

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

FILED
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CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT: EAGLE ENERGY)
PRODUCTION, LLC)

RELIEF SOUGHT: INTERPRETATION AND)
CLARIFICATION OF POOLING)
ORDER NO. 552381,)
INCLUDING DETERMINATION)
OF CONTINUING)
EFFECTIVENESS OF SUCH)
ORDER AS TO INTERESTS)
COVERED THEREBY)

CAUSE CD NO.
201004062-
T/O

LEGAL DESCRIPTION: SECTION 30, TOWNSHIP 15)
NORTH, RANGE 4 EAST OF)
THE IM, LINCOLN COUNTY,)
OKLAHOMA)

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON
AN ORAL APPEAL OF A MOTION FOR DEPOSITION AND
SUBPOENA DUCES TECUM**

This Motion came on for hearing before **Michael L. Decker**, Administrative Law Judge for the Oklahoma Corporation Commission, at 9 a.m. on the 6th day of February, 2012, in the Commission's Courtroom, Jim Thorpe Building, Western Regional Service Office, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Eric R. King**, attorney, appeared for Tower Royalty Company, LLC ("Tower") and Thistle Royalty Company, LLC ("Thistle")(collectively "T&T"); **John E. Lee, III**, attorney, appeared for Alvin Wright (Mr. Wright), proposed deponent, and Pomona Oil Company; **Michael D. Stack**, attorney, appeared for applicant, Eagle Energy Production, LLC ("Eagle"); **John R. Reeves**, attorney, appeared for Claremont Inc. ("Claremont"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance, for the Oklahoma Corporation Commission ("Commission").

The Administrative Law Judge ("ALJ") issued his Oral Ruling on the Motion to which Oral Exceptions were timely lodged and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 6th day of March, 2012. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

The instant Motion for Deposition and Subpoena Duces Tecum was filed by T&T to depose the presumed author, attorney Alvin Wright, of two title opinions covering the 640-acre drilling and spacing unit comprised of Section 30-5N-4E, Lincoln County, Oklahoma. The subject of the underlying application is the clarification of Pooling Order No. 552381, which pooled the working interest owners in Section 30 in 2008. A protested Motion to Dismiss the present proceeding was previously adjudicated through a hearing in the Eastern Regional Service Office on November 9, 2010 which resulted in exceptions being taken to the initial ALJ's oral recommendation to deny the Motion. During consideration of the exceptions, the venue for the application for clarification of the pooling order was changed by agreement from the Eastern Regional Service Office to the Western Regional Service Office. The ALJ's oral recommendation was recommended to be upheld by the Oil and Gas Appellate Referee. Ultimately the Commission en banc denied the Motion to Dismiss. Thereafter discovery measures ensued. T&T asked to depose Mr. Wright by agreement, but such efforts were unsuccessful. The dispute about the proposed deposition of Mr. Wright resulted in the instant Motion for Deposition and Subpoena Duces Tecum.

The issues presented by the Motion were: (1) Should attorney Alvin Wright be ordered to give a deposition in the application for clarification of Pooling Order No. 552381 in CD 201004062-T/O?; (2) Should a subpoena duces tecum be issued to require Mr. Wright to produce certain documents used to prepare two title opinions for Section 30-15N-4E, Lincoln County, Oklahoma, which relate to requirements listed in the title opinions regarding the movants' mineral interests and the impact of the pooling order upon those interests?; and (3) if Mr. Wright is required to give a deposition, should T&T pay Mr. Wright an expert witness fee for his time and pay his counsel an attorney fee for assisting with the deposition?

REPORT OF THE ADMINISTRATIVE LAW JUDGE**ALJ MICHAEL L. DECKER**

(1) After consideration of the Motion, testimony, exhibits, and arguments of counsel, recommended that Exhibits "A", "B", "C", and "D" should be admitted into the record and these exhibits should be clearly delineated as Exhibits "A", "B", "C", and "D" of February 6, 2012 to avoid confusion with prior Exhibits "A", "B", "C", and "D", which were admitted on November 9, 2010 pursuant to the protested Motion to Dismiss previously adjudicated in CD 201004062-T/O.

(2) The Motion for Deposition of Alvin Wright should be granted. The Oklahoma Supreme Court has determined that Oklahoma's discovery procedures should be broadly construed. See *Unit Rig & Equipment Co. v. East*, 1973 OK 100, 514 P.2d 396, at ¶4 ("Our discovery procedures are broad and, with certain limitations (see *Giles v. Doggett*, Okl., 500 P.2d 574, 516, and cases there cited), it is not necessary that questions be limited to those which would be admissible in court. *State ex rel. Westerheide et al. V. Shilling, Judge*, 190 Okl. 305, 123 P.2d 674. Evidence which might lead to the disclosure of admissible evidence is discoverable. *Carman v. Fishel*, Okl. 418 P.2d 963.") T&T's witness, Mr. McCutcheon, provided testimony demonstrating a rational basis for deposing Mr. Wright as a factual witness concerning certain aspects of the preparation of the drilling title opinion (See Exhibit "A" of February 6, 2012) and the division order title opinion (see Exhibit "B" of February 6, 2012) with respect to T&T's mineral interests in Section 30-15N-4E, Lincoln County, Oklahoma. See *McCoy v. Black*, 1997 OK CIV APP 78, 949 P.2d 689, at ¶¶7-8. With respect to the characterization of physician witnesses in civil litigation, the Oklahoma court cited the federal court rule regarding factual witness status: "Conversely, 'to the extent that a treating physician testifies only to the care and treatment of the patient, the physician is not considered to be a 'specially employed' expert and is not subject to the...requirements of Rule 26(a)(2)(B), 'notwithstanding that the witness may offer opinion testimony under [the Federal Rules of Evidence].' (Citation omitted.)" *Salas v. U.S.*, 165 F.R.D. 31, 33 (W.D.N.Y. 1995)." Later in *McCoy*, the Oklahoma court favorably cited the federal characterization that such a physician witness would not be considered an expert but an "actor or reviewer" of the transaction being reviewed in the litigation. *Id.*, at ¶8. It is reasonable to conclude that Mr. Wright's deposition might lead to admissible evidence in the protested application, so the proposed discovery deposition is in accordance with Oklahoma law. *Id.* Mr. Wright's deposition, however cannot breach his attorney/client privilege, so the parties should take care to ensure the proper scope of the deposition is maintained. *Id.*, at ¶5.

(3) At the present stage of the instant proceedings, it is not determined if Mr. Wright will be called as a witness for either party, whether expert or factual in nature. Based on the testimony of Mr. McCutcheon, it appears reasonable that Mr. Wright's deposition will advance the goal of developing potentially relevant information about the effect of Pooling Order No. 552381 upon the Movants' mineral interests in Section 30-15N-4E, Lincoln County, Oklahoma.

(4) The Motion for Subpoena Duces Tecum should be granted to require the delivery of documents in Mr. Wright's possession, which concern references in the title opinions to the T&T mineral interests; the Blackburn lease; and the effect of Pooling Order No. 552381 upon the Blackburn lease, particularly the impact of the commencement provisions of the Blackburn lease; all relating to Section 30-15N-4E, Lincoln County, Oklahoma. The documents should be provided to T&T five days prior to the deposition.

(5) Because Mr. Wright has not been listed by any party as an expert witness in the Commission's proceeding in CD 201004062-T/O, the ALJ recommends that no provision be included in the order granting the Motion for Deposition and Subpoena Duces Tecum requiring the payment by the Movants of an expert witness fee for deposition and an attorney's fee associated with the participation of Mr. Wright's counsel in the deposition. The ALJ recommends the Commission determine, at this stage of the proceedings in CD 201004062-T/O, the provisions of 12 O.S. Sections 3226(B)(4)(c)(1) and (2) regarding payment of such costs by T&T are not applicable to Mr. Wright's deposition. Mr. Wright is being called as a factual witness to be deposed only as to factual issues regarding the portions of the title opinions marked Exhibits "A" and "B" of February 6, 2012. The payment of an expert witness fee for deposition is not applicable when a factual witness is involved. See *Fuller v. Pacheco*, 21 P.3d 74 at ¶ 33 (Ok.Civ.App. 2001) citing *McCoy v. Black*, 949 P.2d 689 at ¶ 8 (Ok.Civ.App. 1997).

(6) Mr. Wright will be questioned regarding his work as an "actor or reviewer" of the documentary materials involved, which may or may not be submitted as evidence by either party in the instant protest. See *McCoy v. Black*, supra, at ¶ ¶ 7-8. Based upon the assertions of the T&T's witness and counsel, Mr. Wright's deposition may reasonably lead to the discovery of pertinent factual information about the title opinions and may better define the relevance of the title opinions to the adjudication of CD 201004062-T/O. *Unit Rig & Equipment Co. v. East*, supra, at ¶4.

POSITIONS OF THE PARTIES

MR. WRIGHT

- 1) **John Lee**, attorney, appearing on behalf of Mr. Wright stated that this motion pertains to Eagle's Application to Clarify Commission Order 552381.
- 2) Mr. Wright states that the case resulting in Order No. 552381 was a pooling brought by ORCA in 2007, which was protested by Blackburn Properties. Mr. Wright asserts that Blackburn Properties was a lessee of the mineral interest owned by T&T. Mr. Wright contends that Blackburn was pooled as the working interest owner of the mineral estate.
- 3) The Report of the ALJ was dated April 4, 2008 and affirmed by the Appellate Referee on March 19, 2008. Special Energy was named the operator in Order No. 552381.
- 4) Mr. Wright asserts that on page 3 of Order No. 552381 there was a special finding regarding the lease between T&T and Blackburn Properties that the lease "did not constitute an arm's length transaction." Mr. Wright contends that T&T has initiated an action in district court in Lincoln County, asserting that their interest was not pooled in the prior pooling order.
- 5) Mr. Wright asserts that Eagle filed this Application to determine if the interest was pooled, and that the district court in Lincoln County has stayed all proceedings until such a determination is made by the Commission.
- 6) Mr. Wright contends that in the interim Special Energy had sold its interest not only in the well, but also in the leases subject to the pooling order to Eagle. Mr. Wright notes that Claremont and Pamona Production are working interest owners in the unit and well.
- 7) Mr. Wright contends that among the documents provided to Eagle by Special Energy in the course of sale was a title opinion provided by Wright and Associates.
- 8) Mr. Wright reasserts its objection to Exhibit "A", Drilling Title Opinion, and Exhibit "B", Division Order Title Opinion, as inadmissible hearsay.
- 9) Mr. Wright notes that the present matter is concerning the recommendation by the ALJ that Mr. Alvin Wright be deposed. Mr. Wright asserts that Mr. Alvin Wright is not a party to this matter, nor is he an employee of a party. Mr. Wright asserts that because Mr. Alvin Wright, as the preparer of a 2007 title opinion, has no factual knowledge other than what appears in the records of the county clerk of Lincoln County and Commission records, Mr. Alvin Wright can give no relevant facts in this proceeding. Mr.

Wright asserts that Mr. Alvin Wright cannot provide testimony regarding whether the interest claimed by T&T was pooled.

10) Mr. Wright contends that Mr. Alvin Wright did not work for Special Energy or ORCA. Mr. Wright asserts that Mr. Alvin Wright was not a part of the leasing process. Mr. Wright asserts that a legal opinion is not a proper target of discovery. Mr. Wright contends that the inclusion of outside legal opinion concerning whether the T&T interest was pooled invades the province of the Commission. Mr. Wright reasserts that there is no reason or right to depose Mr. Alvin Wright.

11) Mr. Wright contends that *Unit Rig & Equipment Co. v. East*, 514 P.2d 396 (Okl. 1973), is inapplicable to this matter because Mr. Alvin Wright was not retained by any party to perform an independent examination.

12) Mr. Wright asserts that *State ex rel. Westerhide v. Shilling*, 123 P.2d 674 (Okl. 1942) is inapplicable because that matter concerned a party to the litigation, whereas Mr. Alvin Wright is a disinterested third party.

13) Mr. Wright asserts that *Carmen v. Fishel*, 418 P.2d 963 (Okl. 1966), is inapposite because the matter concerned fact witness statements.

14) Mr. Wright contends that *McCoy v. Black*, 949 P.2d 689 (Okl.Civ.App. 1997) and *Fuller v. Pacheco*, 21 P.3d 74 (Okl.Civ.App. 2001) are inapplicable as they are medical cases addressing the issue of whether a doctor can be deemed an expert.

15) Mr. Wright cites 12 O.S. Section 3226(b)-(c), and disagrees with the ALJ's characterization of the statute. If you want the facts or opinions from an expert, then that expert needs to be compensated.

16) Mr. Wright contends that issues in this matter are (a) whether the information gained by the deposition of Mr. Alvin Wright would be admissible; (b) whether a subpoena duces tecum should be issued, requiring that Mr. Alvin Wright produce documents used to prepare the title opinion; and (c) whether Mr. Alvin Wright is properly classified as an expert and be paid accordingly.

17) Mr. Wright asserts that the Oklahoma Discovery Code allows for the discovery of facts known and opinions held by an expert. The witness for T&T, Mr. McCutcheon testified that T&T was seeking the facts which influenced Mr. Alvin Wright's opinions. Mr. Wright contends that this assertion was made by Mr. McCutcheon numerous times at hearing. Mr. Wright asserts that 12 O.S. Section 3226 requires that an expert be compensated for providing facts or opinions.

18) Mr. Wright asserts that Mr. Alvin Wright was not an actor or observer such as observing doctors in *Fuller v. Pacheco* and *McCoy v. Black*, who were

considered not to be expert witnesses. Mr. Wright contends that *McCoy v. Black* holds that when a hybrid witness is called to render an opinion, compensation is mandated.

19) Mr. Wright asserts that Mr. Alvin Wright should not be subject to discovery or deposition in this case.

20) Mr. Wright contends that 12 O.S. Section 3226(B) entitles Mr. Alvin Wright to compensation if he is deposed, as he will be testifying concerning the facts underlying his opinion.

T&T

1) **Eric King**, attorney, appeared on behalf of T&T, stated T&T asserts that the ownership history provided by Mr. Wright is not a part of the record and was inappropriately presented at the appellate argument.

2) T&T contends that Mr. Wright did not present any evidence at the February 16th hearing on the Motion for Deposition and Subpoena Duces Tecum.

3) T&T asserts that Mr. McCutcheon, general counsel for JMA, at hearing was not interested in going to the county records and looking at the records in the chain of title, it is about other information he might have been furnished that caused him to render and prepare the opinion. T&T contends that the factual information relied upon by Mr. Wright extends beyond information in the chain of title. T&T asserts that it is seeking only the information furnished to Mr. Wright in order to prepare his title opinion. T&T asserts that Mr. Wright was working for Special Energy as evidenced by the fact that the title opinions were addressed to Special Energy.

4) T&T asserts that no reservation by Mr. Wright was made when the excerpts of the title opinion, Exhibits "A" and "B", were provided in discovery, and that any objections by Mr. Wright therefore have been waived.

5) T&T contends that the heart of this matter is that Mr. Wright demanded a \$250.00 per hour fee for his deposition. The only way he can be paid is if he is deemed an expert.

6) T&T asserts that the ALJ conducted a thorough analysis of the case law and the rules of evidence.

7) T&T cites *Fuller v. Pacheco*, 21 P.3d 74 (Ok.Civ.App. 2001) arguing that Mr. Wright will only be asked to provide factual information. T&T contends that Mr. Wright will not be relied upon for opinion evidence, and therefore cannot be considered an expert witness.

8) T&T reasserts that the ALJ was correct in his interpretation of the rules of evidence and the case law.

9) T&T reasserts that it is seeking the underlying facts provided to Mr. Wright on which he based his assumption for the title opinion. T&T contends that it is seeking the information regarding the source of information provided to Mr. Wright.

10) T&T asserts that Exhibits "A" and "B" were produced by Eagle; that Exhibit "C" was produced by T&T; and that Exhibit "D" was produced by Blackburn.

11) T&T reasserts that the heart of this matter is the witness classification of Mr. Wright. T&T reasserts that it is only seeking the factual basis upon which Mr. Wright created his title opinion, and therefore Mr. Wright will only be used as a non-expert witness.

12) T&T requests that the Appellate Referee uphold the decision of the ALJ.

RESPONSE OF MR. WRIGHT

1) Mr. Wright asserts that the factual background provided is derived from the district court proceeding in Lincoln County and part of the public record.

2) Mr. Wright contends that Mr. Alvin Wright was not an employee of Special Energy for the purposes of a deposition of a corporate representative or employee. Mr. Wright contends that Mr. Alvin Wright was only a contractor of Special Energy.

3) Mr. Wright asserts that if T&T is not interested in the title opinion as it claims, it should have no interest in the facts underlying the opinion. Mr. Wright contends that Mr. Alvin Wright does not possess information that is discoverable as likely to lead to relevant evidence. Mr. Wright asserts that if Mr. Alvin Wright is to be deposed, compensation is required as an expert witness per the discovery code.

4) Mr. Wright requests that the Appellate Referee overrule the recommendation of the ALJ. Mr. Wright requests that, if a deposition should occur, T&T be ordered to pay Mr. Alvin Wright as an expert witness.

CONCLUSIONS

The Referee finds the Oral Report of the Administrative Law Judge should be affirmed.

1) The Referee finds the ALJ's recommendations to grant T&T's Motion for Deposition of Mr. Alvin Wright and to grant T&T's Motion for Subpoena Duces Tecum requiring the delivery of all documents, records and other materials in his possession relating to the title opinions is supported by the evidence, by law and free of abuse of discretion. The Referee also finds that the ALJ's recommendation that Mr. Alvin Wright is a factual witness to be deposed only as to factual issues regarding the title opinions and thus payment of an expert witness fee for deposition is not applicable when a factual witness is involved is supported by the weight of the evidence, the discovery rules and free of reversible error.

2) The Supreme Court in *Boswell v. Schultz*, 175 P.3d 390 (Okl. 2007) stated:

The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aide in their concealment.

3) The Oklahoma Court of Civil Appeals determined in *State ex. rel, Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3d 484 (Okl.Civ.App. 2007):

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1346 (5th Cir. 1978). "The aim of these liberal discovery rules is to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent..."

4) The Oklahoma Supreme Court has also stated in *Unit Rig and Equipment Company v. East*, 514 P.2d 396 (Okl. 1973):

Our discovery procedures are broad and, with certain limitations (see *Giles v. Doggett*, Okl., 500 P.2d 574, 516, and cases there cited), it is not necessary that questions be limited to those which would be admissible in court. *State ex. rel Westerheide, et al. v. Shilling, Judge*, 190 Okl. 305, 123 P.2d 674. Evidence which might lead to the disclosure of admissible evidence is discoverable. *Carman v. Fishel*, Okl., 418 P.2d 963.

5) T&T wants to depose Mr. Wright as a factual witness concerning the preparation of the two title opinions. The information that T&T desires from Mr. Wright goes beyond the chain of title found in the county records. T&T desires background facts as to what information was furnished to Mr. Wright to prepare his title opinions. T&T is trying to ascertain what Mr. Wright was provided to prepare his opinion; what Mr. Wright was told; and what information was furnished to him. T&T asserts that Mr. Wright will not be relied upon for opinion evidence, and therefore cannot be considered an expert witness.

6) The Court of Civil Appeals for the State of Oklahoma determined in *Fuller v. Pacheco*, 21 P.3d 74 (Ok.Civ.App. 2001):

In *McCoy v. Black*, 1997 OK CIV APP 78, 949 P.2d 689, this court analyzed the circumstances under which expert witness fees are actually required by [12 O.S. Section] 3226 (B)(3)(c)(1). Relying on federal case law interpreting Federal Rules of Civil Procedure 26(b), upon which section 3226(B)(3)(c)(1) is based, the court established three guidelines by which to determine whether expert witness fees must be paid. First, where a party "specially employs a physician or other expert for the express purpose" of having that expert testify at trial and give his/her opinion based on the expert's particular realm of authority and review of relevant materials, the witness is an expert, and expert witness fees must be paid. *Id.* at ¶ 7, 949 P.2d at 692. Second, where a treating physician testifies only to the care and treatment of the patient, such witness is not

an expert but a "fact" witness. Id. At ¶ 8, 949 P.2d at 692. Third, where a treating physician is called upon to express an opinion on matters aside from facts derived from examination and treatment of a party, the physician is an expert for purposes of 3226(B)(3)(c)(1). Id. At ¶ 9, 949 P.2d at 693.

7) Thus, Mr. Wright is being called as a factual witness to be deposed only as to factual issues regarding the portions of the title opinions marked as Exhibits "A" and "B" in the hearing conducted on February 6, 2012. The payment of an expert witness fee for deposition is not applicable when a factual witness is involved, as stated in *Fuller v. Pacheco*, supra. Mr. Wright will be deposed concerning his involvement as an "actor or reviewer" of the title opinions involved which may or may not be submitted as evidence by either party in the protested proceeding. However, Mr. Wright's deposition may lead to the disclosure of admissible evidence and factual information concerning the title opinions.

8) Therefore, the Referee recommends affirming the ALJ's findings and recommendations in his Oral Report filed on February 16, 2012.

RESPECTFULLY SUBMITTED THIS 3rd day of April, 2012.


PATRICIA D. MACGUIGAN
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Anthony
Commissioner Douglas
Jim Hamilton
Michael L. Decker, ALJ/OAP Director
Eric R. King
John E. Lee, III
Michael D. Stack
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