In the Matter of:

ERIC W. NELSON,

COMPLAINANT,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 12-045

ALJ CASE NO. 2011-FRS-035

DATE: September 25, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Brian K. McMahon, Esq.; Lake Worth, Florida

***For the Respondent*:**
Jeffrey S. Berlin, Esq.; and Mark E. Martin, Esq.; *Sidley Austin LLP,* Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa W. Edwards, *Administrative Appeals Judge. Judge Edwards concurred.*

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson/West Supp. 2013). Complainant Eric Nelson alleges that his former employer, Respondent Norfolk Southern Railway Company, retaliated against him in violation of the FRSA. The case is before the Administrative Review Board (Board) pursuant to Complainant's appeal from a Department of Labor Administrative Law Judge (ALJ) Decision and Order Granting the Respondent's Motion for Summary Decision. Because we conclude that there exists a genuine issue of material fact precluding summary decision, the Board vacates the ALJ's Decision and Order (D. & O.) and remands the case for further proceedings.

BACKGROUND

This case arises out of a complaint filed with the Occupational Safety and Health Administration (OSHA) on October 14, 2009, as subsequently amended, in which Complainant Nelson alleged that Respondent violated the FRSA's whistleblower protection provisions when it suspended him on October 12, 2009, and subsequently terminated his employment on November 13, 2009, in retaliation for reporting a workplace injury.

On October 14, 2005, prior to the filing of his FRSA complaint, Complainant filed for Chapter 13 bankruptcy. On January 30, 2006, Nelson filed a First Amended Chapter 13 Plan, which was confirmed by the bankruptcy court on March 27, 2006. Nelson subsequently filed several Modified Chapter 13 Plans, the last on November 9, 2009 (Seventh Modified Chapter 13 Plan), less than a month after Nelson filed his FRSA complaint. On November 19, 2009, the bankruptcy court approved the Seventh Modified Chapter 13 Plan, which in turn served as the basis for the court's subsequent Order of Discharge of Debtor issued February 9, 2011. On June 8, 2011, the bankruptcy court issued a Final Decree, noting that the estate had been fully administered and the case was closed. Nelson did not at any time disclose to the bankruptcy court the existence of the FRSA complaint pending before the Department of Labor.

Following conclusion of the bankruptcy proceedings, OSHA issued a preliminary order on August 8, 2011, finding reasonable cause to believe that Respondent had violated the FRSA. Respondent requested a hearing before a Department of Labor Administrative Law Judge. Before the ALJ, Respondent moved for summary decision on the grounds that Nelson was judicially estopped from pursuing his FRSA claim because he had not disclosed it to the bankruptcy court. Citing as controlling precedent the Board's decision in *White v. Gresh Transp., Inc*., ARB No. 07-035, ALJ No. 2006-STA-048 (ARB Nov. 20, 2008), the ALJ granted Respondent's motion for summary decision and dismissed Nelson's complaint.

Nelson has timely appealed the ALJ's D. & O. to the Administrative Review Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions upon appeal of Administrative Law Judge decisions under the FRSA.[1] The ARB reviews the ALJ's factual determinations under the substantial evidence standard and conclusions of law de novo.[2] We review de novo an ALJ's grant of summary decision, viewing the record and all reasonable inferences drawn from it in the light most favorable to the party opposing the motion. Summary judgment is appropriate only when the evidentiary record

---

[1] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110 (2012).

[2] 29 C.F.R. § 1982.110(b); *Michael Ben Graves v. MV Transp., Inc*., ARB No. 12-066, ALJ No. 2011-NTS-004 (ARB Aug. 30, 2013).

demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3]

DISCUSSION

The purpose of judicial estoppel is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-750 (2001) (citations omitted). It is an equitable doctrine designed to "prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Id.* The Supreme Court recognized in *New Hampshire v. Maine* that while "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," three factors "typically inform the decision" on whether to apply the doctrine in a particular case: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled;" and (3) whether the party seeking to assert an inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. at 750-751 (citations omitted).

Consistent with the factors enumerated by the Supreme Court, the Fourth Circuit, within which the present case arises,[4] has held a party's bad faith to be the determinative factor. "[T]he

---

[3] *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 6 (ARB Dec. 28, 2012); *Boyd v. U.S. Env'l Prot. Agency*, ARB No. 10-082, ALJ No. 2009- SDW-005, slip op. at 2-3 (ARB Dec. 21, 2011). Again, given that 29 C.F.R. § 18.40 is patterned after Rule 56 of the Federal Rules of Civil Procedure, it is important to keep in mind that the federal courts have ruled that "[i]t is well established that our review of a grant of summary judgment is de novo." *Marvin J. Perry, Inc. v. Hartford Cas. Ins. Co.,* 412 Fed.Appx. 607, 608 (4th 2011). For the previously stated reasons, we disagree with our colleague's adoption of "abuse of discretion" as the standard for review of an ALJ's application of judicial estoppel to bar Nelson's whistleblower claim. While we do not dispute the equitable aspects of the judicial estoppel doctrine, we consider the ARB necessarily constrained in its appellate review of the ALJ's summary dismissal of Nelson's claim by statutory and regulatory authority, which does not allow for "abuse of discretion" review of ALJ summary dismissals. As with other whistleblower statutes over which the ALJ has jurisdiction, the ARB is expressly limited by the FRSA and its implementing regulations to review of an ALJ's findings of fact under the substantial evidence standard while affording the ARB de novo consideration of an ALJ's conclusions of law, including de novo review as a matter of law of an ALJ's grant of summary judgment. In addition, we do not feel that it is appropriate to rely on an abuse of discretion standard to review an ALJ's use of judicial estoppel to summarily dismiss whistleblower cases where the litigation frequently involves serious safety concerns as in this case.

[4] Federal appellate jurisdiction of FRSA cases rests in either the circuit in which the alleged violation occurred or the circuit in which the complainant resided on the date of the violation. 29 C.F.R. § 1982.112. The hearing record indicates that on October 12, 2009, the date of the alleged violation, Nelson was assigned to Respondent's facility at Charleston, South Carolina, working at a

party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage." *Whitten v. Fred's, Inc*., 601 F.3d 231, 241 (4th Cir. 2010).[5]

"Judicial estoppel has often been applied to bar a civil law suit brought by a plaintiff who concealed the existence of the legal claim from creditors by omitting the lawsuit from his bankruptcy petition." *Whitten*, 601 F.3d at 241 (citing *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006)). The rationale for invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy is that:

> *[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets.* 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. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis,*

---

jobsite in or near Jamestown, North Carolina, and residing in Greensboro, North Carolina – all locales within the jurisdiction of the Court of Appeals for the Fourth Circuit.

[5] The Fourth Circuit has generally required the presence of the following as necessary for invoking judicial estoppel:

> First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation. The position at issue must be one of fact as opposed to one of law or legal theory. Second, the prior inconsistent position must have been accepted by the court. Lastly, the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor.

Whitten, 601 F.3d at 241 (quoting *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007) (citations and internal quotation marks omitted)). *See also Lowry v. Stovall*, 92 F.3d 219 (4th Cir. 1996). Other circuits have adopted similar tests for determining the applicability of judicial estoppel. For example, the Eleventh Circuit considers two factors: "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes v. Pemco Aeroplex, Inc*., 291 F.3d 1282, 1285 (11th Cir. 2002). Consistent with the Supreme Court's admonition in *New Hampshire v. Maine*, the Eleventh Circuit expressly recognized "that these two enumerated factors are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." *Id*. at 1286. *See also In re Coastal Plains, Inc*., 179 F.3d 197, 206-07 (5th Cir. 1999) (identifying various appellate jurisdictions that have embraced similar standards).

> *are impaired when the disclosure provided by the debtor is incomplete.*

Hamilton v. State Farm Fire & Casualty, 270 F.3d 778, 785 (9th Cir. 2001) (modifications omitted; emphasis in original)(quoting *In re Coastal Plains*, 179 F.3d 197, 208 (5th Cir. 1999)).

As the ARB has recognized, a debtor seeking protection under the bankruptcy laws has a statutory duty to truthfully disclose all assets, including potential assets, to the bankruptcy court. *White*, ARB No. 07-035, slip op. at 4. While *White* and the case authority upon which *White* relies focuses on the duty to disclose in bankruptcy proceedings under Chapter 7,[6] "[t]his duty applies to proceedings under Chapter 13 and Chapter 7 alike, because 'any distinction between the types of bankruptcies available is not sufficient enough to affect the applicability of judicial estoppel because the need for complete and honest disclosure exists in all types of bankruptcies.'" *Robinson v. Tyson Foods, Inc*., 595 F.3d 1269 (11th Cir. 2010)(quoting *De Leon v. Comcar Indus., Inc*., 321 F.3d 1289, 1291 (11th Cir. 2003)). *Accord Ajaka v. BrooksAmerica Mortg. Corp*., 453 F.3d 1339, 1344 (11th Cir. 2006).[7]

Nelson does not dispute that he was aware of his FRSA claim; that it arose subsequent to the filing of his bankruptcy petition; that he was obligated to disclose it to the bankruptcy court; and that he failed to do so during the pendency of the bankruptcy proceedings. Since Nelson does not dispute these issues, we do not address them. The issue in this case boils down to motive, and whether Nelson intentionally misled the bankruptcy court to gain unfair advantage. "For purposes of judicial estoppel, intent is a purposeful contradiction – not simple error or inadvertence. '[D]eliberate or intentional manipulation can be inferred from the record' where the debtor has knowledge of the undisclosed claims and has motive for concealment." *Barger v. City of Cartersville*, 348 F.3d 1289, 1294 (11th Cir. 2003)(citing *Burnes*, 291 F.3d at 1287). Given the importance of the safety issues potentially at stake in whistleblower claims such as those arising under the FRSA, like the Fourth Circuit in *Whitten* and *Zinkand*, we consider the question of motive and whether a party acted in bad faith determinative in deciding whether to apply judicial estoppel.

---

[6] *See* 11 U.S.C.A. §§ 521(a)(1), 547(a)(7).

[7] Once the courts did not universally share the opinion that there existed a continuing duty to disclose all assets acquired during the pendency of a Chapter 13 bankruptcy proceeding. The Eleventh Circuit drew a distinction between a debtor's assets in existence prior to the court's confirmation of the debtor's Chapter 13 plan to pay his creditors and post-confirmation acquired assets – the latter remaining the property of the debtor and thus not subject to disclosure. *See Muse v. Accord Human Res., Inc*., 129 Fed. Appx. 487, 2005 WL 891015 (11th Cir. 2005)(construing *Telfair v. First Union Mortg. Corp*., 216 F.3d 1333 (11th Cir. 2000)); *Foreman v. J. Walter Constr. Co.*, 378 B.R. 717 (S.D. Ga. 2007). The Eleventh Circuit no longer embraces this distinction, however. *See Robinson v. Tyson Foods, Inc*., 595 F.3d 1269, 1274 (11th Cir. 2010); *Waldron v. Sylvia Ford Brown*, 536 F.3d 1239, 1242-43 (11th Cir. 2008). Regardless, Complainant concedes on appeal that controlling law requires that assets acquired after the Chapter 13 plan is confirmed but before the bankruptcy case is closed are property of the bankruptcy estate, and thus subject to disclosure. Complainant's Brief in Support of Petition for Review (Mar. 13, 2012).

Here, the ALJ held that Nelson's failure to disclose his FRSA claim constituted an intentional effort to mislead the court based upon his conclusion that Nelson knew that he was obligated to disclose the claim and that Nelson had a theoretical motive for concealment. The ALJ concluded that Nelson was aware of his duty to disclose the FRSA claim based upon the following entry contained in Nelson's Seventh Modified Chapter 13 Plan, which was submitted to the court less than a month after Nelson filed his FRSA complaint:

> The debtor will modify the Plan to provide for the distribution of funds recovered from (1) a potential lawsuit against his former bankruptcy attorney. The debtor has increased payments to unsecured creditors in the amount of $6,000.00 due to the settlement of his personal injury suit.[8]

The ALJ construed Nelson's entry as referring to a "potential future lawsuit," and deduced from this that Nelson "was aware of the requirement that claims arising after the bankruptcy petition was filed had to be reported." D. & O. at 2. "[T]he filing of the Seventh Modified Plan on November 9, 2009, makes it clear that he was aware of the requirement to inform the bankruptcy court of claims arising after the initial bankruptcy petition." *Id*. at 5.

The ARB has repeatedly held that when presented with a motion for summary decision, the evidence is to be viewed in the light most favorable to the nonmoving party.[9] When viewed accordingly, the entry in the Seventh Modified Plan merely indicates, as Nelson argues on appeal, that he was aware of his duty to disclose to the bankruptcy court after the filing of his bankruptcy petition a claim that had arisen *prior to* the filing. The entirety of Nelson's bankruptcy submissions supports his contention that the reference in his Seventh Modified Plan to a "potential lawsuit" was not to a potential *future* lawsuit (as the ALJ concluded), but to a potential lawsuit that existed *prior to* the filing of Nelson's bankruptcy petition – which he brought to the court's attention after he filed his bankruptcy petition.

To begin with, Nelson's First Amended Chapter 13 Plan, submitted to the bankruptcy court on January 30, 2006, stated:

> The debtor will modify the Plan to provide for the distribution of funds recovered from a potential lawsuit against his former bankruptcy attorney which are not exempt to the unsecured creditors.[10]

---

8 Seventh Modified Chapter 13 Plan, filed November 10, 2009. See Declaration of attorney Mark E. Martin (Respondent's Declaration), filed with the ALJ November 3, 2011, presenting documents in support of Respondent's motion for summary decision, at NSR 080.

9 *See, e.g., Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014 (ARB Sept. 26, 2012); *Hasan v. Enercon Servs., Inc*., ARB No. 10-061, ALJ No. 2004-ERA-022 (ARB July 28, 2011).

10 See Respondent's Declaration, at NSR 064.

Consistent with this representation, Nelson subsequently filed with the bankruptcy court a motion to approve the settlement of a claim that existed prior to Nelson's filing for bankruptcy.[11] In his motion, filed July 25, 2007, Nelson explained:

> At the time of filing the Debtor had a pending personal injury claim . . . . [C]ounsel has reached a settlement with the insurance carrier, in the amount of $12,545.16 . . . . Debtor will net a recovery of $6,000.00.[12]

Referencing Nelson's Second Modified Chapter 13 Plan, Nelson's motion to approve the settlement further stated: "The Debtor has previously filed a motion to modify to increase payments to unsecured creditors by $6,000.00." The Second Modified Chapter 13 Plan, filed July 26, 2007, provided (using the identical language found in the Seventh Modified Plan):

> The debtor will modify the Plan to provide for the distribution of funds recovered from (1) a potential lawsuit against his former bankruptcy attorney. The debtor has increased payments to unsecured creditors in the amount of $6,000.00 due to the settlement of his personal injury suit.[13]

In Nelson's subsequently-filed Third,[14] Fourth,[15] Fifth,[16] and Sixth[17] Modified Chapter 13 Plans, the exact same entry is found as that in Nelson's Second and Seventh Modified Chapter 13 Plans. For example, Nelson's Sixth Modified Chapter 13 Plan, filed with the bankruptcy court on October 7, 2009, stated:

---

[11] The Bankruptcy Court approved the requested settlement on August 20, 2007. See Bankruptcy Document Number 50, Respondent's Declaration at NSR 006.

[12] See Exhibit 4 to Nelson's brief on appeal. See also Respondent's Declaration at NSR 005-006, Bankruptcy Document Number 44.

[13] See Exhibit 5 to Nelson's petition for review. See also Respondent's Declaration at NSR 006, Bankruptcy Document Number 45.

[14] Third Modified Chapter 13 Plan, filed July 26, 2007, Bankruptcy Document Number 46. See Respondent's Declaration, at NSR 006.

[15] Fourth Modified Chapter 13 Plan, filed January 16, 2008, Bankruptcy Document Number 53. See Respondent's Declaration, at NSR 006.

[16] Fifth Modified Chapter 13 Plan, filed February 10, 2008, Bankruptcy Document Number 56. See Respondent's Declaration, at NSR 007.

[17] Sixth Modified Chapter 13 Plan, filed October 7, 2009, Bankruptcy Document Number 97. See Respondent's Declaration, at NSR 073.

> The debtor will modify the Plan to provide for the distribution of funds recovered from (1) a potential lawsuit against his former bankruptcy attorney. The debtor has increased payments to unsecured creditors in the amount of $6,000.00 due to the settlement of his personal injury suit.[18]

When the foregoing is viewed in the light most favorable to Nelson, the entry in Nelson's Seventh Modified Plan upon which the ALJ relied merely indicates, as Nelson argues on appeal, that he was aware of an ongoing duty to disclose to the bankruptcy court any claims arising *prior to* the filing of his bankruptcy petition. Rather than supporting the ALJ's conclusion that Nelson was aware of an ongoing duty to disclose claims arising after his initial petition in bankruptcy, this evidence supports Nelson's contention that, at a minimum, an issue of material fact exists as to whether he knew that he was required to disclose his FRSA claim.

Turning to the determinative factor of whether Nelson's failure to disclose his FRSA claim was motivated by an attempt to gain some advantage before the bankruptcy court, the ALJ merely stated: "A motive to avoid disclosure exists whenever, as in this case, the asset is a potential one that the debtor may receive in the future, after the bankruptcy discharge." D. & O. at 5. This conclusion is, however, nothing more than the articulation of a theoretical motive on Nelson's part to conceal his claim. The ALJ cites no evidence in support of his conclusion, and as far as can be determined upon our review of the evidentiary record, none exists – at least not on the record presently before us.

In *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (1996), the Third Circuit rejected the theoretical motivation construct the ALJ embraced in this case. There, the defendant argued that intent to mislead or deceive the bankruptcy court could be inferred from the mere fact of nondisclosure. Noting the non-existence of any court authority in support of such a proposition, the appellate court rejected the defendant's position on policy grounds:

> [P]olicy considerations militate against adopting a rule that requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding. Such a rule would unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies. . . .
>
> Defendants argue that rejecting their proposed "inferred intent" rule "would invite prolonged discovery into the motives of the debtor." We disagree. For purposes of judicial estoppel, we require a showing of intent in other contexts; we see no reason why the process of discerning that intent should be unworkable in the bankruptcy context when it is workable elsewhere. We therefore reject defendant's argument that intent may be inferred for

---

18 *Id.*

> purposes of judicial estoppel solely from nondisclosure notwithstanding the affirmative disclosure requirement of the Bankruptcy Code.

Ryan Operations, 81 F.3d at 364-365.

As previously noted, the courts have held that deliberate or intentional manipulation can be inferred from the record where the debtor has knowledge of the undisclosed claim and a motive for concealment. Nevertheless, the question of a debtor's motive for failing to disclose a claim to a bankruptcy court is an evidentiary matter. For example, in *Burnes*, the court's finding that the plaintiff's motive for failing to disclose his claim required invocation of judicial estoppel was based on the "undisputed" evidence that the plaintiff "stood to gain an advantage by concealing the claims from the bankruptcy court." 291 F.3d at 1288. Not only did the court find it unlikely that the claimant would have received the benefits of conversion to Chapter 7 followed by a non asset, complete discharge, "had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages," the claimant acknowledged that disclosure of the information would have likely changed the results of his bankruptcy. *Id*. Citing the decision in *Burnes* as having been based on "evidence . . . sufficient to conclude that the debtor intended to mislead the bankruptcy court," the Eleventh Circuit similarly found in *Barger* that the debtor "appeared to gain an advantage where she failed to list her discrimination claim in her schedule of assets." *Barger*, 348 F.3d at 1294, 1296. Likewise, in *In re Coastal Plains*, 179 F.3d at 212, the Fifth Circuit's affirmation of the lower court's finding of a motive to conceal turned on the fact that had the claims been disclosed, the debtor's unsecured creditors might have opposed lifting the stay and, as a result, the bankruptcy court might have reached a different conclusion. *See also Payless Wholesale Distrib., Inc. v. Alberto Culver*, 989 F.2d 570, 571 (1st Cir. 1993) (applying judicial estoppel upon finding that the debtor intended to "[c]onceal [its] claims [in the bankruptcy proceeding]; get rid of [its] creditors on the cheap; and start over with a bundle of rights").

Consistent with the foregoing, but reaching the opposite conclusion as to the existence of a bad faith motive, is the Third Circuit's decision in *Ryan Operations*. There, the court found "no evidence that the nondisclosure played any role in the confirmation [by the bankruptcy court] of the plan or that disclosure of the potential claims would have led to a different result. Although it may generally be reasonable to assume that a debtor who fails to disclose a substantial asset in bankruptcy proceedings gains an advantage, the undisputed facts weigh against such an inference in this case." 81 F.3d at 363. Thus, the court concluded, "it appears that Ryan derived and intended no appreciable benefit from its nondisclosure," *id*., and thus that the district court erred in granting summary judgment against Ryan Operations on judicial estoppel grounds. *Accord Ajaka* 453 F.3d at 1346 ("[t]hese facts when taken together, are sufficient in our view to conclude that there exists a question of material fact as to whether Ajaka had the motivation and intent to manipulate the judicial system under the circumstances presented here").

Ultimately, the ALJ's conclusion regarding Nelson's motive is in conflict with well-established case law holding that intent is a question of fact ordinarily precluding a grant of

summary judgment.[19] Summary judgment is particularly unsuitable for divining a complainant's motive when the tribunal is called upon to determine the applicability of judicial estoppel. "Judicial estoppel is intended to be a flexible rule in which courts must 'take into account all of the circumstances of each case in making our determination.'" *Ajaka*, 453 F.3d at 1344 (citation omitted). "[C]ourts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine." *Burnes*, 291 F.3d at 1286. Given that the record before us on appeal presents sufficient evidence of a material issue of fact with regard to Nelson's motive and whether he acted in bad faith in an effort to intentionally mislead the bankruptcy court, as previously discussed, we hold that the ALJ erred as a matter of law in granting summary judgment.

CONCLUSION

For the foregoing reasons, we **VACATE** the ALJ's Decision and Order and **REMAND** this case to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

Lisa Wilson Edwards*, Administrative Appeals Judge,* concurring.

I write separately to briefly make clear that "judicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). The ARB reviews de novo an ALJ's grant of summary decision. *Johnson v. The WellPointe Cos.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 5 (ARB Feb. 25, 2013), *Henderson v.*

[19] *See e.g.*, *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963) (summary judgment generally inappropriate "where motive and intent play leading roles"); *Chanel, Inc. v. Italian Activewear of Fla., Inc*., 931 F.2d 1472, 1476 (11th Cir. 1991) ("[a]s a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the fact finder, to be determined after trial"); *Pfizer, Inc. v. International Rectified Corp*., 538 F.2d 180, 185 (8th Cir. 1976) ("[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles"). *See also McCoy v. WGN Continental Broad.*, 957 F.2d 368, 370-71 (7th Cir. 1992); *Stumph v. Thomas & Skinner*, 770 F.2d 93, 97 (7th Cir. 1985); *Kephart v. Inst. of Gas Tech.*, 630 F.2d 1217, 1218 (7th Cir. 1980); *Franchini vs. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 9 (ARB Sept. 26, 2012).

Wheeling & Lake Erie R.R., ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 5 (ARB Oct. 26, 2012). An ALJ's decision to invoke judicial estoppel is subject to review for abuse of discretion. *See Ah Quin v. County of Kauai Dep't. of Transp.*, – F.3d –, 2013 WL 3814916, *2-*3 (9th Cir. 2013) ("The district court's belief that it was *bound* to preclude Plaintiff from bringing her discrimination claim is mistaken and fundamentally at odds with equitable principles. Judicial estoppel is a discretionary doctrine, applied on a case-by-case basis."); *Stephenson v. Malloy*, 700 F.3d 265, 274-275 (6th Cir. 2012); *In re Oparaji*, 698 F.3d 231, 235 (5th Cir. 2012) ("we review the grant of summary judgment *de novo* and the application of judicial estoppel for abuse of discretion."); *Rockwood v. SKF USA, Inc.*687 F.3d 1, 10-11 (1st Cir. 2012) ("We apply the deferential abuse of discretion standard to judicial estoppel rulings even though we review summary judgment rulings *de novo.*")(citing *Guay v. Burack*, 677 F.3d 10, 15 (1st Cir. 2012)); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012) ("We review for abuse of discretion a district court's invocation of judicial estoppel" and "apply this deferential standard of review based on our acknowledgment that the district court is best equipped to decide judicial estoppel's applicability 'because determining whether a litigant is playing fast and loose with the courts has a subjective element and its resolution draws upon the trier's intimate knowledge of the case at bar and his or her first-hand observations of the lawyers and their litigation strategies.'") (internal citations omitted); *National Union Fire Ins. Co. of Pittsburgh v. Manufacturers & Traders Trust Co.*, 137 Fed. App'x 529 (4th Cir. 2005). "A mistake of law is a *per se* abuse of discretion." *Rockwood*, 687 F.3d at 10.

In this case, the ALJ employed an incorrect legal standard by failing to determine Nelson's intent or motive to mislead the court to gain unfair advantage, a required component for invoking judicial estoppel. As the majority aptly holds, the requisite intent for judicial estoppel should not be inferred from the mere fact of nondisclosure. *See, e.g.*, *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) ("[P]olicy considerations militate against adopting a rule that requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding."). For that reason, the ALJ's decision invoking judicial estoppel in this case was an abuse of discretion and warrants remand.

LISA WILSON EDWARDS
Administrative Appeals Judge