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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001464-MR

HENRY WAYNE TUCKER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 06-CI-00248

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

STUMBO, JUDGE: Henry Wayne Tucker appeals from an Order of the Perry Circuit Court granting the Summary Judgment motion of CSX Transportation, Inc. Tucker was severely injured when a train car ran over his leg during the course of

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

his employment. He argues that the circuit court erred in concluding that he was not a borrowed employee for purposes of the Federal Employers' Liability Act ("FELA") and therefore was not entitled to recover from CSX. We conclude that the circuit court properly determined that Tucker was not a borrowed employee, and accordingly affirm the Order on appeal.

Tucker was injured during the course of his employment when he fell under a moving coal train operated by CSX. Tucker, who received his paycheck from TECO Coal Company and was on TECO property at the time of the accident, was returning to work from a break when he observed a hopper door on a CSX coal car that appeared to be open. Tucker's job responsibilities included closing open hopper doors on empty coal cars before they were loaded with coal, and generally assisting in the coal loading process. After Tucker secured the hopper door, he slipped and fell onto the track, and his lower leg was crushed by a train wheel.

At the time of injury, CSX and TECO were operating under a contract stating that CSX would provide coal trains to TECO's coal load out facility or "tipple." Tucker was a member of a 4-person work crew of TECO employees, who were positioned with two persons on each side of the coal cars as they approached the tipple. It was the work crew's job to inspect the coal cars, close the hopper doors and prepare the cars to receive coal. If a worker determined that the train needed to stop in order to facilitate a door closing, for example, the worker would notify a CSX conductor or brakeman, who would radio instructions to the

engineer. The TECO workers refer to the entire process of radioing the engineer and getting the train stopped as a "three step."

According to the record, Tucker filed a claim for Workers' Compensation benefits against TECO and received a settlement in 2006. Tucker also prosecuted the instant action against CSX, in which he asserted a claim arising under the FELA. It is uncontroverted that in order to prevail under the FELA, Tucker would have to demonstrate that he was a "borrowed employee" under the supervision and control of CSX. That is to say, Tucker would have to prove that though he was employed by TECO, at the time of the accident he was "borrowed" by CSX and working under its authority.

The matter proceeded in Perry Circuit Court, where CSX eventually filed a motion for Summary Judgment. As a basis for the motion, CSX contended that Tucker could not demonstrate that he was a borrowed employee and therefore could not prevail under the FELA. After taking proof on the motion, the circuit court rendered an Order on June 4, 2009, sustaining CSX's motion. As a basis for the Order, the court determined that Tucker was an employee of TECO, which engaged him to perform work; that TECO furnished Tucker's tools; that Tucker was paid by TECO and not CSX; and, that only TECO had the authority to fire or dismiss Tucker. The court went on to find that at all relevant times, CSX did not control or direct the TECO employees, and that, as a matter of law, Tucker was not a loaned or borrowed servant under the FELA. This appeal followed.

Tucker now argues that the Perry Circuit Court committed reversible error in granting the motion of CSX for Summary Judgment. He argues that the court erred in determining that he was not a borrowed servant or borrowed employee of CSX at the time of injury. Tucker maintains that the primary factor in determining whether he was a borrowed employee is whether CSX had the authority to supervise him at the time of injury. In support of this contention, Tucker argues that CSX had the authority to control the inspection he was performing, and that it continued to have the authority to supervise him during the entirety of the inspection process. Tucker goes on to argue that the determinative question is whether CSX had the right to supervise him, and not whether actual supervision or control occurred. In sum, he maintains that when the Summary Judgment motion is viewed in a light most favorable to him and resolving all doubts in his favor, a jury question remains on the issue of whether CSX had the authority to supervise him, and the matter should be reversed and remanded for submission to the jury.

We have closely examined the record, the written arguments and the law, and find no basis for reversing the Summary Judgment on appeal. Tucker correctly states that the primary factor used to determine whether a worker is an "employee," i.e., borrowed servant, of another company for purposes of applying the FELA is whether the company had the power to direct, control, or supervise the employee in performance of work at time of his injuries. *Barnes v. Chesapeake & Ohio Railway Company*, 593 S.W.2d 510 (Ky. 1978). More broadly, there are

three means by which a worker can be characterized as an "employee" of another company for purposes of applying the FELA:

> Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. See Restatement (Second) of Agency s 227; *Limstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28, 48 S.Ct. 241, 72 L.Ed. 453 (1928). Second, he could be deemed to be acting for two masters simultaneously. See Restatement s 226; *Williams v. Pennsylvania R. Co.*, 313 F.2d 203, 209 (CA2 1963). Finally, he could be a subservant of a company that was in turn a servant of the railroad. See Restatement s 5(2); *Schroeder v. Pennsylvania R. Co.*, 397 F.2d 452 (CA7 1968).

Kelley v. Southern Pacific Company, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974).

In determining which purported employer had the authority to direct, control, or supervise the employee in performance of work at the time of his injury, the Court may look to other relevant factors, including " . . . who selected and engaged the plaintiff to perform the work; who furnished the tools with which the work was performed; who paid the plaintiff his wages for the performance of this work; the amount of scale of such wages, and who had the power to fire or dismiss the plaintiff from the work." *Brown v. CSX Transportation, Inc.*, 13 S.W.3d 631, 633 (Ky. App. 1999).

The Perry Circuit Court expressly engaged in this analysis in determining that Tucker was not acting under the control or supervision of CSX at

the time of his injury. It found that TECO selected and engaged Tucker to perform his work; that TECO rather than CSX furnished Tucker's tools; that Tucker received his paycheck from TECO; that TECO established the amount of Tucker's wages; and, that TECO and not CSX had the authority to dismiss Tucker from his employment with TECO. These findings are supported by the record. Furthermore, Tucker acknowledges that as he began to inspect the CSX train, he was working with TECO supervisor Floyd Maggard as part of a two-man team at the base of the tipple.

Tucker contends that the dispositive question is not whether CSX exercised actual control over him at the time of the accident, but whether it *could have* exercised such control. This assertion finds support in the case law. Nevertheless, there is nothing in the record to support the conclusion that CSX could have exercised such a degree of control and/or supervision over Tucker as to characterize him as a borrowed servant. Tucker also maintains that a genuine issue of fact remains as to which CSX employee was operating the radio at the time of Tucker's accident. The answer to this question, however, has no bearing on the underlying issue of whether Tucker was a borrowed servant for purposes of applying the FELA.

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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he 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*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to Tucker and resolving all doubts in his favor, we find no basis for disturbing the Perry Circuit Court's determination that Tucker was employed by TECO at the time of the accident and was not properly characterized as a borrowed servant working under the control of CSX. The record does not support Tucker's claim that he was working under the supervision of CSX, nor that CSX could have asserted such control over him. At the time of the accident, he was a TECO employee, working on TECO property under the direct supervision of another TECO employee. TECO hired him, established his pay scale, provided his tools and had the authority to terminate his employment. CSX exercised no control over him, nor does the record support the claim that CSX could have asserted such control. The Perry Circuit Court properly so found, and we find no error in that determination.

For the foregoing reasons, we affirm the Order of the Perry Circuit Court granting Summary Judgment in favor of CSX.

ALL CONCUR.

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