the **vagueness** of her reporting. (R. 204)

The Council also dismissed claimant’s 1996 episode by characterizing Dr. Luc’s diagnosis as an “initial diagnosis” and insignificant **because** claimant did not seek medical treatment after her outpatient counseling in February 1996. (R. 157) Nothing in the records from Star Mental Health Clinic indicate that Dr. Luc’s diagnosis **was merely** an “initial” diagnosis. The Council fails to recognize that claimant’s failure to seek **medical treatment** or to even appear for several outpatient counseling sessions may have been due to **her mental** retardation and psychotic disorder. While the Council relies upon Dr. Goodman’s 1995 **evaluation** subsequent to claimant’s December 1994 episode to determine that she had no **psychotic impairment**, the Council fails to mention that claimant was not evaluated subsequent to **her January** 1996 episode, and no medical determination was ever made as to whether her **schizophrenia imposed** any additional and significant work-related limitation of function under 12.05C. **In this regard**, the Appeals Council’s failure to fully develop the record constitutes legal error. See Darnell v. Bowen, 631 F. Supp. 96, 100 (W. Va. 1986) (failure of the Commissioner to develop evidence of work impairment of claimant and to consider new medical evidence constituted good cause **for remand** to obtain consultative evaluations of claimant); cf. Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996) (remanding for further development of the

record where the ALJ improperly discounted claimant's diagnosis of depression because there were no medical tests to support it).

The significance of Dr. Luc's 1996 diagnosis also pertains section 12.05D4, which requires "repeated episodes of deterioration or decompensation in work or work-like settings . . . ." The Appeals Council noted that claimant's episodes were "more than a year apart and cannot be considered repeated." (R. 158) However, the fact that she had more than one psychotic episode should be sufficient to consider her episodes "repeated."

In addition, the Council remarked that claimant's evaluations did not reveal the "frequent deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner . . ." as set forth in section 12.05D3. The Council reasoned that, although claimant's attention span varied during intellectual testing, no significant problem was noted during the 1995 examination, and the record does not otherwise demonstrate such deficiencies. (See R. 158) This reasoning ignores the Star Community Mental Health Center evaluation indicating claimant's anxious mood, inappropriate laughter, impulsive manner, flight of ideas, confused organization of thought, paranoia, illusions, hallucinations, time orientation problems, and inadequate short and long term memory. (R. 250-51)

The Appeals Council also determined that claimant's decreased intellectual capacity was not accompanied by the "marked restriction of activities of daily living" or "marked difficulties in maintaining social functioning" listed in section 12.05D1 and 2. For example, claimant was able to do normal household chores such as cooking, cleaning and shopping. She testified that she took care

of her children<sup>4</sup> and occasionally went to their activities at school. (See R. 282-85) Again, the Appeals Council disregarded the Star Community Mental Health Center evaluation in which Dr. Luc's diagnostic impression indicates that claimant has "problems related to the social environment." (R. 247) It also ignores the "community maladjustment" indicated with regard to claimant's social-adaptive behavior. (R. 251) Claimant testified that she does not drive (R. 271), and when she buys groceries, she simply trusts that cashiers will give her the correct change back. (R. 273) She does not like to go anywhere. (R. 285) She does not like people, and she becomes nervous when she is around crowds. She visits no one, and no one visits her. (R. 286) Given the Star Community Mental Health Center evaluation and claimant's testimony, the Appeals Council's section 12.05D analysis is not well-founded.

Although the Appeals Council thoroughly reviewed and discussed the history of claimant's mental impairments, the Appeals Council did not appropriately evaluate the findings and opinions of claimant's examining physicians in light of the 1996 records from Star Community Mental Health Center. Additional medical opinion was necessary to assess the significance of the 1996 episode, the diagnosis of schizophrenia, and subsequent treatment. The Appeals Council erred in determining that claimant's impairment did not meet or equal the Listing of Impairments at section 12.05.

Since the Court determines that the Council erred at step three of the sequential evaluation process, the Court need not determine whether the Appeals Councils erred by denying benefits to claimant at step five.

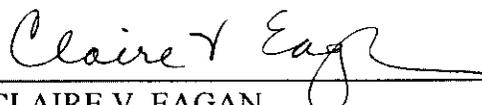
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<sup>4</sup> Her sixth child was born after the second administrative hearing and decision by ALJ Kallsnick. Three were living at home at the time of the second administrative hearing in 1995.

## VI. CONCLUSION

The opinion of the Appeals Council was not supported by substantial evidence, and the correct legal standards were not applied. If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The Appeals Council’s decision in this case may ultimately turn out to be correct, and **nothing** in this order is to be taken to suggest that the Court has presently concluded otherwise. This **remand** “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988). The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 19<sup>th</sup> day of May, 1999.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
IN OPEN COURT

MAY 19 1999

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

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Housing and Urban  
Development,

Plaintiff,

v.

THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF ELLEN K. FLEAR  
aka Ellen Kimball Flear, Deceased;  
HOWARD C. WHITE;  
JOANN GRANBERRY WHITE;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET  
DATE MAY 21 1999

CIVIL ACTION NO. 98-CV-0437-K (J)

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19th day of May, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 22, 1999, pursuant to an Order of Sale dated January 7, 1999, of the following described property located in Tulsa County, Oklahoma:

Lot Ten (10), J.M. GILLIAN RESUBDIVISION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given to the Defendants, The Unknown Heirs, Executors,

Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, by publication; Howard C. White, by mail; JoAnn Granberry White, by mail; State of Oklahoma ex rel. Oklahoma Tax Commission, through Kim D. Ashley, Assistant General Counsel, by mail; County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail; and Matthew White and David C. White, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

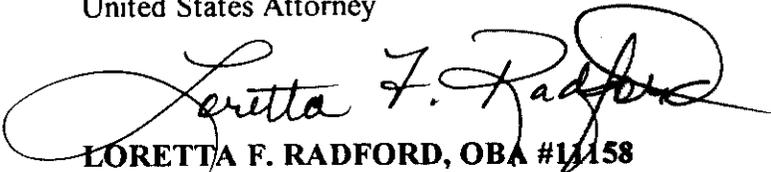
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

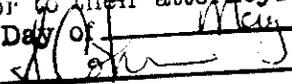


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Report and Recommendation of United States Magistrate Judge  
Case No. 98-CV-0437-K (J) (Flear)

LFR:css

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading was served on all of the parties hereto by mailing the same to them or to their attorneys of record on 21 Day of May, 1998  


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**FILED**

**MAY 20 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

BOBBY GENE CHRISTIAN )  
Plaintiff, )

vs. )

BALL-FOSTER GLASS CONTAINER )  
CO., LLC, )  
Defendant, )

Case No. 97-CV-1016-K(J) ✓

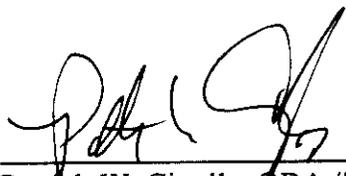
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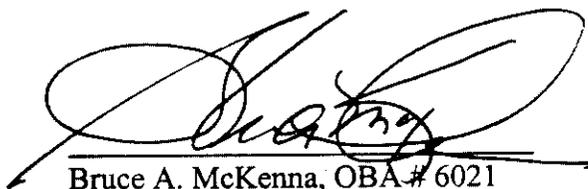
**STIPULATION OF DISMISSAL WITH PREJUDICE**

The parties, by and through their counsel of record, submit to the Court their joint stipulation that the above captioned matter should be dismissed with prejudice to the refiling thereof. This joint stipulation for dismissal is based upon the successful resolution of the matter between and among the parties. Each party is to bear his/its own costs and attorney fees. It is so stipulated.

Respectfully submitted,



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

FOSTER WHEELER USA CORP., a  
Delaware corporation,  
  
Plaintiff,  
  
v.  
  
VBF, INC. (f/k/a ELECTRICAL  
POWER SYSTEMS, INC.,  
an Oklahoma corporation; VERNON  
LAWSON; ADDISON FREDERICK SMITH;  
and WILLIAM C. CODAY,  
  
Defendants,  
  
v.  
  
BRAND EXPORT PACKAGING OF  
OKLAHOMA, INC., ROBERT AND PENNY  
DOWNING; AMERICAN PRESIDENT  
LINES, INC.; ROBBINS-FLEISIG  
FORWARDING, INC.; AND JOSE  
ESCOBAR,  
  
Third Party Defendants.

Case No. 96-C-390-H ✓

ENTERED ON DOCKET  
DATE MAY 21 1999

**FILED**

MAY 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, the parties stipulate that this action, including all claims, counterclaims, cross-claims or third-party claims, be dismissed with prejudice with each party to bear its own attorneys' fees, costs and expenses.

Dated this 18<sup>TH</sup> day of May, 1999.

Respectfully submitted,

  
\_\_\_\_\_  
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and

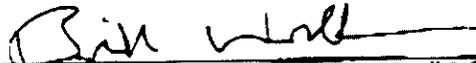
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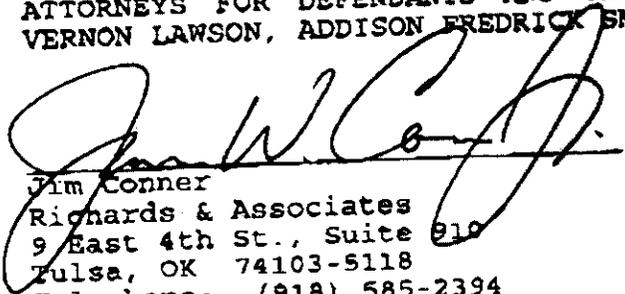
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