BRB No. 09-0649

| | | |
|---|---|---|
| CHRISTY S. SPARKS | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED | ) | DATE ISSUED: 04/12/2010 |
| | ) | |
| and | ) | |
| | ) | |
| THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Summary Decision of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

Monica F. Markovich and James W. Parker (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision (2008-LDA-0371) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 3, 2008, claimant filed a claim for benefits under the Defense Base Act (DBA) for an injury allegedly sustained while she was working for employer in Iraq.[1] While the dispute over disability benefits continued, employer voluntarily paid medical benefits. Emp. Brief at 3; Emp. Motion for Summary Decision exh. 1. On May 16, 2008, claimant and her husband filed a joint bankruptcy petition with the bankruptcy court in the Northern District of Alabama. They filed the required assets and liabilities schedule but did not list the DBA claim as an asset of the estate. Emp. Motion for Summary Decision at exh. 7. In claimant's May 22, 2008, deposition for the DBA claim, employer learned of both the bankruptcy claim and a potential sexual harassment suit against a former employer. *Id.* at exh. 8. On June 12, 2008, claimant and her husband testified under oath and penalty of perjury in the First Meeting of the Creditors in the bankruptcy proceeding. Claimant disclosed the sexual harassment suit but did not mention the DBA compensation claim. *Id.* at exh. 9a. On September 15, 2008, without having received any amendments to the initial assets and liabilities schedule, the bankruptcy court discharged claimant and her husband from their debts totaling over $225,000. *Id.* at exhs. 11-12, 14-15.

Before the administrative law judge, employer argued that claimant is judicially estopped from pursuing the DBA claim because she failed to disclose it to the bankruptcy court; claimant responded that she was not informed she had to disclose the DBA claim to the bankruptcy court. She also stated that, when she informed the bankruptcy trustee of the pending DBA claim after her discharge in bankruptcy, he stated he would not intervene or put a claim on any workers' compensation benefits she might receive, as he anticipated those funds would be exempt from creditors. Cl. Reply Brief at exh. 1. The administrative law judge found that claimant did not disclose the pending DBA claim when she initially filed for bankruptcy, when she met with the creditors, or when she was alerted to the omission by employer, and that the bankruptcy court relied on claimant's representations in granting her discharge. Additionally, the administrative law judge found that claimant's belated notice of the DBA claim to the bankruptcy trustee did not remedy her omission. Decision and Order at 3-5 Thus, the administrative law judge concluded that claimant's positions in the bankruptcy court and before him were inconsistent. Decision and Order at 5-6.

In addressing employer's argument that claimant should be barred from pursuing this claim, the administrative law judge found that claimant's omission in bankruptcy court was not inadvertent, as she knew of her DBA claim at the time she filed for bankruptcy and she had motive to conceal it, thereby keeping any recovery for herself

[1]While claimant was on medical leave in Dubai to refill a prescription for her pre-existing thyroid condition, she allegedly was raped by a supervisor. Emp. M/Protective Order at exh. 3. Employer disputes liability for this injury.

instead of potentially exposing it to her creditors. Decision and Order at 5-6. Because the administrative law judge found the judicial estoppel elements outlined by the United States Court of Appeals for the Fifth Circuit in its decisions in *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598 (5th Cir. 2005), and *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999), are present, he found that claimant is judicially estopped from pursuing her DBA claim, and he granted employer's motion for summary decision. Decision and Order at 5-6. Claimant appeals the administrative law judge's decision. Employer responds, urging affirmance.

This case involves the novel issue of whether a claimant's failure to disclose a pending compensation claim in bankruptcy proceedings can affect her right to pursue her claim under the Act. In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), (d), 18.41(a). In this case, the administrative law judge found that judicial estoppel applies to bar the DBA claim, and, thus, that employer is entitled to summary decision as a matter of law. For the reasons set forth below, we reverse the administrative law judge's decision and remand the case for further proceedings.

Claimant contends Section 16 of the Act, 33 U.S.C. §916, renders any proceeds from her DBA claim exempt from the bankruptcy estate. Therefore, claimant contends that her failure to disclose the DBA claim to the bankruptcy court is insufficient to preclude her pursuit of her claim under the Act as a matter of law, as her bankruptcy discharge was not affected by the non-disclosure of her DBA claim and could not have been affected by full disclosure. Accordingly, claimant contends the doctrine of judicial estoppel is inapplicable. Employer responds, arguing that the administrative law judge acted within his discretion in barring claimant's claim, as claimant's failure to disclose this claim as an asset to the bankruptcy court until after her debts were discharged violated bankruptcy procedures and rendered any proceeds she may obtain from this claim "non-exempt" and, therefore, property of the bankruptcy estate which can be used to repay her creditors. Employer asserts claimant's actions prejudiced her creditors, and that claimant lost her rights under Section 16 by failing to follow bankruptcy procedures.

Section 16 of the Act provides:

> No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

33 U.S.C. §916. Therefore, compensation paid under the Act is exempt from all claims of creditors and cannot be attached for the collection of a debt. *Thibodeaux v. Thibodeaux*, 454 So.2d 813, 16 BRBS 142(CRT) (La. 1984), *cert. denied*, 469 U.S. 1114 (1985) (wife not permitted to garnish husband's disability benefits for child support); *compare In Re Sloma*, 43 F.3d 637 (11th Cir. 1995) (creditors permitted to attach money claimant received via annuity, as payments were not "due and payable under the Act" but were being paid by a third party pursuant to claimant's settlement instructions). In this case, any compensation to which claimant may be entitled for her alleged work injury is due and payable under the Act and exempt from creditors pursuant to Section 16. Significantly, the administrative law judge did not discuss Section 16 in his decision.

We must consider the administrative law judge's finding that claimant's failure to disclose the pending DBA claim to the bankruptcy court estops her from pursuing it in light of this statutory provision. In bankruptcy proceedings, when a debtor files for bankruptcy protection, she must first file a complete and accurate schedule of her assets and liabilities. The list of assets is to include the debtor's interest in all property, even if she believes that the property is worthless or exempt from the bankruptcy estate; that property becomes the property of the bankruptcy estate. 11 U.S.C. §§522, 4003; *In re Robinson*, 292 B.R. 599 (S.D. Ohio 2003). The list of assets must also disclose all potential causes of action, including contingent and unliquidated claims. 11 U.S.C. §521(1); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002); *Coastal Plains*, 179 F.3d at 207-208; *In the Matter of Yonikus*, 996 F.2d 866 (7th Cir. 1993); *In re Johnson*, 345 B.R. 816 (W.D. Mich. 2006). The duty to disclose is a continuing one: a debtor must amend her financial statements if her circumstances change because full disclosure is crucial to the federal bankruptcy system. *Burnes*, 291 F.3d at 1286. Once an asset has been reported, it may be made exempt from the bankruptcy estate by filing a claim for the exemption. 11 U.S.C. §§522, 4003; *United States v. Shadduck*, 112 F.3d 523 (1st Cir. 1997); *Yonikus*, 996 F.2d at 870. Failure to disclose an exemption, especially upon a showing of bad faith, could result in the disallowance of the exemption, the revocation or preclusion of a discharge in bankruptcy, or in criminal sanctions against the debtor. *In re Ford*, 492 F.3d 1148 (10th Cir. 2007) (Tenth Circuit upheld bankruptcy court's denial of debtor's exemption because debtor concealed personal injury action in bad faith); *Yonikus*, 996 F.2d at 872-873 (bankruptcy court denied exemption because

debtor failed to disclose his workers' compensation claim); *In the Matter of Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992); *In the Matter of Doan*, 672 F.2d 831 (11th Cir. 1982); *In re McVay*, 345 B.R. 846 (N.D. Ohio 2006); *Robinson*, 292 B.R. at 609, 612; *In re Park*, 246 B.R. 837 (E.D. Tex. 2000). If a debtor intentionally fails to disclose a cause of action to the bankruptcy court, the debtor may be judicially estopped from pursuing that cause of action, because "the courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding." *Coastal Plains*, 179 F.3d at 208 (quoting *Rosenshein v. Kleban*, 918 F.Supp. 98, 104 (S.D.N.Y. 1996)); *see also Burnes*, 291 F.3d at 1288; *Johnson*, 345 B.R. at 825.

Judicial estoppel is a common-law doctrine designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a second proceeding. It is an equitable doctrine invoked at a court's discretion. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 39 BRBS 47(CRT) (2d Cir. 2005); *Burnes*, 291 F.3d 1282; *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The Supreme Court has identified typical, but not inflexible or exhaustive, factors to consider when determining whether to apply judicial estoppel to a particular case. The factors are: 1) whether the positions are "clearly inconsistent;" 2) whether there was judicial acceptance of the initial position; and, 3) whether the party advancing the inconsistent position would gain an unfair advantage over his opponent.[2] *New Hampshire*, 532 U.S. at 750-751. The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises,[3] considers two factors which it deems consistent with the Supreme Court's instructions: 1) "it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding" and 2) "such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes*, 291 F.3d at 1285 (quoting *Salomon Smith Barney, Inc. v. Harvey, M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001)).[4] In ascertaining whether the inconsistencies "make a mockery of the judicial

[2]Because the purpose of judicial estoppel is to protect the integrity of the judicial process, an opposing party's detrimental reliance on a position asserted is irrelevant, thus distinguishing judicial estoppel from other equitable defenses. *Burnes*, 291 F.3d at 1286; *Coastal Plains*, 179 F.3d at 205.

[3]The Decision and Order in this case was served by the district director in Jacksonville, Florida. *See* 42 U.S.C. §1653.

[4]Employer acknowledges that the administrative law judge incorrectly applied the law of the United States Court of Appeals for the Fifth Circuit rather than the Eleventh Circuit; however, it asserts that application of the two circuits' laws in this case would end in similar results, as both courts view the Supreme Court's instructions in *New*

system[,]" the Eleventh Circuit considered the question of the debtor's intent, and it agreed with the Fifth Circuit that judicial estoppel would apply only if there was deliberate manipulation of the record, which could be inferred from the record. That is, if the omission or error was inadvertent, judicial estoppel would not apply, and "inadvertence" is when the debtor "lacks knowledge of the undisclosed claims or has no motive for their concealment." *Burnes*, 291 F.3d at 1287; *Coastal Plains*, 179 F.3d at 210. In looking at motive, the Eleventh Circuit considered whether the debtor would gain an advantage by concealing the claims from the bankruptcy court. *Burnes*, 291 F.3d at 1288.

Judicial estoppel has been applied to preclude plaintiffs from bringing or benefiting from claims they failed to reveal to the bankruptcy court.[5] *See Burnes*, 291 F.3d at 1286-1288; *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001); *Coastal Plains*, 179 F.3d at 210; *Johnson*, 345 B.R. 825. While the civil courts have disallowed claims for damages that would result in an unfair advantage to the plaintiffs, we find no support for the administrative law judge's finding that claimant's alleged violation of the bankruptcy rules properly results in the loss of her rights under the Act.[6] In view of Section 16, claimant's creditors have no right to attach the proceeds of her claim, and she therefore could not gain an advantage by concealing it.

---

*Hampshire* as flexible and non-exhaustive prerequisites. *Hopkins v. Cornerstone America*, 545 F.3d 338, 347 (5th Cir. 2008). Thus, even after *New Hampshire* was decided, the Fifth Circuit continued to rely on its previous decision in *Coastal Plains*. *Jethroe*, 412 F.3d at 600. *Coastal Plains* provides that judicial estoppel applies when: 1) a party's position is plainly inconsistent with a prior position; 2) the party convinced a court to accept the prior position; and 3) the party did not act inadvertently. *Coastal Plains*, 179 F.3d at 206-207; *see also Jethroe*, 412 F.3d at 600; Decision and Order at 3-4. Therefore, both circuits have considered the inconsistencies of sworn positions as well as the intentions of the parties.

[5]The failure to disclose a cause of action in a bankruptcy schedule constitutes a "prior position" if the debtor later seeks recovery from that cause of action. Schedules, amendments, and the meeting of the creditors all provide the debtor an opportunity to disclose her assets and liabilities. The statements therein are made under penalty of perjury, and if the court grants a discharge based on them, there is "judicial acceptance" for purposes of judicial estoppel. *Johnson*, 345 B.R. at 822, 825.

[6]Contrary to employer's assertion of prejudice to claimant's creditors, we note that employer is not the proper party to assert such a claim; employer is not a creditor, and it has not been prejudiced. In any event, Section 16 would apply with regard to whether there was any prejudice to creditors. Moreover, the issue here is not what the bankruptcy

The Eleventh Circuit's decision in *Burnes*, 291 F.3d 1282, supports the conclusion that judicial estoppel does not apply where claimant gains no advantage from concealing a claim. In *Burnes*, the plaintiff in a class-action employment discrimination suit, Billups, was judicially estopped from pursuing only part of his non-disclosed claim. On July 13, 1997, Billups filed for bankruptcy in the Northern District of Alabama, submitting the requisite forms. Six months later, he charged his employer with employment discrimination, and in December 1999, he and 35 other plaintiffs filed a class action suit, seeking monetary and injunctive relief. Billups, however, did not file an amendment to his bankruptcy papers – either then or when he converted his Chapter 13 petition to a Chapter 7 petition, despite being asked to file amended schedules. On January 23, 2001, Billups received a "no asset" complete discharge of his debts of over $38,000. The employer filed a motion for summary judgment against him in the employment discrimination suit, asserting that his failure to disclose the employment discrimination suit to the bankruptcy court barred him from pursuing the discrimination claim. The district court granted the employer's motion, and Billups appealed. The Eleventh Circuit affirmed the district court's decision estopping Billups from pursuing monetary damages in the class-action lawsuit. *Id.* at 1288 The court also declined to allow Billups to re-open his bankruptcy case to amend his filings. Significantly, however, the court limited the estoppel to the claim for monetary damages and allowed Billups to pursue the claim for injunctive relief, as the injunctive relief offered no monetary value to the estate. *Burnes*, 291 F.3d at 1289. Because there was no monetary recovery that would be of value to the bankruptcy estate, there was no motive to conceal the claim from the bankruptcy court and no unfair advantage to the plaintiff; therefore, there was no intent to make a mockery of the system, and the claim for injunctive relief was permitted to continue.

Other courts have reached the same conclusion where there was no financial advantage to the debtor who failed to disclose information to the bankruptcy court. In *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002), a debtor failed to disclose a pending law suit to the bankruptcy court; however, the claim did not result in a windfall for the plaintiff-debtor, so the court permitted the law suit to proceed. Similarly, in *Calafiore v. Werner Enterprises, Inc.*, 418 F.Supp.2d 795 (D.Md. 2006), a plaintiff was permitted to bring a negligence action for damages only to the extent of his personal injury exemption under Maryland bankruptcy law. He was barred by judicial estoppel from claiming the remainder of the damages because he failed to disclose his negligence suit to the

---

court may do if claimant is permitted to proceed with this case or whether she could face sanctions in that forum. We are concerned only with whether claimant may proceed with her DBA claim. Although we note that while bankruptcy procedures allow for the court to re-open the proceedings to reconsider a discharge, *see Yonikus*, 996 F.2d 866, the trustee has already stated that he will not assert a claim against any recovery under the DBA.

bankruptcy court. Thus, the court inferred intent by deciding that the plaintiff had a "motive to conceal" the claim from the bankruptcy court to the extent that his damages would have exceeded his exemption. In *McClain v. Coverdell & Co.*, 272 F.Supp.2d 631 (E.D. Mich. 2003), a plaintiff-debtor's failure to disclose the existence of one of her bank accounts did not materially affect her bankruptcy proceedings because the amount in the account was less than her personal property exemption. Accordingly, in a subsequent consumer protection claim, the court held that the plaintiff was not barred from asserting a right to the money in that account by arguing that the account should not be debited by the defendant-creditors. Thus, case precedent holds that where there is no unfair advantage over the creditors, subsequent claims may proceed despite the plaintiff-debtor's failure to reveal the claims to the bankruptcy court.

As stated previously, Section 16 of the Act explicitly states that benefits due under the Act "*shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived*." 33 U.S.C. §916 (emphasis added). Under the plain language of Section 16, claimant's claim is not an asset which can be attached by creditors, and the administrative law judge erred as a matter of law in relying on a discretionary doctrine as a basis for denying benefits while ignoring an applicable statutory provision. Moreover, there is no basis for finding Section 16 inapplicable in this case.[7] As any DBA benefits claimant may potentially receive are not an asset to which the bankruptcy creditors are entitled, claimant gained no advantage over them by withholding information about the DBA case from the bankruptcy court. This fact was confirmed by the bankruptcy trustee's letter wherein he relinquished any claim to her benefits. *See Burnes*, 291 F.3d 1282; *see generally Sports Page, Inc. v. First Union Management, Inc.*, 438 N.W.2d 428 (Minn. 1989) (trustee became aware of undisclosed suit for legal misrepresentation prior

[7]An exception to this provision was found with regard to garnishment for spousal support in *Moyle v. Director, OWCP*, 147 F.3d 1116, 32 BRBS 107(CRT) (9th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999). In that case, the United States Court of Appeals for the Ninth Circuit held that the later-enacted garnishment provision of the Social Security Act, 42 U.S.C. §659(a); 5 C.F.R. §581.103(c)(5), and its legislative history, 123 Cong. Rec. 9015, 9019 (March 24, 1977); 123 Cong. Rec. 12909, 12913 (April 29, 1977), specifically authorized garnishment for spousal support of benefits received under the Longshore Act. *Moyle*, 147 F.3d at 1120-1121, 32 BRBS at 110-113(CRT). This exception is not applicable here, as this case does not involve spousal support. *See also Sloma*, 43 F.3d 637 (Section 16 inapplicable because claimant had settled his claim and was receiving annuity payments from a third party which he had assigned to the bank as collateral for his loan; thus, bank could recoup loan payoff through annuity payments); *E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993) (Section 16 inapplicable because state could recoup benefits it paid under its workers' compensation law and was not "creditor" within the meaning of Section 16).

to debtor's discharge and abandoned the property; debtor was not judicially estopped from pursuing claim). Consequently, as one element of the criteria for applying judicial estoppel is absent, the administrative law judge erred in applying this discretionary doctrine to bar claimant from proceeding with her claim under the Act. *Burnes*, 291 F.3d 1289.

In light of the plain language of Section 16 prohibiting the attachment of benefits payable under the Act and the absence of a necessary element for judicial estoppel, we reverse the administrative law judge's conclusion that claimant is judicially estopped from pursuing her DBA claim. We therefore also reverse his consequent decision to grant employer's motion for summary decision. *Morgan*, 40 BRBS 9; *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995). This case is remanded for proceedings on the merits of claimant's DBA claim.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision is reversed, and the case is remanded for consideration of the issues on the merits.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge