Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2014

CLAIM NO. 200977758

OKN CONSTRUCTION COMPANY, LLC PETITIONER

VS. **APPEAL FROM HON. ROBERT SWISHER, ADMINISTRATIVE LAW JUDGE**

NATHAN L. ISAACS,
ISAACS, MASONRY,
and HON. ROBERT SWISHER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. OKN Construction Company, LLC ("OKN") appeals from an interlocutory order dated June 25, 2013 and a final order dated July 16, 2013, rendered by Hon. Robert L. Swisher, Administrative Law Judge ("ALJ"). The ALJ determined Nathan Isaacs ("Isaacs") was permanently totally

disabled as a result of a September 2, 2009 accident. The arguments on appeal concern the ALJ's determinations Isaacs was an employee of OKN at the time of the accident, and his civil suit does not bar this workers' compensation claim. For the reasons set forth herein, we affirm.

Isaacs owned and operated Isaacs Masonry, which typically employed five to six persons. Isaacs Masonry purchased a policy of workers' compensation insurance through Kentucky Employers Mutual Insurance ("KEMI"), which covered its employees but not Isaac. Upon learning it is permissible to exclude himself from coverage, Isaacs so elected because his overall premium was reduced.

Isaacs Masonry began performing work for OKN in 2007. OKN is owned by five partners: Jerry Arnold, Larry Noe, Dale Combs, Wendall Combs, and Donald Combs. OKN often performed work for CCNR Properties, a corporation owned by Noe and the three Combses. OKN also performed work for Saver Group, an entity which operates Sav-A-Lot grocery stores in Eastern Kentucky. Isaacs Masonry was regularly subcontracted by OKN to perform work on Sav-A-Lot stores. OKN held a policy for workers' compensation liability through KEMI.

At the time of Isaacs' injury, Isaacs Masonry had contracted with OKN to perform masonry work at a Sav-A-Lot

store in Whitesburg. Arnold, OKN's sole employee as well as a partner, negotiated the subcontracting agreement with Isaacs on behalf of Isaacs Masonry, which provided for a negotiated price per brick. Arnold acknowledged he often used Isaacs Masonry employees to perform odd jobs at the construction site, such as demo or clean-up work. At these times, he paid Isaacs Masonry $25 per man, per hour.

On September 2, 2009, four or five Isaacs Masonry employees were working at the Whitesburg job site, including Isaacs. Amos Refrigeration had installed new refrigerators and freezers, but the old units remained in the store. Though Amos Refrigeration was contractually responsible for the removal of the units, it was unable to send employees to perform this task for several days. The old units, however, exposed ditches which Isaacs Masonry had been contracted to fill. Fearing the exposed ditches created a hazard, Arnold asked Isaacs Masonry employees to help remove the old units so the fill-in work could be performed that evening. He paid Isaacs Masonry employees at the hourly rate to assist in the job.

Several men participated in the removal, including Isaacs, other Isaacs Masonry employees, and two Saver Group employees. As he helped move a 1500 pound freezer, Isaacs tripped over a forklift which had been

parked near the door. The unit fell on Isaacs, critically injuring him.

He spent the following six weeks in the hospital, recovering from a multitude of broken bones, spinal fractures and nerve root injuries. The effects of the accident are debilitating and greatly impair Isaacs' daily functioning. Dr. Daniel Primm, Jr. submitted an orthopedic evaluation report and, referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), assigned a 57% whole person impairment rating. Dr. William Lester also submitted a report and assigned a 74% whole person impairment. While both physicians assigned impairment ratings for the injuries to Isaacs' back and bladder, only Dr. Lester included a rating for sexual impairment.

On February 10, 2010, Isaacs and his wife filed a civil complaint in Letcher Circuit Court against CCNR Properties, Amos Refrigeration, Saver Group and OKN. Isaacs filed a Form 101 on August 30, 2011, alleging an injury arising out of the course and scope of his employment with OKN. In his Form 101, Isaacs named OKN as his employer but acknowledged that status was disputed. He also identified Saver Group and CCNR Properties as "possible statutory employers."

Thereafter, OKN moved for summary judgment before the Letcher Circuit Court, asserting Isaacs was acting as its employee at the time he was injured, and therefore his remedy lay exclusively in Chapter 342. In his response, Isaacs argued he was not OKN's employee and denied he was concurrently seeking recovery from OKN in both tort and workers' compensation claims. Because KEMI had denied coverage of Isaacs under the workers' compensation policies of both Isaacs Masonry and OKN, Isaacs merely sought to protect his interests in light of the fact his employment status was uncertain:

> Far from seeking concurrent, double recovery from OKN in both workers' compensation and in tort, Nathan has simply availed himself of the potential available claims to ensure that his claim is preserved. Nathan is not seeking to 'have it both ways' as argued at page 6 of OKN's Motion, but is seeking to ensure that he has it one way or the other.

The Letcher Circuit Court did not rule on the motion for summary judgment. The parties eventually settled for $1,350,000 in an agreement dated October 2, 2012. OKN contributed $1,000,000.00 to the settlement proceeds. On December 3, 2012, a "Release and Settlement Agreement" was executed by Isaacs and his wife.

Attention then returned to the pending workers' compensation matter. Apparently abandoning his prior position, Isaacs proceeded to assert a claim for workers' compensation benefits despite settling the civil claim. Consequently, Isaacs argued he was acting as OKN's employee at the time of the injury. OKN naturally responded Isaacs was acting as an independent contractor.

In the June 25, 2013 interlocutory order, the ALJ entered an extremely detailed and thorough synopsis of the evidence, as well as the procedural history of the case. Ultimately, the ALJ determined Isaacs was an employee of OKN at the time of the accident. As such, Isaacs' workers' compensation claim against OKN is not barred by KRS 342.012. For the same reason, KRS 342.610(2), which generally establishes up-the-ladder liability, is inapplicable.

In the interlocutory order, the ALJ also concluded Isaacs' civil suit does not bar his workers' compensation claim. However, he determined OKN is entitled to a credit for sums recovered from Saver Group, CCNR Properties and Amos Refrigeration. Referencing the principles set forth in Quillen v. Tru-Check, Inc., 2009 WL 3337239 (Ky. App. 2009), the ALJ calculated the subrogation credit due OKN. Finally, the ALJ determined Isaacs is

permanently totally disabled as a result of his injuries. After accepting additional proof concerning attorney's fees and litigation expenses, the ALJ entered a final Opinion, Award and Order on July 16, 2013, setting OKN's total credit at $146,391.58. OKN's subsequent petition for reconsideration was denied.

OKN now appeals, raising four arguments. First, it claims KRS 342.012 bars Isaacs' workers' compensation claim. Implicit in this argument is a challenge to the ALJ's finding Isaacs was an employee of OKN at the time he was injured. Next, OKN asserts Isaacs' civil suit bars his workers' compensation claim. Finally, in the event the award of benefits is not vacated or reversed, OKN argues it is entitled to a dollar-for-dollar credit for $1,000,000 it paid Isaacs pursuant to the settlement agreement.

We first consider whether KRS 342.012 bars Isaacs claim. The relevant portions of that statute provide:

> 1) For the purposes of this chapter, an owner or owners of a business, including qualified partners of a partnership owning a business, or qualified members of a limited liability company, whether or not employing any other person to perform a service for hire, shall be included within the meaning of the term employee if the owner, owners, qualified partners, or qualified members of a limited liability company elect to come under the provisions of this chapter

> and provide the insurance required thereunder. Nothing in this section shall be construed to limit the responsibilities of the owners, partners, or members of a limited liability company to provide coverage for their employees, nonqualified partners, or nonqualified members, if any, required under this chapter.

As OKN emphasizes it is undisputed Isaacs obtained a workers' compensation insurance policy for employees of Isaacs Masonry, but elected not to cover himself as an employee. This statute is unambiguous as to Isaacs' status as an employee of Isaacs Masonry. However, this provision is inapplicable because the ALJ determined Isaacs was acting as an employee of OKN at the time he was injured, a conclusion which OKN also challenges.

In Ratliff v. Redmon, 396 S.W.2d 320 (Ky. 1965), the Kentucky Court of Appeals established a nine-factor test to determine if a claimant was acting as an employee or as an independent contractor. Later, in Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969), the Court of Appeals "refined" the nine-factor test by identifying four factors that are most "predominant" stating as follows: "[T]he nature of the work as related to the business generally carried on by the alleged employer, the extent of control exercised by the alleged employer, the professional skill of the alleged employee, and the

true intentions of the parties." A proper legal analysis involves consideration of "*at least*" the four factors set forth in Chambers, and "proper legal conclusions may not be drawn from consideration of one or two of these factors." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 119 (Ky. 1991). There, the Supreme Court stated:

> A reviewing court must give great deference to the conclusions of the fact-finder on factual questions if supported by substantial evidence and the opposite result is not compelled. When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value.
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> Id. at 117; *See also* Uninsured Employers' Fund v. Poyner, 829 S.W.2d 430 at 431 (Ky. App. 1992).

The ALJ individually considered each of the nine Ratliff factors. Not unusually, the particular circumstances of Isaacs' relationship with OKN did not point exclusively to one conclusion. Though Isaacs Masonry was hired to perform brick work, Isaacs and his employees were often paid by the hour on a "sporadic but sustained basis" to perform other tasks at the job site wholly unrelated to masonry. When they were moving the freezer unit, the ALJ concluded they did so at Arnold's request and direction. The ALJ found no particular skill is involved

in commercial refrigeration removal, and the few tools necessary for that endeavor were provided by either Saver Group or OKN. OKN, in the business of providing construction services, was certainly acting within that purview when it asked Isaacs and others to remove the freezer unit.

Certainly OKN has identified several circumstances tending to support a conclusion Isaacs was not its employee. When Jerry Arnold paid Isaacs Masonry employees for this "side work", he wrote one single check to Isaacs Masonry from which Isaacs distributed the hourly wages to his employees. Likewise, Isaacs never received a W-2 from OKN and no taxes were withheld from his pay. The true intent of the parties is not readily discernible, as no written contract existed between OKN and Isaacs Masonry, even for the masonry work.

Acting within his discretion, the ALJ thoroughly considered and weighed the totality of the evidence, and reached a reasoned decision. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The proof emphasized by OKN merely supports a different conclusion than that reached by the ALJ, but does not compel a different result. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

To the extent OKN argues, as a matter of law, a person cannot concurrently be an independent contractor and an employee of the same employer, we disagree. Certainly an independent contractor may agree to perform work for an employer that is outside of and separate from the contracted-for project. We also note several states which recognize a claimant may be acting as an employee as to some tasks, but as an independent contractor as to others. *See e.g.* Williams v. Thurston Paulk, Inc., 455 S.E.2d 132 (Ga. App. 1995); Purdy v. Livingston, 559 S.W.2d 24 (Ark 1977); Vincent v. Pursley, 83 N.E.2d 431 (Ind. App. 1949); Christean v. Industrial Commission, 196 P.2d 502 (Utah 1948); Burnett v. Roberts, 121 P.2d 896 (Wyo. 1942); Clough v. Malley's Estate, 11 A.2d 398 (Conn. 1940).

In another corollary argument, OKN claims Isaacs is estopped from arguing he is an employee of OKN due to his contrary representations before the Letcher Circuit Court. The doctrine of judicial estoppel generally prohibits a person from taking inconsistent positions in judicial proceedings. Hisle v. Lexington-Fayette Urban County Government, 258 S.W.3d 422, 434 (Ky. App. 2008). The doctrine has been applied in the workers' compensation arena. *See e.g.* Weddle Enterprises, Inc. v. Jasper, 2010

WL 1948229 (Ky. App. 2010).[1] "The formula often applied for this principle asks whether (1) the party is taking a position clearly inconsistent with an earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party would derive an unfair advantage if not estopped." Id. at 3 *citing* Hisle, id.

Certainly, Isaacs' current position is inconsistent with his position before the circuit court. However, the parties settled the matter before Isaacs was successful "in persuading a court to accept the earlier position." Id The Letcher Circuit Court dismissed the pending action based on the fact the parties settled the matter; there is no evidence in the record the court adopted the position Isaacs was not OKN's employee. In fact, there is no reference to Isaacs' employment status in the settlement agreement or separate release. Furthermore, even if we were to accept a dismissal due to settlement as "judicial acceptance" of Isaac's position before the circuit court, there is no evidence to establish the position was a basis of or important to the settlement. For these reasons, we conclude Isaacs is not judicially

[1] This unpublished case is cited pursuant to CR 76.28(4)(c).

estopped from arguing he is OKN's employee in this workers' compensation matter.

Having determined Isaacs was acting as OKN's employee at the time of the accident, the ALJ then considered the effect of this finding on the viability of his workers' compensation claim. Ultimately, the ALJ concluded Isaacs' civil suit does not bar the workers' compensation claim, a finding OKN challenges on appeal. According to OKN, Isaacs waived the claim by the express terms of the settlement agreement. Alternatively, it argues the claim is precluded by various provisions of Chapter 342 and the election of remedies doctrine. We first address any statutory prohibition to Isaacs' claim.

KRS 342.325 generally provides that all questions arising under Chapter 342 shall be determined by the ALJ. KRS 342.610(4) provides an exception to this statute where the death or injury to the employee is the result of the deliberate intention of the employer. Under that factual circumstance, the employee may either proceed under Chapter 342 or, in lieu thereof, in civil court. Contrary to OKN's assertions, KRS 342.610(4) has no applicability to this case. Isaacs never asserted, either in this claim or in the Letcher Circuit Court, that his injury was the result of

the deliberate intention of OKN, Amos Refrigeration, CCNR Properties or Saver Group.

OKN also invokes the exclusive remedy provision of KRS 342.690, which states:

> "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 … and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

The ALJ determined Isaacs was acting as OKN's employee, and there is no dispute OKN was insured.

This provision is most commonly used to bar a civil action following successful litigation of a workers' compensation claim. *See e.g.* Borman v. Interlake, Inc., 623 S.W.2d 912 (Ky. App. 1981). Had OKN insisted upon a determination, either from the Letcher Circuit Court or the ALJ, as to whether Isaacs was acting as its employee, it could potentially have raised KRS 342.690 as a complete bar to the civil action. It did not do so, instead electing to settle the claim first. Under the circumstances of this case, then, the question is whether KRS 342.690 can act as a bar to the workers' compensation claim?

We believe it cannot. The statute plainly states OKN's liability pursuant to the Act shall be exclusive and "in place of all other liability of such employer." Liability is "the quality or state of being legally obligated or accountable; legal responsibility to another to society, enforceable by civil remedy or criminal punishment." Black's Law Dictionary, (9th ed. 2009). OKN settled this claim before its liability or any legal obligation was determined, and we do not believe a settlement agreement qualifies as a "liability" for purposes of KRS 342.690(1). More often than not, a settlement agreement does not constitute an admission of liability, but evinces a desire to avoid the expense and risk of litigation. In fact, in the release signed by Isaacs and OKN, it "expressly denied" any liability for Isaacs' accident and injury.

In light of these circumstances, we cannot conclude that OKN has established any "liability" outside of Chapter 342 exists, so as to preclude Isaacs' workers' compensation claim. Before any liability was determined, OKN made a contractual agreement with Isaacs to halt the civil suit. As the ALJ noted, it did so at its own peril, prior to a conclusive determination as to Isaacs'

employment status, and for reasons not apparent on the record.

Next, OKN argues common law principles of election of remedies bars Isaacs' workers' compensation claim. Because workers' compensation is a creature of statute, we question whether the common law doctrine of election of remedies applies, though we have found no Kentucky cases so stating. Notwithstanding, the doctrine of election of remedies "means that when a person has at his disposal two modes of redress, which are contradictory and inconsistent with each other, his deliberate and settled choice and pursuit of one will preclude his later choice and pursuit of the other." Collings v. Scheen, 415 S.W.2d 589, 591 (Ky. App. 1967). We do not believe Isaacs' choice to simultaneously pursue civil and workers' compensation claims can be considered a "deliberate and settled" choice. Rather, it is a logical and protective *response* to the fact his status as OKN's employee was in dispute.

Finally, OKN argues Isaacs' workers' compensation claim is barred by the express terms of the settlement agreement and release. The settlement agreement contained a clause indicating Isaacs would execute a release of "all claims against the defendants arising from this action."

The subsequent release indicated Isaacs and his wife agree "to indemnify and hold forever harmless" OKN and its co-defendants. It further stated: "This indemnity provision includes, but is not limited to, all medical, Social Security, Medicare, disability, added reparations benefits, federal or state claims, liens, or demands."

One could reasonably conclude Isaacs' workers' compensation claim constitutes a disability, state, or medical claim. However, the ALJ was persuaded by several other circumstances. Most importantly, though Isaacs' workers' compensation claim was pending at the time the release was executed, there is no specific mention of this claim. Nor is there an express agreement to dismiss or abandon the claim. Instead, it repeatedly refers only to claims arising from the civil action. Moreover, KRS 342.265 requires that a settlement of a claim for workers' compensation benefits must be approved by the ALJ. The civil settlement was neither submitted to nor approved by the ALJ. For these reasons, we agree with the ALJ that the settlement agreement and release do not bar Isaacs' workers' compensation claim.

Having concluded Isaacs' claim is not barred, the ALJ weighed this determination against Kentucky's clear legislative policy to prevent double recovery, a very real

concern under the factual circumstances of this case. *See* Old Republic Ins. Co. v. Ashley, 722 S.W.2d 55 (Ky. App. 1986). To effectuate an equitable balance, the ALJ applied the principles set forth in KRS 342.690(2), which allow a potential credit against an award of workers' compensation benefits by virtue of a civil recovery against the employer, where the employer has not secured coverage. The ALJ then calculated the credit due OKN based on KRS 342.690(2), and the principles enunciated in AIK Selective Self Ins. Fund v. Bush, 74 S.W.3d 251 (Ky. 2002) and Whittaker v. Hardin, 32 S.W.3d 497 (Ky. 2000).

On appeal, OKN does not dispute the specific amounts calculated by the ALJ, but generally contests that any calculation was conducted. Instead, it argues it is entitled to a dollar-for-dollar credit. We disagree. The ALJ properly calculated the credit under the precepts set forth in Quillen v. Tru-Check, Inc., 2009 WL 3337239 (Ky. App. 2009). Based on the evidence presented, the ALJ allocated the elements of damages in his personal injury claim, determining that a large portion of the award represented pain and suffering. He also deducted the amount of Isaacs' legal fees and expenses.

The ALJ fashioned a fair and equitable remedy in response to a factual situation that is not contemplated by

the Chapter 342. Recognizing OKN had allowed itself to be placed in the position of defending a workers' compensation claim following the settlement, the ALJ neither punished Isaacs' nor allowed him to be unjustly enriched by this scenario. We believe the award is in conformity with the Workers' Compensation Act, and find no reason to disturb it.

Accordingly, the interlocutory order dated June 25, 2013 and a final order dated July 16, 2013, rendered by Hon. Robert L. Swisher, are hereby **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

MEMBER, STIVERS. Respectfully, I dissent as I believe, based on the doctrine of judicial estoppel, the ALJ should have dismissed Isaacs' claim. In Weddle Enterprises, Inc. v. Royce Jasper, et al, 2009-CA-001812-WC, rendered May 14, 2010, Designated Not To Be Published, Judge Wine succinctly explained the doctrine of judicial estoppel as follows:

However, we need not reach a discussion of issue preclusion in this case because we find the doctrine of judicial estoppel to be applicable. The principle acts to estop Weddle's claim on appeal as Weddle now takes a position contrary to the position it took earlier in the

administrative proceeding. [citations omitted] Judicial estoppel is a quasi-estoppel principle that may 'be applied to prohibit a party from taking inconsistent positions in judicial [or quasi-judicial] proceedings.' [citations omitted] The formula often applied for this principle asks whether (1) the party is taking a position clearly inconsistent with an earlier position, (2) the party succeeded in persuading a court to accept the earlier position, and (3) the party would derive an unfair advantage if not estopped. *Id*.

Slip Op. at 6.

In the case *sub judice*, Isaacs takes a position which is completely inconsistent with the position he took in the Letcher Circuit Court action. Although he may not have succeeded in persuading the Court to formally accept his position, I submit the Letcher Circuit Court in essence accepted his position that he was not OKN's employee since it did not rule on OKN's motion for summary judgment. One can only conclude the representation in Isaacs' response to the motion for summary judgment, as set out in the majority opinion on page five, caused the Letcher Circuit Court not to enter summary judgment in favor of OKN.

To allow Isaacs to completely change his position from that presented in the Circuit Court would permit him

to derive an unfair advantage. Consequently, he should be estopped from asserting in this claim that he was an employee of OKN at the time he was injured.

Without question, Isaacs represented he was not OKN's employee in order to maintain the civil action in the Letcher Circuit Court which he ultimately settled for a large sum. After obtaining this money, Isaacs then filed a workers' compensation claim taking a position diametrically opposed to the position contained in his civil complaint, which was reiterated in his response to OKN's motion for summary judgment. Therefore, he is estopped from asserting he was OKN's employee when injured and his subsequent workers' compensation claim should be dismissed.

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