

WTT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 31 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GERALD R. ARNOLD,

Defendant.

)  
)  
)  
)  
) Case No. 99CV0639H(J)

ENTERED ON DOCKET

DATE AUG 31 1999

~~SEARCHED~~

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 Phil Pinnell, 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 31st day of August, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*for* *Veretta F. Radford*

PHIL PINNELL, OBA #7169  
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 31st day of August, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Gerald R. Arnold, 3190 S. 89th E. Avenue, Tulsa, OK 74145.

*Janet M. Owen*  
Janet M. Owen  
Financial Litigation Agent

2

OKS

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

**FILED**

RAE CORPORATION, an Oklahoma corporation,  
Plaintiff,  
v.  
CSI, INC., a Pennsylvania corporation,  
Defendant.

AUG 31 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-723-B(E)

ENTERED ON DOCKET

DATE ~~AUG 31 1999~~

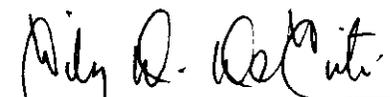
**JOINT STIPULATION FOR DISMISSAL**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, it is hereby stipulated that the above-captioned action may be dismissed with prejudice, each party to bear its own costs and expenses, including attorney's fees.

DATED this 31st day of August, 1999.

  
Scott R. Rowland, OBA #11498  
BOONE, SMITH, DAVIS,  
HURST & DICKMAN  
500 ONEOK Plaza  
100 W. 5th Street  
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Telephone (918) 587-0000

ATTORNEY FOR PLAINTIFF

  
Timothy D. DeGiusti, OBA #13215  
Heidi J. Long, OBA #17667  
ANDREWS DAVIS LEGG BIXLER  
MILSTEN & PRICE  
500 West Main Str., Ste. 5  
Oklahoma City, OK 73102  
Telephone (405) 272-9241

ATTORNEYS FOR DEFENDANT

MT

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

**FILED**

AUG 31 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NAOMI W. LAMB,

Plaintiff,

v.

Case No. 98-CV-0337-H (J)

BALL-FOSTER GLASS CONTAINER  
CO., L.L.C., a Delaware Corporation,

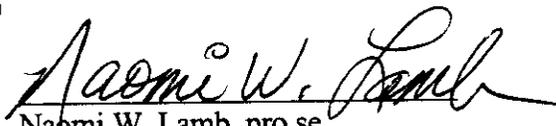
Defendant.

ENTERED ON DOCKET  
AUG 31 1999  
DATE \_\_\_\_\_

**STIPULATION OF DISMISSAL WITH PREJUDICE**

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), Plaintiff, by and through her attorney, hereby dismisses **with prejudice** the above-entitled action.

Respectfully submitted,



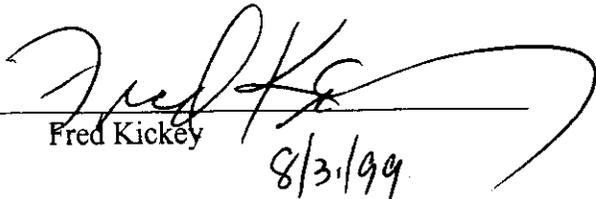
Naomi W. Lamb, pro se  
Plaintiff

517 South Park Street  
Sapulpa, Oklahoma 74066

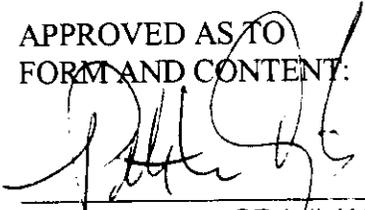
19

CHS

Ball-Foster Glass Container Co., L.L.C.

By:   
Fred Kickey  
8/3/99

APPROVED AS TO  
FORM AND CONTENT:

  
Larry D. Henry, OBA # 4105  
Patrick W. Cipolla, OBA #15203

GABLE & GOTWALS

A Professional Corporation  
100 West Fifth Street  
1000 ONEOK Plaza  
Tulsa, Oklahoma 74103-4219

Attorneys for Defendant

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

**F I L E D**

AUG 3 1 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KEVIN L. WENGER, )  
)  
Plaintiff, )  
)  
v. )  
)  
CRC-EVANS PIPELINE )  
INTERNATIONAL, INC., a )  
Delaware corporation, and )  
WEATHERFORD ENTERRA, INC., )  
a foreign corporation, and PHLIPCO, )  
INC., a foreign corporation, )  
)  
Defendants. )

Case No. 98-CV-401-H(J)

ENTERED ON DOCKET  
DATE AUG 3 1 1999

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS BY  
AND BETWEEN PLAINTIFF AND DEFENDANTS, CRC-EVANS PIPELINE  
INTERNATIONAL, INC., WEATHERFORD ENTERRA, INC., AND PHLIPCO, INC.**

It is hereby stipulated and agreed by and between Plaintiff, Kevin L. Wenger, and the Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Phlipco, Inc., through their respective legal counsel, that all claims and causes of action by and between Plaintiff, Kevin L. Wenger, and Defendants, CRC-Evans Pipeline International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Phlipco, Inc., in this action be fully and finally dismissed with prejudice, because all matters in controversy for which said claims and causes of action were brought have been fully compromised and settled. Plaintiff and Defendants, Defendants, CRC-Evans Pipeline

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International, Inc., Weatherford International, Inc., formerly known as Weatherford Enterra, Inc., and Philipco, Inc., shall each bear their own costs and attorney fees incurred in this action.

Respectfully submitted,

By  \_\_\_\_\_

Randall J. Snapp, OBA #11169

Crowe & Dunlevy

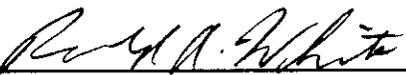
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(918) 599-9855

(918) 599-6335 - Fax

Attorneys for Defendants

By  \_\_\_\_\_

Ronald A. White, OBA # 12037

Hall, Estill, Hardwick, Gable,

Golden & Nelson

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Tulsa, Oklahoma 74103

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(918) 594-0452 - Fax

Attorneys for Plaintiff

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

DUANE VERRETT, individually and )  
on behalf of all others similarly )  
situated )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
THE SABRE GROUP, INC., a )  
Delaware corporation, )  
 )  
Defendant. )

ENTERED ON DOCKET  
DATE AUG 31 1999

No. 97-C-782K ✓

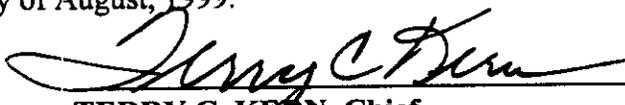
**F I L E D**  
IN OPEN COURT  
AUG 30 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

J U D G M E N T

This matter came before the Court for consideration of Defendant SABRE's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED this 30 day of August, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

DUANE VERRETT, individually and )  
on behalf of all others similarly )  
situated )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
THE SABRE GROUP, INC., a )  
Delaware corporation, )  
 )  
Defendant. )

ENTERED ON DOCKET  
DATE AUG 31 1999

No. 97-C-782K ✓

**FILED**  
IN OPEN COURT

AUG 31 1999

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

ORDER

Before the Court is the Motion of Defendant, The SABRE Group, ("SABRE") to Dismiss or in the Alternative for Summary Judgment (#18). The sole allegation in this lawsuit is that the Defendant, the SABRE Group, Inc. ("SABRE") violated the overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 207 (1998). SABRE has moved to dismiss this action on the grounds that, as a matter of law, it is exempt from the overtime requirements of the FLSA. Alternatively, SABRE seeks summary judgment on the same grounds. The FLSA specifically exempts from the overtime requirements of the FLSA an employer who is a "carrier" subject to the Railway Labor Act ("RLA"), 29 U.S.C.A. § 213 (1998). Defendant argues that, because SABRE is a "carrier" as defined by the RLA, SABRE is exempt from the overtime pay requirements of the FLSA.

## **I. Statement of Facts**

For more than 20 years, American Airlines ("American") has relied upon two broad categories of services now provided through the entity known as SABRE: (1) management information systems and (2) computer reservations services.

### ***A. Airline Management Information Systems***

SABRE's management information services are customized and specifically developed for the air travel industry, including computer systems for planning and operating flight schedules, flight operations, aircraft maintenance records and schedules, bag handling, crew scheduling, and financial accounting, record keeping, and reporting. SABRE provides all of these services to its affiliates-- American, American Eagle Airlines, Inc. and AMR Services, Inc., all of which are subject to the RLA. SABRE also provides a broad range of similar information technology and services to non-affiliated airlines, including US Airways, Canadian Airlines, and Gulf Air. All of these air carriers depend on systems and data provided by SABRE in order to operate their day to day flight operations, scheduling, maintenance, bag handling, crew schedules, and many other functions critical to the safe and efficient operation of the airlines. Nearly 75 airlines rely on at least one product or service from SABRE in areas such as reservations, flight operations, and passenger handling.

### ***B. Airline Computer Reservation Systems***

In addition to providing management information systems and support to air carriers, SABRE owns and operates a computer reservation system ("CRS") which is the largest electronic distributor of air travel in the United States, and one of the largest in the world. One-third of all travel reservations in the world and approximately 45% in the United States are booked through the SABRE

system. SABRE contracts with air carriers to list their flight schedules and process reservations. American is the largest single air carrier client of SABRE. The SABRE CRS is utilized by each airline's internal reservations personnel and by travel agencies in approximately 40,000 locations in over 108 countries to book reservations on more than 420 airlines, 40,000 hotel properties, and 55 car rental companies. The SABRE CRS lists more than 50 million air fare and itineraries and updates airline fare change information five times daily. More than 375 million bookings are made annually; one million are purged and added each day.

Most SABRE employees were directly employed by American prior to the corporate reorganization in 1996 and most continue today to do essentially the same work in support of air transportation for SABRE. When SABRE entered into a contract with US Airways to provide airline management information services, it hired 760 former US Airways employees, who also continue to do largely the same work for SABRE they did when employed by US Airways. All SABRE employees continue to receive flight pass privileges on American and American Eagle and many of the world's other airlines.

#### ***D. Corporate Structure & Control***

From its creation in 1986, until July 1996, SABRE's principal operations were an internal unit of American. On July 1, 1996, the technology and systems operations formerly conducted by the SABRE of American were combined with related units of American's parent, AMR Corporation and restructured in the SABRE Group, Inc., which is wholly owned by the SABRE Group Holdings, Inc., ("TSGH") (a holding company). This reorganization took place primarily (1) to place all airline information technology operations under a single management and legal structure; and (2) to access

capital markets. On October 17, 1996, TSGH sold a new class A common stock to the public, constituting approximately 18% of the economic interest in TSGH, generating cash proceeds of approximately \$589 million.

AMR owns 100% of American Airlines, Inc. and 82% of the economic ownership and 98% of the voting power of SABRE. Thus, SABRE remains under common ownership with American. Both SABRE, TSGH and American remain part of the consolidated AMR corporate group for tax reporting purposes. SABRE has been and will continue to be highly dependent upon American for both earnings and revenue.

#### *E. Services in Connection with Transportation*

American remains by far the largest single client of the SABRE computer reservations system. The SABRE computer reservations system is subject to special federal regulatory requirements applicable to computer reservations systems that are owned, operated, controlled or marketed by "affiliates" of air carriers. 14 C.F.R. § 255 *et seq* (1977). These regulations are designed, in part, to control bias in favor of the related air carrier.

The airline flight operations, airport passenger processing, crew scheduling, reservations accounting and related functions SABRE currently performs for American and American Eagle, as well as other airlines such as US Airways and Gulf Air, are crucial to and an integral part of the transportation functions of these carriers. If certain or large numbers of SABRE employees withdrew from service due to a labor dispute, the carriers serviced by SABRE would be severely handcuffed in their operations, and air travel on these carriers could come to a standstill. As the number of carriers serviced by SABRE continues to grow, so does the impact on flight transportation throughout

the United States if SABRE could not operate due to a labor strike.

## **II. Summary Judgment Standard**

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. Thomas v. Internat'l Business Machines, 48 F.3d 478, 485 (10th Cir. 1995).

## **III. Discussion**

### ***A. Definition of "Carrier" Under the Railway Labor Act***

The Railway labor Act creates a special scheme to govern the labor relations of railroads and airlines because of their unique role in serving the traveling and shipping public in interstate commerce. Congress declared a principal purpose of the Act "to avoid any interruption to commerce" arising from labor disputes. 45 U.S.C. § 151(a). To achieve this goal, the RLA provides for creation of various boards for mediation, arbitration, and Emergency Boards to resolve labor

disputes that could disrupt interstate commerce.

In 1934 Congress amended the RLA and expanded the definition of “carrier” to include carrier affiliates that perform transportation-related services:

The term “carrier” includes any carrier by railroad... and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service... in connection with the transportation....of property by railroad. 45 U.S.C. § 151.

Congress expanded the definition of carrier in order (1) to avoid the possibility that certain employees could interrupt commerce with a strike, and (2) to prevent a carrier covered by the RLA from evading the purposes of the Act by spinning off components of its operation into subsidiaries or related companies. See *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 556 (1937). When the activities of carrier affiliates are necessary to the operations of an air carrier, and a labor dispute at the affiliate could cripple airline operations, those affiliates must be subject to the RLA because such disruption is the very type of interruption to air commerce the RLA was designed to prevent. 45 U.S.C. § 151(a). For these reasons, the FLSA specifically exempts “carriers” under the RLA from its overtime requirements. 29 U.S.C. § 213(b)(3).

***A. The Two-Part Test for RLA Coverage: Common Control and Transportation Functions***

The NMB and the courts interpreting the jurisdictional language of the RLA and analogous acts have consistently applied a two-part test to determine if an entity is a carrier subject to the RLA:

The definition of a carrier... under the Act requires application of a two -part test, one part relating to ownership or control, and the other part relating to the company’s functions vis-a-vis transportation. A company must meeting both tests to be deemed a “carrier” under the Act. *Cybernetics and Systems, Inc.*, 10 N.M.B. 334, 339 (1983). See also *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7<sup>th</sup> Cir. 1987).

### *I. Controlled By or Under Common Control with a Carrier*

The “control” prong of the two-part test is readily satisfied in corporate structures where the subject company and an airline are both owned by the same corporate holding company. In Delpro Co. v. NMB, 509 F.Supp. 468 (D.Del. 1981); Delpro Co. v B.Ry.Carmen, 519 F.Supp. 842 (D.Del. 1981), *aff’d* 676 F.2d 960 (3<sup>rd</sup> Cir. 1982), *cert. denied*, 459 U.S. 989 (1982), the court found “control” by the mere fact of ownership, where a group of carriers owned Delpro’s parent, in which turn owned 100% of Delpro. The court in Delpro concluded that this ownership pattern was enough in itself to establish control, without requiring examination of the control of day to day operations.

The NMB consistently has concluded that corporate relationships like that between American and SABRE satisfy the “control” element of the jurisdictional test. In AMR Services Corp., 18 N.M.B. 348 (1991) the Board held that an AMR subsidiary performing ground services for American and other AIRLINES is a carrier covered by the RLA: “AMR Services is wholly owned by AMR Corporation, the holding company which wholly owns American Airline and American Eagle. AMR Services is controlled by the same entity which controls American Airlines and American Eagle.” Id. at 350.

In AMR Combs-Memphis, Inc., 18 N.M.B. 380 (1991), AMR Combs was 100% owned by AMR Services, Inc. The Board noted that it had recently “found [AMR Services] to be a carrier under the Railway Labor Act... Since AMR [Combs] is directly owned by a carrier, we do not reach the issue of the extent of control exercised by the client carriers over AMR Combs-Memphis.” Id. at 381. The board concluded “AMR Combs-Memphis, Inc. is a carrier under the Railway Labor Act and its employees are subject to the Railway Labor Act.” Id. at 381-382.

In Cybernetics and Systems, Inc., 10 N.M.B. 334 (1983), the CSX holding company, which

owned railroads, also owned L & N Investment (a real estate investment firm) which in turn owned Cybernetics. The NMB concluded the statutory test of common control was satisfied, stating “[Cybernetics] is owned by a subsidiary of a carrier... and its parent railroad holding company. Its officers and directors are, with one exception, officers and directors of rail carriers.” *Id.* at 339.

O/O Truck Sales, Inc., 21 N.M.B. 258 (1994), confirmed that the NMB considers control established automatically in a corporate structure where a holding company owns the entity in question as well as a carrier. There, O/O Truck Sales, Inc. was wholly owned by CSX Intermodel (CSXI), a subsidiary of the CSX holding company. Another CSX subsidiary was the railroad, CSX Transportation (CSXT). The Board held that because O/O was indirectly owned by CSX (through CSXI), it was controlled by the same corporate parent as the railroad and the “control” prong of the test automatically was established.

In light of these cases, as well oral arguments presented on this issue, this Court finds that SABRE is devoted, almost entirely, to effecting air transportation. SABRE is under the common control of American, and clearly meets the first prong of the “carrier” definition under the RLA.

## ***2. Transportation-Related Services***

SABRE has a mutually co-dependent relationship with the carriers it services. In fact, there can be no doubt that SABRE’s specialized information technology services for airline flight operations, airport passenger processing, crew scheduling, passenger reservations, accounting and related functions for American and other airlines are an integral part of the air carriers’ transportation function. Airline operations would cease without these services. Because SABRE employees perform and monitor the computer programming and computer operations that are critical to airline

functions such as flight operations and scheduling, any job action by SABRE employees, however slight, would disrupt the operations, and possibly imperil the safety of these airlines.

In Cybernetics and Systems, Inc., 10 N.M.B. 334 (1983), the NMB determined a computer services company, spun off from the CSX corporate family, continued to be a carrier covered by the RLA. Cybernetics performed various computer services. Id. at 336. Cybernetics continued to provide support to railroads, and to non-railroad customers. Only 45% of man-hours were spent in work for railroads. Id. at 377. The NMB concluded:

Railroads perform various accounting and data processing functions. . . . While C&S refuses to divulge the specific work done for specific carriers, a quarter of million man-hours a year is a substantial amount of railroad work. Work essential to the operation of a railroad is no less railroad work simply because the carrier creates a subsidiary to perform that work. Id. at 339.

SABRE's circumstances are clearly distinguishable from those few cases where the services of the affiliated company have only a tenuous, negligible and remote relationship to air transportation. See Northwest v. Jackson, *supra*, 185 F.2d 74, 77 (8<sup>th</sup> Cir. 1950). SABRE is covered by the RLA and the FLSA exemption, because SABRE's functions are integrally related to air transportation and have historically been performed by airline employees. The fact that such systems are now more complex and are managed with computer technology does not detract from the fact that the underlying data and functions are still airline data and functions, but instead emphasizes the sophistication and complexity of SABRE's services upon which air carriers must rely. The fact that a company provides services to carriers and to some non-carriers does not detract from RLA jurisdiction, as long as there is still an essential element of transportation related service. Cybernetics, 10 N.M.B. at 339.

The Plaintiff opposes this motion for summary judgment, arguing that an employee must be involved in the air carrier's transportation function in order to be eligible for an exemption under the

RLA . Furthermore, Plaintiff contends: "There is no evidence in this action demonstrating that the Plaintiff employees here fall within the transportation function of a carrier by air as opposed to other duties."

The Court finds that the Plaintiff has not presented any evidence that SABRE is not absolutely integral and devoted to continued air transportation. In sum, activities that traditionally have been performed by employees of air carriers do not cease to be an integral part of transportation simply because they have been spun off into a separate corporation. To effectuate the primary purpose of the RLA to prevent interruptions in interstate commerce, the Court finds that SABRE is a carrier subject to the Railway Labor Act, and therefore exempt from the overtime requirements of the FLSA.

#### **IV. Conclusion:**

The Plaintiff has presented no genuine issue of material fact for trial. The Court finds that SABRE meets the two part test for status as a "carrier" subject to the RLA because it is under common control with American and performs services in relation to transportation. Accordingly, SABRE is exempt from the overtime provisions of the FLSA. The Defendant's Motion for Summary Judgment (#18) is GRANTED.

IT IS SO ORDERED THIS 30 DAY OF AUGUST, 1999.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
AUG 30 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JAMES FRANKLIN, et al.,** )  
 )  
 **Plaintiff,** )  
 )  
 **vs.** )  
 )  
 **THE FLAGSTAR COMPANY d/b/a** )  
 **DENNY'S RESTAURANT,** )  
 )  
 **Defendant.** )

Case No. 99-CV-0376-BU (J)

**FILED**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE AUG 31 1999

**ORDER**

NOW ON THIS 30 day of August, 1999, for good  
cause shown, the Plaintiff's Stipulation of Dismissal With Prejudice is hereby granted.

**IT IS SO ORDERED.**

  
UNITED STATES DISTRICT JUDGE

10/1

1/6

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MIKE McCARTY; PAT McCARTY, )  
)  
Plaintiffs, )  
)  
v. )  
)  
THE CITY OF BARTLESVILLE; )  
STEVEN L. BROWN; ROBERT )  
NEWMAN; TIM SHIVELY, )  
)  
Defendants. )

ENTERED ON DOCKET  
DATE AUG 31 1999  
98-CV-181-H(M) ✓

**FILED**  
AUG 30 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

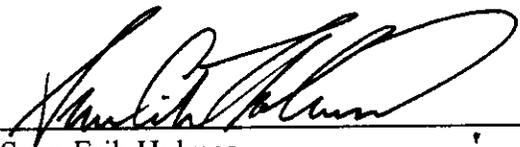
JUDGMENT

This matter came before the Court on Defendants' Motion for Summary Judgment filed December 16, 1998. The Court duly considered the issues and rendered a decision in accordance with the order filed on August 30, 1999.

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

IT IS SO ORDERED.

This 30<sup>TH</sup> day of August, 1999.

  
Sven Erik Holmes  
United States District Judge

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"undesirables."

3. Plaintiffs, Defendant Shively, and Officer Brian Helkenberg were among the officers hired to provide security at Brookhaven. Originally, Bartlesville police officers provided security for Brookhaven around the clock, but management subsequently changed the hours so that security would be provided by the officers from 6:00 P.M. to 6:00 A.M.
4. The officers working security at Brookhaven during the time around-the-clock security was provided signed up for work at the Bartlesville police department. After the security hours were reduced, the scheduling procedure changed and the officers thereafter determined what hours they would work and Brookhaven management scheduled them accordingly.
5. Brookhaven's owner again changed the security schedule to provide security from 6:00 P.M. until 2:00 A.M. or 4:00 A.M. After these changes were made, Plaintiffs were scheduled to work security at Brookhaven from 10:00 P.M. until 2:00 A.M. or 4:00 A.M.
6. Elaine Lea, a Brookhaven employee, was responsible for keeping track of the time the officers worked security at Brookhaven for payroll purposes.
7. In the spring of 1997, Pat McCarty was contacted by the manager of Brookhaven Apartments, Diane Cunningham, to investigate whether off-duty police officer Brian Helkenberg was being compensated by Brookhaven as a security officer while not actually performing such work.
8. As part of his investigation, Pat McCarty asked for and received payroll records for Officer Helkenberg from Ms. Cunningham, and reviewed those records and Bartlesville Police Department records relating to Officer Helkenberg's scheduled work hours.

9. Pat McCarty concluded as a result of the investigation that Officer Helkenberg was charging Brookhaven for work he did not perform. Pat McCarty took the result of his investigation to his shift commander, Lt. Robert Peugh, who turned the case over to the Defendant Newman over the objection of Pat McCarty.
10. Defendant Newman, acting as Chief of Police in the absence of Defendant Brown, decided to personally conduct an administrative investigation into Officer Helkenberg's conduct. As part of his investigation, Defendant Newman interviewed Diane Cunningham, David Lea, and Elaine Lea.
11. After his review of Officer Helkenberg's records, Defendant Newman suspended Officer Helkenberg and then prepared a report which he gave to Defendant Brown. Defendant Brown directed Defendant Newman to assign the investigation to Sergeant Tim Shively.
12. Defendant Newman knew that Defendant Shively had negative feelings toward the Plaintiff due to professional conflicts between the Plaintiffs and Defendant Shively, and Defendant Shively has admitted to these negative feelings.
13. After interviewing Officer Helkenberg, who indicated that the Leas told him that they sometimes paid Pat McCarty when he did not work, Shively expanded the investigation to include other officers, including both Pat and Mike McCarty.
14. As part of that investigation Sergeant Shively contacted Paul Scruggs, an owner of Oklahoma Property Management, Inc., which is an owner of and the managing entity for Brookhaven Apartments. Mr. Scruggs voluntarily gave time records to Sergeant Shively. Sergeant Shively also reviewed time sheets from the Bartlesville Police Department during his investigation.

15. Time sheets from the Bartlesville Police Department are maintained in such a manner as to allow widespread access to the records within the Department to all officers.
16. Based on a review of the payroll records, Shively concluded that on twenty-one different dates Mike McCarty had double-billed a total of 42.75 hours of work over a two year time period, and that on nineteen different dates Pat McCarty had double-billed a total of 36.25 hours over a similar two year time period. Shively further concluded that Dan Woolery also double-billed on three different dates.
17. Shively interviewed Woolery on April 23 to get an explanation for the billing discrepancies, and was ultimately allowed the opportunity to rectify the situation by making restitution to Brookhaven and writing a letter of apology. Shively did not interview Mike McCarty or Pat McCarty or afford them the opportunity to explain the billing discrepancies.
18. On or about April 24, 1997, the City served notices upon Pat McCarty and Mike McCarty requiring them to appear for a disciplinary hearing. A hearing was held on April 28, 1997, for Mike McCarty and on April 29, 1997, for Pat McCarty. At those hearings, Pat McCarty and Mike McCarty explained that the apartment complex employees often filled out the time sheets in advance and that all time billed was made up.
19. On April 29, Sergeant Shively interviewed David and Elaine Lea. Elaine Lea informed Sergeant Shively that she kept the time sheets for Brookhaven, that on occasion officers signed partially completed time sheets, and that it was possible that officers signed blank time sheets. She further informed Sergeant Shively that she worked with officers in an effort to help them make up previously billed time and that she kept no record of made-up

time.

20. Sergeant Shively provided Washington County District Attorney Rick Esser a copy of the report of his investigation surrounding the Brookhaven overpayments, and on May 8, 1997, Mr. Esser acknowledged receipt of that report by letter to Chief Brown. Upon reading the report, which contained the interview transcripts of David and Elaine Lea regarding their time-keeping methods, Mr. Esser determined that there was probable cause to support the charges suggested in Sergeant Shively's report. On May 15, 1997, Plaintiffs were charged with obtaining money by false pretenses and were arrested.
21. On May 16, 1997, Plaintiffs were both discharged from their positions as police officers.
22. On May 19, 1997, Plaintiffs filed grievances regarding their discharges which were processed pursuant to the Collective Bargaining Agreement ("CBA") governing the relationship between Plaintiffs and the Department. The FOP sought on behalf of the Plaintiffs to waive the time limit for seeking arbitration under the CBA. The City declined, and the matters were not submitted to arbitration.
23. On July 3, 1997, the Washington County Court held a preliminary hearing as to the criminal charges, and found there was probable cause for Plaintiffs to be bound over for trial.
24. On September 17, 1997, the Washington County Court held another hearing, and in the course of that hearing the Plaintiffs' criminal defense attorney, Wes Johnson, conceded that the district attorney had probable cause to file the charges against Plaintiffs, but moved to dismiss the charges based upon the court's exclusion of key documents. That motion was sustained, and the criminal charges against Plaintiffs were dismissed.

25. The City reinstated Plaintiffs with full back pay on or about October 3, 1997.

## II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

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

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250

("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

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

### III

In their motion, Defendants seek summary judgment on each of Plaintiffs' three claims brought pursuant to 42 U.S.C. § 1983 for deprivation of liberty and property interests without due process of law; for violation of their Fourth Amendment protection against unreasonable search and seizure; and for malicious prosecution.<sup>1</sup> The Court will address each of these claims.

### A

Defendants seek summary judgment on Plaintiffs' due process claim. The Court initially

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<sup>1</sup>Plaintiffs set forth for the first time in their Response to Defendants' Motion for Summary Judgment a claim based on Garrity v. New Jersey, 385 U.S. 493 (1967). See Plaintiffs' Response to Defendants' Motion for Summary Judgment at 24-25. Because Plaintiffs admittedly did not specifically plead this claim in their Amended Complaint, see id. at 24, the Court construes Plaintiffs' assertions regarding Garrity as a motion to amend the pleadings, see Viernow v. Euripides Development Corp., 157 F.3d 785, 796 n.26 (10th Cir. 1998), and concludes that Plaintiffs' attempt to so amend is untimely given the history of this case. See, e.g., Evans v. McDonald's Corp., 936 F.2d 1087, 1091 (10th Cir. 1991) (holding motion to amend was properly denied where case had been on file for two years, counsel had filed one amended complaint, and Plaintiffs were faced with an adverse ruling on summary judgment).

notes that by order dated September 15, 1998, this Court dismissed Plaintiffs' claim for deprivation of property interest without due process of law contained in their Complaint, and Plaintiffs did not reurge that claim in their First Amended Complaint. Accordingly, the Court need not address Defendants' arguments regarding the applicability of Hennigh v. City of Shawnee, 155 F.3d 1249 (10th Cir. 1998), to Plaintiffs' due process claim.

Regarding Plaintiffs' claim for deprivation of a liberty interest without due process of law, Plaintiffs allege in their First Amended Complaint that they were subjected to "intense and widespread publicity from radio, television, and newspaper" reports and that Sergeant Shively's investigation report as well as these media reports contained false information. See First Amended Complaint, at ¶ 24. In addition, in response to Defendants' Motion for Summary Judgment and at the hearing on the motion, Plaintiffs asserted that the arrest affidavits and criminal charges filed against them constituted false statements actionable under the Due Process Clause. At the hearing on the motion, Plaintiffs conceded that the arrest warrants had never been filed or made public prior to Plaintiffs' inclusion of them in their response to the summary judgment motion. See Plaintiffs' Supplemental Brief in Opposition to Defendants' Motion for Summary Judgment, at 5 n.2. In light of this concession, Plaintiffs cannot contend that any Defendant published those statements for purposes of their liberty interest claim. See Whatley v. City of Bartlesville, 932 F. Supp. 1300, 1303 (N.D. Okla. 1996) (intragovernment dissemination not "publication" for purposes of liberty interest claim). In addition, both Plaintiffs admitted in their depositions that they can provide no evidence which indicates that any of the Defendants had any involvement in the publication of the allegedly false statements made in the media reports of their arrest and prosecution, and neither has presented any record evidence to the

contrary. See Whatley, 932 F. Supp. at 1303-04. Accordingly, the Court concludes that neither the arrest warrants nor the media reports can support the liberty interest claim Plaintiffs assert. Thus, the Court considers only Plaintiffs' arguments and record evidence regarding Sergeant Shively's investigation report and the filing of criminal charges to determine whether Defendants are entitled to summary judgment on Plaintiffs' liberty interest claim.

It is well settled that mere defamation or damage to a person's reputation is insufficient, standing alone, to invoke the guarantee of procedural due process. See Paul v. Davis, 424 U.S. 693, 699 (1976). Rather, a person holds a liberty interest in his or her reputation "as it affects his protected property interest in continued employment." Workman v. Jordan, 32 F.3d 475, 480 (10th Cir. 1994), cert. denied, 514 U.S. 1015 (1995); Melton v. City of Oklahoma City, 928 F.2d 920, 925 (10th Cir.), cert. denied, 532 U.S. 906 (1991). To demonstrate a deprivation of a liberty interest that gives rise to constitutional protection, Plaintiffs must establish that (1) Defendants made statements that impugn their good name, reputation, honor, or integrity; (2) those statements were false; (3) those statements were published; and (4) the statements occurred in the course of terminating the employee or foreclose other employment opportunities for Plaintiffs. See Workman, 32 F.3d at 480; Melton, 928 F.2d at 925.

Defendants argue that even assuming all other elements of a liberty interest claim have been proved, neither Sergeant Shively's investigation report nor the filing of criminal charges were statements occurring in the course of terminating the employee or that the statements foreclosed other employment opportunities for Plaintiffs. Plaintiffs respond that because the administrative and criminal investigations "were closely intertwined, initiated and conducted by the defendants, and because the allegations of obtaining money by false pretenses were the

genesis of both the decision to terminate and the decision to indict, the inescapable conclusion is that the 'statement' in question was made in the course of the termination of plaintiffs' employment." See Plaintiffs' Supplemental Brief in Opposition to Defendants' Motion for Summary Judgment, at 8. The Court does not agree. The record contains no evidence from which a reasonable jury could conclude that any allegedly false statements made in Sergeant Shively's investigation report or the criminal charges were made in the course of the termination of Plaintiffs. Although it is unquestionable that the criminal charges arising from Sergeant Shively's investigation were motivating factors in the decision to terminate Plaintiffs, any such false statements made by the Defendants were made in the context of the criminal investigation and criminal charges against Plaintiffs, not in the context of the administrative decision to terminate Plaintiffs. Thus, Plaintiffs cannot, on this record, establish any nexus between the criminal proceedings and the personnel proceedings which would support a finding that any allegedly false statements were made in the course of terminating Plaintiffs.

Moreover, Plaintiffs cannot establish that the allegedly false statements at issue foreclosed other employment opportunities for them, as Plaintiffs have been reinstated to their positions with full back pay, see Workman, 32 F.3d at 480, and "[d]amage to prospective employment opportunities is too intangible to constitute a deprivation of a liberty . . . interest." Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1269 (10th Cir. 1989). Accordingly, based on this record, the Court concludes that Defendants are entitled to summary judgment on Plaintiffs' liberty interest claims.

## B

Defendants further seek summary judgment on Plaintiff's claim for Defendants' alleged

violation of their Fourth Amendment protection against unreasonable search and seizure based on Sergeant Shively's possession and examination of the employee time records from Oklahoma Property Management Company and from the Bartlesville Police Department. Defendants assert that Plaintiffs lack standing to assert a claim under the Fourth Amendment, that Sergeant Shively's seizure of those records was reasonable because the owner or custodian of those records consented to the seizure, and that Defendants are entitled to qualified immunity.

In order to challenge the lawfulness of a search or seizure, Plaintiffs must establish that they have standing to do so. See United States v. Marchant, 55 F.3d 509, 512 (10th Cir.), cert. denied, 514 U.S. 907 (1995). Whether a party has standing to challenge a search or seizure is a question of law to be determined by the Court. See United States v. Shareef, 100 F.3d 1491 (10th Cir. 1996). To have standing to assert a claim under the Fourth Amendment, a person must have a "legitimate expectation of privacy in the area searched, not merely in the items seized." United States v. Skowronski, 827 F.2d 1414, 1418 (10th Cir. 1987). This inquiry requires that the party asserting the Fourth Amendment claim establish that he or she has a subjective expectation of privacy in the place searched, and that his or her expectation is one that society would recognize as objectively reasonable. See United States v. Abreu, 935 F.2d 1130, 1132 (10th Cir.), cert. denied, 502 U.S. 897 (1991). In determining whether Plaintiffs' expectation of privacy was objectively reasonable, the Court may consider issues of ownership, lawful possession, and lawful control of the place searched. See id. at 1133. Specifically, to determine whether Plaintiffs have standing to challenge a search and seizure occurring in the workplace, the Court must consider (1) the employee's relationship to the items seized; (2) whether the items were in the immediate control of the employee when they were seized; and (3) whether the

employee took actions to maintain his privacy in the item. See United States v. Anderson, 154 F.3d 1225, 1232 (10th Cir. 1998), cert. denied, 119 S. Ct. 2048 (1999).

Based on a review of the record and applicable authorities, the Court concludes that Plaintiffs lack standing to challenge the Defendants' seizure of the payroll records from Brookhaven and the Bartlesville Police Department. Assuming, without deciding, that Plaintiffs had a subjective expectation of privacy in the places searched, the Court concludes that Plaintiffs' expectations were not objectively reasonable. With respect to the time sheets retained by the Bartlesville Police Department, it is uncontroverted that Plaintiffs had no immediate control over the time sheets at the time they were seized, that the Department maintained those records in a manner which allowed broad access to the time sheets at issue, and there is no indication in the record that either Plaintiff took action to maintain privacy in those records. Similarly, with respect to the time sheets maintained by the Leas, it is uncontroverted that the time sheets were not under the control of the Plaintiffs at the time they were seized; in fact, access to these time sheets was granted by a third-party custodian of the documents. Moreover, there is no record evidence upon which the Court may find that Plaintiffs sought to maintain privacy in the Brookhaven time sheets. Indeed, in both instances, Plaintiffs' relationship to the items seized was attenuated; the items seized only reflected the amount of time spent at each workplace, matters which could have been objectively confirmed, and contained no information of a confidential or personal nature.

In response, Plaintiffs suggest that Oklahoma law requires such information to be kept

confidential. See Okla. Stat. Ann. tit. 40, § 61; Okla. Stat. Ann. tit. 51, § 24A.7.<sup>2</sup> After an independent review of those authorities, however, the Court finds that nothing in the specific statutory language or statutory scheme of these provisions suggests that these provisions would apply to the instant case or, assuming their relevance, would support the expansive reading Plaintiffs would urge the Court to adopt. Accordingly, the Court concludes that the Plaintiffs lack standing to bring a claim under the Fourth Amendment based on the seizure of the payroll records from Brookhaven and the Bartlesville Police Department, and the Court need not address Defendants' arguments regarding consent and qualified immunity.

C

Defendants seek summary judgment on Plaintiff's claim for malicious prosecution under

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<sup>2</sup>The statutes cited by Plaintiffs provide in pertinent part:

An employer may disclose information about a current or former employee's job performance to a prospective employer of the current or former employee upon request of the prospective employer . . . [.]

Okla. Stat. Ann. tit. 40, § 61.

A public body may keep personnel records confidential:

1. Which relate to internal personnel investigations including examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation; or
2. Where disclosure would constitute a clearly unwarranted invasion of personal privacy such as employee evaluations, payroll deductions, or employment applications submitted by persons not hired by the public body.

See Okla. Stat. Ann. tit. 51, § 24A.7.

42 U.S.C. § 1983 as recognized by the Tenth Circuit in Wolford v. Lasater, 78 F.3d 484 (10th Cir. 1996). Under Oklahoma state law, which provides the contours of a malicious prosecution claim under § 1983, a showing of probable cause is a complete defense to a malicious prosecution claim, as it negates an essential element of the tort. See Wolford, 78 F.3d at 489; Parker v. Midwest City, 850 P.2d 1065, 1067 (Okla. 1993); Lewis v. Crystal Gas Co., 532 P.2d 431, 433 (10th Cir. 1975).<sup>3</sup>

Based upon a review of the record, the Court concludes that Plaintiffs cannot establish that the criminal charges filed against them in Washington County were brought without probable cause. The record clearly indicates that after hearing testimonial evidence at Plaintiffs' preliminary hearing, including evidence regarding the inaccuracy of the time sheets and the Leas' inaccurate time keeping methods, the state trial court explicitly found that there was reason to believe crimes were committed and that Plaintiffs committed them. Moreover, the Washington County District Attorney undertook an independent review of Sergeant Shively's investigation report and, based on the information contained therein, determined that there was probable cause to support the charges. Although Plaintiffs seek to undermine the credibility of District Attorney Rick Esser by pointing out discrepancies in his testimony regarding the timing of his receipt of Sergeant Shively's report, they fail to respond in any way to the two separate and independent findings of probable cause based on the same evidence which Sergeant Shively provided in his

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<sup>3</sup>To maintain a claim of malicious prosecution in Oklahoma, a plaintiff must prove the following elements: (1) the bringing of the original action by the defendant; (2) successful termination of the original action in favor of the plaintiff; (3) want of probable cause to bring the action; (4) malice; and (5) damages. See Parker v. Midwest City, 850 P.2d 1065, 1067 (Okla. 1993).

report. Finally, the record in this case indicates that Plaintiffs' own criminal defense attorney conceded the existence of probable cause at a September 17, 1997 hearing on a motion to dismiss the charges. Given the record evidence in this case, Plaintiffs cannot establish the essential element of lack of probable cause. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' malicious prosecution claim.

IV

Based on the above, Defendants' Motion for Summary Judgment filed December 16, 1998 (Docket # 27) is hereby granted.

IT IS SO ORDERED.

This 30<sup>TH</sup> day of August, 1999.

  
Sven Erik Holmes  
United States District Judge

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

**F I L E D**

TIMOTHY D. DAVISON,  
SSN: 516-76-6264,

Plaintiff,

v.

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

Defendant.

AUG 30 1999 SA

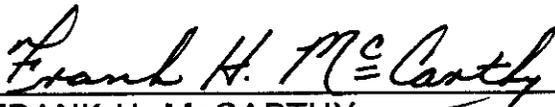
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE NO. 98-CV-647-M ✓

ENTERED ON DOCKET  
DATE AUG 31 1999

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 30<sup>th</sup> day of AUG., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

AUG 30 1999 SA

TIMOTHY D. DAVISON, )  
SSN: 516-76-6264, )

PLAINTIFF, )

vs. )

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

DEFENDANT. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CASE No. 98-CV-647-M ✓

ENTERED ON DOCKET  
AUG 31 1999

DATE \_\_\_\_\_

ORDER

Plaintiff, Timothy D. Davison, 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 August 31, 1995 applications for supplemental security income and disability insurance benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 14, 1997. By decision dated June 20, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 26, 1998. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born November 20, 1959 and was 37 years of age on the date of the hearing. [R. 36, 282]. He claims inability to work since June 21, 1995, due to weakness, spasticity, numbness, fatigue, optic neuritis, muscle spasm and pain associated with multiple sclerosis as well as asthma, psoriasis, osteoarthritis, degenerative disk disease and drowsiness caused by medication. [R. 98, 99, 106, 288, 290].

The ALJ determined that Plaintiff has severe impairments of multiple sclerosis (MS), optic neuritis left eye, psoriasis, asthma and degenerative disc disease, all of which compromise his capacity to lift, carry, bend and to be exposed to unprotected heights, dangerous moving machinery, driving, vibration, temperature extremes, dust/allergens, fumes/smoke, gases and caustic chemicals. [R. 19]. He concluded those impairments prevent Plaintiff from returning to his past relevant work as fleet service clerk, air traffic controller and laborer. [R. 23]. The ALJ found that Plaintiff

retained the residual functional capacity (RFC) for light work activity limited to lifting and carrying no more than 10 to 15 pounds occasionally, no more than frequent lifting and carrying up to 10 pounds, standing and walking 10 to 30 minutes each at a time, sitting up to 3 hours at a time, walking 10 to 30 minutes, standing 1 hour and sitting 6 hours each out of an 8-hour workday, no repetitive pushing/pulling foot controls, no repetitive grasping with the left hand, no repetitive fingering bilaterally, no bending, squatting, crawling and climbing, no more than occasional reaching and no exposure to unprotected heights, dangerous moving machinery, driving, vibration, temperature extremes, dust/allergens, fumes/smoke, gases and caustic chemicals. [R. 20-21]. Based upon the testimony of a vocational expert (VE), the ALJ decided there were other jobs in the regional and national economies that Plaintiff could perform with this RFC and found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. [R. 22]. 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 two errors on the part of the Commissioner. He asserts the ALJ did not accord proper weight and consideration to the opinions of Plaintiff's treating physicians and that the ALJ's RFC determination is not based upon substantial evidence. The court agrees. For the reasons discussed below, the court finds the decision of the Commissioner must be reversed and remanded for the immediate award of benefits.

### Treating Physicians' Opinions

The medical records reveal Plaintiff underwent treatment for asthma and skin problems as far back as 1993. [R. 212, 216]. Multiple Sclerosis (MS)<sup>2</sup> was first suspected by Plaintiff's treating physicians in 1989 and was reinvestigated and confirmed in 1995 after Plaintiff commenced complaining of numbness, visual problems, back and leg pain and paresthesias.<sup>3</sup> [R. 195-198]. Continuing and frequent complaints of worsening symptoms are documented in the record February through July 1995. [R. 183, 185, 187, 189, 192]. Rodney L. Myers, M.D., Plaintiff's treating neurologist, completed an "Attending Physician's Statement" in which he opined that Plaintiff "has been continuously disabled (unable to work) from June 21, 1995" and that it was unknown when he would be able to return to work. [R. 171]. Plaintiff was prescribed Baclofen<sup>4</sup> as well as Elavil and Parafon Forte. [R. 159-185]. Plaintiff continued to report severe exacerbation and "flare up" of symptoms to his treating physicians through August 1995 with dosages of Baclofen adjusted frequently as Plaintiff's symptoms waxed and waned. [R. 159-168]. A "Handicapped Parking

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<sup>2</sup> Multiple Sclerosis: a disease in which there are foci of demyelination of various sizes throughout the white matter of the central nervous system, sometimes extending into the gray matter. Typically, the symptoms of lesions of the white matter are weakness, incoordination, paresthesias, speech disturbances, and visual complaints. The course of the disease is usually prolonged, so that the term *multiple* also refers to remissions and relapses that occur over a period of many years. The etiology is unknown. *Dorland's Medical Dictionary*, 28th Ed., p. 1496.

<sup>3</sup> Paresthesia: an abnormal touch sensation, such as burning, prickling, or formication, often in the absence of an external stimulus. *Dorland's Medical Dictionary*, 28th Ed., p. 1234.

<sup>4</sup> Baclofen: a muscle relaxant, antispastic, indicated for alleviation of signs and symptoms of spasticity resulting from multiple sclerosis, particularly for relief of flexor spasms and concomitant pain, clonus and muscular rigidity. *Physician's Desk Reference*, 49th Ed. 1995, p. 1065.

Privilege Application" was signed by Dr. Myers on August 11, 1995, noting Plaintiff's inability to walk without the use of an assistive device due to MS. [R. 169]. Finally, after months of aggressive treatment, Trudy Milner, D.O., one of Plaintiff's treating physicians at the clinic, reported on September 2, 1995, that Plaintiff had "recently just gotten over an acute flare up" of MS. [R. 155].

At the request of Dr. Myers, Plaintiff was examined by Ellen I. Zanetakis, M.D., on September 14, 1995. [R. 148-153]. Dr. Zanetakis assessed probable osteoarthritis with low back pain, probably compounded by MS and abnormal stresses on the lumbosacral spine, psoriasis and MS. [R. 150-151]. She prescribed Voltaren to be taken in lieu of Motrin. [R. 151].<sup>5</sup> Dr. Zanetakis noted during her October 11, 1995 follow up examination of Plaintiff, that he had increasing stiffness in the lower extremities and had titrated the Baclofen on his own up to about 100 mg. daily. [R. 146]. The Voltaren was discontinued because it bothered Plaintiff's stomach. [R. 143]. Dr. Zanetakis suggested follow up with the radiologist's suggestion for a limited bone scan of the SI joints since Plaintiff's continuing problems far outweighed the degenerative changes revealed by the MRI. *id.* On November 8, 1995, Dr. Zanetakis reported to Dr. Myers that the bone scan revealed only fairly advanced osteoarthritis at about the T10 level and recommended continuation of current medications. [R. 140].

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<sup>5</sup> Voltaren: a nonsteroidal anti-inflammatory drug (NSAID), indicated for the acute and chronic treatment of signs and symptoms of rheumatoid arthritis, osteoarthritis, and ankylosing spondylitis. *Physician's Desk Reference*, 49th Ed. 1995, p. 1076.

On October 18, 1995, Dr. Myers filled out a statement for American Airlines, Plaintiff's employer, indicating that Plaintiff cannot lift, climb, stoop, bend, kneel, sit or stand for prolonged times, or push or pull. [R. 142]. The form indicated Plaintiff could reach and could use his arms and hands, legs and feet. Medications listed were Baclofen and Elavil and treatment prescribed was "Rest due to fatigue." *Id.* Plaintiff was last seen at the Utica Park Clinic on November 27, 1995.

On January 8, 1996, Plaintiff was examined by Michael Berkey, M.D. [R. 232]. Dr. Berkey noted another "flare" and referred Plaintiff to a neurologist, John E. Cattaneo, M.D., who he saw on January 16, 1996. Dr. Cattaneo reported to Dr. Berkey his impression after examining Plaintiff:

This patient has chronic relapsing remitting multiple sclerosis. His primary problems have been optic neuritis over the past couple of years.

\* \* \*

The patient does have burning type dysesthesia which have been controlled with Elavil but, at times he does have flareups. Beyond this, his ambulation is somewhat compromised from his muscle spasms, but this seems to be under optimal control with the Baclofen at this time, and I would not change the current doses. He does have lower back problems, and I suspect that he may end up with a radiculopathy in the lumbar region in the next several years, so we need to watch this closely. [R. 221].

Dr. Berkey's office notes document regular examinations and/or consultations with Plaintiff regarding continuing complaints and MS related symptoms from January through December 1996. [R. 225-246]. During that treatment period, Dr. Berkey filled out several forms: an "Attending Physician's Statement of Functional Capacity" for MetLife Insurance, dated May 1, 1996 [R. 229-230]; a "Physician's Statement for

American Airlines" dated September 18, 1996 [R. 228]; and a MetLife "Supplemental Statement" dated December 7, 1996 [R. 226-227]. In every one of these forms, Dr. Berkey stated unequivocally that Plaintiff is permanently disabled and unable to work at his prior or any occupation. Then, on April 9, 1997, Dr. Berkey filled out a "Physical Residual Functional Capacity Evaluation" form provided by the Social Security Administration. [R. 249-251]. Dr. Berkey assessed Plaintiff's capacity during an 8-hour work day to be limited to: 3 hours sitting at one time, 6 hours total during the workday; 10-30 minutes standing; 10-30 minutes walking; never lifting or carrying any weight; no use of feet or hands for repetitive movement; no bending, squatting, crawling, climbing or reaching. He checked as "marked" Plaintiff's ability to engage in activities involving unprotected heights, exposure to dust, fumes and gases and driving. Plaintiff was assessed as totally restricted from being around moving machinery, exposure to marked changes in temperature and humidity and vibrations. *Id.* Objective medical findings cited by Dr. Berkey were: optic neuritis, spasticity, weakness. [R. 250].

In his decision, the ALJ mentioned Dr. Cattaneo's examination of Plaintiff in January 1996. [R. 20]. He did not comment upon the weight he accorded Dr. Cattaneo's report. As to Dr. Berkey's reports and opinion, the ALJ said:

The claimant's treating internist, Michael H. Berkey, M.D. was of the opinion that claimant was disabled and that he could lift or carry no weight in April 1997 (Exhibit 32). However, Dr. Berkey was of the opinion, in May 1996, that claimant could **occasionally** lift and/or carry up to 30 pounds. (Exhibit 29). [emphasis added]. [R. 20].

Apparently, the ALJ was referring to the form filled out by Dr. Berkey for MetLife on May 1, 1996, which contained four categories for the doctor to mark his evaluation of Plaintiff's carrying and lifting limitations according to frequency and percentage of workday activities. [R. 230]. The choices were: Never; Less than 20%; 20% - 60%; and Greater than 60%. For 0-15 pounds and 16-30 pounds, Dr. Berkey checked "Less than 20%." For 31-45 and Greater than 45 pounds, Dr. Berkey checked "Never." The marks represented the "top limit of frequency" for each weight class. *Id.* The court notes the term "occasionally" was used by the ALJ in his interpretation of Dr. Berkey's 1996 MetLife form. The term does not actually appear anywhere in the MetLife form.

According to the regulations, the term "occasionally" means occurring from very little up to one-third of the time, and would generally total no more than about 2 hours of an 8-hour workday. 20 C.F.R. § 404.1567(a) (1986); Social Security Ruling (SSR) 96-9p. Since "less than 20%" of the workday is a substantially less amount of lifting than 33% of the workday, the court does not agree with the ALJ that Dr. Berkey's May 1996 RFC assessment conflicts with his April 1997 RFC, if indeed that is what the ALJ meant to imply. Furthermore, as in all his reports and forms, Dr. Berkey wrote on that same 1996 MetLife form that Plaintiff is "completely disabled [due to] multiple sclerosis." [R. 230]. The court also notes that on the RFC form provided by the SSA the only choice for lifting less than "occasionally" which was described on the form as "up to 1/3 of an 8-hour workday" was "never", which is the choice made by Dr. Berkey to describe Plaintiff's lifting abilities in a work setting. [R. 249].

The ALJ also mischaracterized Plaintiff's testimony as to his lifting ability. At the hearing, Plaintiff testified:

A. I can lift my water glass full of ice and water, I don't know what it weighed, probably five pounds.

Q. How about a gallon of milk?

A. No, not really.

Q. You can't do it or you just don't do it?

A. I don't do it. I - -

Q. Could you do it if you had to?

A. Yeah, but I - - messes.

Q. What do you mean messes?

A. I spill things. I'm real clumsy.

[R. 295]. A reasonable interpretation of Plaintiff's testimony is that he could lift a regular glass of drinking water which, in most cases, ranges from 5 to 8 ounces. It is disingenuous of the ALJ to represent Plaintiff's testimony as reflecting that he could "frequently" lift a 5 pound glass of water and that he could lift a gallon of milk "subject to spilling." [R. 20]. The court concludes Plaintiff's testimony did not contradict his treating physician's assessment of his inability to lift any weight on a regular and continuous basis in a job setting.

As to the weight given the treating physicians' opinions, the ALJ said:

Normally, the opinions, diagnoses, and medical evidence of a treating physician, who is familiar with claimant's impairments, treatments and responses over a length of time, should be accorded considerable weight. However,

Dr. Berkey's opinion, that claimant could not lift or carry any weight what-so-ever, is inconsistent with the credible objective findings. The claimant had complained of left upper extremity weakness and numbness affecting his left arm more than the right (Exhibit 27). The undersigned gives greater weight to the testimony and opinion of the nonexamining Medical Expert than the opinion of claimant's treating physician. [R. 20].

It is true that it is the ALJ, rather than the physician, who is authorized to make a final decision concerning disability. However, a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, the ALJ cannot interpose his own medical expertise over that of a physician, especially when that physician is the regular treating doctor for the disability claimant. *Kemp*, 816 F.2d at 1476.

Exhibit 27, in the record, is Dr. Cattaneo's report. [R. 220-221]. It does not contain a statement that was inconsistent with Dr. Berkey's opinion regarding upper extremity weakness and numbness affecting the left arm more than the right, as described by the ALJ. The closest Dr. Cattaneo came to making any comment about Plaintiff's lifting problems reads as follows:

The patient's primary complaints are that of muscle cramping and stiffness and dysesthesia primarily in the left leg and arm which have been treated with Elavil.

[R. 220]. If this is the statement upon which the ALJ relied to demonstrate inconsistency between Dr. Berkey's opinion and the rest of the medical evidence, then such reliance is error because it is based upon a misstatement of the evidence. Furthermore, the ALJ's conclusory statement that the treating physician's opinion is inconsistent with the credible objective findings is insufficient under the established precedent. See *Goatcher v. United States Department of Health & Human Services*, 52 F.3d 288, 290 (10th Cir. 1995)(ALJ must examine other evidence to see if it outweighs the treating physician report, not the other way around). Specific, legitimate reasons for rejection of a treating physician's opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988).

The ALJ made absolutely no mention of Dr. Myers's treatment records and opinion of disability. There is no indication from the ALJ's decision whether he determined Dr. Berkey's medical records were inconsistent with the records or objective findings of any of Plaintiff's former treating and examining physicians, particularly those of Dr. Myers and the associates in his clinic and/or of Dr. Zanetakis. Instead, the ALJ simply stated that he "gives greater weight to the testimony and opinion of the nonexamining Medical Expert than the opinion of claimant's treating physician." [R. 20]. It is well established that the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment

are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim. *Broadbent v. Harris*, 698 F.2d 407, 412 (10th Cir. 1983). Particularly troubling in this case, is that the Medical Expert, Michael Karathanos, M.D., testified at the hearing regarding his assessment of Plaintiff's condition and limitations without ever having examined Plaintiff and without even having listened to his testimony.<sup>6</sup> [R. 264-273].

The record contains an abundance of medical history, including hospital records, laboratory tests, MRIs, bone scans, treatment notes, medication lists and medical evaluations spanning a period of over two years. When viewed as a whole, this evidence supports the treating physician's position regarding Plaintiff's physical condition and it is essentially uncontradicted by medical evidence from any other examiner. See *Williams v. Bowen*, 844 F.2d 748, 758 (10th Cir. 1988). The court, therefore, finds that the ALJ improperly disregarded the opinions of the treating physicians.

#### **The RFC Determination**

The ALJ's conclusion that Plaintiff could perform a wide range of light work is not supported by substantial evidence in view of the treating physician's opinion that Plaintiff's limitations during an 8-hour work day are: 3 hours sitting at one time, 6 hours total during the workday; 10-30 minutes standing; 10-30 minutes walking;

---

<sup>6</sup> Even Dr. Karathanos seemed to appreciate this potential problem when he asked that he be allowed to listen first to Plaintiff's testimony before giving his opinion of the restrictions placed upon Plaintiff by his treating physician. [R. 267]. The court does note that, after Plaintiff's testimony was taken, Dr. Karathanos was given an opportunity to change his testimony, which he declined to do. [R. 296].

never lifting or carrying any weight; no use of feet or hands for repetitive movement; no bending, squatting, crawling, climbing or reaching, marked ability to engage in activities involving unprotected heights, exposure to dust, fumes and gases and driving and totally restricted from being around moving machinery, exposure to marked changes in temperature and humidity and vibrations. Furthermore, the court finds no objective medical evidence suggesting that the severity of Plaintiff's MS symptoms and related problems as well as psoriasis, asthma and degenerative disc disease, were not sufficient to produce symptoms as severe as those of which Plaintiff has consistently complained. The court notes that many of the symptoms complained of by Plaintiff are listed as adverse side effects of Baclofen, the medication Plaintiff was prescribed for treatment of MS. See *Physician's Desk Reference*, 49th Ed. 1995, p. 1066, (transient drowsiness, confusion, headache, insomnia, paresthesia, muscle pain, coordination disorder, tremor, rigidity, dystonia, ataxia, blurred vision, etc). Despite this evidence, the ALJ's assessment of Plaintiff's RFC does not take into account the effects of these documented adverse reactions. The ALJ either ignored or discredited, without a valid explanation, the evidence supporting Plaintiff's contention that he cannot work on a sustained basis. Having discussed the ALJ's errors in considering medical source opinions and assessing Plaintiff's subjective allegations of nonexertional limitations, the court concludes the evidence does not support the ALJ's determination that Plaintiff retains the RFC for sustained work at the

light or sedentary exertional levels.<sup>7</sup> "In order to engage in gainful activity, a person must be capable of performing on a reasonably regular basis." *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984); *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994).

### Conclusion

The court finds insubstantial support in the record for the Commissioner's finding that Plaintiff could perform a wide range of light or sedentary work with restrictions and substantial evidence that he could not. Where the burden is on the Commissioner at step five of the disability evaluation process to produce evidence that Plaintiff can perform other work in the national economy, and the Commissioner does not meet that burden and, thus, does not sufficiently rebut the prima facie case of disability, reversal is appropriate. "[O]utright reversal and remand for immediate award of benefits is appropriate when additional fact finding would serve no useful purpose." *Williams v. Bowen*, 844 F.2d 748 (10th Cir. 1988). The record here fully supports a determination that Plaintiff is disabled within the meaning of the Social Security Act. Further proceedings would only delay the determination and award of benefits.

Accordingly, this case is REVERSED and REMANDED to the Commissioner for the immediate calculation and award of benefits from June 21, 1995.

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<sup>7</sup> Although the VE's response to the ALJ's hypothetical regarding jobs Plaintiff could perform with the RFC as given were only sedentary jobs, the ALJ found that Plaintiff could perform a wide range of light jobs with restrictions. [R. 278-279].

So ordered this 30<sup>th</sup> day of August, 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

DEANNA ROBERTS,

Plaintiff,

vs.

LONE STAR STEAKHOUSE AND  
SALOON OF OKLAHOMA, INC.,

Defendant.

ENTERED ON DOCKET

DATE AUG 31 1999

No. 99-CV-379-K

**F I L E D**  
IN DISTRICT COURT

AUG 30 1999

Phyllis L. ... Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

Before the Court is the motion of the defendant to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) F.R.Cv.P. Plaintiff commenced this action in this Court by filing a complaint on May 17, 1999 and filed an amended complaint May 27, 1999. The complaints implicitly invoke this Court's jurisdiction pursuant to 28 U.S.C. §1332(a) because they recite the diversity of citizenship between the parties and allege "Plaintiff's damages exceed \$75,000". The cause of action alleged is negligence on the defendant's part when plaintiff allegedly slipped and fell in the bathroom of defendant's restaurant.

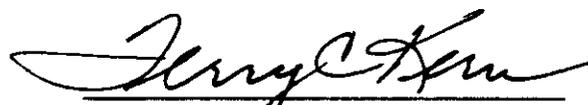
Defendant has filed the present motion, asserting that plaintiff cannot satisfy the amount in controversy required by §1332(a). The federal courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states. Miera v. Dairyland Ins. Co., 143 F.3d 1337, 1339-40 (10<sup>th</sup> Cir.1998). The burden of proving jurisdiction is on the party asserting it. Gibson v. Jeffers, 478 F.2d 216, 221 (10<sup>th</sup> Cir.1973). When deciding whether the

amount in controversy is adequate, “the sum claimed by the plaintiff controls if the claim is apparently made in good faith.” Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938)(footnote omitted). In other words, “[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to satisfy dismissal.” Id. at 289.

However, once the amount has been challenged, the party asserting jurisdiction has the burden of showing that it does not appear to a legal certainty that the claim is for less than the requisite amount. Gibbs v. Buck, 307 U.S. 66, 72 (1939). Once a party’s allegations of jurisdictional facts are challenged, it must support those allegations by competent proof. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). In the context of a personal injury allegation, it has been held that medical evidence is required. Rosenboro v. Kim, 994 F.2d 13, 18 (D.C.Cir.1993). By contrast, plaintiff has responded to the present motion with a letter written by plaintiff’s counsel to defendant’s insurer (which relates medical expenses totaling \$8,415.28) and an affidavit by the plaintiff which relates that her injured knee is painful and stiff, she often has problems rising from her chair, she can no longer water ski, play tennis and ride horses, she must wear a brace for activity and each day she does special exercises for the knee (which are done twice and take about 15 minutes). In the Rosenboro decision, the District of Columbia Circuit held that plaintiff’s own testimony of intermittent back pain was insufficient, in the absence of medical evidence, to establish the (at the time) \$50,000 jurisdictional amount. Plaintiff has requested no extension of time to secure medical evidence and has not produced so much as a letter from plaintiff’s treating physician. Dismissal is appropriate.

It is the Order of the Court that the motion of the defendant (#3) to dismiss for lack of subject matter jurisdiction is hereby GRANTED.

ORDERED THIS 30 DAY OF AUGUST, 1999.

A handwritten signature in cursive script, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**HOMEWARD BOUND, INC.** )  
et al., )  
 )  
 **Plaintiffs,** )  
 )  
vs. )  
 )  
 **THE HISSOM MEMORIAL CENTER,** )  
et al., )  
 )  
 **Defendants.** )

Case No. 85-C-437-E

ENTERED ON DOCKET  
DATE AUG 31 1999

**ORDER & JUDGMENT**

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on August 5, 1999, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees, objection and the Stipulation of the parties.

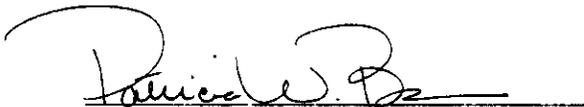
The Court hereby awards the firm Bullock & Bullock the agreed to attorney fees and expenses in the amount of \$49,798.70.

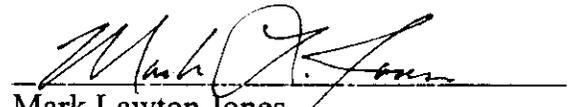
IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$49,798.70, and a judgment in the amount of \$49,798.70 is hereby granted on this day.

9/6/99

ORDERED this 30<sup>th</sup> day of August, 1999.

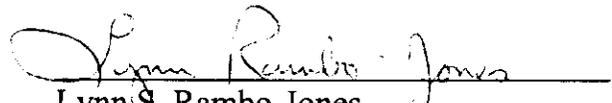
  
HONORABLE JAMES O. ELLISON  
United States District Court

  
Louis W. Bullock  
Patricia W. Bullock  
BULLOCK & BULLOCK  
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Tulsa, Oklahoma 74103-3783  
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- and -

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4545 North Lincoln, Suite 124  
Oklahoma City, OK 73105  
(405) 530-3439

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

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

**FILED**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GEO-GRAPHICS, INC., an Oklahoma  
corporation, )

Plaintiff, )

vs. )

H. A. FULLER-SUTHERLAND d/b/a  
LIBERTY MARKETING COMPANY. )

Defendant. )

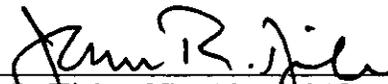
Case No. 98 CV 0782 (M) ✓

**ENTERED ON DOCKET**  
**DATE AUG 31 1999**

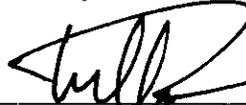
STIPULATION FOR DISMISSAL

COME NOW the parties, Geo-Graphics, Inc., and H. A. Fuller-Sutherland d/b/a Liberty Marketing, and jointly request that the Court dismiss the above-captioned case without prejudice pursuant to the settlement agreement entered into by and between the parties on August 17, 1999.

Respectfully submitted,



James R. Hicks, OBA No. 11345  
Morrel, West, Saffa, Craig & Hicks, Inc.  
5310 East 31st Street, Suite 1100  
Tulsa, Oklahoma 74135-5014  
(918) 664-0800 Fax 663-1383  
E-mail: jim@law-office.com  
Attorney for Plaintiff



Timothy E. McCormick, OBA No. 5920  
McCormick, Schoenenberger & Davis, P.A.  
1441 South Carson Avenue  
Tulsa, Oklahoma 74119  
(918) 592-3655 Fax 582-3657  
Attorney for Defendant

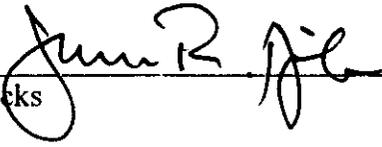
DIB c/s

13

CERTIFICATE OF MAILING

This is to certify that on this 30 day of August, 1999, a true, correct and exact copy of the above and foregoing instrument was mailed via regular United States Mail with proper postage thereon fully prepaid to:

Timothy E. McCormick  
McCormick, Schoenenberger & Davis, P.A.  
1441 South Carson Avenue  
Tulsa, Oklahoma 74119  
Attorney for H. A. Fuller-Sutherland d/b/a  
Liberty Marketing Company, Defendant

  
\_\_\_\_\_  
James R. Hicks

\\sharon\geo\18\pleading012

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ERIC E. PERKINS, )  
SSN: 445-70-0972, )

Plaintiff, )

v. )

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

Defendant. )

Case No. 98-CV-0380-EA

ENTERED ON DOCKET

DATE **AUG 31 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 30th day of August 1999.

*Claire V Eagan*

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**AUG 30 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ERIC E. PERKINS,** )  
**SSN: 445-70-0972,** )

**Plaintiff,** )

**v.** )

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

**Defendant.** )

**Case No. 98-CV-0380-EA**

ENTERED ON DOCKET

DATE **AUG 31 1999**

**ORDER**

On August 30, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**Procedural History**

On April 10, 1995, claimant applied for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge Leslie S. Hauger, Jr. (ALJ) was held December 4, 1996, in Tulsa, Oklahoma. By decision dated December 16, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On March 18, 1998, 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.

Claimant previously applied for benefits on December 12, 1991. On October 19, 1992, the ALJ (Stephen C. Calvarese) found that claimant was entitled to a closed period of disability from December 1, 1990, to June 22, 1992. The Appeals Council denied review of that decision on June 26, 1993. Claimant did not further appeal it to this Court.

#### Claimant's Background

Claimant was born on April 8, 1961, and was 35 years old at the time of the second administrative hearing in this matter. He has a high school education and one semester of college education. Claimant has worked as a pipeliner and gauger. Claimant alleges an inability to work beginning December 1, 1990, due to back problems, leg problems, ankle problems, neck problems, headaches, foot numbness, side effect from medication, pain and limited mobility. (Complaint, Docket # 1, at 2.) However, the relevant period begins on October 20, 1992, the day following ALJ Calvarese's opinion. Claimant injured his back on the job in July or August 1990. He subsequently had two lumbar spine surgeries to repair herniated discs (February 1991 and December 1991) and one surgery to remove the hardware from his back (January 1996). He claims to suffer from chronic headaches and neck pain. He now claims in his brief that he also suffers from depression, although he did not make that claim in his application, his disability report, his request for reconsideration, or his complaint.

#### The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of light work,

reduced by claimant's exertional impairments of back pain and headaches. He also found that no additional nonexertional impairments further reduced claimant's light work base. The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that claimant was not disabled under the Social Security Act at any time through the date of the decision. The ALJ did not ask the vocational expert any questions about claimant's job as a gauger (R. 47); he only asked the exertional and skill level of claimant's past relevant work as a pipeliner, which the vocational expert testified was semi-skilled and heavy exertion. (R. 447-48) Instead, the ALJ relied on 202.21 of the grids. 20 C.F.R. Pt. 404, Subpt. P, App. 2. (R. 22-23)

#### Issues

Claimant asserts as error that:

(1) the ALJ failed to demonstrate that he considered the medical evidence (specifically, claimant discusses the reports of Drs. Swyden, Folz, Connor, Cattaneo, Hayes, Sibley, and Clevenger) regarding claimant's impairments as required by law; and

(2) the ALJ's findings that claimant had no significant nonexertional impairments (specifically, claimant references his headaches, memory loss, depression, and chronic pain syndrome) and could perform the prolonged standing required of light work are not supported by substantial evidence.

#### Applicable Law

Light work involves lifting no more than 20 pounds at a time with *frequent* lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in

this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. §§ 404.1567(b), 416.967(b).

The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

A treating physician's opinion is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

The ALJ is required to "evaluate every medical opinion" he receives, 20 C.F.R. § 404.1527(d), and to "consider all relevant medical evidence of record in reaching a conclusion as to disability," Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989), even though he is not required to discuss every piece of evidence. "Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996) (citations omitted).

The Court notes that the ALJ recited the boilerplate language (R. 20) sharply criticized in Barnes v. Apfel, Case No. 98-5156, 1999 WL 559846, \*1 n.1 (10th Cir. Aug. 2, 1999)

(unpublished):

It is also indicated by what appears to be boilerplate language that the ALJ carefully reviewed all of the medical evidence except those exhibits omitted because they “relate to a time not covered by the claim, illegibility, duplicity, different physicians reporting the same diagnoses, physician duplication of hospitalization records, failure to state a diagnosis, statement of the claimant’s complaints without a diagnosis, prescription of medication only, etc.” Appellant’s App. at 21. This kind of general disclaimer does not excuse an ALJ from careful consideration of all the relevant evidence and from linking findings to specific evidence. See Huston v. Bowen, 838 F.2d 1125, 1133 (10th Cir. 1988) Further, because the ALJ does not identify which exhibits fall within the parameters of this list, we cannot tell which exhibits he omitted. This failure may itself be grounds for reversal. See Baker v. Bowen, 886 F.2d 289, 291 (10th Cir. 1989) Indeed, actual reliance on the boilerplate could itself result in reversal, since certain of the ALJ’s stated criteria for omitting consideration of medical exhibits--such as the failure of a physician to state a diagnosis--contradict an ALJ’s duty to consider all relevant medical evidence, see id., 20 C.F.R. § 404.1527(d). This is especially true where, as here, the ALJ relies on a paucity or lack of complaints to treating sources on the record to reject claimant’s allegations of disabling pain.

Id., at \*1 n.1.

#### Findings

In his December 17, 1996 decision, the ALJ recites testimony from the administrative hearing of December 4, 1996, and he points to various medical evidence to support his decision. These include reports by Drs. Clevenger, Halford, Hayes, Cattaneo, and other references to rehabilitation and tests. He does not mention the reports from Drs. Swyden, Connor or Sibley. He performed a perfunctory pain/credibility analysis purportedly pursuant to Luna v. Bowen and the criteria at 20 C.F.R. §§ 404.1529, 416.929, and he assessed claimant to have diminished credibility. He stated that “claimant is not credible because his pain medication is not for severe pain; he can

take care of himself; some of his physicians indicated that he would be better if he were not receiving workers [sic] compensation; and he was comfortable during the hearing.” (R. 21).

The ALJ’s findings are not supported by substantial evidence. As the claimant argues, the ALJ did not discuss uncontroverted evidence he chose not to rely upon, or the significantly probative evidence he rejects. The evidence shows that claimant took numerous medications for severe pain, and he stopped taking them when they began to cause serious gastrointestinal problems or when they failed to provide any relief. The reports from Drs. Swyden, Connor and Sibley indicate that claimant suffered from severe headaches, pain in his neck, back and leg which failed to improve significantly, on a sustained basis, with various treatments.

The ALJ’s reliance on the reports of some doctors is selective and misleading. For example, the ALJ does not discuss Dr. Folz’ diagnosis of chronic pain syndrome or his treatment of claimant for severe headaches and neck pain. (R. 315-27, 334) He ignored the reports from Dr. Cattaneo regarding the nature and severity of claimant’s headaches. (R. 355-60) He mischaracterized the findings of Dr. Clevenger, who found that claimant’s back pain had markedly diminished -- not his headaches. (R. 290-91) He also states that Dr. Hayes did not report significant headaches. This is not true. Dr. Hayes reported “bad,” “constant,” “horrible” headaches for which he prescribed treatment and considered referral. (R. 379-80) Significantly, these mischaracterizations are the only evidence to which the ALJ refers before he finds that claimant’s headaches or other pain did not impose severe nonexertional impairments that would further reduce claimant’s light work base.

Given the ALJ’s error regarding claimant’s nonexertional impairments, he was not justified in relying on the grids to find that claimant was not disabled. See 20 C.F.R. Pt. 404, Subpt. P, App. 2, §200. See, e.g. Trimiar v. Sullivan, 966 F.2d 1326, 1333 (10th Cir. 1992). Since this matter is

remanded for considerations of the entire record regarding claimant's exertional and nonexertional impairments, the Court declines the address claimant's remaining arguments regarding his memory loss, his depression, and whether he could perform the prolonged standing required of light work.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. **IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. 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).

Dated this 30th day of August, 1999.

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

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

NATIONAL-OILWELL, L.P., a Delaware )  
Limited Partnership, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
INTERFAB, LTD., an Oklahoma Corporation )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE AUG 31 1999

Case No. 98-CV-425-K(E)

**FILED**  
IN OPEN COURT

AUG 30 1999

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

AGREED JUDGMENT

The Plaintiff National-Oilwell, L.P. a Delaware Limited Partnership, having filed its Complaint herein on June 17, 1998 and InterFab, Ltd., an Oklahoma Corporation, having filed its counterclaim against National-Oilwell have agreed upon a basis for settlement of this action including the entry of this Consent Judgment pursuant to this Court's Order of June 8, 1999 for partial summary judgment in favor of National-Oilwell, L.P. and against InterFab, Ltd.

Judgment is hereby entered in favor of National-Oilwell, L.P. in the amount of \$300,000 on its claims against Defendant InterFab, L.P.

Judgment is hereby entered in favor of National-Oilwell, L.P. and against InterFab, Ltd. on InterFab, Ltd.'s counterclaim against National-Oilwell, L.P. InterFab, Ltd. shall take nothing of its claim.

Each party is to bear its respective costs and attorneys fees.

DATED this 30 day of August, 1999.



Honorable Terry Kern  
Chief Judge, United States District Court  
Northern District of Oklahoma

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

TY INC., )  
a Delaware Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
STEPHEN A. MOSS, an individual, )  
d/b/a CLEARLY BETTER PRODUCTS, INC., )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE AUG 31 1999

Case No. 99-CV-428-H(J) ✓  
Judge Sven Erik Holmes

**FILED**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**CONSENT JUDGMENT**

Plaintiff, Ty Inc. ("Ty"), filed a Complaint in this action on May 5, 1999, against Stephen A. Moss, doing business as Clearly Better Products, Inc. ("Moss"), to prevent the unlawful use of Ty's BEANIE BABIES, BEANIE BABY, BEANIES, BEANIE, and TY trademarks. Ty and Moss have stipulated to the following findings of fact and conclusions of law, and consent to the entry of this Consent Judgment.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

**I. FINDINGS OF FACT**

1. Ty is the creator of numerous, extraordinarily successful plush toy products, including BEANIE BABIES, BEANIE BUDDIES, TEENIE BEANIE BABIES, PILLOW PALS, and ATTIC TREASURES plush toy products. Ty markets its plush toy products throughout the world and sells them through authorized dealers. Since their introduction in 1994, Ty's plush toy products have proven to be extremely popular throughout the world.

2. In connection with the marketing and sale of its plush toy products, Ty has established a web site on the Internet that can be accessed through several uniform resource locators ("URLs"), including WWW.BEANIEBABIES.COM and WWW.TY.COM.

3. Ty's web site has rapidly become one of the most popular sites on the Internet, receiving nearly 3 billion visits in the past two years.

4. In connection with the marketing and sale of its plush toy products, Ty uses several trademarks, including BEANIE BABIES, BEANIE BABY, BEANIE BUDDIES, BEANIE BUDDY, BEANIES, and BEANIE ("the BEANIE marks"), as well as the mark TY. Ty has obtained a federal registration from the United States Patent and Trademark Office for the mark BEANIE BABIES (Reg. No. 2,049,196) for use with plush toys. These marks are valid, subsisting, and owned by Ty.

5. Ty has sold more than one billion dollars of plush toy products under or in connection with its BEANIE marks, and has spent millions of dollars marketing its plush toy products under or in connection with these marks, including hundreds of thousands of dollars developing and maintaining its web site.

6. Long prior to the acts of Defendant complained of herein, and by virtue of Ty's extensive marketing and sale of its plush toy products, Ty's BEANIE marks have become extremely well known, acquired additional distinctiveness, and have come to represent an extremely valuable goodwill owned by Ty.

7. Defendant has obtained a registration from Network Solutions Inc. for the domain name CLEARLYBEANIE.COM. This Internet domain name is accessible to Internet users in the Northern District of Oklahoma and throughout the world.

8. This domain name directs a consumer's Internet browser to Defendant's web site (referred to in this complaint as "the CBP Web Site"). At the CBP Web Site, Defendant has sold display cases and devices for use in displaying Ty's BEANIE BABIES products.

9. Defendant obtained the domain name registration for CLEARLYBEANIE.COM with full knowledge of Ty's long prior use and ownership of its BEANIE marks, and with the intention of generating Internet traffic to its web site and sales of its infringing products, thereby gaining a free ride on the goodwill established in the extraordinary popularity of Ty and Ty's own web site. Ty requested that Defendant cease and desist from its use of Ty's BEANIE mark.

10. After initially agreeing to Ty's demands, Defendant proceeded to place its inventory for sale on the Internet auction site eBay. These items, sold under the names "BEANIE BOXES" and "BEANIE DISPLAYS," were offered to Internet users in the Northern District of Oklahoma and throughout the world.

11. Defendant's CBP Web Site and "BEANIE" products are highly damaging to Ty, in that they are likely to cause confusion, mistake, or deception in that people are likely to believe that Defendant's business is connected with, or sanctioned by, Ty's business, or a business legitimately connected with, sponsored by, or approved by Ty. In addition, Defendant's use of Ty's trademark will dilute and tarnish Ty's trademarks and reputation.

## **II. CONCLUSIONS OF LAW**

### **A. TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

1. To establish trademark infringement and unfair competition under federal law, Ty must show that it has a valid and protectable trademark, that it has priority over Moss's use, and that there is a likelihood of confusion. Ty has met its burden on each of these elements. First, the

BEANIE Marks are clearly valid and protectable. The BEANIE BABIES mark has been registered on the principal register of the United States Patent and Trademark Office. This registration is considered to be *prima facie* evidence of the validity of the mark, and the registrant's right to use the mark. 15 U.S.C. §§ 1057(b) and 1115(a). Moreover, Ty has sold in excess of one billion dollars of plush toys under, or in connection with, the BEANIE Marks, and has spent millions of dollars advertising its plush toys in connection with these marks. As a result of its sales and marketing efforts, Ty has established a valid, protectable, and extremely valuable goodwill in these marks.

2. Ty also was the first to use the marks. It first used its BEANIE BABIES mark at least as early as 1993. Moss did not register the domain name CLEARLYBEANIE.COM until at least April 10, 1998, and only later began using those domain names. As a result, Ty has clearly established prior use of the BEANIE Marks.

3. The likelihood of confusion also exists in this case. The Tenth Circuit has formulated a six factor test to evaluate the likelihood of confusion: (1) the degree of similarity between the plaintiff's and the defendant's marks, including the marks' appearance, pronunciation, suggestion, and manner of display; (2) the strength or weakness of the plaintiff's mark; (3) the intent of the alleged infringer in adopting its mark; (4) similarities and differences of the parties' goods, services and marketing strategies; (5) the degree of care likely to be exercised by purchasers of the goods or services involved; and (6) evidence of actual confusion, if any. *Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 554 (10th Cir. 1998).

4. In this case, the likelihood of confusion is high for the following five reasons. First, the level of sales and marketing by Ty demonstrate that the BEANIE marks are very strong.

Second, the domain name CLEARLYBEANIE.COM is merely an extension of the BEANIE Marks. Third, Ty uses its marks for Internet services, as does Defendant. Fourth, many consumers, especially children, are unlikely to exercise a high degree of care when searching for an Internet web site. As a result, many consumers will naturally conclude that Moss's domain name, and corresponding web site, are owned, or authorized, by Ty because they are merely extensions of the BEANIE Marks. Lastly, Moss registered his domain names with the intent to trade upon the extraordinary popularity and goodwill of the BEANIE Marks and its BEANIEBABIES.COM web site.

5. For the foregoing reasons, the likelihood of confusion is high, and Moss has thus infringed Ty's trademarks and unfairly competed with Ty. *See, e.g., Cardservice Int'l, Inc. v. McGee*, 950 F. Supp. 737, 741 (E.D. Va. 1997) (CARDSERVICE.COM found to violate CARDSERVICE mark) and *Lozano Enterprises v. La Opinion Publishing Co.*, 44 U.S.P.Q.2d 1764 (C.D. Cal. 1997) (LAOPINION.COM, LAOPINION-SA.COM, LAOPINION-LOSANGELES.COM, and LAOPINION.NET found to violate LA OPINION mark).

#### B. TRADEMARK DILUTION

6. Defendant, by its actions, has diluted the BEANIE Marks under the Federal Dilution Act, 15 U.S.C. § 1125(c). To establish a violation under the Federal Dilution Act, Ty must show that: (1) it owns a mark; (2) its mark is famous; (3) the Defendant's use began after the mark became famous; (4) the Defendant made a commercial use of the mark in commerce; and, (5) the Defendant's use of the mark dilutes the quality of the mark by diminishing the capacity of the mark to identify and distinguish goods and services. 15 U.S.C. § 1125(c); *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1238 (N.D. Ill. 1996).

7. Ty has established the first three elements of this test as set forth in the Findings of Fact. Ty has also met its burden with respect to the “commercial use” requirement of the dilution test. Moss registered the domain name CLEARLYBEANIE.COM with the intent to profit from, and trade upon, the extraordinary popularity and goodwill of the BEANIE Marks. In addition, Moss used the BEANIE Marks to promote his sale of unauthorized, unlicensed BEANIE BABIES products.

8. Defendants’ use of the Internet alone is sufficient to meet the liberal “in commerce” requirement of the Lanham Act. *See, Intermatic Inc.*, 947 F. Supp. at 1239-40.

9. Ty has also shown that the Moss has diluted the BEANIE Marks. First, by registering the domain name CLEARLYBEANIE.COM, Moss has lessened Ty’s ability to identify and distinguish its goods and services by way of the Internet. *See Intermatic Inc.*, 947 F.Supp. at 1240. In addition, by using the BEANIE Marks in its Internet site, Moss has diminished the distinctiveness of the BEANIE Marks. *See Intermatic Inc.*, 947 F. Supp. at 1240-41. For the foregoing reasons, Moss has diluted Ty’s valuable trademark rights.

### **III. ORDER**

1. This Court has jurisdiction over the subject matter of this action and the parties.

2. Defendant Moss, his heirs, executors, administrators, agents, representatives, successors, assigns and anyone claiming any interest through him, are hereinafter permanently enjoined and restrained from:

- a. Using the BEANIE Marks or any name, domain name, or mark which is comprised in whole or in part of the term BEANIE BABIES, BEANIE BABY, BEANIES, BEANIE or any term confusingly similar thereto;

- b. Doing any act or thing likely to confuse, mislead, or deceive others into believing that Moss's goods or services emanate from, are connected with, or are sponsored or approved by, Ty; and,
- c. Assisting, aiding or abetting any person to engage in any of the activities prohibited in paragraphs 2(a) and 2(b) above.

3. In the event of any violation of paragraph 2 of this Consent Judgment, Moss acknowledges that Ty will not have an adequate remedy at law and that Ty shall be entitled to immediate injunctive relief, in addition to any other remedies Ty may have. Moss agrees to submit to the jurisdiction of the United States District Court for the Northern District of Oklahoma. Ty also shall be entitled to recover its reasonable attorneys' fees and costs incurred to prosecute any violations of paragraph 2.

4. Defendant Moss shall permanently remove from the Internet its CLEARLYBEANIE.COM domain name and corresponding web site.

5. This Consent Judgment constitutes the entire agreement between Moss and Ty and supersedes any prior agreements or understandings between them, whether written or verbal, and may not be modified in any manner, except by a writing signed by the parties or their duly authorized representatives.

6. This Consent Judgment shall bind and benefit Moss, his heirs, executors, administrators, agents, representatives, successors, assigns and anyone claiming any interest through him.

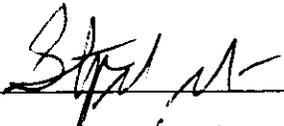
7. No appeal shall be taken from this Consent Judgment.

8. This Court shall retain jurisdiction over this action to the extent necessary to insure full compliance with all obligations imposed by this Consent Judgment.

9. The Parties acknowledge that they have full knowledge of the terms, conditions and effects of this Consent Judgment.

APPROVED AND CONSENTED TO BY:

STEPHEN A. MOSS, doing business as CLEARLY BETTER PRODUCTS, INC.

BY: 

PRINTED: Stephen A Moss

ITS: \_\_\_\_\_

DATED: 7-16-99

TY INC.

BY: 

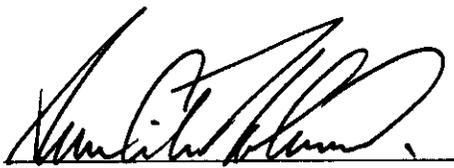
PRINTED: SCOTT E. ROGERS

ITS: GENERAL COUNSEL

DATED: 8/11/99

SO ORDERED:

Dated: AUGUST 30, 1999



Hon. Sven Erik Holmes  
United States District Judge

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

KATHLEEN DONICA, )  
)  
Plaintiff, )  
)  
vs. ) Case No. 98-CV-0439H(M)  
)  
HEALTHSOUTH CORPORATION, a )  
Delaware corporation, )  
)  
Defendant. )

**FILED**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

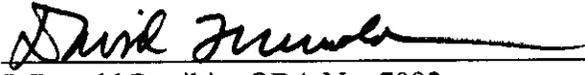
ENTERED ON DOCKET

DATE AUG 30 1999

**STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF SHELLEY J. MARSHALL**

Opt-In Plaintiff Shelley J. Marshall ("Marshall") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Marshall's claims against HealthSouth in this matter, and Marshall by this dismissal, effectively withdraws her name from the class in this case.

Respectfully submitted,



J. Ronald Petrikin, OBA No. 7092  
David H. Herrold, OBA No. 17053  
CONNER & WINTERS, P.C.  
15 East Fifth Street, Ste. 3700  
Tulsa, Oklahoma 74103-4344  
(918) 586-5711; (918) 586-8547 fax

-and-

Donald E. Herrold, OBA No. 4140  
Jack N. Herrold, OBA No. 4141  
HERROLD, HERROLD, SUTTON & DAVIS, P.A.  
2250 East 73rd Street, Ste. 600  
Tulsa, Oklahoma 74136  
(918) 491-9559; (918) 491-7337 fax

Attorneys for the Plaintiff, KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

-AND-

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L. Traywick Duffie, Admitted *Pro Hac Vice*  
W. Christopher Arbery, Admitted *Pro Hac Vice*  
HUNTON & WILLIAMS  
4100 NationsBank Plaza  
600 Peachtree Street, N.E.  
Atlanta, Georgia 30308  
(404) 888-4000; (404) 888-4190 *fax*

-and-

Sarah Jane McKinney, OBA No. 17099  
HALL, ESTILL, HARDWICK, GABLE, GOLDEN  
& NELSON, P.C.  
320 South Boston Avenue, Suite 400  
Tulsa, Oklahoma 74103  
(918) 594-0439; (918) 594-0505 *fax*

Attorneys for the Defendant,  
HEALTHSOUTH CORPORATION

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

**FILED**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHN WINTON and )  
EVELYN WINTON )  
Plaintiffs, )

v. )

BOARD OF COUNTY COMMISSIONERS )  
OF TULSA COUNTY, OKLAHOMA, et al; )  
Defendants. )

Case No. 97-CV-841-J

ENTERED IN DOCKET  
DATE **AUG 30 1999**

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE  
OF DEFENDANT JACK PUTMAN**

Pursuant to Fed.R.Civ.P. 41(a), the Plaintiffs, by and through their attorneys, and the Defendants, by and through their attorneys, jointly stipulate that Defendant Jack Putman is hereby dismissed as party to this action with prejudice, with each party to bear their own costs and attorneys fees in connection with plaintiffs' action against said defendant.

Dated this 30<sup>th</sup> day of August, 1999.

PLAINTIFFS JOHN WINTON  
& EVELYN WINTON

By: [Signature]  
D. Gregory Bledsoe  
Steven A. Novick  
1717 S. Cheyenne Ave  
Tulsa, OK 74119-4611  
918-599-8123  
Attorneys for Plaintiffs

DEFENDANTS BOARD OF COUNTY  
COMMISSIONERS OF TULSA COUNTY,  
STANLEY GLANZ, JACK PUTMAN

TIM HARRIS  
DISTRICT ATTORNEY  
By: [Signature]  
Linda K. Greaves,  
Assistant District Attorney  
406 Tulsa County Courthouse  
Tulsa, Oklahoma 74103  
918-596-4859  
Attorneys for Defendants

MT

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C/SF

**CERTIFICATE OF MAILING**

I hereby certify that on the 30<sup>th</sup> day of August, 1999, I mailed a true, correct and exact copy of the above and foregoing to:

D. Gregory Bledsoe, Esq.  
Steven A. Novick, Esq.  
1717 S. Cheyenne Avenue  
Tulsa, OK 74119

Bobby L. Latham, Jr. Esq.  
5100 E. Skelly Dr.  
1050 Meridian Tower  
Tulsa, OK 74135  
Attorney for Defendant Wexford

  
Linda K. Greaves



liable. Defendants answered in the arbitration proceeding. Plaintiff's initial counsel then withdraw in the arbitration proceeding. On April 23, 1999, plaintiff's present counsel entered an appearance and filed a notice to hold arbitration in abeyance<sup>1</sup>.

On April 23, 1999, plaintiff (by and through present counsel) filed a civil action in the District Court for Tulsa County. The allegations of the petition are very similar to those made in the Statement of Claims filed with the NASD. On May 28, 1999, defendants removed the action to this Court. Both defendants ultimately filed motions to stay these proceedings and compel arbitration, to which plaintiff objects.

Plaintiff argues that the Court should ignore the arbitration provisions in the client account agreements because plaintiff has raised allegations of fraud and forgery in the obtaining of plaintiff's signature. It is true that if there is a well-founded claim that arbitration agreements resulted from fraud or coercion, a party may not be compelled to arbitrate its claims. Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110, 1118 (3<sup>rd</sup> Cir.1993). However, plaintiff nowhere asserts that every single client account agreement between her and defendants contains a forged or fraudulently-obtained signature. Accordingly, the agreement to arbitrate is binding and mandatory. 9 U.S.C. §2.

Defendants also make a secondary argument, which is that the execution by plaintiff of the Uniform Submission Agreement represents her waiver of civil litigation. Plaintiff "does not maintain that this document is forged and acknowledges her signature is genuine." (Plaintiff's response to Everen's motion at 2-3). However, she alleges that through discovery in the arbitration proceeding she learned more of the extent of the fraud and forgery allegedly performed by Robert Sanditen and plaintiff now desires to proceed in the civil courts. Such authority as exists supports

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<sup>1</sup>The pleadings do not reflect if the NASD has ruled on that request.

the defendants' position that a Uniform Submission Agreement is binding upon a signing party to submit all issues to arbitration. See First Montauk Securities Corp. v. Menter, 26 F.Supp.2d 688 (S.D.N.Y.1998). Cf. Nghiem v. NEC Electronic, 25 F.3d 1437, 1440 (9<sup>th</sup> Cir.), cert. denied, 513 U.S. 1044 (1994) ("Once a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority.")

It is the Order of the Court that the motion of the defendant Everen Securities (#2) and the motion of the defendant Shearson Smith Barney (#8) to compel arbitration and stay proceedings are hereby GRANTED. The parties are directed to submit to arbitration pursuant to their agreement and the Federal Arbitration Act. The parties are to advise the Court when arbitration is completed and whether further action by this Court is necessary. The Court Clerk is directed to administratively close this case pending further Order of the Court.

ORDERED THIS 30 DAY OF AUGUST, 1999.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE



liable. Defendants answered in the arbitration proceeding. Plaintiff's initial counsel then withdraw in the arbitration proceeding. On April 23, 1999, plaintiff's present counsel entered an appearance and filed a notice to hold arbitration in abeyance<sup>1</sup>.

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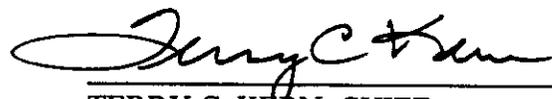
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It is the Order of the Court that the motion of the defendant Everen Securities (#2) and the motion of the defendant Shearson Smith Barney (#7) to compel arbitration and stay proceedings are hereby GRANTED. The parties are directed to submit to arbitration pursuant to their agreement and the Federal Arbitration Act. The parties are to advise the Court when arbitration is completed and whether further action by this Court is necessary. The Court Clerk is directed to administratively close this case pending further Order of the Court.

ORDERED THIS 30 DAY OF AUGUST, 1999.



TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 27 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JEFFREY M. WEISER, PAUL E. )  
JORNAYVAZ and HOWARD W. )  
MARTIN, )

Plaintiffs, )

v. )

STEPHEN J. HEYMAN, STEPHEN E. )  
JACKSON, individually and as Trustee )  
of the Stephen E. Jackson Trust, )

Defendants. )

Case No. CV-95-854-BU ✓

ENTERED ON DOCKET  
DATE AUG 30 1999

**STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE  
OF HOWARD W. MARTIN**

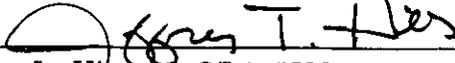
Plaintiff Howard W. Martin ("Martin"), and Defendants, Stephen J. Heyman, Stephen E. Jackson, individually and as Trustee of the Stephen E. Jackson Trust, stipulate that pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, all claims asserted by Martin against the Defendants in the above-captioned action are hereby dismissed with prejudice. Each party shall bear its own costs and expenses including attorney fees.

Dated: August 27, 1999.

By: *Donald L. Kahl*  
Donald L. Kahl, OBA # 4855  
T. Lane Wilson, OBA # 16343  
HALL, ESTILL, HARDWICK,  
GABLE & NELSON  
320 S. Boston, Suite 400  
Tulsa, Oklahoma 74103-3708  
(918) 594-0400

ATTORNEYS FOR PLAINTIFF  
HOWARD W. MARTIN

015

By:  \_\_\_\_\_

James L. Kincaid, OBA #5021

Jeffrey T. Hills, OBA #14743

**CROWE & DUNLEVY**

A Professional Corporation

321 South Boston

500 Kennedy Building

Tulsa, Oklahoma 74103

(918) 592-9800

**ATTORNEYS FOR DEFENDANTS**

**STEPHEN J. HEYMAN and STEPHEN**

**E. JACKSON, individually and as Trustee of  
the Stephen E. Jackson Trust**

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**AUG 30 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**HERI K. CARROLL,  
SSN: 448-48-0870,**

**Plaintiff,**

**v.**

**KENNETH S. APFEL, Commissioner,  
Social Security Administration,**

**Defendant.**

**Case No. 98-CV-0263-EA**

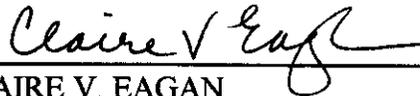
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**DATE AUG 30 1999**

**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 30th day of August 1999.



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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 30 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**HERI K. CARROLL,**  
SSN: 448-48-0870,

Plaintiff,

v.

**KENNETH S. APFEL, Commissioner,**  
Social Security Administration,

Defendant.

Case No. 98-CV-0263-EA

ENTERED ON DOCKET

DATE AUG 30 1999

**ORDER**

On August 30, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**Procedural History**

On February 25, 1994, 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, and on reconsideration. A hearing before Administrative Law Judge R. J. Payne (ALJ) was held February 21, 1996, in Tulsa, Oklahoma. By decision dated March 27, 1996, the ALJ found that claimant was

not disabled at any time through the date of the decision. On January 30, 1998, 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's Background

Claimant was born on June 22, 1948, and was 47 years old at the time of the administrative hearing in this matter. He has a high school education. Claimant worked as a cook, janitor, truck driver and lawn maintenance worker. Claimant alleges an inability to work beginning January 6, 1994, due to back problems, a crushed left hand, shoulder problems, hip problems, pain, and limited mobility resulting from various injuries.

#### The ALJ's Decision

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work reduced by his inability to perform work that requires repetitive pushing or pulling of arm controls with his left arm; repetitive pushing or pulling of leg controls; repetitive overhead reaching with the left arm; more than occasional reaching with the left arm; gripping of over 10 pounds with the left hand; fine manipulations of the left hand; exposure to unprotected heights; more than occasional stooping, crouching, bending, or climbing stairs; or work where he could not alternately sit or stand every hour. (R. 29) The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

### Issues

Claimant asserts as error that the ALJ:

- (1) failed to give controlling weight to the opinion of the treating physician;
- (2) failed to meet his step five burden to support the RFC with substantial evidence; and
- (3) failed to consider claimant's impairments in combination.

### Applicable Law

The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

A treating physician's opinion is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Sedentary work involves lifting no more than 10 pounds at a time and *occasionally* lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying

out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. 20 C.F.R. §§ 404.1567(a), 416.967(a).

Light work involves lifting no more than 20 pounds at a time with *frequent* lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. §§ 404.1567(b), 416.967(b).

The burden of proof in disability cases shifts to the Commissioner at step five of the five-step evaluation process. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988) (burden at step five is on Commissioner). The RFC determination is initially part of the step four evaluation and, thus, is made before the burden of proof shifts at step five. Shaffer v. Apfel, No. 97-5174, 1998 WL 314376 (10th Cir. June 4, 1998). At step four, the claimant must establish that he or she cannot perform his past relevant work. At step five, the Commissioner has to show that the claimant can perform other work that exists in the national economy. Miller v. Chater, 99 F.3d 972, 976 (10th Cir. 1996); Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993).

In other words, it is the Commissioner's burden to prove that the claimant can work at a lower RFC level than his or her past relevant work. Thompson, 987 F.2d at 1491. The ALJ cannot rely on the absence of evidence to support a finding that claimant retains the RFC to do work at the claimant's RFC level. Miller, 99 F.3d at 976; Thompson, 987 F.2d at 1487; see also Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) ("Once the claimant makes a prima facie showing of disability that prevents his engaging in his prior work activity, the burden of going forward shifts

to the [Commissioner], who must show that the claimant retains the capacity to perform an alternative work activity and that this specific type of job exists in the national economy.")

When a claimant has one or more severe impairments, the Social Security Disability Reform Act of 1984 requires the Secretary to consider the combined effect of the impairments in making a disability determination. 42 U.S.C. § 423(d)(2)(C); Campbell v. Bowen, 822 F.2d 1518, 1521 (10th Cir. 1987).

### Findings

Claimant's treating physician, Kenneth C. Duncan, M.D., opined that claimant could not sit, stand, or walk for more than 30 minutes in an 8-hour day; could occasionally lift up to 20 pounds, could occasionally carry up to 10 pounds, could never bend, squat, crawl, climb or reach; could not be exposed to unprotected heights or marked changes in temperature; or be around moving machinery. (R. 224-26)

The ALJ specifically requested an RFC from Dr. Duncan, the treating physician. (R. 305) Although the ALJ stated that he rejected the RFC findings of Dr. Duncan because he did not believe they were supported by objective medical evidence, he essentially incorporated some of Dr. Duncan's findings in his own RFC assessment. He used Dr. Duncan's August 22, 1995 report that claimant had limited motion of his left shoulder and lumbar spine (see R. 23), and he used Dr. Duncan's assessment that claimant could occasionally lift up to 20 pounds (not expressly stated in the decision). He rejected Dr. Duncan's opinion that claimant would eventually develop a frozen shoulder because that is not evidence that claimant presently has a frozen shoulder. (R. 26, 196, 197, 225) The ALJ also found two "inconsistencies," but these do not appear to arise from valid observations. A doctor's encouragement to exercise and walk does not necessarily mean that

claimant can walk for more than 30 minutes. (R. 203) Further, the fact that a claimant can walk 3 or 4 blocks does not mean he can walk for 30 minutes. (R. 276) While the ALJ was not required to give controlling weight to the opinion of the treating physician, his reasons for rejecting Dr. Duncan's opinion do not appear valid.

Claimant points out that the ALJ did not give "good cause" for not giving substantial weight to the treating physician's opinion. He rejected the opinion of Dr. Duncan, a specialist in neurology, because his opinion was "not supported by objective medical evidence." (R. 26) However, Dr. Duncan's assessment contains almost all of the objective evidence in the record for the relevant period. After the onset date of January 6, 1994, the only medical evidence other than the evidence from Dr. Duncan, is a report of a CT scan (R. 230), a report of a non-physician physical therapist (R. 208-10), and a consultative examiner's report (R. 114-18). The CT scan only dealt with the lumbar spine, not with claimant's hand or shoulder problems. In this instance, the ALJ erred by rejecting the treating physician's opinion because it did not agree with the consultative examiner's report.

Similarly, the ALJ relied upon the absence of evidence in an effort to support his RFC with substantial evidence. As claimant points out, the ALJ states that "[t]here is no evidence; however, that the claimant has a frozen shoulder." (R. 26) The ALJ made that statement to rebut Dr. Duncan's opinions, based on x-rays, that claimant's shoulder would ultimately develop a severely limited shoulder due to lack of motion and pain. (R. 197) The absence of evidence does not weigh against the claimant's position at step five; it weighs against the Commissioner's position because the Commissioner has the burden of proof. The evidence that the ALJ used to support his position were the consultative examiner's opinion and a vague description of the examination by Dr. Duncan, an

opinion that he ultimately rejected. The ALJ's RFC assessment is inconsistent with the consultative examiner's opinion, on which the ALJ relied for his statement that claimant has essentially no use of his left hand. (R. 23) The consultative examiner did not complete an RFC; Dr. Duncan did complete one.

The ALJ appears to rely on the March 1995 report of the consultative examining physician, Dr. Varsha Sikka, M.D., who noted that claimant had tenderness in the lumbar spine, but no muscle spasm and straight leg raising was positive at 70 degrees. (R. 23, 115-16) The ALJ inferred, from Dr. Sikka's report, that "claimant had essentially no use of his left hand." Yet, the ALJ's RFC assessment only restricted use of claimant's left hand to "gripping of over 10 pounds with the left hand; fine manipulation of the left hand." (R. 23) The ALJ also referred to a 1974 report of claimant's orthopedic surgeon, Jerry Sisler, M.D., for the proposition that claimant's hand injury had not become worse over the years. (R. 25, 135, 141) Finally, the ALJ pointed out that claimant failed to keep some of his physical therapy appointments in 1995. (R. 25, 206) The ALJ did evaluate claimant's testimony in light of Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987) and Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

However, the ALJ failed to consider the claimant's neck, hip and leg impairments; relied on a consultative report of March 1995 which was before claimant's April 1995 car accident; rejected the treating physician's opinion based on alleged inconsistencies which are not necessarily inconsistencies; and ignored the treating physician's follow-up report in November 1995 regarding claimant's frozen shoulder. Thus, the ALJ's opinion regarding claimant's RFC is not supported by *substantial* evidence. The Court notes that Dr. Duncan's RFC assessment does not mandate a finding of disability. The ALJ's decision may ultimately turn out to be correct. Also, the ALJ's

opinion is contrary to law because the Act requires him to consider the combined effect of all impairments even those that are not severe standing alone. See 42 U.S.C. § 523(d)(2)(C); S.S.R. 96-8p. He failed to consider the neck, hip, and leg impairments. On remand, the ALJ should revise his questions to the vocational expert to reflect those impairments that are supported by substantial evidence in the record.

#### Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. The decision is **REVERSED** and **REMANDED**. 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).

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 30th day of August, 1999.

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



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**AUG 30 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**MARGARET WOODARD,**  
SSN: 446-52-7224,

**Plaintiff,**

v.

**KENNETH S. APFEL, Commissioner,**  
**Social Security Administration,**

**Defendant.**

**Case No. 98-CV-0085-EA**

ENTERED ON DOCKET  
DATE **AUG 30 1999**

**ORDER**

On August 30, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**Procedural History**

On October 10, 1995, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.). Claimant's application for benefits was denied in its entirety initially (November 30, 1995), and on reconsideration (May 6, 1996). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held December 6, 1996, in Tulsa, Oklahoma. By decision dated March 21, 1997, the ALJ found that claimant was not disabled at any time through the date of

the decision. On November 26, 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.

#### Claimant's Background

Claimant was born on May 23, 1950, and was 46 years old at the time of the administrative hearing in this matter. She has a high school education and one half semester of college. Claimant worked as a substitute teacher, a teacher's assistant, a stock clerk, a blue print machine operator, a file clerk, an assembly worker, a personnel record clerk, receptionist and outreach educator. Claimant alleges an inability to work beginning June 9, 1995, due to shoulder problems, neck problems, headaches, chest pain, right arm problems, leg problems, hand problems, problems with concentration, pain and limited mobility. Her problems and pain allegedly arise from on-the-job injuries in 1985 and 1989 resulting in chronic strain, recurrent bursitis, tendinitis, and/or fibrositis.

#### The ALJ's Decision

The ALJ made his decision at the fourth step of the sequential evaluation process. He found that claimant had a severe impairment consisting of a cervical strain, but that such impairment did not meet or equal any impairment or combination of impairments in the Listing of Impairments at 20 C.F.R. Pt. 404, Subpt. P, App. 1. He also found that claimant had the residual functional capacity (RFC) to perform work-related activities except for work involving lifting more than 10 pounds frequently and 20 pounds at a time with [no?] more than occasional overhead reaching with her right upper extremity. (R. 23, 27) He determined that claimant's past relevant work as a substitute teacher, teacher assistant, outreach educator, blueprint machine operator, file clerk, personnel record clerk, receptionist, and school clerical worker and switchboard operator did not require the performance

of work-related activities precluded by her RFC limitations, and that her impairment did not prevent her from performing her past relevant work. The ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

#### Issues

Claimant asserts as error that the ALJ failed to perform a proper Winfrey v. Chater analysis by

- (a) not giving the appropriate weight to the treating physician's opinion in developing the RFC at phase one;
- (b) not making any findings regarding physical or mental demands of claimant's past relevant work at phase two; and
- (c) delegating his fact-finding responsibilities to the vocational expert at phase three.

#### Applicable Law

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). At step four, a vocational expert's role is limited: the VE may supply information about the demands of claimant's past relevant work; however, the VE cannot perform the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. Id., at 1025.

The regulations provide that, although the final responsibility for determining the ultimate issue of disability is reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the Commissioner will give controlling weight to a treating physician's opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, id. §§ 404.1527(d)(2), 416.927(d)(2).

A treating physician's opinion is entitled to substantial weight unless good cause is shown for rejecting it. Goatcher v. United States Dep't of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

#### Findings

The ALJ relied upon the report of Douglas B. Kelly, M.D., who opined two weeks before the onset date that there were no objective findings to support claimant's physical complaints, and he found inconsistencies in her responses regarding her pain. (R. 23, 97-100) He also mentioned a

report by John Vosburgh, M.D. which indicated that “claimant called needing to reopen claim because of back (upper) pain. Patient will pick up copy of medical records to give to insurance company.” (R. 25, 105) He also noted that claimant indicated, in her disability report, the work restrictions established by Dr. Vosburgh. (R. 26, 80) He did not rely upon Dr. Vosburgh’s report *per se*. He also discounted the RFC assessment of claimant’s treating physician, Gary Davis, M.D., in its entirety. (R. 171-73) The ALJ was not required to rely upon Dr. Davis’ report if it was not well-supported by medically acceptable clinical and laboratory diagnostic evidence, and if it was inconsistent with other substantial evidence in the record. He explained that he disregarded Dr. Davis’ RFC assessment for those reasons. (R. 25-26) The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). While the “substantial evidence” to support the ALJ’s opinion is questionable, the weight given by the ALJ to the treating physician’s opinion in developing the RFC was not necessarily inappropriate.

However, the ALJ erred by not making the necessary findings regarding physical or mental demands of claimant’s past relevant work at phase two of his Winfrey analysis. The ALJ asked the VE to testify as to the demands of claimant’s past relevant work, and she gave him the skill and exertional levels required of each. (R. 263-64) The ALJ recites the VE’s testimony in this regard (R. 26), and merely concludes that some of the jobs listed as her past relevant work do not require the performance of work-related activities preclude by claimant’s limitations. (R. 27) A recitation of the skill and exertional levels does not constitute the function-by-function analysis contemplated by SSA 96-8p or otherwise meet the requirements of Winfrey.

The ALJ also recited the VE's testimony regarding whether claimant could perform her past relevant work, given her RFC. (R. 26, 264-65) This was error. Under Winfrey v. Chater, a vocational expert cannot perform the ALJ's fact-finding responsibilities regarding the claimant's past relevant work demands and the claimant's ability to perform past relevant work. 92 F.3d at 1025. The ALJ erred by delegating his fact-finding responsibilities to the vocational expert at phase three.

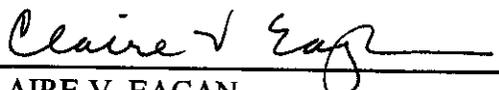
If the Commissioner "failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence." Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this 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).

#### Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. The decision is **REVERSED** and **REMANDED**.

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

Dated this 30th day of August, 1999.

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

**FILED**

**AUG 27 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JAMES EDWARD JELLEY, #246600, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 MIKE ADDISON, )  
 )  
 Respondent. )

Case No. 98-CV-607-B (E)

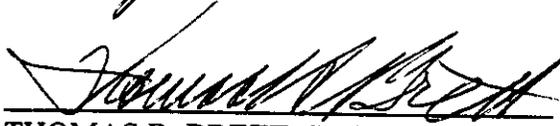
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**AUG 30 1999**  
DATE \_\_\_\_\_

**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 27<sup>th</sup> day of Aug., 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

AUG 27 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES EDWARD JELLEY, #246600, )  
)  
Petitioner, )  
)  
vs. )  
)  
MIKE ADDISON, )  
)  
Respondent. )

Case No. 98-CV-607-B (E)

**ENTERED ON DOCKET**  
**DATE AUG 30 1999**

**ORDER**

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus (Docket #5). Petitioner, a state inmate appearing *pro se*, has not filed a response to the motion to dismiss in spite of being afforded a second opportunity to submit a response (see March 4, 1999 Order (#7), directing Petitioner to file a response). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

***BACKGROUND***

On July 11, 1996, Petitioner was convicted in Craig County District Court after entering pleas of guilty to Trafficking in Illegal Drugs (Count I) and Failure to have a Tax Stamp for a Controlled Dangerous Substance (Count II) in Case No. CRF-95-33 and to Unlawful Delivery of a Controlled Dangerous Substance in Case No. CRF-95-32. Petitioner did not move to withdraw his pleas and did not otherwise perfect a direct appeal.

Respondent asserts that on March 12, 1998, Petitioner filed an application for post-conviction

8

relief in the state district court (see #6 at 2). On April 14, 1998, that court denied the requested relief (Id.). Petitioner appealed to the Oklahoma Court of Criminal Appeals where the denial of post-conviction relief was affirmed on June 30, 1998 (#6, Ex. B).

On July 31, 1998, Petitioner filed the instant petition for writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma (#1). On August 11, 1998, the petition was transferred to this Court.

### *ANALYSIS*

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(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 from filing by such State actions;

(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(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C),

and (D). Also, the limitations period is tolled or suspended during the pendency of a state application for post-conviction relief properly filed during the limitations period. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on July 21, 1996. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on July 21, 1996, and, absent a tolling event, a federal petition for writ of habeas corpus filed after July 21, 1997, would be untimely.

Although the limitations period is tolled while a state post-conviction proceeding, filed during the one-year period, is pending, see § 2244(d)(2), the post-conviction proceeding filed by Petitioner in the instant case does not toll the limitations period because it was not filed until March 12, 1998, almost eight months after the period expired on July 21, 1997. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). Therefore, Petitioner's petition, filed July 31, 1998, is clearly untimely.

Petitioner offers no explanation for his failure to file the instant petition for writ of habeas corpus within the one year limitations period. Finding no statutory or equitable basis for extending the limitations period, the Court concludes Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus dismissed with prejudice.

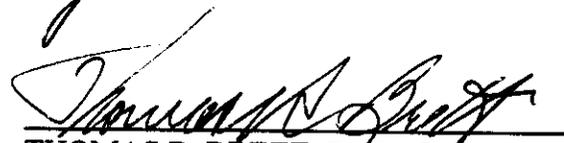
**CONCLUSION**

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

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

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 27<sup>th</sup> day of Aug., 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

MT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
AUG 27 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHN BARTON, an individual, and  
SWEET PEAS, INC., an Oklahoma  
corporation, dba SALAD ALLEY,

Plaintiffs,

v.

SOUPER SALAD, INC.,  
a Texas Corporation,

Defendant.

CASE NO. 98-CV-629E(E)

ENTERED ON DOCKET  
DATE AUG 30 1999

**STIPULATION OF DISMISSAL**

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his, its, her or their own costs, expenses, and attorney fees without assessment against any other party.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER  
& GABLE, P.L.L.C.

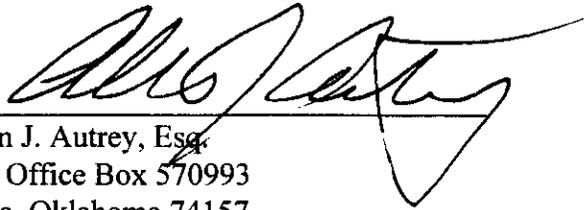
By:

  
WILLIAM S. LEACH, OBA #14892  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
(918) 582-1173 - PHONE  
(981) 592-3390 - FAX

Attorney for Defendant  
Souper Salad, Inc.

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Allen J. Autrey, Esq.  
Post Office Box 570993  
Tulsa, Oklahoma 74157  
**Attorney for Plaintiff**

0673\0084\pleadings\stip.prej

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

**F I L E D**

**AUG 27 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CURTIS JOHNSON,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

Case No. 98 CV 699 EA

**ENTERED ON DOCKET**

**DATE AUG 30 1999**

**ORDER OF DISMISSAL WITH PREJUDICE**

-----

THIS MATTER comes before the Court on the Joint Application of the parties hereto. The Court finds that all of the issues between the parties have been completely settled and compromised, and therefore dismisses the above-entitled cause of action with prejudice as to any future actions.

SO ORDERED this 27<sup>th</sup> day of August, 1999.

*Claire V. Egan*  
\_\_\_\_\_  
U.S. DISTRICT JUDGE  
MAGISTRATE

Prepared by:

JOHN A. GLADD    OBA #3398  
Attorney for Defendant  
2642 East 21<sup>st</sup> Street, Suite 150  
Tulsa, Oklahoma 74114-1739  
Phone: 918-744-5657 \* Fax: 918-742-1753

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

**FILED**

AUG 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MELVIN EARL AMES, )  
)  
Petitioner, )  
)  
vs. )  
)  
)  
EDWARD L. EVANS, )  
)  
Respondent. )

No. 95-C-1182-B (J)  
(Base File)

No. 96-C-477-B

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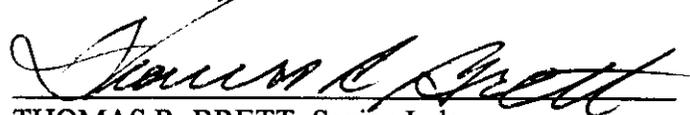
DATE AUG 27 1999

**ORDER**

By Order entered November 20, 1998 (#27), this Court directed the State of Oklahoma to assign new counsel to Petitioner and to grant him an out-of-time appeal. On August 25, 1999, the undersigned received a copy of the Oklahoma Court of Criminal Appeals's "Order Granting Appeal Out of Time," filed in that court on August 24, 1999. Because the State of Oklahoma has complied with the November 20, 1998 Order, the Court finds this habeas corpus action should be dismissed.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for writ of habeas corpus is **dismissed with prejudice**. The Clerk is directed to file a copy of this Order in Case No. 96-C-477-B.

SO ORDERED THIS 26<sup>th</sup> day of Aug, 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

45/29

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

**F I L E D**  
AUG 26 1999 *[Signature]*

REED KEFFER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GREYHOUND LINES, INC., )  
)  
Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 98-C-713-C ✓

ENTERED ON DOCKET  
DATE AUG 27 1999

ORDER

Before the Court is the motion for summary judgment filed by defendant, Greyhound Lines, Inc. (GLI), pursuant to Rule 56 of the Federal Rules of Civil Procedure.

In July 1998, plaintiff, Reed Keffer, filed the present action in the District Court in and for Tulsa County, Oklahoma, alleging age discrimination, breach of contract and intentional infliction of emotional distress. GLI removed the present action to this Court on September 17, 1998, under diversity jurisdiction and, alternatively, under federal question jurisdiction. As the basis for federal question jurisdiction, GLI states that Keffer's age discrimination claim arises, if at all, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq.<sup>1</sup> On July 27, 1999, GLI filed its present motion seeking summary judgment on all of the claims alleged by Keffer. All materials related to GLI's motion for summary judgment have now been submitted, and the matter is ripe for ruling.

GLI set forth in its present motion seventeen paragraphs of facts which it considers undisputed. Keffer, in his response to GLI's present motion, only disputes paragraph fourteen of

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<sup>1</sup> Oklahoma law does not appear to provide for a statutory private right of action for claims of age discrimination. Rather, such a claim is prosecuted by the Oklahoma Human Rights Commission. See 25 O.S. § 1101, et seq.

GLI's statement of facts, and he alleges that he was terminated because of his age and not because of any perceived performance problems.

GLI maintains a bus terminal in Tulsa, Oklahoma. Keffer began working at that terminal for GLI as operations manager on February 26, 1990. On January 11, 1991, Keffer became driver supervisor, and on April 9, 1992, Keffer was appointed facility manager. In 1994, Keffer became terminal manager of the Tulsa terminal. Bernie Styers was Keffer's supervisor from January 1994 until January 1997. Janna Willardson became district manager and Keffer's supervisor in January 1997.

GLI conducts random audits of its terminals, including the Tulsa terminal. The auditors test operations in specific areas and assess whether a terminal and its employees are in compliance with company regulations. The terminal manager is responsible for the terminal's audit score, and GLI uses the score to judge the performance of its terminal managers. GLI audited the Tulsa terminal in November 1996. Keffer did not dispute any of the audit's findings, and he admits that the result of that audit was not acceptable as a long-term proposition.

At the time that Willardson became district manager in January 1997, the Tulsa terminal was experiencing problems with morale and race relations. Certain black employees perceived a favoritism on Keffer's part towards white employees. In February 1997, Willardson visited the Tulsa terminal to inquire into the morale problem. Willardson interviewed the Tulsa employees and later reported her findings to Keffer. Keffer expressed displeasure with the fact that Willardson interviewed employees outside of his presence.

In April 1997, Human Resources Director Don Briggs met with Keffer and warned him that he needed to do a better job of communicating with his employees and correcting the morale problem. Briggs also advised Keffer that there was a continuing perception that he showed

favoritism towards white employees, and Briggs warned Keffer that his future employment with GLI depended on his improvement in these areas. Subsequently, again in April 1997, Willardson and Briggs met with Tulsa terminal employees. Willardson reported her findings to Keffer and warned that he needed to demonstrate improvement with respect to employee problems. Willardson warned that a failure to show improvement in these areas would result in termination.

In August 1997, Willardson advised Keffer that employees were continuing to assert that he was showing favoritism towards white employees, that employees suffered from improper training, and that poor morale existed at the Tulsa terminal. Willardson warned that failure to improve these areas would result in termination.

In September 1997, GLI audited the Tulsa terminal. The audit found several violations of GLI's regulations, and it further found that six of the twenty-four violations that were listed in the November 1996 audit had not been corrected. The audit was designated a borderline red flag audit, which indicates that the auditor considered it to be bordering on unacceptable. Keffer drafted a letter to his employees explaining that the audit was somewhere between a horror story and a disaster.

GLI again audited the Tulsa terminal in November 1997. Significant violations of GLI's regulations and policies were reported in the audit, and the audit found that fourteen of the twenty-four violations found in the September 1997 audit had not been corrected. The audit was designated a significant audit, which is the lowest score possible.

Following this audit, on November 18, 1997, Willardson terminated Keffer. At the time of his dismissal, Keffer was fifty-seven years of age, and on August 11, 1998, Keffer filed his charge of discrimination with the Oklahoma Human Rights Commission (OHRC), claiming discrimination on the basis of age. On July 24, 1998, Keffer filed the present action in Oklahoma district court.

Prior to considering the merits of the present motion for summary judgment, the Court must address certain preliminary issues. 29 U.S.C. § 626(d) provides that, “No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.” Thus, a “timely filing with the EEOC is a prerequisite to a civil suit under . . . the ADEA.” Aronson v. Gressly, 961 F.2d 907, 911 (10<sup>th</sup> Cir. 1992). While the parties agree that Keffer filed his charge of discrimination with the OHRC in August 1998, there is no indication that Keffer ever filed such a charge with the EEOC. Neither a review of the undisputed facts nor a review of the entire record shows that Keffer filed a charge with the EEOC. Nor does the record show that the charge was forwarded to the EEOC by the OHRC.

The Court notes that in certain cases the filing of a complaint with a state human rights commission may satisfy the filing requirements of § 626(d). 29 C.F.R. § 1626.10(a) provides that the EEOC may enter into agreements with state agencies to cooperate in the processing of age discrimination charges. Section 1626.10(c) provides that when a worksharing agreement with a state agency is in effect, charges received by one agency under the agreement shall be deemed received by the other agency. See also Sanchez v. Pacific Powder Co., 147 F.3d 1097, 1099-1100 (9<sup>th</sup> Cir. 1998). In the present case, however, the parties strangely provide no evidence or argument that Oklahoma has entered into such a worksharing agreement with the EEOC. Rather, the parties merely agree that Keffer filed his charge with the OHRC, claiming discrimination on the basis of

age.<sup>2</sup> The Court views this assertion as being inadequate for demonstrating that the filing requirements of § 626(d) have been satisfied.

Moreover, even if a worksharing agreement exists between the EEOC and OHRC, this does not necessarily mean that filing a charge with the OHRC will automatically satisfy the filing requirements of § 626(d). In order to satisfy such federal filing requirements, a charge filed with the state agency under a worksharing agreement must adequately inform the EEOC that the aggrieved person is seeking redress for age discrimination *and that he expects the EEOC to take action.* Stearns v. Consolidated Management, Inc., 747 F.2d 1105, 1113 (7<sup>th</sup> Cir. 1984). In the instant case, there is no indication that Keffer sought to inform the EEOC that he was seeking redress for age discrimination, and there is nothing which suggests that Keffer expected the EEOC to take action. Nor is there any indication that the EEOC actually received the charge. Rather, the only charge made by Keffer was to the OHRC, and his original action was filed in state court. This suggests that Keffer did not intend for the EEOC to take any action whatsoever. Hence, the Court will dismiss the present ADEA claim as being improperly commenced.<sup>3</sup>

Turning to GLI's motion for summary judgment on Keffer's claims of breach of contract and intentional infliction of emotional distress, the Court notes that Keffer failed to address or otherwise

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<sup>2</sup> Presumably, the parties expect the Court to contact the OHRC and EEOC and take judicial notice of such an agreement, if one exists. It would have been extremely helpful to the Court in resolving this matter if the parties had fully briefed this issue.

<sup>3</sup> The Court notes that even if it were to reach the merits of GLI's motion for summary judgment on Keffer's ADEA claim, it would grant the motion. Keffer submitted no competent evidence that his age had any bearing on GLI's decision to terminate his employment. Rather, the Court is satisfied that the evidence points in only one direction – that Keffer was terminated for just cause for repeatedly failing to adhere to the warnings issued by his superiors and repeatedly failing to bring his terminal into compliance with GLI's regulations. The ADEA is certainly not a sword which a marginal or poor employee may use to forever protect his job after he reaches a certain age.

defend them in his response to GLI's motion. The Court therefore finds that Keffer abandoned the claims, and the Court grants summary judgment in favor of GLI as to them.

Accordingly, the Court hereby DISMISSES Keffer's ADEA claim, and the Court hereby GRANTS GLI's motion for summary judgment with respect to Keffer's breach of contract and intentional infliction of emotional distress claims. All other pending motions filed in this case are hereby rendered MOOT by entry of this Order.

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



H. DALE COOK  
United States District Judge

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

**F I L E D**

AUG 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REED KEFFER, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GREYHOUND LINES, INC., )  
)  
Defendant. )

No. 98-C-713-C

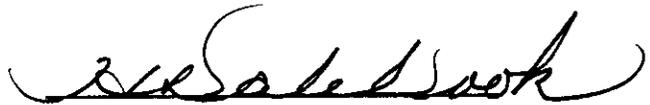
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DATE AUG 27 1999

**JUDGMENT**

This matter came before the Court for consideration of the motion for summary judgment filed by defendant, Greyhound Lines, Inc. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendant, Greyhound Lines, Inc., in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for defendant, Greyhound Lines, Inc., and against plaintiff.

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

  
H. DALE COOK  
United States District Judge

**FILED**  
AUG 26 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

NIKITA McELWEE, )  
)  
Plaintiff, )  
)  
vs. )  
)  
)  
REDLEE, INC., )  
)  
Defendant. )

No. 98-C-951-B /

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

ORDER

Before the Court is the Motion to Dismiss (Docket No. 8) filed by defendant REDLEE, INC. ("REDLEE"). In his Amended Complaint, Plaintiff Nikita McElwee ("McElwee") alleges REDLEE discriminated against him based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5 *et seq.*, and 42 U.S.C. §1983. REDLEE moves to dismiss the §1983 claim based on failing to state a claim and the Title VII claim for failing to file a timely charge with the Equal Employment Opportunity Commission ("EEOC") and timely serve REDLEE with the Amended Complaint. As McElwee concedes he cannot state a §1983 claim, the Court dismisses that claim. The Court thus considers whether McElwee is barred from pursuing his Title VII race discrimination claim.

REDLEE asserts that McElwee did not timely file a charge against it with the EEOC as it never received notice and was not aware of McElwee's claim against it until served with the amended complaint on June 24, 1999. McElwee contends he did timely file his charge and attaches a copy of the EEOC Dismissal and Notice of Rights dated 9/11/98 which identifies REDLEE as Respondent. The Court accordingly denies REDLEE's motion to dismiss for failing

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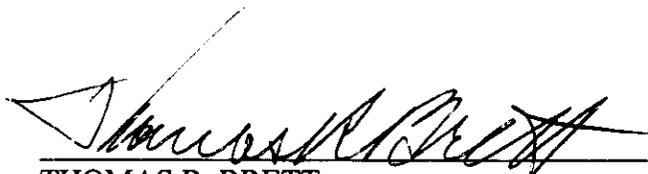
to file his EEOC charge timely.

REDLEE also moves to dismiss for failing to serve the Amended Complaint until June 24, 1999, more than 120 days after the filing of the lawsuit, in violation of Fed.R.Civ.P. 4(m). McElwee responds that he filed the Amended Complaint on May 13, 1999 and received the Court's permission to extend the time to serve defendant until May 31, 1999. On May 21, 1999, McElwee attempted to serve REDLEE through its authorized agent for service of process identified by the Oklahoma Secretary of State as Charles L. Redfern, 2300 W. Washington Pl., Broken Arrow, Ok 74012. The complaint and summons were returned by the U.S. Post Office on June 18, 1999 marked "forwarding order expired." McElwee then located REDLEE's current address in the telephone directory and served it on June 24, 1999.

McElwee argues there was good cause for the delay in service on REDLEE as he relied on REDLEE's legal obligation as a out-of-state corporation doing business in Oklahoma to provide the Secretary of State with the name and address of its authorized agent for service of process. The Court agrees. REDLEE's motion to dismiss the Title VII claim based on violation of Rule 4(m) is denied.

Based on the above, the Court grants REDLEE's motion to dismiss plaintiff's §1983 claim and denies the motion to dismiss his Title VII claim.

IT IS SO ORDERED, THIS 26<sup>th</sup> DAY OF AUGUST, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



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

**FILED**

AUG 26 1999

TONYA WALKER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED PARCEL SERVICE, INC., )  
 a corporation, )  
 )  
 Defendant. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 99-CV-509-BU ✓

**ENTERED ON DOCKET**

**DATE AUG 27 1999**

ADMINISTRATIVE CLOSING ORDER

The Court, upon agreement of counsel in this case, finds that this action should be administratively closed during the pendency of the proceedings before the Tenth Circuit Court of Appeals, in regard to the appeal filed in Tonya Walker v. United Parcel Service, Inc., Case No. 97-CV-1042-BU. It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the proceedings in the Tenth Circuit Court of Appeals.

The parties are DIRECTED to notify the Court in writing of the resolution of the appellate proceedings so that the Court may reopen this matter, if necessary, to address Defendant's motion to dismiss and to obtain a final determination of this litigation.

ENTERED this 26<sup>th</sup> day of August, 1999.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

9

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

FILED

AUG 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

EDWARD L. GOODWIN, an )  
individual, and EDWARD L. )  
GOODWIN, next of kin of )  
ALMETA GOODWIN, deceased; )  
Plaintiff, )

v. )  
FARMERS INSURANCE GROUP OF )  
COMPANIES d/b/a FIRE INSURANCE )  
EXCHANGE, FIRE UNDERWRITERS )  
ASSOCIATION, FARMERS INSURANCE )  
EXCHANGE, FARMERS UNDERWRITERS )  
ASSOCIATION, and FARMERS )  
INSURANCE COMPANY, INC. )

Defendants. )

Case No. CIV-99C 395-BU(J)

ENTERED ON DOCKET

DATE AUG 27 1999

**DISMISSAL**

Comes Now the Plaintiff, Edward Goodwin, an individual and as  
next of kin of Almeta Goodwin, and does hereby dismiss the  
defendants, Farmers Insurance Group of Companies, Fire Insurance  
Exchange, Fire Underwriters Association and Farmers Underwriters  
Association.

Warren G. Morris, OBA #6431  
C. Eric Pfanstiel, OBA #16712  
1918 E. 51<sup>st</sup> St., Suite 1-E  
Tulsa, OK 74105  
(918) 749-1775

Attorneys for Plaintiff,  
Edward L. Goodwin

C15

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing document was mailed via first class mail, postage prepaid, this 25 day of August, 1999 to:

Kenneth W. Elliott  
Elliott, Morris & Parks  
City Place Building  
Twenty-second Floor  
204 North Robinson Ave.  
Oklahoma City, OK 73102

Gary S. Chilton  
500 West Main  
Oklahoma City, OK 73102

C. E. Chilton

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

TED EZELL,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 98-CV-334-H (J) ✓

**F I L E D**

AUG 25 1999 *CL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

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



Sven Erik Holmes  
United States District Judge

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

CITYSURF, INC., )

Plaintiff, )

v. )

AMERICAN BUSINESS )  
INFORMATION, INC., )

Defendant. )

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 98-CV-9-H ✓

**F I L E D**

AUG 25 1999 *cl*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

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



Sven Erik Holmes  
United States District Judge

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

FRAN AGUILERA,

Plaintiff,

v.

KWIKSET CORPORATION,

Defendant.

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 96-CV-1143-H ✓

**FILED**

AUG 25 1999 *CP*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

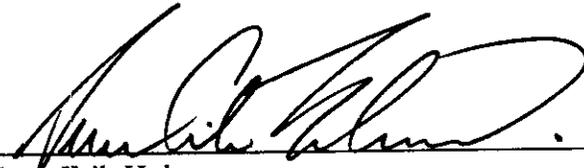
ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 25<sup>th</sup> day of August, 1999.

  
Sven Erik Holmes  
United States District Judge

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

KEVIN L. WENGER,  
Plaintiff,

v.

CRC-EVANS PIPELINE  
INTERNATIONAL, INC.;  
WEATHERFORD ENTERRA INC.;  
PHLIPCO, INC.,  
Defendants.

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 98-CV-401-H ✓

**F I L E D**

AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

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

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

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

NORMAN HOLT,  
Plaintiff,  
vs.  
PRUDENTIAL HEALTH CARE  
PLAN INC.,  
Defendant.

ENTERED ON DOCKET  
DATE AUG 26 1999  
Case No. CV-98-600-H

**FILED**

AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

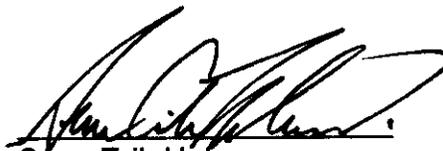
**ADMINISTRATIVE CLOSING ORDER**

The parties having jointly filed a motion to continue the administrative closing of this action until February 22, 2000, when the parties will advise the Court as to the status of the case, it is hereby ordered that the Clerk continue the administrative termination of 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 stipulations or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court on or before February 22, 2000, as to whether this matter should be reopened or dismissed with prejudice, failure of which shall result in this case being deemed dismissed with prejudice.

IT IS SO ORDERED.

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

  
Sven Erik Holmes  
United States District Judge



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

COLORADO WESTERN INSURANCE  
COMPANY.

Plaintiff,

v.

FLAVORS RESTAURANT, INC.,  
HENRY PRIMEAUX, MICHAEL FUSCO,  
AMBROSE SOLANO and VICKI SOLANO,

Defendants.

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 98-CV-610-H ✓

**F I L E D**

AUG 25 1999 *AR*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER AND JUDGMENT**

IT IS HEREBY ORDERED that the stay previously entered herein is lifted, that the arbitration decision made in this matter is confirmed in all respects, and that judgment is hereby entered in conformity with the award.

IT IS SO ORDERED.

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

  
Sven Erik Holmes  
United States District Judge

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

**FILED**

AUG 26 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LASONDA K. HARPER )

Plaintiff, )

vs. )

No. 98-CV-766-B(J) ✓

MIKE LOWTHER, Individually, and as )  
an employee and representative of Solvay )  
Flourides; and SOLVAY FLOURIDES, )  
a Delaware corporation, )

Defendants. )

ENTERED ON DOCKET  
DATE AUG 26 1999

**ORDER**

Comes on for consideration Defendants' Motion for Summary Judgment (Docket # 9) and the Court finds the same shall be granted.

**Summary Judgment Standard**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

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

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that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

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

### Undisputed Material Facts

The Court has reviewed the materials submitted in support of and in opposition to the material facts urged by the parties and finds the record establishes the following facts are undisputed:<sup>1</sup>

1. Plaintiff contacted the EEOC by phone and was mailed a Charge of Discrimination for her review and signature. She believed some of the information on the Charge form was inaccurate. Instead of signing and returning the Charge, or marking through those portions with which she disagreed, Plaintiff faxed an unverified letter dated March 13, 1998 to the EEOC which she apparently considered to be her written Charge of Discrimination. The purpose of the letter was to clarify the nature of her allegations against Solvay Fluorides.
2. After Plaintiff faxed the letter to the EEOC, she decided not to have any further communications with the EEOC or to cooperate with the agency and instead to “just blow things over” because everything at work appeared to her to be back to normal.
3. Plaintiff never signed an EEOC form Charge of Discrimination.
4. Prior to filing this lawsuit, Solvay Fluorides never received a Charge of

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<sup>1</sup>Plaintiff’s original response brief did not comply with N.D. LR 56.1(B) and Plaintiff was ordered by the Court to file a statement in compliance with that rule. Plaintiff’s Supplemental Response is minimally responsive to the Court’s Order at best and required the Court to painstakingly determine the facts in dispute through an independent review of the record submitted. N.D. LR 56.1(B) was designed to expedite the summary judgment process and should be strictly adhered to.

Discrimination containing the allegations raised in the litigation, never was requested by the EEOC to supply information responding to the allegations contained in this litigation, and never was afforded the opportunity to participate in conciliation.

5. On or about July 17, 1998, a Dismissal and Notice of Rights was mailed to the Plaintiff indicating the EEOC was closing her file because she “failed to provide information, failed to appear or be available for interviews/conferences or otherwise failed to cooperate to the extent it was not possible to resolve the charge.”

6. Plaintiff was hired at Solvay Fluorides in July 1996 as a lab technician. She was interviewed by David Iacoe who became her supervisor and Co-Defendant Lowther who was the plant manager.

7. Plaintiff’s sexual harassment claim is based upon one incident that allegedly occurred in April 1997. Plaintiff claims that Lowther was standing behind her and pulled the back of her t-shirt away from her neck a short time. She claims he also said “Do you know of anyone being a mistress or wanting to be a mistress?” Plaintiff’s breasts were not exposed and Plaintiff makes no such accusation. After the incident, Plaintiff went back to work.

8. Plaintiff also relies upon one admittedly (by Defendant Lowther) offensive and sexually suggestive comment referencing a golf shot made to another female worker outside the presence of the Plaintiff to support her claim of sexual harassment.

9. Plaintiff actively worked at the Solvay Fluorides plant until July 5, 1998, when

she took a leave of absence.

10. Plaintiff relies upon certain comments attributed to Lowther as the basis for her retaliation claim. Those are (1) a comment about her being in "time out" since she was sitting in the corner of a room; (2) an inquiry about whether she had allowed visitors into the laboratory during the night shift; (3) comments made at her performance review concerning her attendance and interpersonal skills; (4) a comment directed to her at a safety meeting about a missing grinder; and a statement about her employment status allegedly made to a third party.

11. Plaintiff claims that in June 1997, while she was sitting in a corner of a lab office doing data entry work, Lowther passed by the office and jokingly said: "LaSonda, what are you having, a time out?" to which she responded "Huh" and Lowther replied: "You know, like when a little kid gets in trouble and gets put in the corner, is that what you would call yourself having, time out?" Plaintiff found this alleged conversation to be offensive because she was not a child.

12. Plaintiff claims that in October 1997, Lowther talked to her about receiving reports that she had visitors at the plant during her night shifts and asked if this was true. Plaintiff told him that when the weather was bad, she had someone there at night waiting for her. Lowther accepted her explanation. Plaintiff asked if he minded if the visitor came out to the plant and sat in the office area. Lowther said no and that his only concern was that the visitor did not go back into the plant or the lab. No disciplinary action was

taken as a result of the conversation.

13. Plaintiff claims that as part of her performance review in the latter part o 1997, Lowther made three comments that were in retaliation for complaining about the alleged sexual harassment incident. Plaintiff claims Lowther told her that she was the reason that a co-worker had resigned; he made a comment about her attendance and the number of times she had called in sick; and he made a comment about her going over his head to his boss on the alleged sexual harassment matter. Although Plaintiff complains about the alleged comments made during her performance review, she had no complaints about her raise or the ratings on the performance review. In fact, her overall performance review for 1997 and corresponding raise were better than the previous year.

14. On February 6, 1998, Plaintiff claims that during a safety meeting Lowther made a comment that a grinder was missing and said "LaSonda, if you just bring it back, won't nothing be said." Plaintiff found this alleged comment offensive because she thought he was saying she was a thief.

15. While Plaintiff was on short term disability leave in the second half of 1998, she claims that she sought to cash a check at Budget Finance. When the finance company called Solvay Fluorides to verify Plaintiff's employment, Lowther responded to the finance company representative's question as to whether Plaintiff was an employee of the company by stating: "Yes, for now." Her check was cashed by the finance company. Under the company's short term disability leave policy, an individual's employment is

terminated if the employee does not return to work at the end of the employee's leave eligibility. Plaintiff's employment was terminated under this policy because she did not return to work.

16. Plaintiff suffered no adverse employment action while an employee of Solvay Fluorides. At the end of 1996, she received a 45 cent per hour increase in pay and at the end of 1997, she received a 65 cent per hour increase. Plaintiff has no complaints about her performance reviews or her raises.

#### Arguments and Authority

Defendants first move for summary judgment based upon procedural grounds. Defendants assert Plaintiff's failure to file a Charge of Discrimination leaves the Court without subject matter jurisdiction over all of Plaintiff's Title VII claims. Plaintiff never filed the prerequisite Charge of Discrimination necessary to file a civil action in federal court. She did not sign the form mailed to her by the EEOC. Instead, she faxed a letter to the EEOC which was not verified as required by 42 U.S.C §2000e-5(b). Thereafter, by her own testimony, she decided not to have any further communications with the EEOC and to "just blow things over" because everything at work appeared to be back to normal. Because she had initially placed a call to the EEOC and had been mailed a form Charge of Discrimination to which a claim number had been assigned, the EEOC issued a Dismissal and Notice of Rights in which Plaintiff was informed that her file was being closed because she "failed to provide information, failed to appear or be available for

interviews/conferences or otherwise failed to cooperate to the extent it was not possible to resolve the charge." There is nothing in the record to indicate Plaintiff contacted the EEOC to question the reasons stated and, as previously stated, she has admitted she had no intention of pursuing the claim before the EEOC.

Plaintiff now states the only deficiency in her Charge of Discrimination is that the letter she faxed to the EEOC was not verified. Plaintiff asserts that under the holding of *Peterson v. City of Wichita, Kan.*, 888 F.2d 1307 (10th Cir. 1989), she should be allowed to cure this technical deficiency by submitting a verification at this time, more than one year after she received the Dismissal and Notice of Rights and filed her Complaint in this Court, during which time she was represented by counsel.

The Tenth Circuit in *Peterson* did find, as Plaintiff urges, that EEOC regulation 29 C.F.R. §1601.12(b) (1988) permits a verified charge to relate back to amend a timely filed but unverified charge. This regulation provides: "A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments. . . will relate back to the date the charge was first received."

However, the facts in *Peterson* differ significantly from those now before the Court.<sup>2</sup> In *Peterson*, the plaintiff also originally submitted an unverified complaint.<sup>3</sup>

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<sup>2</sup>The facts are more fully set forth in the district court's decision found at 706 F. Supp. 766 which was reversed by the appellate court. Several of the facts referenced herein come from that opinion. This Court has carefully reviewed the underlying facts in applying the appellate

However, Peterson was sent a letter stating that a copy of his charge would be provided to the defendant within 10 days and that the information in his charge was insufficient to continue the investigation. A copy of the charge was, in fact, sent to the defendant that same day. Peterson was requested to contact the EEOC within 30 days to arrange for an interview or his charge would be dismissed. Peterson was represented by counsel throughout this time.

At the EEOC's request, after the expiration of the time to file, Peterson submitted a completed questionnaire which was executed under penalty of perjury. The EEOC used this to prepare a formal perfected charge which was executed by Peterson. In the letter which accompanied the formal charge for Peterson's signature, his charge number was followed by the word "PERFECTED" in all capital letters. The letter advised Peterson of the need to return the formal charge promptly. The EEOC issued its determination of no reasonable cause two months later and the lawsuit was then filed.

The most significant distinguishing factor between *Peterson* and the case at bar is that the late verification in *Peterson* was filed while the EEOC investigation was ongoing. Accordingly, there was no allegation of prejudice to the defendant by application of the relating-back provision. The Court noted that the purpose of verification is to protect

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court's ruling to the facts now before the Court.

<sup>3</sup>Peterson had gone through three administrative agencies and/or procedures prior to the EEOC finally receiving his charge when it was forwarded to the agency by a state agency. It was clear he had every intent to pursue his claim and the defendant was aware of that.

employers from frivolous claims. Allowing amendment prior to enforcing an EEOC summons eliminates any prejudice to the employer and allows the parties to participate in conciliation, a primary purpose of the administrative process. *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982).<sup>4</sup> Defendants herein were wholly deprived of that process through no fault of theirs. Based thereon, the Court concludes that EEOC regulation 29 C.F.R. §1601.12(b) (1988) is inapplicable under these facts. Consequently, the Court is without subject matter jurisdiction over all of Plaintiff's Title VII claims.<sup>5</sup>

Defendants also move for summary judgment on Plaintiff's claims brought pursuant to the Oklahoma Anti-Discrimination Act for sexual harassment. In response, Plaintiff admits she has no cause of action under this Act but urges the Court should be allowed to proceed under the tort principles stated in *Burk v. K-Mart Corp*, 770 P.2d 24 (Okla. 1989) and expanded in *Collier v. Insignia Financial Group*, 1999 WL 326277 (Okla. May 25, 1999).

The Court finds *Burk* inapplicable. Plaintiff has not alleged she was wrongfully discharged, constructively or otherwise, as a result of any of Defendants actions. Plaintiff's claims brought pursuant to the Oklahoma Anti-Discrimination Act for sexual harassment must also be dismissed.

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<sup>4</sup>The EEOC does not proceed to investigate a claim until it is verified. Consequently, Plaintiff's claim was never forwarded to the Defendants nor investigated. Defendants first notice of any claim was their receipt of a copy of the Dismissal and Notice of Rights.

<sup>5</sup>Plaintiff originally also made a claim for racial harassment based upon a comment regarding rap music but has confessed this claim in her initial response to summary judgment.

Finally, Defendants urge Plaintiff's claims as to each cause of action fail on the merits. In light of the Court's rulings herein, it is unnecessary to address those claims based upon Title VII, although the Court notes in its review, the evidence appears to be insufficient to support any of the claims. The one independent tort urged by Plaintiff is for intentional infliction of emotional distress.

The Court finds the evidence does not support this claim going to a jury and Defendants are entitled to summary judgment on the tort of outrage. The necessary elements to establish a cause of action for this tort are set forth in *Eddy v. Brown*, 715 P.2d 74 (Okla.1986). They are: (1) the tortfeasor acted intentionally or recklessly; (2) the tortfeasor's conduct was extreme and outrageous; (3) the plaintiff actually experienced emotional distress; and (4) the emotional distress was severe.

While Lowther's actions could be considered intentional and/or reckless, they fall short, individually and collectively, of being extreme and outrageous so as to be considered "beyond all possible bounds of decency" or "utterly intolerable in a civilized community." *Id.* The Oklahoma Supreme Court found no liability for "mere insults, indignities, threats,...[or] occasional acts that are definitely inconsiderate and unkind." This Court concludes this necessarily includes isolated acts of buffoonery. Plaintiff's brief admits the alleged shirt-pulling incident falls short of being a sexual assault by characterizing it as "dangerously close." She also states Lowther's comments regarding the grinder are slander, however, no cause of action was brought under this theory.

The Tenth Circuit has found far more egregious conduct to fall outside the legal parameters of this tort. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379 (10th Cir. 1991). Plaintiff's claim of intentional infliction of emotional distress must also fail.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is hereby granted.

DONE THIS 26<sup>th</sup> DAY OF AUGUST, 1999.

  
\_\_\_\_\_  
THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE



notice upon "Unknown Owners" is unnecessary as the District Court of Tulsa County has approved this final order as an instrument of conveyance pursuant to 69 O.S. § 1708 (c).

3. ***Authority for the condemnation and this order.*** This action is brought by the plaintiff under the authority of 25 U.S.C. § 357. This final order vesting title and granting temporary easements is authorized by Federal Rules of Civil Procedure, Rule 71A, as supplemented by 69 O.S. § 1701, et seq.
4. ***Public purpose of the acquisition.*** The plaintiff is a body corporate and politic, created and existing pursuant to 69 O.S. §§ 1701, et seq., endowed with the right of eminent domain to acquire property for turnpike projects. The property described below and condemned by the plaintiff is acquired for the public purpose of a new turnpike project. The project is specifically authorized by 69 O.S. § 1705 (e) (22).
5. ***Description of the property condemned by the plaintiff.*** The property condemned by the plaintiff herein is located in Tulsa County, Oklahoma, and is more particularly described as follows:
  - a. ***The property condemned in fee simple absolute.*** The property condemned by the plaintiff in fee simple absolute is more particularly described on Exhibit A-336-Amended. This parcel condemned in fee simple contains a total of 4.19 acres, more or less.
  - b. ***The property condemned for temporary easements.*** The property condemned by the plaintiff for temporary easements contains two parcels which are respectively described on Exhibit A-336.1, containing .11 acres,

more or less, condemned for a temporary easement, and Exhibit A-336.2, containing .37 acres, more or less, condemned for a temporary easement.

*c. Incorporation of exhibits.* The exhibits describing the parcels condemned in fee simple absolute and for temporary easements are attached hereto and incorporated by reference. All of the parcels condemned by the plaintiff hereinafter are described as the "Subject Property."

*d. The total area condemned.* The total area condemned in fee simple and temporary easement is 4.67 acres, more or less. The additional 1.02 acres of land included in the 5.69 acres referenced in the complaint filed by the plaintiff is existing section line right-of-way located along the remaining north and east boundaries of the defendants' property. The 1.02 acres is not being acquired by the plaintiff and will remain the property of the defendants, subject to existing section line right-of-way.

6. *Ownership of the Subject Property.* The Subject Property originally was allotted in severalty, but conveyed in restricted fee, to Tyler Burgess, Full-Blood Muscogee (Creek), Roll No. 4226. By direct inheritance and restricted mesne conveyances and orders, the Subject Property became vested in Yahola Burgess, Muscogee (Creek) Indian. As of the date of this order, the Subject Property is owned by the Estate of Yahola Burgess, and is subject to certain restraints on alienation. The defendants, Marcella S. Giles, a/k/a Marcella Burgess Giles and Wynema Capps, are the personal representatives of said estate and heirs of Yahola Burgess, deceased, and are 5/8 degree Muscogee (Creek) blood quantum.

7. ***Public necessity for the acquisition.*** The parties agree *and the Court finds* that it is necessary for the plaintiff to acquire fee simple title to that part of the Subject Property referred to as Parcel CR-336, less and except the oil, gas, or other minerals lying beneath the Subject Property and that may be produced therefrom, all as described in the petition filed herein. The parties also agree *and the Court finds* that it is necessary for the plaintiff to acquire temporary easements in those parts of the Subject Property referred to as Parcel CR-336.1 and Parcel CR-336.2. The temporary easements shall be held by the plaintiff for a period of two years from the date of this order, or until cessation of use of CR-336.1 and CR-336.2, whichever shall occur first.
8. ***Prior order of the Court approving settlement between the parties and granting possession upon deposit of funds .*** On or about July 2, 1999, the Court entered its order approving settlement between the parties, dissolving preliminary injunction, authorizing deposit and disbursement of funds and granting possession upon deposit of funds. In the order, the Court found that the plaintiff and the defendants, Marcella S. Giles and Wynema L. Capps, individually and as personal representatives and heirs of the estate of Yahola Burgess, had settled all issues in this case. The terms of the settlement between the parties, described in the prior order were found to be fair, reasonable and in the best interests of the defendants. Accordingly the settlement was approved and confirmed by the court.
9. ***Performance by parties of conditions for entry of final order vesting fee simple title and granting temporary easement.*** According to the prior order

entered by the Court, the parties were to perform certain acts prior to entry of a final order. The Court now finds that all such acts have been performed by the parties, including:

- a. That the defendant, Marcella S. Giles, has completed or has caused to be completed the opening of the OST-OTFM-IIM Trust Account, Estate of Yahola Burgess, with the Department of the Interior, Muskogee, Oklahoma.
- b. That the plaintiff has paid or has caused to be paid the total sum of \$420,076.20 into the OST-OTFM-IIM Account opened with the Department of Interior, Muskogee Oklahoma, in the name of the Estate of Yahola Burgess. (The total sum of \$420,076.20 was deposited in two deposits as described in the prior order of the court.) Provided, it is understood and agreed by all parties that such payment constitutes full and complete payment of just compensation for the acquisition of the Subject Property and for any and all damages to the part not taken, if any. Provided further, as of the date of entry of this final order, all issues raised by the defendants in any pleadings filed in this matter are deemed resolved, including, without limitation, all issues related to proper parties, service, personal and subject matter jurisdiction, compliance with federal and state laws, and the 404 Permit issued by the United States Army Corps of Engineers to the plaintiff.
- c. That the defendants, Marcella S. Giles and Wynema L. Capps, as co-administrators of the Estate of Yahola Burgess, deceased, have executed approval of this final order, which order constitutes the instrument of conveyance of the Subject Property to the plaintiff, and they have secured

the endorsement of approval on this final order by the judge of the state district court having jurisdiction over the estate, pursuant to 69 O.S. §1708(c).

10. ***Vesting of fee simple title and grant of temporary easements.*** The court finds that judgment should be entered as follows:
  - a. That vesting in the plaintiff of fee simple title in and to the Parcel CR-336, described in Exhibit "A-336-Amended" should be approved and confirmed, excluding minerals other than the right to remove and use any and all road building materials.
  - b. That temporary easements in Parcels CR-336.1 and CR-336.2, respectively described in Exhibits A-336.1 and A-336.2, for a period of two years from the date of this final order, or until cessation of use of the respective parcels, whichever shall occur first, should be granted to and approved and confirmed in the plaintiff.
11. ***Continuing obligations which shall survive entry of this final order.*** The following obligations shall survive entry of this final order:
  - a. That the plaintiff shall design and construct the turnpike and the overpass to the east and in front of houses on South 129<sup>th</sup> East Avenue so that well water on the remaining portion of the defendants' property will not be polluted or adversely affected by the turnpike. This condition shall survive entry of the final order vesting title by this court described in paragraph 8.j. herein.
  - b. That use by the plaintiff and its contractors and agents of the temporary easement along South 129<sup>th</sup> East Avenue, Broken Arrow, Oklahoma,

described herein as Parcel CR-336.1, shall be limited to driveway and bar ditch construction purposes. No overnight parking or storage of equipment by the plaintiff's contractors, employees or agents shall occur on Parcel CR-336.1. During the entirety of the term of the temporary easement, ingress and egress for the defendants, Marcella S. Giles and Wynema Capps, and their tenants and licensees, shall exist from South 129<sup>th</sup> East Avenue to the rental house and garage located on the remainder of the property owned by the Estate of Yahola Burgess and not condemned herein. The existing chain link fence along South 129<sup>th</sup> East Avenue will be removed by the plaintiff as part of construction. A replacement fence shall be provided and installed by the plaintiff, at its expense.

12. *Ad valorem taxes.* The Subject Property is exempt from ad valorem taxation, as restricted fee property. No taxes are due.
13. *Costs of the action.* All parties shall bear their own, respective attorneys fees, costs and expenses incurred as a result of this matter.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that all of the conditions identified in the order of this court filed herein on July 2, 1999, for grant of a final order vesting fee simple title and temporary easements, have been performed.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the plaintiff hereby is vested with fee simple title to that portion of the Subject Property known as Parcel CR-336 and described on Exhibit A-336-Amended, less and except the oil, gas, or other minerals lying beneath the Subject Property and that may be produced therefrom without damage to the plaintiff's fee ownership.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the plaintiff hereby is granted temporary easements in Parcels CR-336.1 and CR-336.2, which are respectively described on Exhibits A-336.1 and A-336.2, for a period of two years from the date of this order or until cessation of use of Parcel CR-336.1 and Parcel CR-336.2, respectively, whichever shall occur first.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that this final order constitutes the instrument of conveyance of the respective interests in and to the Subject Property, pursuant to 69 O.S. §1708(c).

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that no ad valorem taxes are due concerning the Subject Property, as the property is exempt from taxation.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the continuing obligations of the parties described in the findings above shall survive entry of this final order.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that all parties shall bear their own, respective attorneys fees, costs and expenses incurred as a result of this matter.

This judgment has been approved by all parties, and the party submitting it to the Court shall mail a file-stamped copy of the judgment to all parties.

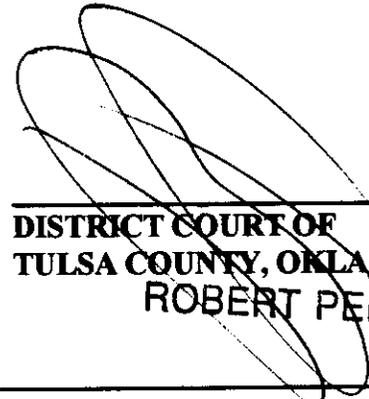
DATED this 25<sup>TH</sup> day of August, 1999.

  
\_\_\_\_\_  
**JUDGE OF THE UNITED STATES  
DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF  
OKLAHOMA**

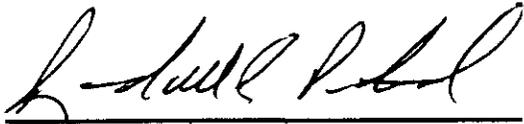
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**APPROVAL BY DISTRICT COURT OF TULSA COUNTY**

In accordance with the provisions of 69 O.S. § 1708 (c), the undersigned Judge of the District Court of Tulsa County hereby approves the foregoing order as an instrument of title.

  
8-13-99  
\_\_\_\_\_  
**DISTRICT COURT OF  
TULSA COUNTY, OKLAHOMA  
ROBERT PERUGINO**

**APPROVAL BY PARTIES AS TO FORM:**



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and for the defendant, Wynema L. Capps  
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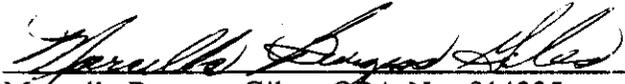
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**APPROVAL BY PARTIES AS TO FORM;**



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**APPROVAL BY PARTIES AS TO FORM:**

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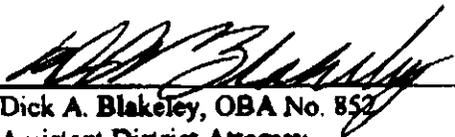
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**PARCEL NO. CR336**

**LEGAL DESCRIPTION**

A strip, piece or parcel of land lying in part of the Northeast Quarter (NE¼) of Section 32, Township 18 North, Range 14 East of the Indian Base and Meridian, Tulsa County, Oklahoma. Said parcel of land being described as follows:

Beginning 726.22 feet South of the Northeast corner of said NE¼; THENCE South 01°13'28" East along the East Line of said NE¼ a distance of 519.08 feet; THENCE South 88°38'08" West a distance of 65.00 feet; THENCE North 02°37'56" East a distance of 520.42 feet; THENCE North 88°46'32" East a distance of 30.00 feet to the POINT OF BEGINNING.

Containing 24,660 square feet or 0.57 acres, more or less.

AND

Beginning 793.14 feet West of the Northeast corner of said NE¼; THENCE South 01°22'07" East a distance of 30.00 feet; THENCE South 01°23'59" East a distance of 20.00 feet; THENCE South 85°29'21" West a distance of 453.05 feet; THENCE North 01°13'22" West a distance of 74.75 feet to a point on the North line of said NE¼; THENCE North 88°37'08" East along the North line of said NE¼ a distance of 452.16 feet to the POINT OF BEGINNING.

Containing 28,211 square feet or 0.65 acres, more or less.

AND

Commencing at the Northeast corner of said NE¼; THENCE South 01°13'28" East along the East line of said NE¼ a distance of 1245.30 feet; THENCE South 88°37'05" West a distance of 440.04 feet to the POINT OF BEGINNING, THENCE continuing South 88°37'05" West a distance of 805.26 feet; THENCE North 01°13'28" West a distance of 423.92 feet; THENCE Southeasterly on the arc of a curve to the left, said curve having a radius of 2101.83 feet (said curve being sub-tended by a chord bearing South 51°32'54" East, and a chord length of 224.89 feet), an arc distance of 225.00 feet; THENCE South 60°18'28" East a distance of 455.51 feet; THENCE South 80°52'21" East a distance of 245.38 feet to the POINT OF BEGINNING.

Containing 129,289 square feet or 2.97 acres, more or less.

**ACCESS CLAUSE WITH ACCESS TO A SECTION LINE ROAD**

Together with all abutters rights, including all rights to access from the remaining portion of grantor land onto the LIMITED ACCESS TURNPIKE to be constructed on the above described property, except the grantor, heirs, successors or assigns, shall have the right of access from the Section Line Road, along the North side of the above described property, and along the East side of the above described property, beginning at the Northeast corner of said Northeast Quarter and extending South along the East line of the Northeast Quarter a distance of 1076.22 feet.

Rev. 6/07/99

**EXHIBIT A-336-AMENDED**  
(INCLUDES EXISTING SECTION LINE RIGHT-OF-WAY)

**PARCEL NO. CR336.1**

**TEMPORARY CONSTRUCTION EASEMENT  
LEGAL DESCRIPTION**

A strip, piece or parcel of land lying in the Northeast Quarter (NE $\frac{1}{4}$ ) of Section 32, Township 18 North, Range 14 East of the Indian Base and Meridian, Tulsa County, Oklahoma. Said parcel of land being described as follows:

Commencing at the Northeast corner of said Northeast Quarter (NE $\frac{1}{4}$ ); THENCE South 01°13'28" East along the East line of said Northeast Quarter (NE $\frac{1}{4}$ ) a distance of 966.23 feet; THENCE South 88°46'35" West a distance of 46.22 feet to the POINT OF BEGINNING; THENCE South 88°46'32" a distance of 40.50 feet; THENCE South 15°53'53" West a distance of 93.50 feet; THENCE North 89°22'16" East a distance of 62.15; THENCE North 02°30'54" East a distance of 90.20 feet to the POINT OF BEGINNING.

Containing 4,608 square feet or 0.11 acres, more or less.

**EXHIBIT "A-336.1"**

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

JOSE GOMEZ and  
SANDRA GOMEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ENTERED ON DOCKET

DATE AUG 26 1999

Civil No. 98-MC-33H ✓

**F I L E D**

AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The United States moved to dismiss or in the alternative for summary denial of the  
Petition to Quash Internal Revenue Service Summonses. A hearing was held on that Motion on  
August 13, 1999. Having considered the Motion and Brief in Support, the Response thereto, the  
United States' Reply, and the arguments of counsel, the Courts finds as follows:

1. The Petitioners have withdrawn and conceded all issues raised in their Petition  
except the issue regarding whether the Petition should be quashed for the Internal Revenue  
Service's failure to provide notice to Sandra Gomez of the summons issued to Donald E. Boyd,  
CPA on September 28, 1998, in strict compliance with 26 U.S.C. § 7609.

2. When a noticee does not receive notice in compliance with 26 U.S.C. § 7609, but  
nevertheless receives actual notice or sufficient notice such that the noticee is able initiate a  
petition to quash the summons in a timely manner and before the date of compliance commanded  
by the summons, the noticee is not prejudiced and the summons is therefore not rendered  
unenforceable because of the improper notice. See, Cook v. United States, 104 F.3d 886, 888-  
890 (6th Cir. 1997); Sylvestre v. United States, 978 F.2d 25, 27-28 (1st Cir. 1992); United States  
v. Texas Heart Institute, 755 F.2d 469, 477-478 (5th Cir. 1985) overruled on other grounds by

**FILED**

**AUG 26 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

LASONDA K. HARPER

Plaintiff,

vs.

MIKE LOWTHER, Individually, and as  
an employee and representative of Solvay  
Flourides; and SOLVAY FLOURIDES,  
a Delaware corporation,

Defendants.

No. 98-CV-766-B(J)

ENTERED ON DOCKET  
DATE AUG 26 1999

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Mike Lowther and Solvay Flourides, and against the Plaintiff, Lasonda K. Harper. Plaintiff shall take nothing on her claim. Costs are assessed against the Plaintiff, if timely applied for under N. D. LR 54.1, and each party is to pay its respective attorney's fees.

Dated this 26<sup>th</sup> day of August, 1999.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**  
AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TIMOTHY LYNN BARKUS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STEPHEN KAISER, )  
 )  
 Respondent. )

Case No. 98-CV-855-B (M)

**ENTERED ON DOCKET**  
DATE **AUG 26 1999**

**ORDER**

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus (Docket #6). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#8). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition is not timely filed and Respondent's motion to dismiss should be granted.

***BACKGROUND***

Petitioner was found guilty by a jury of First Degree Burglary (Count I), First Degree Rape (Count II), Forcible Sodomy (Count III), and Rape by Instrumentation (Count IV) in Tulsa County District Court, Case No. CF-93-2950. In accordance with the jury's recommendation, Petitioner was sentenced to ten years imprisonment on Count I, fifty years on Count II, fifteen years on Count III, and five years on Count IV, to be served consecutively, and fines of \$200.00 on each count. Petitioner appealed his conviction and sentence (see #7, Ex. A). On October 31, 1996, the Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions and sentences in an unpublished summary opinion (#7, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review

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in the United States Supreme Court.

Respondent indicates that Petitioner first filed an application for post-conviction relief in April, 1998. In his brief in support of petition for writ of habeas corpus (#3), Petitioner confirms that he filed "what was inartfully drafted as a 'Petition for Writ of Habeas Corpus Application for Post-Conviction Relief Requesting Evidentiary Hearing'" on April 17, 1998 in the state district court. (#3 at 8). The requested relief was denied on May 13, 1998. Petitioner does not indicate whether he appealed that denial of relief. Petitioner also states that on May 12, 1998, he filed his "Application for Post-Conviction Relief Requesting Evidentiary Hearing." (Id.) Petitioner does not indicate the outcome of that second application for post-conviction relief.

Petitioner filed the instant federal petition for writ of habeas corpus on November 10, 1998 (#1).

### *ANALYSIS*

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(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 from filing by such State actions;

(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(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C), and (D). Also, the limitations period is tolled or suspended during the pendency of a state application for post-conviction relief properly filed during the limitations period. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Petitioner's conviction became final on or about January 29, 1997, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on January 29, 1997, and, absent a tolling event, a federal petition for writ of habeas corpus filed after January 29, 1998, would be untimely.

Although the limitations period is tolled while state post-conviction proceedings, filed during the one-year period, are pending, see § 2244(d)(2), the post-conviction proceedings filed by Petitioner in the instant case do not toll the limitations period because they were filed almost three months after the period expired on January 29, 1998. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed November 10, 1998 is clearly untimely.

In his response to the motion to dismiss (#8), Petitioner argues that the limitations period in this case should be equitably tolled to prevent "a fundamental miscarriage of justice." Section 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling. Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, --- U.S. ----, 119 S.Ct. 210, 142 L.Ed.2d 173 (1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims). However, in this case, the Court is not persuaded by Petitioner's attempts to justify his late filing. Although Petitioner claims to be "actually innocent" of the crimes for which he was convicted (#3 at 12), he is not entitled to equitable tolling unless he can demonstrate that he diligently pursued his federal habeas claims. As discussed below, Petitioner fails to justify either the nearly eighteen (18) month delay between the resolution of his direct appeal in October, 1996, and the filing of a post-conviction relief application in April, 1998, or waiting almost two (2) years after conclusion of direct appeal proceedings to seek federal habeas corpus relief.

Petitioner argues his untimeliness should be excused because he is a "simple layman, unskilled in the ways of the law and unable to afford an attorney and has been (for the relevant time frame) incarcerated at a private prison which does not have an inmate Law Library and extremely limited access to typewriters." (#8 at 2). However, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Williams v. Boone, No. 98-6357, 1999 WL 34856, at \*3 (10th Cir. Jan.28, 1999); Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner). Also, Petitioner's allegation that he did not have access to a law library is insufficient to justify equitable tolling because Petitioner fails to

show what, if any, diligent steps he took to request or obtain any legal materials, or that the government denied him access on request. See Miller, 141 F.3d at 978. Petitioner's conclusory allegations are insufficient to justify equitable tolling. See id. ("It is not enough to say that the [state] facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate."); cf. Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir.1986) (affirming denial of federal habeas petition that was "based on general allegations . . . without substantive, supporting facts"), *modified on other grounds*, 822 F.2d 1477, 1478 n. 2 (10th Cir.1987). Lastly, Petitioner's limited access to a typewriter does not excuse his untimeliness because habeas corpus petitions filed in this Court may be handwritten, see "Information and Instructions, Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (persons in state custody)." Thus, Petitioner did not need to wait for a typewriter to prepare his petition. The Court concludes that Petitioner did not diligently pursue his habeas corpus claims, Miller, 141 F.3d at 978, and he is not entitled to equitable tolling of the limitations period. Respondent's motion to dismiss should be granted.

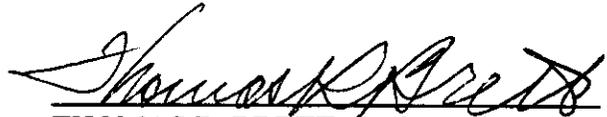
### ***CONCLUSION***

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

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

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#6) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 25 day of Aug, 1999.



THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TIMOTHY LYNN BARKUS, )

Petitioner, )

vs. )

Case No. 98-CV-855-B (M)

STEPHEN KAISER, )

Respondent. )

ENTERED ON DOCKET

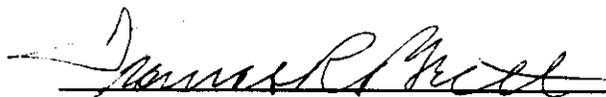
DATE AUG 26 1999

**JUDGMENT**

This matter came before the Court upon Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

SO ORDERED THIS 25 day of Aug., 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

AUG 25 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LANCAS, C.A., )  
 )  
Plaintiff(s), )  
 )  
vs. )  
 )  
THE PRO-QUIP CORP., et al, )  
 )  
Defendant(s). )

Case No. 99-C-254-B

ENTERED ON DOCKET

DATE AUG 26 1999

ADMINISTRATIVE CLOSING ORDER

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

If, by 12-1-99, 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 25 day of August, 1999.



THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

JESSICA A. MOORE,

Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,  
ASSOCIATED RESOURCES, INC., and  
BRIAN L. RICE,

Defendants.

ENTERED ON DOCKET

DATE AUG 26 1999

Case No. 99CV0017H (J)  
Hon. Sven Holmes

**F I L E D**

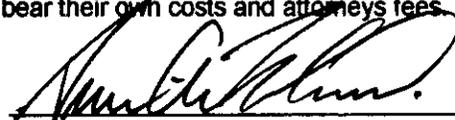
AUG 25 1999

ORDER APPROVING DISMISSAL OF DEFENDANT,  
ASSOCIATED RESOURCES, INC.'S. CROSS-CLAIM  
AGAINST THE DEFENDANT, BRIAN L. RICE

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NOW on this 25<sup>TH</sup> day of August, 1999, the motion of Defendant Associated Resources, Inc. to approve its Dismissal with Prejudice of its Cross-Claim against Defendant Brian L. Rice comes on for hearing. The Court after reviewing the pleadings filed in this matter and being fully advised of the premises hereby approves the Dismissal with Prejudice by Defendant Associated Resources, Inc. of its Cross-Claim against Defendant Brian L. Rice is hereby approved.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any and all claims and causes of action by and between Defendant, Associated Resources, Inc., and Defendant, Brian L. Rice, be, and hereby are, dismissed with prejudice pursuant to the Stipulation of Dismissal with Prejudice of All Claims by and between Defendant, Associated Resources, Inc., and Defendant, Brian L. Rice. Defendant, Associated Resources, Inc., and Defendant, Brian L. Rice, are each to bear their own costs and attorneys fees.

  
\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

James K. Deuschle  
525 South Main, Suite 209  
Tulsa, OK 74103-4503  
(918) 592-2280  
(918) 592-2281 (Facsimile)  
ATTORNEY FOR THE DEFENDANT,  
ASSOCIATED RESOURCES, INC.

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

**FILED**

AUG 24 1999 SA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

NATIONAL BANK OF CANADA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PERFORMANCE VALVE & CONTROLS, )  
INC.; et al., )  
 )  
Defendants. )

Case No. 97-CV-796-BU

ENTERED ON DOCKET  
DATE **AUG 25 1999**

**ORDER**

This matter came before the Court for hearing on August 16, 1999 upon Plaintiff's Motion to Reopen Case. Having heard the oral statements of counsel and having reviewed the record herein, the Court **ORDERS** as follows:

1. Plaintiff's Motion to Reopen Case (Docket Entry #114) is **DENIED**.
2. In light of the entry of the Agreed Partial Order of Dismissal, the only remaining claims of Plaintiff, National Bank of Canada, are against Defendant, Richard J. Bednar. The Clerk of the Court is **DIRECTED** to administratively close this action in his records until February 1, 2005 to allow Defendant, Richard J. Bednar, to complete the agreed pay-out, the final payment being due January 15, 2005. If the parties have not reopened this matter by February 1, 2005, Plaintiff's action against Defendant, Richard J. Bednar, shall be deemed to

be dismissed with prejudice.

ENTERED this 24<sup>th</sup> day of August, 1999.

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

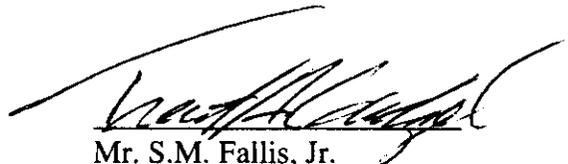


The parties have stipulated that defendants Rick Ross, Eric Helveston and John Does I-V be dismissed with prejudice. All parties will bear any costs incurred as of the date of this notice in regard to the litigation involving any of these defendants.

DATED this \_\_\_\_ day of August, 1999.



Mr. Donald M. Bingham  
Karen E. Langdon  
Riggs, Abney, et. Al  
502 West Sixth Street  
Tulsa, OK 74119-1010  
**Attorneys for John Walls**



Mr. S.M. Fallis, Jr.  
Trent A. Gudgel  
Nichols, Wolfe et. al  
400 Old City Hall Bldg.  
124 East Fourth Street  
Tulsa, OK 74103-5010  
**Attorneys for Ed Ferguson**



Michael R. Vanderberg  
Office of City Attorney  
220 South 1st Street  
Broken Arrow, OK 74012  
**Attorney for Rick Ross, Eric  
Helveston and John Does I-V  
And City of Broken Arrow**



Kent Spence  
David Gosar  
P.O. Box 548  
15 South Jackson Street  
Jackson, Wyoming 83001  
**Plaintiff's Attorneys**

1751  
5-23-99

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

**FILED**

AUG 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

Plaintiff, )

v. )

TARSAC, INC., a California corporation, )  
and ROBERT A. BASSETT, an individual, )

Defendants. )

Case No. 99-CV-198-BU (J) ✓

ENTERED ON DOCKET

DATE AUG 25 1999

JOURNAL ENTRY OF JUDGMENT

NOW on this 24th day of August 1999, the above-styled case comes on before the Court.

The Plaintiff appearing by its attorney, Steven W. Soulé of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and the Defendants TARSAC, Inc. and Robert A. Bassett ("Defendants") appear not.

The Court, being fully advised and having reviewed the pleadings on file herein, finds and orders as follows:

1. That Plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty") is an Oklahoma corporation with its principal place of business in Tulsa County, State of Oklahoma. Defendant TARSAC is a California corporation with its principal place of business in the State of California. Defendant Bassett is a citizen and resident of the State of California.

2. The Defendants have had significant contacts with the State of Oklahoma and have consented to jurisdiction and venue in connection with the agreement described below. Therefore, this Court has jurisdiction over the subject matter herein and the parties hereto.

3. On August 16, 1999, this Court entered it's Order granting Thrifty's Motion for Summary Judgment filed on June 24, 1999.

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4. From March 1, 1989, to April 24, 1992, Defendants operated a Thrifty Car Rental franchise.

5. On or about April 23, 1992, the Defendants executed and delivered to Thrifty a Promissory Note in the principal amount of \$317,969.17. The Promissory Note was given pursuant to a certain Agreement for Termination of Franchise Agreements and Transfer of Assets in Lieu of Foreclosure dated April 23, 1992, between Thrifty and the Defendants.

6. The Defendants are in default of their obligations under the Promissory Note.

7. There is due and payable to Thrifty under the Promissory Note the principal amount of \$245,980.54, plus accrued interest of \$66,872.58, plus interest at the rate of 8.75% per annum until paid, plus attorney's fees and costs.

**IT IS ORDERED, ADJUDGED AND DECREED** by this Court that Thrifty Rent-A-Car System, Inc. have and recover judgment in its favor against the Defendants, TARSAC, Inc., a California corporation and Robert A. Bassett, an individual, jointly and severally, (i) for the amount of \$245,980.54, plus accrued interest of \$66,872.58, plus interest at the rate of 8.75% per annum from the date of judgment until paid, (ii) reasonable attorney's fees in the amount of \$1892 and costs in this action in the amount of \$280.65, plus (iii) plus all accruing attorneys' fees and costs incurred herein.

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

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

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

**FILED**

AUG 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA and )  
 OKLAHOMA WATER RESOURCES BOARD, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Civil Action No.98-C-521-B

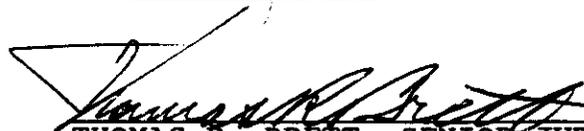
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DATE AUG 25 1999

**AMENDED 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 Oklahoma, et al, U.S.D.C. for Western District of Oklahoma, 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, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed without prejudice.

IT IS SO ORDERED this 24 day of August, 1999.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**AUG 24 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**SHANNON BIRDSELL, for a minor** )  
**Robert A. Burns,** )  
**SSN: 634-12-7345,** )

**Plaintiff,** )

**v.** )

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

**Defendant.** )

**Case No. 97-CV-0802-EA**

**ENTERED ON DOCKET**

**DATE AUG 25 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 24th day of August 1999.

*Claire V Eagan*

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHANNON BIRDSELL, for a minor )  
Robert A. Burns, )  
SSN: 634-12-7345, )

Plaintiff, )

v. )

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

Defendant. )

Case No. 97-CV-0802-EA

ENTERED ON DOCKET

DATE AUG 25 1999

**ORDER**

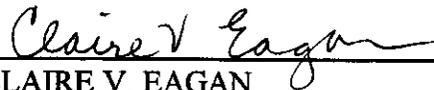
On August 24, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income benefits, the disposition of which both parties have consented to before this Court. Gayle Troutman, Esq., appeared on behalf of the plaintiff, and Cathryn McClanahan, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996); Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should apply the three-step sequential evaluation

process found at 20 C.F.R. § 416.924, and if necessary, ensure that a Childhood Disability Evaluation Form, SSA-538, is properly completed and considered. See id., § 416.924(g).

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).

Dated this 24th day of August, 1999.

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
PLAINTIFF, )  
)  
v. )  
)  
BRENDA K. RATLIFF; THE BRENDA K. )  
RATLIFF LIVING TRUST; THE FIRST )  
NATIONAL BANK AND TRUST COMPANY )  
OF VINITA, as Trustee of the Brenda K. )  
Ratliff Living Trust; and THE FIRST )  
NATIONAL BANK AND TRUST COMPANY )  
OF VINITA, BY AND THROUGH ITS )  
PRESIDENT, DON YARGER, as the )  
Personal Representative for the Estate of )  
Harry W. Ratliff, )  
)  
DEFENDANTS. )

**FILED**

AUG 24 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil No. 98-CV-0343BU(M) J

ENTERED ON DOCKET

DATE AUG  
AUG 24 1999

STIPULATION OF DISMISSAL

Plaintiff, the United States of America, and defendants Brenda K. Ratliff; the Brenda K. Ratliff Living Trust; and Brenda K. Ratliff, as Trustee of the Brenda K. Ratliff Living Trust, hereby stipulate that the plaintiff's complaint against these defendants and their Counterclaim against the plaintiff shall be and hereby are dismissed with prejudice. Each party shall bear its respective costs, including attorneys' fees or any other costs of this litigation.

Dated this 24<sup>th</sup> Day of August, 1999.

JEFFREY S. SWYERS, OBA # 16317  
Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 7238, Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 514-6507

Attorneys for Plaintiff, United States

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*Charles D. Harrison*

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Attorneys for Defendant, Brenda K. Ratliff,  
individually and as Trustee of and for the  
Brenda K. Ratliff Living Trust

FILED

AUG 24 1999 *JA*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SANDRA J. ARMSTRONG, )  
 )  
 Defendant. )

Case No. 99CV0492K(E)

ENTERED ON DOCKET

DATE AUG 24 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 Phil Pinnell, 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 24<sup>th</sup> day of August, 1999.

UNITED STATES OF AMERICA

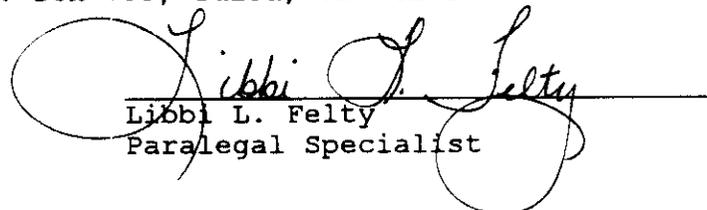
Stephen C. Lewis  
United States Attorney



PHIL PINNELL, OBA #7169  
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 24<sup>th</sup> day of August, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Sandra J. Armstrong, 16538 E. 2nd St., Tulsa, OK 74108 and Everett R. Bennett, Jr., Frasier, Frasier & Hickman 1700 S.W. Boulevard, P. O. Box 799, Tulsa, OK 74101-0799.



Libbi L. Felty  
Paralegal Specialist

*CW*

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT  
STATE OF OKLAHOMA

**F I L E D**

AUG 23 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACK BROTTON, JR., d/b/a  
CARAVAN CATTLE COMPANY,

Plaintiff,

vs.

Case No. 99-CV-60-B

AMERICAN EQUITY INSURANCE  
COMPANY, a foreign corporation,

Defendant.

ENTERED ON DOCKET

DATE AUG 21 1999

**ORDER OF DISMISSAL WITH PREJUDICE**

NOW on this 20<sup>th</sup> day of Aug, 1999, the Court has for its consideration the parties' stipulation for dismissal of the captioned litigation with prejudice to the refiling thereof. For good cause shown, the court finds that the stipulation, should be accepted, and that this case should be dismissed with prejudice and that the defendant party to bear his/its own costs and attorney fees.

(60D)

IT IS SO ORDERED.



THOMAS R. BRETT  
SENIOR UNITED STATES DISTRICT JUDGE

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

F I L E D

BETSY D. BENEFIELD, )  
SSN: 354-60-3056, )  
 )  
Plaintiff, )

AUG 23 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

v. )

CASE NO. 98-CV-775-M ✓

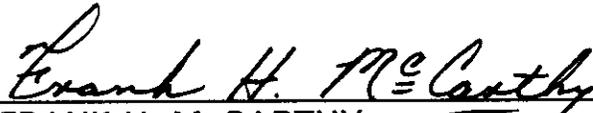
KENNETH S. APFEL, )  
Commissioner of the Social Security )  
Administration, )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE AUG 24 1999

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 25<sup>th</sup> day of AUG, 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

BETSY D. BENEFIELD,  
SSN: 354-60-3056,

PLAINTIFF,

vs.

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

DEFENDANT.

ENTERED ON DOCKET

DATE AUG 24 1999

CASE No. 98-CV-775-M

**F I L E D**

AUG 23 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Plaintiff, Betsy D. Benefield, 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. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the 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

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<sup>1</sup> Plaintiff's applications for Disability Insurance Benefits and Supplemental Security Income Benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held September 20, 1994, after which the ALJ entered a decision dated December 14, 1994 denying benefits. After the Appeals Council denied review, Plaintiff appealed the Commissioner's decision to the Northern District of Oklahoma. Upon motion by the U.S. Attorney on behalf of the Commissioner, the court remanded the claim to the Commissioner for further administrative action. A second hearing was held May 5, 1997. By decision dated July 25, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council declined review on August 8, 1998, making the decision of the ALJ the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.984(b)(2) and 416.1484(b)(2).

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

Plaintiff was born March 21, 1958 and was 36 years old at the time of the first hearing, 39 at the time of the second hearing. [R. 30, 205]. She claims to have been unable to work since May 1, 1993, due to emotional problems and mental stress, difficulty in understanding and following instructions, back pain, and vision problems. [Plaintiff's Brief].

The ALJ determined that Plaintiff is impaired by some mental problems, severe enough to reduce her ability to work, but that she retains the residual functional capacity (RFC) to perform a full range of simple repetitive work. [R. 190]. The ALJ determined Plaintiff could return to her past relevant work (PRW) and found that Plaintiff was not disabled as defined by the Social Security Act. [R. 190]. The case

was thus decided at step four 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 three errors on the part of the ALJ. She claims the ALJ: failed to provide the step four analysis as required by law; erred in failing to consider any physical impairments in the RFC; and prepared findings on the PRT form which are not supported by substantial evidence. [Plaintiff's Brief, p. 1]. For the reasons discussed below, the Court affirms the decision of the Commissioner.

#### **Plaintiff's First Allegation of Error**

Plaintiff contends the ALJ did not comply with the step four analysis required by law.<sup>2</sup> In addition, Plaintiff complains the ALJ improperly combined the Step Four analysis with the Step Five analysis into one step. She states: "Nothing in the regulations or case law suggests such an analysis would be appropriate, particularly since the burden with respect to the RFC shifts to the Commissioner at Step Five." [Plaintiff's Brief, p. 2].

In his decision, the ALJ found that Plaintiff "is impaired by some mental problems, and such impairments are severe enough to reduce [her] ability to work." [R. 190]. He determined that Plaintiff has the residual functional capacity to perform

---

<sup>2</sup> At step four, the ALJ must perform a three-phase evaluation consisting of: an assessment of the claimant's residual functional capacity; a determination of the physical and mental demands of the claimant's past relevant work; and a determination as to the claimant's ability to meet the physical and mental job demands found in phase two despite the mental and/or physical limitations found in phase one. Specific findings must be made at each of these phases. *Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996).

a full range of simple repetitive work. *Id.* At the hearing, he posed a hypothetical question containing this RFC to a vocational expert (VE), who testified that Plaintiff could perform light food service work, light office cleaning work, medium unskilled assembly work, and light hand packaging jobs, all of which exist in significant numbers in the economy. [R. 226-227]. In the portion of the decision containing the discussion of his findings, the ALJ listed the jobs identified by the VE at the hearing and said: "Since claimant can perform her past work, and other work that exists in significant numbers in the national economy, she is not disabled." [R. 190]. Finding No. 6 of the ALJ's decision reads as follows:

Claimant's impairment and residual functional capacity do not preclude claimant from performing claimant's past relevant work as a fast food worker, babysitter or hotel maid, **or other jobs that exist in significant numbers in the regional and national economy, and she is, therefore, not disabled.** [emphasis added]. *Id.*

Plaintiff's only challenge to a step five determination in this case is her allegation that the ALJ's RFC determination was flawed because it lacked the physical impairments that had been included in a previous determination. As discussed later in this order, the court concludes the RFC determination by the ALJ in the decision at issue in this case is based upon substantial evidence and was properly reached. So, even if the court found that the step four evaluation was insufficient, there is sufficient evidence to support a step five determination of no disability. It is not necessary, therefore, to discuss the merits of Plaintiff's arguments regarding the step four determination, other than her allegation that there is error in the ALJ's combination of the two steps into one finding. See *Berna v. Chater*, 101 F.3d 631, 632-33 (10th Cir.

1996)(subsidiary findings necessary for alternative disposition were included in body of ALJ's decision, were sufficient basis for denial of benefits and were unchallenged, therefore success on appeal is foreclosed -- regardless of the merits of arguments relating to the challenged alternative). See also *Murrell v. Shalala*, 43 F.3d 1388, 1390 (10th Cir. 1994).

The court notes the ALJ's decision did not set forth a separate step five "finding" in his determination. Twice in his decision, however, the ALJ specifically noted that Plaintiff retained the RFC to perform other jobs that exist in significant numbers in the regional and national economy. And, although the ALJ might have been more punctilious in expressing an alternative finding, as in a separate subsection or finding, there is no requirement that every step of each decisional process be enunciated with precise words and phrases drawn from relevant disability regulations. See *Renner v. Heckler*, 786 F.2d 1421, 1424 (9th Cir. 1986)(ALJ need not precisely enunciate each decisional step); *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992). Plaintiff herself acknowledged that the ALJ had reached a step five determination. Her complaint is confined to the form and format used by the ALJ in his written decision rather than the correctness of the step five determination. In reviewing administrative decisions, the courts do not require procedural perfection. *Mays v. Bowen*, 837 F.2d 1362, 1364 (5th Cir. 1988); *Diaz v. Secretary of HHS*, 898 F.2d 774, 777 (10th Cir. 1990); and *Benskin v. Bowen*, 830 F.2d 878, 883 (8th Cir. 1987). Because the court concludes that the step five determination stands as unchallenged and as an independent and sufficient basis for

a denial of benefits, Plaintiff's argument for remand upon the basis of improper analysis at step four is not reviewed or discussed herein. Plaintiff's first allegation of error, therefore, fails.

#### **Plaintiff's Second Allegation of Error**

Plaintiff's second argument for reversal is that an earlier order of the district court remanding the claim for further development required the ALJ to include physical impairments he had assessed in his earlier decision in this decision now at issue before the court. Plaintiff states the "law of the case" doctrine applies. She cites *Key v. Sullivan*, 925 F.2d 1056 (7th Cir. 1991) as authority. *Key*, however, is distinguishable from this case. In *Key*, the district court had explicitly affirmed a prior administrative determination but remanded the claim to the Commissioner to make additional specific findings related to the remand order. The Seventh Circuit held that the "law of the case doctrine" comes into play only with respect to issues previously determined. The doctrine "most often applies to issues already fully decided in cases that subsequently re-appear before the rendering court." *Key*, at 1061, [citations omitted]. "If an issue is left open after remand, the lower tribunal is free to decide it." *Id.*, [citations omitted]. Because *Key*'s PRW and RFC were not open issues; that is, they had already been determined in the district court when it affirmed that portion of the ALJ's previous decision, the court ruled the [Commissioner] had exceeded the scope of the remand order by revisiting those issues.

In the case at bar, this court remanded the claim upon motion of the Commissioner for "further administrative action" without examining the merits of the

claim or reaching a determination as to any of the issues presented by the Plaintiff. [R. 232]. The Appeals Council's remand order vacated the earlier decision and ordered the ALJ to issue a new decision. [R. 235-236]. The Tenth Circuit has held that the ALJ was not bound by an earlier residual functional capacity assessment even though the ALJ first found that Plaintiff could not perform a full range of light, medium or sedentary work, but upon remand found that Plaintiff could perform a full range of light work. *Campbell v. Bowen*, 822 F.2d 1518, (10th Cir. 1987). The court notes that, in the instant case, the ALJ considered additional evidence before making his second ruling, and there is substantial evidence in the record supporting his determination. Contrary to Plaintiff's contention, the ALJ did properly consider all of the evidence relating to Plaintiff's impairments. Therefore, her second allegation of error is without merit.

### **Plaintiff's Third Allegation of Error**

Plaintiff asserts the ALJ's findings on the Psychiatric Review Technique Form (PRT) are not supported by substantial evidence.<sup>3</sup> Plaintiff takes issue with the report by Minor Gordon, Ph.D., who examined Plaintiff on March 4, 1997. [R. 253-260]. She claims his opinion was based upon a "misunderstanding of Ms. Benefield's education."

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<sup>3</sup> The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. § 1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

[Plaintiff's brief, p. 4]. Dr. Gordon stated that Plaintiff's responses to the individual subtest when she could not name any past Presidents of the United States; did not know how many weeks there are in a year; the identity of Louie Armstrong; the month in which Labor Day falls; didn't know the meanings of the words: conceal, sentence, consume or regulate; was unable perform basic math problems; did not know why child labor laws are needed; why it is better to borrow money from a bank rather than from a friend; or why people who are born deaf are unable to talk, were highly inconsistent with an individual who graduated from high school and attended one and a half years of college with no history of head trauma. [R. 255]. The scores Plaintiff earned in Dr. Gordon's examination placed her in the borderline range of mental retardation. She achieved a full-scale I.Q. of 78. Dr. Gordon stated: "[t]here is clearly evidence of malingering, based on her response to the Wechsler series." *Id.* Dr. Gordon noted that during the interview, based on casual conversation, Plaintiff's cognitive processes, a gross estimate of her level of intelligence, was average. The tempo of her thought processes was of variable speed and latency, the rhythm spontaneous and the organization coherent. [R. 254]. He said: "The overall picture here is of a 38-year-old female who is quite capable of performing some type of routine repetitive task on a regular basis." [R. 256].

While it may be true that the ALJ "focused" on the opinion of Dr. Gordon in preparing the PRT, it is apparent that he considered all the evidence, including other WAIS-R examinations that revealed Plaintiff had low average to average intelligence. [R. 144, 166, 282, 292]. The ALJ discussed the GAF ratings in the record as well as

Dr. Werlla's evaluation. [R. 189]. He reviewed and discussed Plaintiff's testimony, her daily activities and her demeanor at the hearing. [R. 189].

Evidence referred to by Plaintiff that she claims conflicts with the ALJ's PRT includes a psychological evaluation performed in 1991 reflecting a GAF rating of 35-45. [R. 168]. That examiner's statement that Plaintiff was not "currently capable of maintaining competitive employment" was made two years before Plaintiff alleges she became unable to work in 1993. [R. 102]. Furthermore, Plaintiff testified that she left her job at Wendy's due to pregnancy rather than any mental impairments. [R. 40, 53]. And, while she implies that she only passed one course in junior college with a sympathy grade, her testimony and the history she gave medical examiners reported attendance at a junior college for over a year although the actual amount of credit hours she earned is inconsistent. [R. 166, 215, 293].

After considering the entire record, the ALJ limited Plaintiff to simple repetitive work activity. The record supports such a finding. The court finds no error on the part of the ALJ in preparing the PRT.

### **Conclusion**

The Court finds the ALJ evaluated the record in accordance with the correct legal standards established by the Commissioner and the courts. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 23<sup>rd</sup> day of AUG., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

JOHN G. ROE, )  
)  
Plaintiff, )  
)  
v. )  
)  
SHANGRI-LA RESORT, )  
)  
Defendant. )

FILED

AUG 23 1999

Case No. 98 CV-0559K ✓

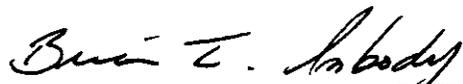
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U.S. DISTRICT COURT

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AUG 23 1999

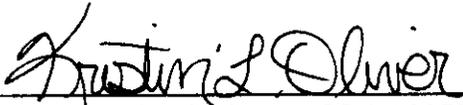
DATE \_\_\_\_\_

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

The parties hereby jointly stipulate for the dismissal of this cause with prejudice pursuant to Fed. R. Civ. P. 41(a)(1). The parties are to bear their own respective attorneys' fees and costs.

  
\_\_\_\_\_  
G. Steven Stidham, OBA #8633  
Brian T. Inbody, OBA #17188  
SNEED LANG, P.C.  
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*Attorneys for Plaintiff John G. Roe*

  
\_\_\_\_\_  
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Dennis C. Cameron, OBA #12236  
Kristin L. Oliver, OBA #17687  
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*Attorneys for Defendant Shangri-La Resort*

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

**FILED**

AUG 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

S. WILLIAM HOUSE; DALE SEAMAN; )  
ABNER B. LEMERT d/b/a LEMERT )  
BROTHERS, a partnership; LEON MERZ )  
RAY A. MERZ and EVERETT L. MERZ )  
d/b/a MERZ BROTHERS, a partnership; )  
and, BAR ELEVEN LAND & CATTLE )  
COMPANY, INC., an Arizona corporation, )

Plaintiffs, )

vs. )

No. 98 CV 0237K (M)

NATIONAL FARMS, INC., a Delaware )  
corporation, )

Defendant. )

ENTERED ON DOCKET

DATE AUG 23 1999

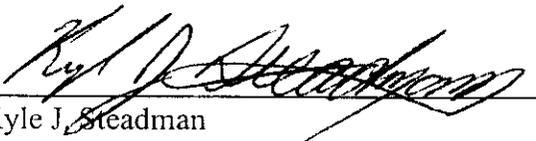
**STIPULATION OF DISMISSAL WITH PREJUDICE,  
PURSUANT TO FED.R.CIV.P. 41(a)(1)**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, all parties to this action, by and through their undersigned counsel, do hereby stipulate and agree that this action, and all claims asserted herein by any Plaintiff, are hereby dismissed with prejudice, with each party to bear his or its own costs and attorney fees.

CH

**Stipulation of Dismissal With Prejudice,  
Pursuant to Fed.R.Civ.P. 41(a)(1)  
Page 2**

BRADSHAW, JOHNSON & HUND  
200 West Douglas, Suite 100  
Wichita, KS 67202-3013

By   
\_\_\_\_\_  
Kyle J. Steadman

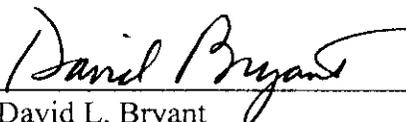
and

John. H.. Tucker  
RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE  
P.O. Box 21100  
Tulsa, OK 74121-1100

ATTORNEYS FOR PLAINTIFFS

**Stipulation of Dismissal With Prejudice,  
Pursuant to Fed.R.Civ.P. 41(a)(1)  
Page 3**

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400 Beacon Building.  
406 S. Boulder Ave.  
Tulsa, OK 74103

By   
David L. Bryant

and

W. Robert Wilson  
WILSON & PAYNE  
Suite 400, First National Building  
P.O. Box 1557  
Pawhuska, Oklahoma 74056

ATTORNEYS FOR DEFENDANT

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

FILED

AUG 20 1999

Phil Lombardi, Clerk U.S. DISTRICT COURT

JESSICA A. MOORE,
Plaintiff,
vs.
BARRETT RESOURCES CORPORATION, ASSOCIATED RESOURCES, INC., and BRIAN L. RICE, Defendants.

Case No. 99CV0017H (J) Hon. Sven Holmes

ENTERED ON DOCKET DATE AUG 23 1999

AMENDED STIPULATION OF DISMISSAL WITH PREJUDICE OF ASSOCIATED RESOURCES, INC., OF CROSS-CLAIM AGAINST DEFENDANT, BRIAN L. RICE

COME NOW the Defendants, Associated Resources, Inc., by and through its attorney of record, James K. Deuschle, and Brian L. Rice, by and through his attorney, Danny P. Richey, and hereby stipulate to the dismissal with prejudice of Defendant, Associated Resources, Inc.'s Cross-Claim filed in this matter against Defendant, Brian L. Rice and both parties agree that each shall bear their own costs and attorneys fees incurred in this action.

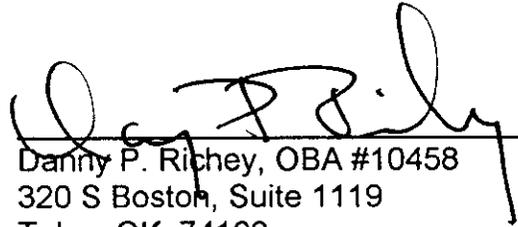
The Defendant, Associated Resources, Inc. By its attorney,

[Signature]
JAMES K. DEUSCHLE, OBA #011593
525 South Main, Suite 209
Tulsa, Oklahoma 74103-4503
(918) 592-2280 Telephone
(918) 592-2281 Facsimile

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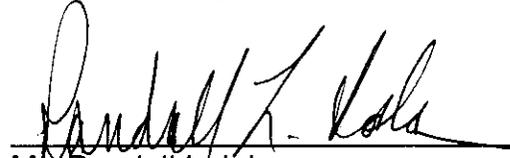
CTJ

The Defendant, Brian L. Rice  
By his Attorney,



Danny P. Richey, OBA #10458  
320 S Boston, Suite 1119  
Tulsa, OK 74103  
(918) 587-7805 Telephone  
(918) 587-7806 Facsimile

The Plaintiff, Jessica A.A. Moore  
By her Attorneys,



Mr. Randall L. Iola  
Mr. R. Tom Hillis  
Attorney-at-Law  
15 E Fifth Street, Suite 2750  
Tulsa, OK 74103-4334

The Defendant, Barrett Resources Corp  
By its Attorney,



Mr. Randall Snapp  
Attorney-at-Law  
321 S Boston Ave, Suite 500  
Tulsa, OK 74103-3313

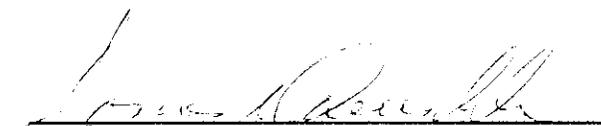
**CERTIFICATE OF SERVICE**

I, James K. Deuschle, do hereby certify that on the 20<sup>th</sup> day of August, 1999, I mailed a true and correct copy of the foregoing instrument with proper postage affixed thereto to the following:

Mr. Randall L. Iola  
Mr. R. Tom Hillis  
Attorney-at-Law  
15 E Fifth Street, Suite 2750  
Tulsa, OK 74103-4334

Mr. Randall Snapp  
Attorney-at-Law  
321 S Boston Ave, Suite 500  
Tulsa, OK 74103-3313

Mr. Danny P. Richey  
Attorney-at-Law  
320 S Boston, Suite 1119  
Tulsa, OK 74103

  
\_\_\_\_\_  
JAMES K. DEUSCHLE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA *ex rel.*  
WILLIAM I. KOCH and  
WILLIAM A. PRESLEY,

Plaintiffs,

v.

KOCH INDUSTRIES, INC., *et al.*,

Defendants.

**FILED**  
AUG 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 91-CV-763-K(J) ✓

ENTERED ON DOCKET

DATE AUG 23 1999

**REPORT AND RECOMMENDATION**

Now before the Court is Defendants' "Motion for Partial Summary Judgment Invoking Bar of Statute of Limitations On Natural Gas Accounting Claims." [Doc. No. 481]. The motion has been referred by the Court to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636 and Fed. R. Civ. P. 72.

Defendants' motion is directed solely at the claims in Count II of the Second Amended Complaint. Defendants argue that, pursuant to 31 U.S.C. § 3731(b)(1), the limitations period applicable to these claims is 6 years. Defendants also argue that the claims currently stated in Count II of the Second Amended Complaint do not relate back to any prior complaint. Consequently, Defendants argue that any claims in Count

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II of the Second Amended Complaint accruing before April 16, 1991<sup>1/</sup> are barred by the statute of limitations.

Plaintiffs argue that the claims in Count II of the Second Amended Complaint relate back, pursuant to Fed. R. Civ. P. 15(c)(2), to the filing of the original complaint in The Precision Company v. Koch Industries, Inc., et al., No. 89-CV-437-C (N.D. Okla. May 25, 1989) (Precision I). Plaintiffs also argue that, pursuant to 31 U.S.C. § 3730(b)(2), the applicable limitations period is 10 years. Consequently, Plaintiffs argue that only claims accruing before May 26, 1979 are barred by the statute of limitations.

The undersigned agrees with Defendants. For the reasons discussed below, the undersigned finds that all claims in Count II of the Second Complaint accruing before April 16, 1991 are barred by the statute of limitations. Consequently, the undersigned recommends that Defendants' motion for partial summary judgment be **GRANTED**.

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<sup>1/</sup> Plaintiffs filed a motion for leave to file the Second Amended Complaint on April 15, 1997. See Doc. No. 191. On March 5, 1998, the undersigned recommended that Plaintiffs' motion for leave to amend be granted. See Doc. No. 247. On October 26, 1998, the Court entered its Order adopting this recommendation. See Doc. No. 398. The Second Amended Complaint was then filed by Plaintiffs on October 29, 1998. See Doc. No. 414. For purposes of their motion for partial summary judgment, Defendants have conceded that the date the application for leave to amend was filed, rather than the date the Second Amended Complaint was actually filed, should be used as the date which tolls the statute of limitations.

I. **LAW OF THE CASE<sup>2/</sup>**

The Court has previously held that no complaint filed in this case (91-CV-763-K) will relate back, pursuant to Fed. R. Civ. P. 15(c), to any complaint filed in the Precision I case (i.e., 89-CV-437-C). See Doc. Nos. 473, pp. 11-14; and 526, pp. 4-7. The Court has also previously held that, as *qui tam* relators, Plaintiffs cannot benefit from the 10 year statute of limitations in 31 U.S.C. § 3731(b)(2). See Doc. No. 526, p. 12. Plaintiffs have presented nothing in their response to Defendants' motion for partial summary judgment which would cause the undersigned to recommend that the Court reconsider or change any of these prior holdings.

Based on the Court's prior holdings, the applicable statute of limitations is six years, as provided in § 3731(b)(1). Also, the earliest complaint which could possibly have tolled § 3731(b)(1)'s limitations period was the original Complaint filed in this action on September 30, 1991. Thus, the only remaining issue to be resolved for purpose of Defendants' motion for partial summary judgment is whether the claims added by amendment to Count II of the Second Amended Complaint relate back, under Fed. R. Civ. P. 15(c), to the original Complaint filed in this action.

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<sup>2/</sup> The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, it does not limit the tribunal's power." Arizona v. California, 460 U.S. 605, 618 (1983). See also Messenger v. Anderson, 225 U.S. 436, 444 (1912) (holding that the doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.").

## II. DISCUSSION

### A. LEGAL PRINCIPLES

The relation back principles of the Federal Rules of Civil Procedure are found in Rule 15, which provides as follows:

- (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
  - (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
  - (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
  - (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c).

The False Claims Act provides the statute of limitations applicable to this action. See 31 U.S.C. § 3731(b). Section 3731(b) contains no provision dealing with the

relation back of amendments to complaints stating *qui tam* claims. Thus, Rule 15(c)(1) is not applicable to this case.

The Second Amended Complaint drops as parties certain entities named as defendants in previous complaints. The Second Amended Complaint does not, however, add or change any party. Thus, Rule 15(c)(3) is not applicable to this case.

The relation back issue presented by Defendants' motion will be governed by Rule 15(c)(2). Plaintiffs must establish, therefore, that the claims added by way of amendment to Count II of the Second Amended Complaint arise out of the same "conduct, transaction, or occurrence" set forth in the original Complaint.<sup>3/</sup>

Rule 15(c) allows relation back when the claims asserted in the amendment arise out of the same "conduct, transaction or occurrence." Fed. R. Civ. P. 15(c)(2) (emphasis added). This disjunctive phrasing makes it clear that for relation back to occur, it is sufficient, although not required, that the new claim arise out of the same "transaction or occurrence" as the original claims. Relation back may also occur, however, when the new claim arises out of the same "conduct" as the original claims.

The theory behind Rule 15(c)(2) is that "once litigation involving particular conduct or a given transaction has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of . . . claims that arise out of the same conduct, transaction, or occurrence as set forth

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<sup>3/</sup> The "claims" asserted in the original Complaint and the First Amended Complaint (doc. no. 26) are identical. So, if the Second Amended Complaint relates back to the First Amended Complaint it will also relate back to the original Complaint. To make a relation back determination, the undersigned will, therefore, compare the allegations in the original Complaint with those in the Second Amended Complaint.

in the original pleading." 6A Charles A. Wright et al., Federal Practice and Procedure: Civil 2d § 1496 (1990). Because the purpose of a statute of limitations is to prevent the assertion of stale claims, its purpose is not violated by allowing, after the statute has run, the addition of claims arising out of conduct, transactions or occurrences which are already a part of active litigation.

**B. COUNT II OF THE ORIGINAL COMPLAINT**

Count II of the original Complaint contains the following claim(s):

[Defendants have] violated 31 U.S.C. § 3729(a)(7) by knowingly making, and causing to be made, false records and statements to conceal and decrease the obligation of [Defendants] and other entities to pay money to the United States Government in exchange for natural gas. [Defendants have] accomplished this by several different means, including but not limited to, the following:

- (a) Falsely integrating natural gas measurement charts, in [Defendants'] favor, thus understating natural gas production;
- (b) Miscalibrating gas meters, in [Defendants'] favor, to understate natural gas production;
- (c) Installing drip valves in specially designed pipes and collecting the liquid run off of condensate without paying the owners for it;
- (d) Understating the British Thermal Unit value of the natural gas [Defendants extract];
- (e) Tightening down on the recording pin on the has meter so the initial measure has to overcome the friction of the pin against the paper;

- (f) Putting the wrong sized orifice plate in the meter run, putting the orifice plate on backward, or not centering it;
- (g) Letting the ink run out on [Defendants'] recording pens and then later filling in the blanks by hand to record less natural gas flow; and
- (h) Falsely increasing the recorded proportion of non-natural gas substances contained in the natural gas, thereby decreasing the purchase price paid.

Doc. No. 1, ¶ 64.<sup>4/</sup>

**C. COUNT II OF THE SECOND AMENDED COMPLAINT**

Count II of the Second Amended Complaint contains the following claim(s):

[Defendants have] violated 31 U.S.C. § 3729(a)(7) and other provisions of the False Claims Act by knowingly making, using and causing to be made, false records and statements to conceal and decrease the obligation of [Defendants] and other entities to pay money to the United States Government in exchange for natural gas. [Defendants have] accomplished this by several different means, including but not limited to, the following:

- a. [REDACTED]

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<sup>4/</sup> The original Complaint also contains certain allegation identified as "Background Facts" which touch on the claim(s) pled in Count II. In the Background Facts section, Plaintiffs allege facts to establish that Defendant do in fact purchase natural gas from federal and Indian leases. Doc. No. 1, ¶¶ 41-42. Plaintiffs also describe in general terms which federal agencies are to receive royalty payments for natural gas production on federal and Indian leases. *Id.* at ¶¶ 43-48. Finally, the Background Facts section alleges that the federal government relies on Defendants to accurately measure and report the volume of natural gas products removed from federal and Indian leases. *Id.* at ¶¶ 49 & 52.

**b) Deducting \$1.65 per barrel from the price paid for natural gasoline, thereby fraudulently understating the net sales proceeds from natural gasoline for royalty payment purposes[.]**

Doc. No. 414, ¶ 56 (redlining indicates additions to the original Complaint).<sup>5/</sup>

The gas at issue in Count II of the Second Amended Complaint was processed at one of Defendants' natural gas processing plants. The gas and products extracted from the gas were then sold by Defendants to third parties. The amount Defendants received from third parties for these natural gas products would then be allocated back to the leases from which the gas was originally purchased. In other words, payment for the gas occurred at the tailgate of Defendants' processing plants, and not at the wellhead. See Doc. Nos. 418, 429 and 453, Defendants' Motion for Summary Judgement on Plaintiffs' Natural Gas Accounting Claims.

Defendants deduct certain fees and charges from the gross proceeds received from third parties for the sale of processed natural gas products. This is how Defendants are compensated for processing the gas. Count II alleges that two of the deductions made by Defendants to gross receipts were improper. These charges were allegedly levied by Defendants' accounting personnel after the processed gas products had been sold to third parties to calculate the net proceeds that would be allocated

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<sup>5/</sup> The Second Amended Complaint also contains certain allegation identified as "Background Facts" which touch on the claim(s) pled in Count II. In the Background Facts section, Plaintiffs allege facts to establish that Defendant do in fact purchase natural gas from federal and Indian leases. Doc. No. 414, ¶¶ 32-33. Plaintiffs also describe in general terms which federal agencies are to receive royalty payments for natural gas production on federal and Indian leases. Id. at ¶¶ 34-39. Finally, the Background Facts section alleges that the federal government relies on Defendants to accurately measure and report the volume of natural gas products removed from federal and Indian leases. Id. at ¶¶ 40 & 44.

back to the leases. See Doc. Nos. 418, 429 and 453, Defendants' Motion for Summary Judgement on Plaintiffs' Natural Gas Accounting Claims. Thus, these claims have been referred to by the parties as the natural gas accounting claims.

**D. THE CLAIMS IN COUNT II OF THE SECOND AMENDED COMPLAINT DO NOT ARISE OUT OF THE SAME CONDUCT, TRANSACTION OR OCCURRENCE AS THE CLAIMS IN COUNT II OF THE ORIGINAL COMPLAINT.**

**1. Not the Same Transaction or Occurrence**

Plaintiffs have made no attempt to demonstrate any correlation between those instances when Defendants allegedly performed the bad deeds identified in Count II of the original Complaint (i.e., mis-integrating, mis-calibrating, using the wrong orifice plate, etc.) and those instances in which Defendants allegedly performed the bad deeds identified in Count II of the Second Amended Complaint (i.e., making improper deductions to gross proceeds from the sale of processed natural gas products). The undersigned finds that there is no basis upon which the Court could find that the taking of the improper deductions alleged in Count II of the Second Amended Complaint arises out of the same transactions or occurrences where Defendants allegedly mis-integrated, mis-calibrated or did any of the other things alleged in Count II of the original Complaint. The transactions and occurrences at issue in Count II of the original Complaint are different than, not the same as, the transactions and occurrences at issue in Count II of the Second Amended Complaint.

A common test for determining whether one claim arises out of the same transaction or occurrence as another is to ask whether both claims arise out of the

same nucleus of operative facts. See Gilles v. United States, 906 F.2d 1386, 1390 (10th Cir. 1990) (*en banc*). Applying this test confirms that the claims pled in Count II of the Second Amended Complaint do not arise out of the same transaction or occurrence as the claims pled in Count II of the original Complaint. The facts which Plaintiffs would have had to establish under Count II of the original Complaint bear no resemblance to the facts which Plaintiffs will have to establish under Count II of the Second Amended Complaint. The undersigned finds, therefore, that the claims in Count II of the original and Second Amended Complaints do not arise out of the same nucleus of operative facts.

## **2. Not the Same Conduct**

Plaintiffs' argue primarily that the claims in Count II of the original and Second Amended Complaints arise out of the same conduct. Plaintiffs argue that "[t]here is no question that [Defendants'] accounting methods were placed at issue in the [original] Complaint through Plaintiffs' allegations of underpayment of royalties." Doc. No. 499, p. 5. Despite its decisiveness, the undersigned does not agree with this statement.

Five of the eight allegations in Count II of the original Complaint all relate to Defendants' alleged tampering with the meters used to measure natural gas. See Doc. No. 1, ¶¶ 64(a)-(b) and 64(e)-(g). Two of the allegations relate to Defendants' alleged recording of false measurements (i.e., BTU's and non-gas substances). Id. at ¶¶ 64(d) and 64(h). The remaining allegation relates to Defendants' alleged theft of condensate by siphoning it out of the system. Id. at ¶ 64(c). In the Second Amended Complaint,

Plaintiffs are challenging the conduct of Defendants' accounting staff. Plaintiffs are challenging the correctness of certain deductions made by Defendants' cost accountants to come up with a net proceeds figure to be allocated back to the leases from which natural gas was purchased. The undersigned finds that the conduct alleged in Count II of the Second Amended Complaint is in no way similar to that conduct which is alleged in Count II of the original Complaint.

Plaintiffs argue that Defendants' Answer to the First Amended Complaint, which states claims identical to those in the original Complaint, demonstrates that Defendants themselves understood that their cost accounting methods in general were being called into question by the original Complaint. In particular, Plaintiffs point to the following statement in Defendants' Answer:

Substantially all of the natural gas purchased by Koch is purchased for processing in one of its gas liquids extraction plants under 'saved and sold' contracts, pursuant to which Koch apportions among its sellers a portion of the proceeds it receives from the gas liquids extracted and the residue gas sold.

Doc. No. 44, ¶ 12(e) (emphasis original). Plaintiffs fail to quote the second sentence of ¶ 12(e), which puts this statement in better context. The second sentence states as follows:

As a result, all overages and shortages inure to the benefit of or are borne by Koch and its sellers on a pro rata basis, and, as a matter of law, no further amount can be due and owing.

Id.

Plaintiffs have argued that due to many of the acts pled in Count II of the original Complaint, Defendants were consistently able to take more gas than that for which they actually paid (i.e., they created consistent natural gas overages). See Doc. No. 1, ¶¶ 64(a)-(b) and 64(e)-(g). Defendants have asserted as a defense to Plaintiffs' natural gas overage claims that even if Defendants engaged in the activities identified in Count II of the original Complaint, there would be no overages because the proceeds of the gas actually sold were allocated back to the producers of the gas on a pro rata basis. So, if Defendants sold more than they originally measured, that overage would be passed back to the producers on a pro rata basis. This defense, valid or not, is embodied in ¶ 12(e) of Defendants' Answer. Even if looking to a party's answer to resolve a relation back issue were proper, the undersigned finds nothing in Defendants' Answer which signals their understanding that its natural gas cost accounting practices were being challenged by Count II of the original Complaint.

Plaintiffs also point out that Count II in both the original and First Amended Complaints contained "including but not limited to" language. Plaintiffs argue that this language should have made Defendants "aware that additional aspects of its gas royalty payment system could be called into question in this action." Doc. No. 499, p. 7. This language cannot, however, substitute for conduct, transactions or occurrences which are not actually present in the original Complaint. This type of

boilerplate language provides little, if any, effective notice of un-enumerated allegations.<sup>6/</sup>

Plaintiffs argue that Count II of the Second Amended Complaint (1) adds substance to the "skeletal claims" contained in the original Complaint, (2) amplifies the allegations in the original Complaint, and (3) is a natural offshoot of the basic scheme pled in the original Complaint. See Doc. No. 499, p. 8. The undersigned does not agree. The conduct at issue in the original Complaint, which primarily involved metering and measuring natural gas, and the conduct at issue in the Second Amended Complaint, which is directed solely at certain cost accounting decisions, are too dissimilar to support relation back under Rule 15(c)(2). The existence of the pattern of conduct pled in Count II of the original Complaint simply does not imply the existence of the pattern of conduct pled in Count II of the Second Amended Complaint.

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<sup>6/</sup> Nielsen v. Professional Financial Management, Ltd., 682 F. Supp. 429 (D. Minn. 1987), which Plaintiffs cite in support of their "including but limited to" argument is distinguishable. In Nielsen, a plaintiff investor sued defendant for fraud in the organization and promotion of certain tax shelters. In his complaint, plaintiff indicated that he was one of several hundred investors affected by defendant's fraud. Plaintiff then amended his complaint to add several of these other investors as additional plaintiffs.

First, as was discussed in great detail in prior orders of this Court, plaintiff-changing amendments require a unique analysis, which was not applied by the court in Nielsen. See Doc. Nos. 473 and 526. Second, the claims being asserted by the new plaintiffs in Nielsen were identical to the claim being asserted by the original plaintiff. Unlike in this case, the defendant in Nielsen knew when the original complaint was filed which aspects of its conduct were being challenged.

### **3. Pre-Amendment Notice from Sources Other than the Original Complaint**

Plaintiffs cite several cases which they allege stand for the following proposition: An amended complaint can relate back to the date a defendant receives notice, from any source, that plaintiff intends to sue defendant with respect to the conduct, transaction or occurrence raised in the amended complaint, even if the same conduct, transaction or occurrence at issue in an amended complaint is not present in the original complaint. As support for this proposition, Plaintiffs cite Azarbal v. Palacio, 724 F. Supp. 279 (D. De. 1989); Senger v. Soo Line Railroad Co., 493 F. Supp. 143 (D. Minn. 1980); and Ford Motor Co. v. United States, 896 F. Supp. 1224 (Ct. Int'l Trade 1995)

Plaintiffs argue that even if the original Complaint in this case did not give Defendants notice of the claims now in Count II of the Second Amended Complaint, Defendants obtained notice of the claims during a status conference in January 1996 (i.e., after the filing of the original Complaint and before the filing of the Second Amended Complaint). Relying on their reading of the cases cited above, Plaintiffs argue that the Second Amended Complaint should relate back at least to the January 1996 status conference. The undersigned does not agree that the cases cited by Plaintiffs stand for the sweeping proposition which Plaintiffs advance.

Plaintiffs propose that the Second Amended Complaint be related back to a date which has nothing to do with the filing of a pleading. The undersigned finds no support for such an approach in Rule 15(c). By its own terms, Rule 15(c) permits one

"pleading" to relate back to another "pleading." Pleading is a term of art in the Federal Rules of Civil Procedure, which is defined with an exhaustive list in Rule 7 to include complaints, answers, and replies to counterclaims. Thus, Rule 15(c) contemplates that a complaint will be related back to another complaint.

Rule 15(c) is designed to ensure that the original pleading gives notice of the claim to be asserted in the amended pleading. Rule 15(c)(2) accomplishes this by requiring that an amended pleading be grounded in the same conduct, transaction or occurrence that was pled in a prior pleading. Plaintiffs cannot simply skip over Rule 15(c)(2)'s requirement that a prior pleading give notice that particular conduct, transactions or occurrences are at issue.

In each of the cases cited by Plaintiffs, the court found that the original complaint actually contained sufficient allegations to identify the conduct, transaction or occurrence at issue in the amended complaints being reviewed by the courts. For this reason the courts held that the amendments would relate back to the original complaints. These courts then confirmed their decisions by noting that the defendants had also received extra-pleading notice. However, none of the decisions cited by Plaintiffs dispensed with Rule 15(c)(2)'s same conduct, transaction or occurrence requirement.

**E. RULE 9(b) DOES NOT IMPACT THE RELATION BACK DETERMINATION**

Rule 15(c) insures that amendments relate back only when the subject of the amendment arises out of the same transaction, occurrence or conduct pled in the original pleading. Rule 9(b) requires that any pleading which intends to raise

allegations of fraud must do so explicitly and in detail. Reading these two rules together, Defendants argue that if a pleading must be amended to add allegations to satisfy Rule 9(b)'s particularity requirement, those allegations by definition can not arise out of the same transaction, occurrence or conduct pled in the original pleading. Doc. No. 481, p. 15. The undersigned rejects this argument for substantially the same reasons the court in Wells v. HBO & Co. rejected a similar argument. See 813 F. Supp. 1561, 1566 (N.D. Ga. 1992).

The undersigned has determined that relation back should not occur in this case because the new allegations do not arise out of the same conduct, transaction or occurrence pled in the original Complaint. That determination was in no way predicated on the existence of some heightened relation back standard created by Rule 9(b)'s intersection with this case.

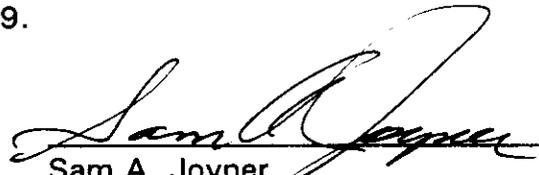
#### **CONCLUSION**

The undersigned recommends that Defendants' "Motion for Partial Summary Judgment Invoking Bar of Statute of Limitations On Natural Gas Accounting Claims" be **GRANTED**. [Doc. No. 481]. The undersigned finds that the applicable limitations period is six years as provided in 31 U.S.C. § 3731(b)(1). The undersigned finds that Count II of the Second Amended Complaint does not relate back, under Fed. R. Civ. P. 15(c), to any prior complaint. Thus, the undersigned recommends that the Court grant summary judgment in favor of Defendants as to any claim asserted in Count II of the Second Amended Complaint which accrued prior to April 16, 1991.

## OBJECTIONS

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

Dated this 19 day of August 1999.

  
Sam A. Joyner  
United States Magistrate Judge

### CERTIFICATE OF SERVICE

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

23rd Day of August, 1999.  
C. Portillo, Deputy Clerk

MT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
 )  
Plaintiff, )

v. )

JAMES R. UTT aka James Russell Utt; )  
SPOUSE OF JAMES R. UTT )  
aka James Russell Utt; )  
REBECCA LYN UTT aka Rebecca L. Utt )  
aka Rebecca Lyn Ratliff aka Rebecca Osborne; )  
SPOUSE OF REBECCA LYN UTT )  
aka Rebecca L. Utt aka Rebecca Lyn Ratliff )  
aka Rebecca Osborne; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma; )  
STATE OF OKLAHOMA ex rel. )  
Oklahoma Tax Commission, )

Defendants. )

ENTERED ON DOCKET  
DATE AUG 23 1999

CIVIL ACTION NO. 98-CV-0562-H (E)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the  
Northern District of Oklahoma

On July 22, 1999, the United States of America recovered judgment  
in rem against the Defendants, James R. Utt aka James Russell Utt and Rebecca  
Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne, in the  
above-styled action to enforce a mortgage lien upon the following described  
property:

Lot Two (2), Block Eight (8), of the Resubdivision of the  
Amended Plat of MEADOW HEIGHTS ADDITION to the City  
of Broken Arrow, Tulsa County, State of Oklahoma,  
according to the Recorded Plat thereof.

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The amount of the judgment is the sum of \$41,597.20, plus administrative charges in the amount of \$529.00, plus penalty charges in the amount of \$208.00, plus accrued interest in the amount of \$2,042.84 as of December 15, 1997, plus interest accruing thereafter at the rate of 7.75 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.966 percent per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, James R. Utt aka James Russell Utt and Rebecca Lyn Utt aka Rebecca L. Utt aka Rebecca Lyn Ratliff aka Rebecca Osborne, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisal and to apply the proceeds to the payment of the costs of the sale; the judgment of Defendant, County Treasurer, Tulsa County, Oklahoma; the judgment of Plaintiff, United States of America; and the judgment of Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission. Any residue is to be paid to the Court Clerk to await further order of this Court.

**THEREFORE**, this is to command you to proceed according to law, to advertise and sell, with appraisal, the above-described real property and apply the proceeds thereof as directed.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 20<sup>th</sup> day of August, 1999.

**PHIL LOMBARDI**, Clerk  
United States District Court for  
the Northern District of Oklahoma

By M. Tawater  
Deputy

Order of Sale  
Case No. 98-CV-0562-H (E) (Utt)

LFR:css

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

**FILED**

AUG 20 1999 *ML*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHARON PITMAN, Wife of GAIL )  
PITMAN, Deceased, )  
 )  
Plaintiff, )

vs. )

Case No. 92-C-451-E /

BLUE CROSS AND BLUE SHIELD OF )  
OKLAHOMA, individually and as )  
Trade Name of GROUP HEALTH )  
INSURANCE OF OKLAHOMA, INC., )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE AUG 23 1999

ORDER

Now before the Court is the Motion for an Award of Attorney Fees (docket #108) of the Plaintiff, Sharon Pitman.

Plaintiff, who has successfully prosecuted this ERISA claim now seeks attorney fees pursuant to 29 U.S.C. § 1132(g) in the amount of \$346,945.00. Defendant argues that this is not an appropriate case for an award of attorney fees, that the rate requested by Plaintiff's counsel is excessive, that a multiplier is inappropriate, and that fees should be denied or reduced because of the reconstructed time records relied on by Plaintiff's counsel.

Award of Fees

Pursuant to 29 U.S.C. § 1132(g), a district court may, in its discretion, award "a reasonable attorney's fee and cost of action to either party" in an action filed by a plan participant or beneficiary to cover benefits under the plan. The factors to consider in determining whether an attorney fee award is warranted are:

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1) the degree of the opposing parties' bad faith or culpability; 2) the ability of the opposing parties to satisfy an award of attorney fees; 3) the deterrence value of an award of attorney fees; 4) whether the parties requesting fees sought to benefit all plan participants or to resolve a significant legal question regarding COBRA/ERISA; and 5) the relative merits of the parties' positions.

Smith v. Rogers Galvanizing Co., 128 F.3d 1380, 1386 (10<sup>th</sup> Cir. 1997).

In Smith, the Court of Appeals, in making its own analysis of these factors, concluded that an award of fees was warranted when the third and fifth factors weighed in favor of granting fees to the plaintiffs. Id. In this case, Defendant argues that only the second and fifth factors weigh in favor of an award because Defendant has the ability to pay Plaintiff's attorney's fees and Plaintiff did prevail in the underlying lawsuit. The Court agrees that there is no evidence of bad faith or culpability on the part of defendant, but finds that the deterrence value of an award of attorney's fees also weights in favor of an award. Considering these factors, the ultimate victory of plaintiff, and the resolution of an issue that may ultimately inure to the benefit of other plan participants, the Court finds that an award of attorney fees is appropriate in this case.

#### Hourly Rate

Plaintiff requests an hourly rate of \$200 for Plaintiff's counsel, Sandy McMath, and an hourly rate of \$150 for Plaintiff's counsel, Ronald Horgan. In fixing the rate, the court must decide what lawyers of comparable skill and experience practicing in the area in which litigation occurs would charge. Ramos v. Lamm, 713 F.2d 546, 555 (10<sup>th</sup> Cir. 1983). Plaintiff supports her request with the affidavits of three attorneys:

John Norman, Jo L. Slama, and Frank Verderame. Because Frank Verderame does not purport to have any knowledge of what ERISA attorneys would charge in the Northern District of Oklahoma, the Court gives greatest weight to the affidavits of John Norman and Jo Slama. Mr. Norman testifies in his affidavit that a rate between \$175 and \$225 would be both customary and reasonable. Ms. Slama testifies in her affidavit that she believes Mr. McMath's time to be worth more than \$400 per hour because very few advocates are willing to take cases for claimants in ERISA cases.

Defendant counters with the affidavit of Page Dobson, who testifies that he has represented Blue Cross and Blue Shield in ERISA actions and that his normal and ordinary charges for this representation are \$100 per hour. Defendant also argues that Mr. McMath may have represented numerous plaintiffs in insurance cases, he had not previously handled any ERISA matter prior to the case at bar. Lastly, Defendant points out that the Court of Appeals, in Beard v. Teska, 31 F.3d 942, 957 (10<sup>th</sup> Cir. 1994) held that \$125.00 was the prevailing market rate in the Northern District of Oklahoma for attorneys specializing in education law in 1993 and 1994.

Unfortunately, none of the affidavits submitted are particularly helpful in that they do not address the direct question of the prevailing market rate in the Northern District of Oklahoma for attorneys specializing in ERISA law in the time period of 1992 to 1996. At best, the affidavits establish a range of approximately \$100 to \$175 per hour. The Court finds that, given Mr. McMath and Mr. Horgan's modest experience in ERISA cases, an hourly rate near the middle of that range would be most appropriate. The Court finds that a rate of \$125 per hour would be appropriate as the

prevailing market rate for the time period in question.

#### Multiplier

Plaintiff also requests that a multiple of three be applied to the lodestar figure. Plaintiff supports this request with the affidavits of Joe Slama and Frank Verdome who make the identical statements that "[a] lodestar multiple of 2.5 to 3 in view of the difficulty and protracted nature of this case, together with its significance, would be appropriate." Defendant objects to any enhancement or multiplier, arguing that an enhanced fee should be reserved for the "exceptional" case. The Court, in Ramos explained the purpose of an enhanced fee:

The Court in Hensley v. Eckerhart acknowledged that an enhanced fee award could be made in cases in which the success achieved was exceptional. . . . "Exceptional success" justifying an enhanced fee may be based upon the performance of counsel—for example, victory under unusually difficult circumstances or with an extraordinary economy of time— or upon the result achieved—total victory or establishment of significant new law. . . . [W]e believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should be rarely awarded, and should be confined to cases in which the bulk of the work was done well in a relatively short time given the complexity of the task."

713 F.2d, at p. 557.

Applying this standard to the performance of the plaintiff's attorneys in this case, the Court concludes that a multiplier is not appropriate. While certainly plaintiff's counsel achieved a favorable result, the Court does not find the result to be so exceptional as to warrant a multiplier or enhancement. It simply cannot be said that counsel achieved victory under unusually difficult circumstances, or established significant new law.

## Reconstructed Time Records and Reasonableness

While defendant objects to the use of reconstructed time records, defendant acknowledges that contemporaneous time records are not a "per se absolute requirement" for an award of attorney fees. Carter v. Sedgwick County, Kan., 929 F.2d 1501 (10<sup>th</sup> cir. 1991). While the Court agrees, under the reasoning of Ramos and Carter, that contemporaneous time records are preferred in an award of fees, the court finds that, after thoroughly reviewing the reconstructed time records, the explanations for hours spent, and the record of the case itself, the reconstructed time records are not on their face unreasonable so as to warrant disregard of them or a denial of fees.

Nonetheless, Defendant makes two arguments regarding the reasonableness of the hours spent, and the Court will address each in turn to determine whether a reduction is warranted. First Defendant argues that hours billed for travel time should be reduced on the theory that travel time is "essentially unproductive." It is a total of thirty six hours of travel time to which Defendant objects. In the overall scheme of this litigation, and tasks accomplished by both sides in the course of the litigation, the court does not find this amount of time unreasonable.

Defendant also objects to the hours of Ronald Horgan, asserting that much of his time was spent consulting with Mr. McMath or reviewing Mr. McMath's work. This assertion is not supported by Mr. Horgan's affidavit. A review of his affidavit reveals that Mr. Horgan, for the most part, performed separate and different tasks from Mr. McMath. Further, it is not clear from the affidavit that any of his work was merely a duplication of Mr. McMath's efforts.

The Court finds that the reconstructed time records represent a reasonable number of hours spent on the tasks necessary in this litigation. As a result, Plaintiff's Motion for an Award of Attorney Fees (docket #108) is granted in the amount of \$64,537.50 (516.3 hours times \$125.00 per hour).

IT IS SO ORDERED THIS 20<sup>th</sup> DAY OF AUGUST, 1999.

  
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JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHELLE R. JOHNSTON,  
SSN: 494-82-8237,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 98-CV-0687-EA

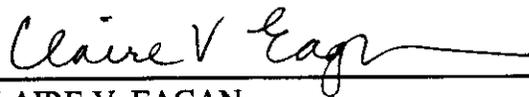
ENTERED ON DOCKET

DATE AUG 23 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 20th day of August 1999.



CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**AUG 20 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**MICHELLE R. JOHNSTON,**  
**SSN: 494-82-8237,**

**Plaintiff,**

v.

**KENNETH S. APFEL, Commissioner,**  
**Social Security Administration,**

**Defendant.**

**Case No. 98-CV-0687-EA**

ENTERED ON DOCKET

DATE **AUG 23 1999**

**ORDER**

On August 20, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Loretta Radford, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should order a consultative psychiatric examination or request the presence of a medical expert to testify at a supplemental hearing. 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).

Dated this 20th day of August, 1999.

  
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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 20 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANTHONY T. WILLS,  
SSN: 444-70-9552,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,  
Social Security Administration,

Defendant.

Case No. 98-CV-0826-EA

ENTERED ON DOCKET

DATE AUG 23 1999

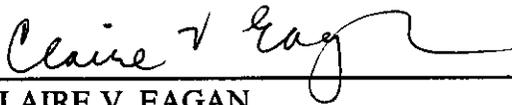
**ORDER**

On August 20, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income and disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Loretta Radford, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

**IT IS THEREFORE ORDERED** that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should discuss the substantial evidence which supports a finding of whether, if claimant stopped using drugs, any or all of his remaining limitations would be disabling. See 20 C.F.R. §§ 404.1535(b), 416.935(b). 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).

Dated this 20th day of August, 1999.

  
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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE