

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000408-WC

OKN CONSTRUCTION COMPANY, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-77758

NATHAN L. ISAACS; ISAACS MASONRY;
HON. ROBERT SWISHER, ADMINISTRATIVE
LAW JUDGE; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: OKN Construction Company, LLC, petitions for review of an opinion of the Workers' Compensation Board that affirmed the decision of the Administrative Law Judge (ALJ). The ALJ awarded Nathan Isaacs permanent total disability benefits and medical benefits for a catastrophic, work-related injury.

OKN Construction contends that the Board erred by agreeing with the ALJ who determined: that Isaacs was covered by the provisions of the workers' compensation statute; that he was an employee and not an independent contractor at the time of his injury; that a civil action filed in Letcher Circuit Court did not bar his workers' compensation claim; and that OKN Construction was not entitled to a dollar-for-dollar credit for the sums that it paid to settle the related civil action.

After our review, we affirm.

There is little dispute with respect to the essential facts underlying this proceeding. The Board recited as follows:

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.

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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[lition] 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.

* * * * *

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 interest in light of the fact his employment status was uncertain.

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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.

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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.

On appeal, the Workers' Compensation Board affirmed. This petition for review followed.

Upon review of a decision of the Board, we may reverse only where the Board has overlooked or misconstrued controlling law or has so flagrantly erred in evaluating the evidence that gross injustice has resulted. *Daniel v. Armco Steel Co.*, 913 S.W.2d 797 (Ky.App. 1995). This precedent effectively requires a review of the ALJ's decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Where – as here – the ALJ has found in favor of the party bearing the burden of proof, we must affirm the decision as long as it is supported by substantial evidence and is based upon the correct application of controlling law. *Special Fund v. Francis*, 708 S.W.2d at 643.

As summarized above, OKN Construction raises several issues for our review. We have reordered them for purpose of our analysis.

First, OKN Construction argues that in this workers' compensation proceeding, Isaacs is estopped from claiming that he was an employee of OKN Construction at the time of his injury because he had asserted a contrary position during the course of the civil proceedings. A member of the Board was persuaded

that the doctrine of judicial estoppel applied under these circumstances and dissented from the Board's opinion that affirmed the award of benefits.

The doctrine of judicial estoppel “protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.” *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 763 (Ky. App. 2001), citing *Reynolds v. Commissioner*, 861 F.2d 469, 472-73 (6th Cir. 1988). However, when a civil matter has been settled, a party has not “successfully and unequivocally” asserted his position because the court has not adopted a different position asserted by one of the competing parties. *Id.* Consequently, judicial estoppel cannot be invoked. Since the prior civil action was settled by the parties, there can be no judicial estoppel in this proceeding. The Board did not err by concluding that application of the doctrine was not warranted.

In the alternative, OKN Construction contends that Isaacs made a judicial admission that he was not its employee during the course of the civil proceedings. Thus, it argues that he ought to be bound by that admission in this workers' compensation proceeding. We disagree.

A judicial admission is a formal act by a party in the course of a judicial proceeding either in a pleading or in presenting testimony that serves as a substitute for the production of evidence by the opponent and bars a party from disputing a proposition in question. *Center v. Stamper*, 318 S.W.2d 853 (Ky. 1958) (citing *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021 (1941)). Courts

are exceedingly reluctant to apply the doctrine of judicial admissions. And, “[u]nless the circumstances and conditions virtually eliminate the possibility of error, ‘a judicial admission in one action is not conclusive in another action.’” *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378 (Ky. 1992) (citing *Center v. Stamper*, 318 S.W.2d 853, 855 (Ky. 1958)).

The application of the doctrine of judicial admissions was not warranted in this workers’ compensation proceeding for several reasons. First, the circumstances under which the parties negotiated a settlement of the civil action and subsequently litigated the workers’ compensation action did not “virtually eliminate the possibility of error.” The Isaacs’ 2010 tort action was filed against CCNR Properties, Amos Refrigeration, Saver Group, and OKN Construction. They alleged damages based upon the negligence of any or all of the named defendants. In connection with the application for workers’ compensation benefits filed in August 2011, Isaacs was forthright with respect to his representations. He acknowledged that his status as an OKN Construction employee was unclear under the circumstances, and he identified Saver Group and CCNR Properties as “possible” statutory employers. OKN Construction argued strenuously in the civil action (and contrary to its position in the administrative proceedings) that Isaacs either was its employee at the time of his injury or was the employee of an uninsured subcontractor -- so as to shield it from civil liability. Nonetheless, it agreed to settle the civil action *before* a determination in the workers’ compensation proceedings could be made.

It does not appear that the arguments presented in the civil proceeding prior to its dismissal were made in any attempt to manipulate the courts. Instead, the summary judgment motion and Isaacs's response to the contention of OKN Construction in its motion that he was its employee appear to have been intended to narrow the issues for summary judgment. They were not statements that would ordinarily cause a court to dispense with the necessity of hearing evidence with respect to a material fact. Furthermore, we are not persuaded that either the summary judgment motion or Isaacs's written response to the motion constitute pleadings from upon which a judicial admission may be based. Motions for summary judgment and their resulting responses do not serve the same purpose as pleadings in setting forth factual allegations for purposes of judicial admissions.

OKN Construction next argues that the Board erred by failing to conclude that Isaacs's civil action constituted an election of remedies pursuant to the provisions of KRS 342.610(4), barring him from asserting a subsequent claim for workers' compensation benefits. We disagree.

The provisions of KRS 342.610(4) give an injured worker or his estate the option of pursuing a claim for workers' compensation benefits or of pursuing a claim for damages in a civil action "[i]f injury or death results to an employee through the deliberate intention of his employer to produce such injury or death" However, this statutory provision is inapplicable where there has been no allegation of injury through *deliberate* intention. No such allegation of deliberate

intention on the part of OKN was asserted. Thus, no election of remedies was required.

Furthermore, the provisions of KRS 342.325 direct that “all questions arising under this chapter, *if not settled by agreement* of the parties interested therein, with the approval of the administrative law judge, shall be determined by the administrative law judge except as otherwise provided in this chapter.”

(Emphasis added.) We agree that this provision grants exclusive jurisdiction to determine issues arising under the workers’ compensation act -- including whether there was an employment relationship between the parties -- to the ALJ and not to the circuit court. Under the circumstances, the Board did not err in concluding that the common law doctrine of “election of remedies” was inapplicable to these statutory proceedings.

Next, OKN Construction contends that the Board erred by affirming the ALJ’s factual determination that Isaacs was working as an employee of OKN Construction at the time he was injured. We disagree.

An administrative law judge has the sole discretion to determine the quality, character, and substance of the evidence. The ALJ may reject any testimony and may believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party’s proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). As the claimant, Isaacs bore the burden of proving each of the essential elements of his claim -- including whether he was an employee of OKN Construction. Again, if the party with the burden of proof and

risk of persuasion is successful before the ALJ, the issue on appeal is whether the evidence supports the finding in his favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

In this case, the Board carefully evaluated the evidence. It concluded that the ALJ's decision was reasonable in light of the evidence and the applicable law. OKN Construction denied that there was ever a contract of hire between it and Nathan Isaacs, individually. However, the circumstances indicated that the parties understood that the masonry work required at the job site was to be undertaken by Isaacs Masonry and his fellow tradesmen at a negotiated rate. Other work -- largely unskilled -- was made available to Nathan Isaacs and individual members of his crew at different times and at a different negotiated rate. The Board did not err by concluding that this evidence was sufficient to establish a contract of employment between OKN Construction and Nathan Isaacs for the "side work" that was separate and distinct from the contract entered into between OKN Construction and Isaacs Masonry concerning the necessary masonry work; the evidence certainly did not compel a different conclusion.

Next, OKN Construction contends that the Board erred by failing to conclude that Isaacs's failure to procure workers' compensation insurance for himself as a sole proprietor rendered him ineligible for benefits under the statutory

scheme. Since Isaacs did not file a workers' compensation claim against Isaacs Masonry but did so against OKN Construction as his employer, we conclude that this argument is unavailing.

The provisions of KRS 342.012 govern workers' compensation coverage for business owners of sole proprietorships. The statute provides, in pertinent parts, as follows:

(1) For the purposes of this chapter, an owner . . . of a business . . . 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 . . . elect[s] to come under the provisions of this chapter and provide the insurance required thereunder.

(2) When an owner . . . ha[s] elected to be included as [an] employee[], this inclusion shall be accomplished by the issuance of an appropriate endorsement to a workers' compensation insurance policy.

Pursuant to the provisions of KRS 342.012, Isaacs's decision not to purchase insurance for himself would operate to bar his attempt to bring a claim against Isaacs Masonry for benefits under the policy of insurance that he purchased for the employees of Isaacs Masonry. However, the Board did not err by concluding that the provision does not bar Isaacs's recovery against OKN Construction. The ALJ found that Isaacs was not working as an independent contractor and owner of Isaacs Masonry at the time of his injury but that he was functioning as an employee of OKN Construction instead.

Finally, OKN Construction argues that the Board erred by concluding that it was not entitled to a dollar-for-dollar credit for the settlement that it paid to Isaacs

in the Letcher Circuit Court action. OKN Construction contends that the failure to afford a dollar-for-dollar credit for its contribution to the settlement of the civil action means that Isaacs has won a double recovery. We disagree.

In the interlocutory opinion, award, and order entered in June 2013, the ALJ concluded that a policy to prevent double recovery for work-related injuries underlies Kentucky's workers' compensation scheme. The ALJ determined that the potential for double recovery clearly existed in this case. Thus, he fashioned a credit based upon his reasoning that settlement proceeds paid by OKN Construction through its general liability insurance carrier contemplated elements of damage including pain and suffering and loss of consortium -- damages that were not within the purview of the workers' compensation act. Accordingly, the ALJ's computation allocated a portion of the settlement proceeds to Isaacs's spouse and a portion to pain and suffering. It also allocated a portion of the settlement proceeds to the Isaacses' attorney's fee and litigation expenses. These amounts were deducted from the settlement proceeds "off the top" and were not subject to the claim of OKN Construction for credit toward the workers' compensation award.

The Board concluded that the ALJ had properly calculated a partial credit against Isaacs's award by using as a model the computation employed by this Court in *Quillen v. Tru-Check, Inc.*, 2009 WL 3337239 (Ky. App. 2009). While the computation discussed in *Quillen* concerned the right of subrogation with respect to sums collected from both the employer and a third-party tortfeasor, we

are persuaded that the Board correctly determined that the ALJ's analysis was fair and equitable under the unique facts of this case.

The Board did not overlook or misconstrue controlling law, nor did it so flagrantly err in evaluating the evidence that it has caused gross injustice by affirming the decision of the ALJ. Consequently, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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