UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHANNAH SPEED, Personal Representative of the Estate of Vinal L. Speed,	)	
Plaintiff,	)	
v.	)	Civil Action No. 05-149-B-C
GIDDINGS & LEWIS, LLC, et al.,	)	
Defendants	)	

ORDER ACCEPTING AND ADOPTING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE ON DEFENDANT GENERAL ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT

After full *de novo* review of the record herein, including *inter alia*, the Recommended Decision on Motion for Summary Judgment (Docket Item No. 49), Plaintiff's Objection thereto (Docket Item No. 50), the Supplemental Affidavit of James Bowie in support thereof (Docket Item No. 51), Defendant's Response (Docket Item No. 57-1), the excerpt from the Deposition of Johannah Speed (Docket Item No. 57-2), and the attached Affidavit of Joseph P. Patin II (Docket Item No. 57-3) and the Annual Report of G. E. Power Systems, Inc. for Tax Year 2003 (Docket Item No. 57-4) in support thereof, the Court hereby **AFFIRMS, ACCEPTS,** and **ADOPTS** the Recommended Decision on Motion for Summary Judgment, and it is hereby **ORDERED** that the said Motion be, and it is hereby, **GRANTED** on the grounds that Defendant, General Electric Company, is entitled to immunity from suit under the Maine Workers' Compensation Act, 39-A M.R.S.A. §104.

The Court has carefully studied the Objection and supporting materials thereto and **REJECTS** the Objection as being based on an impermissible attempt to supplement the record before the Magistrate Judge after the rendition of the Magistrate Judge's Recommended Decision on a record that was proposed as complete factually and in terms of argumentation in proceedings before the Magistrate Judge which showed that there was no genuine dispute on a material issue of fact that had to be resolved to decide the Motion. That factual issue was whether the Plaintiff's decedent was employed at the time of his death by Defendant General Electric Company and, as the parties developed the record, it evolved into an issue of whether General Electric Company and General Electric Power Systems were the same corporate entity. If they were, on the applicable law, §104 rendered the Defendant General Electric Company immune from suit.

As the Magistrate Judge noted on page 3 of her Recommended Decision that Plaintiff *suggested*, without producing any supporting evidence, that the two entities were separate legal entities by referring to the contents of the Affidavit of Defendant's witness, David Cox. Plaintiff did not produce in the proceeding before the Magistrate Judge any evidence to substantiate that suggestion or any argument on the question.[1]

Plaintiff now objects to the Magistrate Judge's conclusion that there was, on the record before her, no genuine dispute as to the fact that Plaintiff's decedent was employed at death by General Electric Company, seeking to supplement the record by the argument and evidence that corporate records establish that there is a legal entity distinct from Defendant General Electric known as General Electric Power Systems, incorporated

[1] General Electric Company offered supplemental evidence that General Electric Power Systems was simply a subdivision of General Electric and not a separate entity. The Magistrate Judge noted that this material was "not a permissible summary judgment tactic," Recommended Decision at 3 n.2, as the material could have been put in the Defendant's Statement of Material Fact.

in the State of New York, arguing that this entity employed the decedent. Such supplementation of the record, after the Magistrate Judge has acted, is not permissible. The case of *Patterson-Leitch Company, Inc. v. Massachusetts Municipal Wholesale Electric Company*, 840 F.2d 985, 990-91 (1st Cir. 1988) holds that, "[A]n unsuccessful party is not entitled as of right to *de novo* review by the [District] Judge of an argument never seasonably raised before the Magistrate." *Id*. Here, the claim that the two entities were legally separate was *suggested* before the Magistrate, but no focused argument was made in support of it before the Magistrate Judge, and Plaintiff failed to offer before the Magistrate Judge any argument on the point. Plaintiff cannot generate the issue of employment of the decedent by the New York entity for the first time *after* the Magistrate Judge has acted. Where the factual claim is clearly subsumed in the evidentiary record before the Magistrate Judge, Plaintiff cannot let the issue be resolved on the record before the Magistrate Judge and then offer a new evidence and additional argument, after the fact of decision, to overturn the Magistrate's Decision. *See Koken v. Auburn Manufacturing, Inc.*, 341 F. Supp. 2d 20 (D. Me. 2004) (where Defendant-objectant argued that it should be permitted to produce in support of its Objection "additional facts" and argument to those produced to the Magistrate). In *Koken*, this Court found that the allegedly "new" issues, "were points of factual and legal controversy properly subsumed in the evidentiary record, [and] written submissions and argumentation of counsel," *Id*. at 24, and denied the Objection. That result was affirmed by the First Circuit Court of Appeals. *Koken v. Black & Veatch Construction, Inc.*, 426 F.3d 39, 52 n.10 (1st Cir. 2005); *see also Singh v. Superintending School Committee of City of Portland*, 593 F. Supp. 1315, 1318 (D. Me. 1984) ("The [Federal Magistrate's] Act necessarily

contemplates that on referral of a pretrial motion to the Magistrate for . . . hearing and determination thereon, all parties are required to take before [the Magistrate Judge] not only their 'best shot'[,] but all of their shots.") That is precisely the case here, and Plaintiff cannot be permitted to defeat by such means the Magistrate Judge's process as it is established under 28 U.S.C. § 636 (b)(1)(D). *Koken*, 341 F. Supp. 2d at 27. She cannot "save [her] knockout punch for the second round." *Patterson-Leitch*, 840 F.2d at 991.

/s/ Gene Carter
GENE CARTER
Senior U.S. District Court Judge

Dated at Portland, Maine this 25th day of September, 2006.

Plaintiff

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