RENDERED: January 23, 2004; 10:00 a.m.
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ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT: FEBRUARY 9, 2005 (2004-SC-0450-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001933-MR

MARIE MOORE, Individually and as
Administratrix of the Estate of
Michael Moore, deceased;
MICHAEL LEEANN MOORE, an infant,
By and through MARIE MOORE, her next friend;
BRADY AUSTIN MOORE, an infant, by and through
MARIE MOORE, his next friend — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 01-CI-00012

ADDINGTON MINING, INC.,
COLUMBIA GAS TRANSMISSION CORPORATION,
And
EMPLOYERS RISK SERVICES, INC. — APPELLEES

OPINION
REVERSING
AND
REMANDING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND BARBER, JUDGES.

BUCKINGHAM, JUDGE: Marie Moore, individually and in her capacity as administratrix of the estate of Michael Moore and as guardian and next friend of Michael Moore’s children, appeals from a

summary judgment entered by the Pike Circuit Court in favor of Addington Mining, Inc. Because we conclude there were genuine issues of material fact to be resolved, we reverse and remand.

Michael Moore was an employee of Sunny Ridge Mining, Inc. Sunny Ridge was a mining company originally organized and owned by Hobart Potter. At the time of Moore's accident which is the subject of this litigation, Sunny Ridge was owned by Sunny Ridge Enterprises, Inc., which was owned by Coal Ventures Holding, Inc., which was owned by AEI Resources, Inc. Addington Mining was also owned by AEI Resources, Inc. In other words, Sunny Ridge and Addington Mining were both subsidiary corporations of AEI Resources.

Moore was working at Sunny Ridge's Mine No. 21 when a problem developed with a gas line which required mining at that location to cease. Most of the Sunny Ridge employees were transferred by AEI Resources personnel to the Addington Mining job site located at Dials Branch in Pike County. That job site was less than one mile from Sunny Ridge's Mine No. 21. There was testimony by deposition that these employees were to be at the Dials Branch site for approximately six weeks while the gas line was being moved at Mine No. 21.

When the Sunny Ridge employees were transferred to the Dials Branch site, Sunny Ridge equipment was also transferred and the Sunny Ridge employees continued to have the same Sunny

Ridge supervisors. Furthermore, while the Sunny Ridge employees worked at the Addington Mining site, they continued to receive their paychecks from Sunny Ridge. However, through inter-office accounting at AEI Resources, Addington Mining was assigned the expense of using Sunny Ridge employees since the employees were actually working at the Dials Branch site.

On May 18, 2001, Moore, a Sunny Ridge employee, was operating an endloader at the Addington Mining site. His endloader hit a high pressure gas line owned by Columbia Gas Transmission Corporation thereby causing an explosion and fire. Moore died later from extensive burns.

Moore's widow, individually and in her capacity as administratrix of Moore's estate and as guardian and next friend of their children, filed a civil complaint in the Pike Circuit Court against Addington Mining and Columbia Gas. Addington Mining filed a motion to dismiss on the ground that all claims against it were barred by the exclusive remedy provisions of the Kentucky Workers' Compensation Act, specifically the provisions of KRS[1] 342.690(1). Addington Mining asserted in its motion that Moore was a "loaned servant" from Sunny Ridge to Addington Mining and that his only remedy against it would be pursuant to the Workers' Compensation Act.

[1] Kentucky Revised Statutes.

Because the circuit court considered evidence outside the pleadings, it treated Addington Mining's motion to dismiss as a motion for summary judgment.[2] The court concluded as a matter of law that Moore was a loaned employee or loaned servant from Sunny Ridge to Addington Mining on the date of the accident which led to Moore's death. Thus, it awarded summary judgment to Addington Mining on the ground that Moore's claims were subject to the exclusive remedy provisions of KRS 342.690(1). This appeal followed.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

[2] See Kentucky Rules of Civil Procedure (CR) 12.03.

The applicable statute provides as follows:

> 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, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

KRS 342.690(1).

Marie Moore argues on appeal that the circuit court erred in determining as a matter of law that Michael Moore was a loaned servant or loaned employee from Sunny Ridge to Addington Mining. She contends that there were fact issues in this regard at the very least. We agree.

In Memphis Mining Co. v. Shacklett, 153 Ky. 476, 155 S.W. 1154 (1913), the court addressed whether the relation of master and servant (employer and employee) is a question of law or a question of fact. The court stated:

> Whether the relation of master and servant exists is a mixed question of law and fact and must be submitted to the jury under proper instructions where there is conflict in the evidence. . . . In 26 Cyc. 971, it is said: "Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible; its

> weight and sufficiency being left to the jury under the instructions of the court."

155 S.W. at 1155. "The existence or nonexistence of an employment relationship between two parties is a question of fact[.]" 82 AM JUR 2d Workers' Compensation § 122 (2003). See also Ambrosius Indus., Inc. v. Adams, Ky., 293 S.W.2d 230, 237 (1956), wherein the jury was instructed to determine facts in connection with whether an employee was a "loaned servant."

General authority has defined the loaned servant or loaned employee doctrine as follows:

> According to the "borrowed or loaned servant doctrine," when one employer provides an employee to another employer, the employee become the "borrowed servant" of the second employer for that particular transaction, and if the second employer exercises control over the "borrowed servant," the second employer assumes liability for the activities of that borrowed employee, and the original employer is not liable for any of that employee's conduct.

82 AM JUR 2d Workers' Compensation § 197 (2003). There is a three-pronged test for determining whether an employee of one employer has become a loaned employee of another employer. The three parts of the test concern whether: "1) the worker has an expressed or implied contract of hire with the special employer, 2) the work being done is essentially that of the special employer, and 3) the special employer has a right to control the details of the work." Allied Mach., Inc. v. Wilson, Ky. App.,

673 S.W.2d 728, 730 (1984), citing Larson, The Law of Workmen's Compensation § 48. See also Rice v. Conley, Ky., 414 S.W.2d 138, 140 (1967).

Under the aforementioned three-prong test, it appears to us that Moore was not a loaned employee to Addington Mining or, at the very least, there were fact issues in this regard. There is no question that the second prong of the test, that the work being done was essentially that of the special employer, was met. However, based on the evidence in the record at this point, the first and third prongs were not met.

The first prong requires that the worker have an expressed or implied contract of hire with the special employer. Wilson, 673 S.W.2d at 730. It has been stated that:

> There must be mutual assent, express or implied, for a contract of hire to exist, for purposes of determining whether a claimant is a "worker" as defined by a workers' compensation act. Likewise, for there to be a contract for hire, for purposes of a worker being an "employee" under a workers' compensation act, there must be informed consent by the employee to the employment relationship.

82 Am Jur 2d Workers' Compensation § 124 (2003). Moore was still employed by and under the direction of Sunny Ridge at the time of the accident. Sunny Ridge continued to pay Moore's wages, and he continued to work under the supervision of Sunny Ridge employees. Furthermore, there is no indication that Moore

assented to an employer-employee relationship with Addington Mining. Under these circumstances, it cannot be concluded as a matter of law that Moore had an expressed or implied contract of hire with Addington Mining. Therefore, the first prong was not met.

The third prong of the test to determine whether an employee of one employer has become a loaned employee of another employer is whether the special employer had a right to control the details of the work. Wilson, 673 S.W.2d at 730. In determining an employment relationship, our supreme court has stated that "the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work." United Eng'rs & Constructors, Inc. v. Branham, Ky., 550 S.W.2d 540, 543 (1977). Further, in Turner Constr. Co. v. Garrett, Ky., 310 S.W.2d 786 (1958), the court held that "[t]he test of whether a master's servant doing special service for a third party becomes the servant of the third party depends on who controls the servant while he performs the special service. The right to discharge the servant immediately gives complete control." Id. at 789.

In this case the special employer, Addington Mining, did not control the details of the work. Sunny Ridge employees were directed by AEI Resources personnel and David Maynard, in his capacity as area manager over AEI's mines in the Pike County

area, to the Addington Mining site to work. However, Moore and the other employees were under the supervision of Sunny Ridge supervisors. The record does not indicate that Moore or any other Sunny Ridge employee was under the supervision or control of Addington Mining employees so far as the details of their work were concerned.[3] In fact, Maynard testified in his deposition that Moore's supervisor at Sunny Ridge, Blaine Owens, would have reported to either Roger Smith, another Sunny Ridge employee, or Maynard himself. Despite the fact that Addington Mining had supervisors on site, Maynard did not identify any who supervised Moore's work. In fact, when asked who directed Owens to send Moore to the specific location where the accident occurred, Maynard stated Owens made that decision himself. We conclude that the third prong of the test for determining whether an employee of one employer has become a loaned employee of another employer was not met.

Addington Mining's motion came before the circuit court on a motion to dismiss. The motion was treated as a motion for summary judgment because the court considered matters outside the pleadings. See CR 12.03. We hold as a matter of law that Moore was not a loaned employee from Sunny Ridge to

[3] To the extent David Maynard had control over Sunny Ridge employees, that control derived from his position as area manager over all seven of AEI Resources' mines in the Pike County area.

Addington Mining.[4] There are no genuine issues of material fact in this regard. However, Moore has not yet filed her motion for summary judgment. Thus, it is proper for us to remand the case for further proceedings.

Finally, Addington Mining argues that subsidiary corporations are not subject to common law civil actions by the employees of a sister subsidiary corporation. It asserts that the only exception to the exclusive remedy provision of the Kentucky Workers' Compensation Act deals with the parent/subsidiary situation such as that found in Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979). However, we agree with Moore that an action by an employee of one subsidiary corporation against another subsidiary corporation would not be an exception to the general immunity of an employer from suit by one of its employees. Rather, where, as here, there are separate corporate entities, an employee of one corporation may maintain a cause of action against a sister corporation. See Green v. Windsor Mach. Prods., Inc., 173 F.3d 591 (6th Cir. 1999). As the Sixth Circuit noted in the Boggs case:

> [B]usiness enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that

[4] The parties informed this court that discovery in regard to this issue was complete when the matter was submitted to the circuit court for ruling.

> courts also recognize the separate identities of the enterprises when sued by an injured employee.

Boggs, 590 F.2d at 662. See also Square D Co. v. Kentucky Bd. of Tax Appeals, Ky., 415 S.W.2d 594 (1967), wherein the court held that separate corporate identities should be recognized and not disregarded. Id. at 601.

The summary judgment of the Pike Circuit Court is reversed, and this case is remanded for further proceedings.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
Eldred E. Adams, Jr. Louisa, Kentucky	Billy R. Shelton Lexington, Kentucky