RENDERED: AUGUST 16, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000624-MR

CASSANDRA FALK, INDIVIDUALLY
AND AS ADMINISTRATRIX OF
THE ESTATE OF JAMES JEFFREY FALK;
AND JAMES BLAKE FALK AND
LAURYN EMILY FALK, BY AND THROUGH
THEIR NEXT FRIEND, MOTHER, AND
CUSTODIAN CASSANDRA FALK — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 11-CI-05433

ALLIANCE COAL, LLC — APPELLEE

AND

NO. 2012-CA-000625-MR

SANDY TRAVIS, INDIVIDUALLY AND
AS ADMINISTRATRIX OF THE ESTATE OF
JUSTIN TRAVIS; MELISSA CARTER,
INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF MICHAEL W. CARTER;
AND HAYDEN WAYNE CARTER, BY
AND THROUGH HIS NEXT FRIEND, MOTHER,
AND CUSTODIAN MELISSA CARTER — APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 11-CI-02155

ALLIANCE COAL, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: These consolidated appeals stem from two summary judgments entered in favor of Alliance Coal, LLC. The summary judgments dismissed the claims of Appellants, the estates of three coal miners killed in mining accidents. We find no error and affirm.

On April 28, 2010, Justin Travis and Michael Carter were killed in a mining accident. The mine was run by Webster Coal Company (WCC), which is a subsidiary of Alliance Coal. On October 27, 2010, James Falk was killed in a mining accident. This mine was run by Riverview Coal, LLC (Riverview), which is also a subsidiary of Alliance Coal. In both cases, Appellants have received and continue to receive workers' compensation death benefits.

Appellants brought suit against Alliance Coal arguing that its own negligence led to the deaths of the coal miners. WCC and Riverview were not sued due to restrictions set forth in Kentucky's workers' compensation statutes

which will be discussed in more detail later. The actions were brought by Appellants pursuant to *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979). After some discovery, Alliance Coal moved for summary judgment in both cases. It claimed it could not be sued because it was the workers' compensation insurer and Kentucky's workers' compensation act gives workers' compensation carriers immunity from suit. Alliance Coal argued that it was a self-insurer and that it was authorized by statute and administrative regulations to provide workers' compensation insurance through its own self-insurance program to all of its subsidiaries. The trial court ultimately agreed and granted summary judgment in favor of Alliance Coal in both cases. These appeals followed.

> 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. Kentucky Rules of Civil Procedure (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.,* Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor . . . ." *Huddleston v. Hughes,* Ky.App., 843 S.W.2d 901, 903 (1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). All parties agree there are no issues of material fact in dispute and this case hinges on questions of law.

Pursuant to Kentucky Revised Statute (KRS) 342.690(1), some entities are granted immunity from tort actions when workers' compensation benefits are paid. KRS 342.690(1) states in relevant part:

> 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. . . . The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier[.]

This case revolves around whether or not Alliance Coal was the workers' compensation carrier for WCC and Riverview. "'Carrier' means any insurer, or legal representative thereof, authorized to insure the liability of employers under this chapter and includes a self-insurer[.]" KRS 342.0011(6). "'Self-insurer' is an employer who has been authorized under the provisions of this chapter to carry his own liability on his employees covered by this chapter[.]" KRS 342.0011(7).

Appellants argue that Alliance Coal is not the direct employer of the decedents nor is it the carrier of workers' compensation benefits; therefore, it is not entitled to immunity. Appellants claim that WCC and Riverview self-insure their own employees. Appellants claim that Alliance Coal is only the guarantor of workers' compensation benefits, not the carrier, and that a guarantor is not included within the immunity statute. We disagree and find that Alliance Coal is a workers' compensation carrier and is entitled to immunity under KRS 342.690(1).

states:

> A corporation having a wholly-owned subsidiary may submit one (1) joint application to the executive director, if the parent corporation has sufficient assets to qualify for a self-insurance certificate for both itself and the subsidiary. A joint application shall be accompanied by a certificate of the secretary of each corporation indicating that their respective boards of directors have by resolution authorized joint and several liability for all the workers' compensation claims asserted against them. These certificates shall be effective until revoked by the corporations following thirty (30) days written notice to the executive director.

In this case, Alliance Coal filed a joint application for self-insurance. This application listed itself and all of its subsidiaries, including WCC and Riverview. The above regulation specifically authorizes a parent company, which has sufficient assets, to apply for self-insurance and cover both itself and its subsidiaries. In contrast, 803 KAR 25:021 Section 3 allows employers to apply for individual self-insurance. A subsidiary of a parent corporation may also apply for self-insurance under this provision. In order for a subsidiary to apply under Section 3, the parent company must also file a guarantee in which it agrees to cover any workers' compensation benefits not paid by the subsidiary.[1] Alliance Coal chose to file a joint application that would allow it to cover the employees of all of its subsidiaries. Alliance Coal applied for and was granted status as a self-insurer under 803 KAR 25:021 Section 6.

[1] Alliance Coal also filed a guarantee agreement when it applied for self-insurance for it and its subsidiaries.

The facts of this case support the conclusion of the trial court that Alliance Coal is immune from suit pursuant to the exclusivity provision found in KRS 342.690(1). The estates of the decedents currently receive workers' compensation benefits. The checks that the estates of Travis and Carter receive bear the name of WCC; however, the accounts the checks are drawn from are Alliance Coal accounts. The checks that the Falk estate receives bear the name of Riverview; however, the accounts the checks are drawn from are Alliance Coal accounts. We note that all three sets of beneficiaries are in fact paid from the same account.

In addition, to gain approval of its application to be a self-insurer, Alliance Coal is required to meet a number of other regulatory and statutory requirements. For example, Alliance Coal must secure a surety bond pursuant to 803 KAR 25:021 Section 4. The amount of this bond is determined by the Department of Workers' Claims and is based, in part, on the Department's determination of the risks being covered under the self-insurance program. Alliance Coal has paid for and posted the surety bond every year. Neither WCC nor Riverview have ever posted such a bond. Also, to maintain self-insurance, Alliance Coal, and not its subsidiaries, pays a quarterly simulated premium assessment pursuant to KRS 342.122. Finally, to be self-insured, Alliance Coal is required to participate in the Kentucky Coal Employers Self Insurance Fund pursuant to KRS 342.906(3). KRS 342.906(3) states:

> There is created a nonprofit, unincorporated legal entity known as the Kentucky coal employers self-insurance fund to function as a guaranty fund for individually self-

> insured coal employers to secure workers' compensation liabilities under this chapter and pursuant to administrative regulations promulgated by the commissioner. Each coal employer that is individually self-insured and that has been authorized and certified to self-insure on or after March 1, 1997, shall participate as a member of the guaranty fund created pursuant to the provisions of this subsection as a condition of maintaining authorization and certification to self-insure. The commissioner shall revoke a coal employer's authority and certification to self-insure for failure to maintain membership in the guaranty fund or to pay assessments levied by the guaranty fund created pursuant to the provisions of this subsection.

Alliance Coal has always been a member of this guaranty fund, WCC and Riverview have not.

Alliance Coal's self-insurance program acts like an internal insurance company. The program covers all the employees of Alliance Coal and its subsidiaries. Alliance Coal is a carrier as defined by KRS 342.0011(6) because it is a self-insurer authorized by 803 KAR 25:021 Section 6 to insure the employees of WCC and Riverview.[2]

Assuming, *arguendo*, that even if Alliance Coal does not strictly meet the definition of a carrier or self-insurer, public policy would dictate that they still be granted immunity. We find that the reasoning set forth in *Malkiewicz v. R. R. Donnelley & Sons Co.*, 794 S.W.2d 728 (Tenn. 1990), is persuasive as its facts are quite similar to the case at hand. In that case, a parent company insured the

[2] We cannot say that the legislature deliberately sought to establish immunity for parent companies with the resources to self-insure all subsidiaries, but that is the result of the legislation and regulatory scheme put in place.

employees of its subsidiaries for workers' compensation purposes. The Tennessee Supreme Court stated:

> We have carefully considered the contentions of the parties. We believe that inclusion of a guarantor within the definition of "employer" so as to afford it the benefit of the exclusive remedy provisions of the statutes is consistent with the legislative purpose of insuring to injured workers solvent and responsible sources of recovery under the compensation program. Like the employer, the guarantor, or entity which will "guarantee the payment" of compensation benefits "in the amount and manner when due as provided for in this chapter", T.C.A. § 50–6–405(a)(2), is liable without fault for those benefits. When it pays them, funds their payment or assumes responsibility for them, it should stand in the same position as the employer or insurer with respect to the exclusivity provisions, in the absence of proof of a scheme or device to escape legitimate obligations. The Commissioner of Commerce and Insurance must approve any guaranty arrangement and, in our opinion, is unlikely to authorize one entered into for any purpose inconsistent with the statutory objectives.
>
> On the other hand, the cost of workers' compensation insurance is great and is increasing. For some employers it is almost prohibitive. A solvent and responsible guarantor of an employer's liability serves a legitimate purpose, and such a guarantor should not be exposed to tort liability any more than the employer whose functions and responsibilities it secures.
>
> We do not find it necessary to utilize canons of statutory construction to resolve the issue. If an employer and its insurer are exempt from tort actions, in our opinion so is a person or entity which "guarantees" the employer's liability as required by the statutes under the supervision and with the approval of the Commissioner of Commerce and Insurance. Such a guarantor should not be deemed a third party subject to a tort action by an injured employee under T.C.A. § 50–6–112. It is the duty of an employer to "secure payment of

> compensation as required by the Workers' Compensation Law." Otherwise it may be deprived of its common-law defenses and of the exclusive remedy protection. T.C.A. § 50–6–111. A guarantor which provides the necessary security has the same position as an insurer.

Id. at 730-31.

For the foregoing reasons we affirm the judgment of the circuit court granting summary judgment in favor of Alliance Coal.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEES:
John C. Whitfield Madisonville, Kentucky	P. Douglas Barr Lexington, Kentucky