OPINION ENTERED: February 1, 2013

CLAIM NO. 201200725

HARRY S. MAYNARD PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

C&R HOLDING OF EASTERN KY, LLC,
JOSHUA ENTERPRISES, INC.,
UNINSURED EMPLOYERS FUND,
and R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Harry S. Maynard ("Maynard") seeks review of the order rendered August 24, 2012 by Hon. Scott Borders, Administrative Law Judge ("ALJ"), dismissing his claim against C&R Holding of Eastern Kentucky, LLC ("C&R Holding") as barred pursuant to the election of remedy provision

contained in KRS 342.610(4) and Zurich American Insurance Company v. Brierly, 936 S.W.2d 561 (1997). Maynard also appeals from the order entered September 27, 2012, overruling his petition for reconsideration. The sole issue on appeal is whether the ALJ erred in dismissing the claim pursuant to the election of remedies statute. We affirm.

Maynard filed a Form 101, Application for Resolution of Injury Claim on May 31, 2012 alleging on October 15, 2008, he was injured in the following manner:

> Claimant was performing refueling and maintenance on dozer. Employer, by and through its Foreman/Superintendent, Steven R. Adkins, climbed onto bulldozer and struck Claimant, causing him to fall approximately 6-8 feet to the ground.

Maynard alleged he sustained compression injures, fractured vertebra, herniated C5-6 and C6-7 discs, injuries to both knees, subsequent CVA/stroke related to traumatic injury resulting in significant right-side paralysis/paresis to both upper and lower extremities as a result of the physical altercation with his supervisor, Steven R. Adkins ("Adkins"). Maynard named both C&R Holding and Joshua Enterprises, Inc. ("Joshua Enterprises") as Respondents because his employer was undergoing a merger or acquisition and he received paychecks from both parties at the time of the altercation. Maynard attached various medical records

in support of the Form 101 indicating he suffered a stroke on November 15, 2008 and underwent anterior cervical discectomy and fusion surgery at C5-C6 and C6-C7 on July 22, 2009.

By letter dated June 6, 2012, Dwight T. Lovan, Commissioner of the Department of Workers' Claims, certified Joshua Enterprises did not have workers' compensation insurance on October 15, 2008. However, C&R Holding had coverage. Subsequently, by order dated June 8, 2012, the Uninsured Employers' Fund ("UEF") was joined as a party by Hon. J. Landon Overfield, Chief Administrative Law Judge.

C&R Holding filed a motion to dismiss or bifurcate on June 27, 2012 arguing the claim is barred by the statute of limitations, and due to Maynard's election of remedies pursuant to KRS 342.610(4). We will not summarize the statute of limitations argument since it is not before this Board on appeal. C&R Holding argued Maynard's claim is barred by KRS 342.610(4) and the holding in Zurich American Insurance v. Brierly, supra, since he elected to proceed in a civil action in Pike Circuit Court. C&R Holding noted Maynard continues to pursue the civil action, but now has filed a workers' compensation claim requesting benefits for injuries resulting from the same incident alleged in the civil action. C&R Holding argues, "Upon filing that civil

action, Plaintiff waived any and all rights to proceed under the Kentucky Worker's Compensation Act. Hence, the Plaintiff's claim is barred, as a matter of law based upon the Plaintiff's election of his choice of remedies."

In support of its motion to dismiss, C&R Holding attached as an exhibit a copy of the complaint filed on October 15, 2009. In the complaint Maynard named, among others, Adkins, Joshua Enterprises, and C&R Holding as defendants. At all relevant times, Maynard alleges Adkins acted individually and as foreman, agent, and representative of Joshua and C&R Holding. In the complaint, Maynard alleges on October 15, 2008, he was verbally accosted by Adkins while he was working. Thereafter, Maynard alleges Adkins climbed onto the bulldozer and struck him. Maynard alleged the above actions "were outrageous, shock the conscience, were reckless, willful, wanton and/or intentional, and were the direct and proximate cause of severe and permanent injuries." In the civil action, Maynard seeks past and future medical expenses, lost wages, permanent loss of future earning capacity, past and future pain and suffering, and permanent loss of enjoyment of life from the defendants, jointly and severally. He also seeks punitive damages against the defendants "as a result of the

outrageous, willful, intentional and malicious acts described herein."

C&R Holding also attached as an exhibit its "Motion to Dismiss Complaint" filed December 1, 2009 in Pike Circuit Court. In said motion, C&R Holding argued Maynard's civil complaint against it and Adkins should be dismissed pursuant to the exclusiveness of liability statute found in KRS 342.690, as well as the election of remedies provision of KRS 342.610(4). By order dated January 7, 2010, the Pike Circuit Court overruled C&R Holding's motion.

Maynard submitted voluminous medical records from Pikeville Medical Center, UK Chandler Medical Center and Dr. Kevin Pugh of Orthopedic and Sports Medicine. We will not undertake to summarize this medical evidence, as it is not pertinent to this issue on appeal.

In an order dated August 24, 2012, the ALJ sustained C&R Holding's Motion to Dismiss, stating as follows:

> This matter comes on before the undersigned Administrative Law Judge on the Defendant/employer's Motion to Dismiss the Plaintiff's claim or in the alternative to Bifurcate Claim on Legal Issues.
>
> Defendant/employer argues that the Plaintiff's workers' compensation claim is barred under the provisions of KRS 342.610(4). That section permits a

claimant to proceed under the Workers' Compensation Act or civilly if his injury or death results from the deliberate intention of the employer to produce such injury or death. Specifically, if a claimant elects to proceed civilly and a suit is brought under this subsection, "all right to compensation under this chapter shall thereby be waived as to all persons."

In its Motion to Dismiss, Defendant/employer attached a complaint filed by the Plaintiff in the Pike Circuit Court against various parties, including C & R Holding of Eastern KY, LLC, the named Defendant/Employer in this workers' compensation action. That complaint alleged, among other matters that the actions of the Defendant/Employer were "outrageous", "shock the conscience", "were reckless", "willful", "wanton" and/or "intentional." It appears the Defendant/Employer at the time this civil action was filed, was paying TTD and medical benefits to the Plaintiff under the Workers' Compensation Act.

Defendant/employer moved to dismiss the Plaintiff's civil action in the Pike Circuit Court by motion filed November 12, 2009. That motion, also attached to the Defendant/employers' Motion to Dismiss the claim under consideration herein, also argued that the protections of the exclusive remedy set forth in KRS 342.690 and KRS 342.610(4) barred the Plaintiff's right to pursue the civil action.

The Plaintiff responded to the motion again arguing that the Defendant/Employer, vicariously through its employee, intentionally acted to injure the Plaintiff. The Pike Circuit Court, by Order dated January 6, 2010

> overruled the Defendant/employers' motion to dismiss the civil action.
>
> After reviewing the Defendant/ Employer's Motion to Dismiss, the Plaintiff's response to the motion and attachments to the various pleadings, the undersigned Administrative Law Judge finds that the Plaintiff's workers compensation claim herein is barred pursuant to KRS 342.610(4) and the case of Zurich American Insurance Company v. Brierly, 936 S.W.2d 561 (1997). In that case, the Kentucky Supreme Court specifically held that an employee (or dependent in the event of death) that choose to sue in circuit court, waived all rights to compensation under KRS Chapter 342. (Brierly at 564).
>
> In this case, the Plaintiff's election to proceed civilly for an intentional act against the Defendant/ Employer requires dismissal of this workers compensation claim,
>
> Therefore, IT IS HEREBY ORDERED, the Defendant/Employer's Motion to Dismiss is SUSTAINED and the Plaintiff's claim is hereby dismissed, with prejudice.

Maynard filed a petition for reconsideration on September 6, 2012, setting forth the same arguments made on appeal to this Board. Maynard also asserted rather than dismissal, the claim could be held in abeyance until the resolution of the civil action or an order be entered "setting forth [the ALJ's] finding that joinder of the Employer in the civil action does indeed appear to trigger

the exclusive remedy and election of remedies provisions of the Act, and granting plaintiff a time certain (e.g. 30 days) to seek appropriate dismissals in the civil action, or face dismissal of the workers' compensation action."

Subsequent to filing the petition, but prior to the ALJ's order ruling on the petition, Maynard filed a "Notice of filing of New/Additional Evidence on behalf of Plaintiff" on September 25, 2012. Maynard attached evidence which he stated was previously unavailable to him, including the transcript of Adkins' deposition taken on September 20, 2012 for the civil action in Pike Circuit Court.

Adkins disputed Maynard's allegation he was a foreman on October 15, 2008, the day of the altercation. Rather, he stated he was an employee of C&R Holding. Adkins testified as to his version of the events leading up to the altercation with Maynard. In general, Adkins testified Maynard instigated a verbal argument. Later that morning, Adkins testified Maynard continued to yell at him and "right out of the blue" struck him. Adkins testified he then hit Maynard two or three times on the jaw and head. Adkins disputes the location of the altercation alleged by Maynard, stating the fight occurred on the ground rather than on top of the bulldozer.

In an order dated September 27, 2012, the ALJ overruled Maynard's petition, stating as follows:

> This matter having come before the undersigned Administrative Law Judge upon Plaintiff's Petition/Motion for Reconsideration, and Defendant/Employer having responded, and the Administrative Law Judge being otherwise fully and sufficiently advised;
>
> **IT IS HEREBY ORDERED**, Plaintiff's said Petition/Motion is hereby **OVERRULED**, based on Defendant/ Employer's response.

On appeal, Maynard states he received TTD benefits and medical benefits through May 2010. Maynard also states at all relevant times he was an employee of either Joshua Enterprises or C&R Holding. He argues C&R Holding "has apparently accepted responsibility as the correct Defendant/ Employer." Maynard acknowledges he filed a civil action in Pike Circuit Court against Adkins, both in his individual and agent capacity, Joshua Enterprises and C&R Holding.

Maynard argues he did not waive entitlement to workers' compensation benefits by virtue of his civil action. He argues although the Kentucky Workers' Compensation Act contains an exclusive remedy provision in KRS 342.690, several exceptions exist, including the one set forth in KRS 342.700(1), which lifts the protection of KRS

342.690 from a third person who willfully or intentionally causes injury to another employee. Maynard also relies upon Kearns v. Brown, 627 S.W.2d 589 (Ky. App. 1982) and Russell v. Able, 931 S.W.2d 460 (Ky. App. 1996).

Maynard argues an employer may lose the protection of KRS 342.690 if it knew or should have known the offending employee's conduct, or of his propensity to engage in such or similar conduct, or otherwise ratified the offending employee's conduct, citing to Brewer v. Hillard, 15 S.W.3d 1 (Ky. App. 1999) and Haines v. Bellsouth Telecommunications, Inc., 133 S.W.3d 497 (Ky. App. 2004).

Maynard asserts Kentucky law provides a formula for apportionment and offset between civil recovery and workers' compensation award arising for the same facts, rather than a complete prohibition, citing Quillen v. Tru-Check, Inc., WCB 08-99276, rendered March 27, 2009 and Cincinnati Insurance Co. v. Samples, 192 S.W.3d 311 (Ky. 2006).

Maynard also argues the immunity provided in KRS 432.690 does not apply to "an employee, officer or director or an employer or carrier . . . in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director." Maynard argues he has alleged willful and unprovoked

physical aggression by C&R Holding's foreman, Adkins. He also argues factual findings as to whether Adkins' actions fell within the course and scope of his employment are determinative on the issue of who is liable for the "ultimate disposition of both the civil action and workers' comp action." Maynard also argues immunity for both Adkins and C&R Holding may be waived pursuant KRS 432.690, and therefore his pursuit of both civil damages and workers' compensation benefits would no longer be limited.

KRS 342.690(1) provides in part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury or death.

This provision is referred to as the "exclusive remedy" rule. The exemption from liability provided an employer by the statute also extends to employees of the employer, as well as the employer's carrier. *See* KRS 342.690(1); Wymer v. JH Properties, Inc., 50 S.W.3d 195, 197 (Ky. 2001). The exclusive remedy provision preempts common law tort claims. American General Life & Accident Ins. Co. v. Hall, 74 S.W.3d 688, 691 (Ky. 2002) *and* Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814, 819 (Ky. 1992).

KRS 342.610(4) creates an exception to the exclusive remedy provision of KRS 342.690(1) if the employee is injured through the deliberate intention of the employer. KRS 342.690(4) states as follows:

> If injury or death results to an employee through the deliberate intention of his or her employer to produce such injury or death, the employee or the employee's dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. **If injury or death results to an employee through the deliberate intention of his or her employer to produce such injury or death, the employee or the employee's dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons.** If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons. (emphasis added)

The Kentucky Supreme Court interpreted this statute in Zurich American Ins. Co. v. Brierly, supra, where Brierly was killed in an explosion while an employee at Alusuisse

Flexible Packaging. A Form 101 was filed, and the administrator of the decedent's estate filed a civil complaint against the employer and its carrier under the tort theory the employer had deliberately intended and caused Brierly's death. The administrator also sought to dismiss the workers' compensation claim on the basis it had elected its tort remedy in lieu of compensation benefits pursuant to KRS 342.610(4). The ALJ found KRS 342.610(4) controlling and dismissed the workers' compensation claim for lack of jurisdiction. The Workers' Compensation Board reversed the decision and remanded the case for a finding that Zurich invoked the jurisdiction of the Act by filing the Form 101. The Court of Appeals reversed the Board and reinstated the ALJ's decision. In affirming the Court of Appeals, the Court stated as follows:

> **This section of the statute gives the injured employee or the dependent or personal representative of a deceased employee an election as to the forum in which to proceed. It does not afford an opportunity to proceed in both forums and elect the judgment or award that is most beneficial. As a consequence of such election, the plaintiff in a civil action is forever excluded from any remedy under Chapter 342 of the Workers' Compensation Act.**
>
> We agree with the Court of Appeals that there is simply nothing about the determination of "deliberate intent" that is so peculiar to Workers'

Compensation Law that a circuit judge or jury could not decide the issue. The statute provides an exception to KRS 342.325 and clearly allows for a choice to either take under the act or to sue in a civil proceeding. The argument that the estate may try to collect under the act if their civil suit should fail is totally without merit. The statute plainly sets forth the loss of a right to collect under the act if one would continue with the civil lawsuit. . . .

KRS 342.325 provides that "except as otherwise provided in this chapter" all questions shall be presented to the Board. We agree with the Court of Appeals that the proper interpretation of the statute is that if the death is a result of the employer's deliberate intention to cause death, the employee's dependents may take either under KRS Chapter 342, or in lieu thereof, sue at common law as if the Workers' Compensation Statute had never been adopted. The statute provides that if the decedent's dependents choose to sue at law, all right to compensation under the chapter is waived. The statute clearly provides a choice to the dependents either to take under the chapter or to sue in tort and is an exception to KRS 342.325. . . . .

It is the holding of this Court that KRS 342.610(4) provides an exception to KRS 342.325 to the effect that if the death of an employee is the result of the deliberate intention of the employer to cause the death, the dependents of the employee may either proceed under Chapter 342, or in lieu thereof, sue at law, as if Chapter 342 had never been adopted. **In the event the dependents of the decedent choose to sue in civil court, all rights to**

> **compensation under Chapter 342 are waived. The statute clearly provides a choice to the dependents to either take under the chapter or to file a civil lawsuit.** (emphasis added)
>
> Id. at 562-564.

Similarly, in American General Life & Acc. Ins. Co. v. Hall, supra, an injured employee filed a civil action against his employer and supervisor seeking damages for mental and emotional injuries inflicted by sexually discriminatory practices. Subsequently, the injured employee filed an application for, and was awarded, workers' compensation benefits premised upon the sexual harassment and resulting injuries. The lower court entered summary judgments in favor of the employer and supervisor. The Kentucky Court of Appeals affirmed as to the supervisor, and reversed and remanded as to the employer. No further review was sought with regard to the supervisor. Regarding the employer, the Supreme Court reversed the Court of Appeals and reinstated the trial court's judgment and stated as follows:

> KRS 342.690(1) provides that a claim for workers' compensation benefits is "exclusive and in place of all other liability of such employer to the employee ...." KRS 342.610(4) creates an exception to the "exclusive remedy" rule if the employee is injured through

> the deliberate intention of the employer. . . .
>
> In *Zurich American Insurance Co. v. Brierly,* Ky., 936 S.W.2d 561 (1996), we held that the statute means what it says:
>
>> This section of the statute gives the injured employee or the dependent or personal representative of a deceased employee an election as to the [forum] in which to proceed. It does not afford an opportunity to proceed in both [forums] and elect the judgment or award that is most beneficial.
>
> *Id.* at 562. Thus, having accepted payment of benefits under KRS Chapter 342, Hall is now precluded from suing her employer in circuit court for the same injuries and disabilities. *Borman v. Interlake, Inc.,* Ky.App., 623 S.W.2d 912, 913 (1981); *cf. Preston v. Elm Hill Meats, Inc.,* Ky., 420 S.W.2d 396 (1967) (interpreting an identical waiver provision in former KRS 342.170). . .
>
> As in *Zurich American Insurance Co. v. Brierly, supra,* "[t]he present case involves a clear choice on the part of the claimant," *id.* at 563, to elect and accept the benefits of her workers' compensation remedy and thereby waive her right to pursue a civil action for damages. KRS 342.610(4).
>
> Id. at 690-691, 693.

In the case *sub judice*, we believe the ALJ correctly dismissed Maynard's workers' compensation claim

as barred by KRS 342.610(4) and Zurich American Insurance Company v. Brierly, supra. The ALJ specifically noted the Supreme Court in Brierly held "an employee (or dependent in the event of death) that choose to sue in circuit court, waived all rights to compensation under KRS Chapter 342."

It is undisputed Maynard's workers' compensation claim and civil action are premised upon the same October 15, 2008 event and resultant injuries in which he alleges Adkins, individually and as foreman of C&R Holding, physically struck Maynard. In his brief to the Board, Maynard acknowledges he received TTD benefits and medical benefits through May 2010. He filed his civil complaint on October 15, 2009 and subsequently filed the Form 101 on May 31, 2012. It also appears from the face of the civil complaint Maynard is seeking damages from several parties, including the employer, C&R Holding, based upon common law tort claims. Maynard has not argued to the contrary, i.e., his allegations are premised upon a claim for statutory civil rights. We also note Maynard continues to seek to hold C&R Holding liable for damages stemming from the October 15, 2008 incident. C&R Holding's motion to dismiss Maynard's civil complaint pursuant to the exclusiveness of liability statute, KRS 342.690 and the exception under KRS 342.610(4), was overruled by the Pike Circuit Court.

As noted previously, KRS 342.610(4) provides an exception where injury or death results through the ***deliberate*** intention of the employer to cause such injury or death. Maynard alleges in his civil complaint, paragraph 16:

> The actions of the defendant [Maynard], individually and as foreman, agent, representative and company official of the defendants, were outrageous, shock the conscience, were reckless, willful, wanton and/or intentional, and were the direct and proximate cause of severe and permanent injuries to [Maynard] . . . .

Maynard pled a cause of action in his civil claim, which in part, would be barred by the exclusive remedy provision of KRS 342.690(1), were it not for the fact the otherwise barred allegations fall within the parameters of the statutory exception to the exclusive remedy provision in KRS 342.610(4). Regardless of whether Maynard's claim ultimately falls within the parameters of KRS 342.610(4), i.e., whether C&R Holding deliberately intended to produce his alleged injuries, he clearly has elected to proceed against his employer based upon common law tort liability due to a work-related injury. *See also* Scott Isert v. Ford Motor Company, Claim Number 03-01504, rendered September 3, 2004. Therefore, as a matter of law, we find no error with the ALJ's dismissal of Maynard's claim pursuant to KRS

342.610(4) and Zurich American Insurance Company v. Brierly, supra. Maynard elected to proceed in a civil action and "[A]s a consequence of such election, the plaintiff in a civil action is forever excluded from any remedy under Chapter 342 of the Workers' Compensation Act." Id. at 562.

The cases relied upon by Maynard are distinguishable, and therefore not applicable. In Kearns v. Brown, supra, the Kentucky Court of Appeals concluded "the immunity provisions of KRS 342.690 are not applicable to a *fellow employee* whose actions are so far removed from those which would ordinarily be anticipated by the employer that it can be said that the employee causing the injury has removed himself from the course of his employment or that the injury did not arise out of the employment." Id. at 591. In Russell v. Able, supra, the Court of Appeals found, pursuant to KRS 342.700(1), the receipt of workers' compensation benefits is not a bar to filing a civil action against a *third party who is legally liable to the injured employee*. Id. at 462-463. The Court also included within the definition of a third party a "*fellow employee*" who fails to fall within the immunity set forth under KRS 342.690. Id. Kearns and Russell focus on the liability of a fellow employee or third party for a tort claim arising from a work-related injury. Similarly, Brewer v. Hillard,

supra, focuses on the liability of an employee for a tort claim arising from a work-related injury. In the case *sub judice*, the issue on appeal is whether Maynard can proceed simultaneously against the *employer* in a civil action and workers' compensation claim.

We also find Maynard's argument the provisions of KRS 342.700(1) provide an exception to the exclusive remedy rule without merit. KRS 342.700(1) reads as follows:

> Whenever an injury for which compensation is payable under this chapter has been sustained under circumstances **creating in some other person than the employer a legal liability to pay damages**, **the injured employee may either** claim compensation or proceed at law by civil action against the other person to recover damages, **or proceed both against the employer for compensation and the other person to recover damages, but he shall not collect from both.** If the injured employee elects to proceed at law by civil action against the other person to recover damages, he shall give due and timely notice to the employer and the special fund of the filing of the action. **If compensation is awarded under this chapter, the employer, his insurance carrier,** the special fund, and the uninsured employer's fund, or any of them, having paid the compensation or having become liable therefor, **may recover in his or its own name or that of the injured employee from the other person in whom legal liability for damages exists**, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense. The

> notice of civil action shall conform in all respects to the requirements of KRS 411.188(2). (emphasis added)

We acknowledge KRS 342.700(1) allows an injured party to assert a tort claim against "some other person than the employer" to recover damages and against the employer for workers' compensation benefits. However, nothing in the language allows the injured worker to proceed simultaneously against the employer for compensation and for damages in a tort claim, as well as a tort claim against the "other person". The remainder of the language found in KRS 342.700(1) merely grants subrogation rights to the employer in circumstance where compensation has been awarded under Chapter 342, allowing it to recover "from the other person in whom legal liability for damages exists, not to exceed the indemnity paid and payable to the injured employee, less the employee's legal fees and expense."

Maynard's reliance upon Quillen v. Tru-Check, Inc., Claim No. 08-99276, rendered March 27, 2009, is equally misplaced. In Quillen, the claimant was awarded TTD benefits and permanent partial disability benefits based upon a work-related injury. The claimant also settled a third party liability action against a tortfeasor

who was not an employee. On appeal, the Board addressed the ALJ's calculations in determining the amount of the employer's subrogation lien against the claimant's workers' compensation award. There the Board stated:

> KRS 342.730(1) authorizes an injured worker in tandem with maintaining a workers' compensation claim to independently pursue recovery against a third party tortfeasor for civil tort damages. Where the worker is successful in recovering damages in tort, KRS 342.700(1) gives subrogation rights to an employer who has paid workers' compensation benefits resulting from the same injury and prevents the worker from receiving a double recovery.

Unlike the claimant in Quillen, not only is Maynard pursuing a workers' compensation claim, he is pursuing civil tort damages against C&R Holding and the alleged third-party tortfeasor. In addition, the correct method of calculating an employer's subrogation lien is an issue not before the Board.

Maynard has requested oral arguments. After having reviewed the record, it is determined oral argument is unnecessary, and therefore the request is **DENIED**.

Accordingly, the August 24, 2012 Order and September 27, 2012 Order overruling Maynard's petition for reconsideration by Hon. Scott Borders, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

_____
MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON DARRELL SAMMONS
P O BOX 255
PIKEVILLE, KY 41502

COUNSEL FOR RESPONDENT C&R HOLDING:

HON BENITA J RILEY
P O BOX 1350
PRESTONSBURG, KY 41653

RESPONDENTS:

JOSHUA ENTERPRISES, INC
210 SLAUGHTER ROAD
SALYERSVILLE, KY 41465

UNINSURED EMPLOYERS FUND
1024 CAPITAL CENTER DR, STE 200
FRANKFORT, KY 40601

KY EMPLOYERS MUTUAL INSURANCE
250 WEST MAIN ST, STE 900
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042