

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002333-MR

LONNIE NEWTON

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CI-01224

E.L. PIPE, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

DYCHE, JUDGE: Lonnie Newton, an electrician employed by B&B Electric, was injured on his job; he sought and was awarded workers' compensation benefits. He brought this action in tort against E.L. Pipe, Inc., to recover further for his injuries. E.L. Pipe was the prime contractor on the job; it let a subcontract for electrical work to Advanced Electrical Systems, which, in turn, subcontracted with B&B. All employers were

covered by workers' compensation insurance; Newton's benefits were paid by B&B's carrier.

E.L. Pipe defended this tort action by asserting the "exclusive remedy" defense provided by KRS 342.690(1):

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 For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610. . . .

What is called "up-the-ladder immunity" stems from the provisions of the latter-cited statute:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. . . . A person who contracts with another: . . . (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

KRS 342.610(2)(in part).

The trial court found that E.L. Pipe was a "contractor" under KRS 342.610(2), and therefore entitled to the

defense provided by KRS 342.690(1). Newton now appeals; we affirm.

The facts, as set out above, are undisputed. Newton argues that E.L. Pipe is **not** a contractor, urging a narrow reading of the above statutes. We are unable to agree. To us, this is a classic case demonstrating one facet and purpose of the workers' compensation statute: ensuring workers' compensation coverage for all employees. Had B&B not been covered, then Newton could have proceeded "up-the-ladder" against E.L. Pipe for benefits under the workers' compensation scheme. In order to benefit from this coverage, Newton had to waive his rights under tort common law. He could have rejected coverage under workers' compensation and preserved his tort rights; he did not.

Newton also argues that E.L. Pipe was not a contractor because it had no license to perform electrical work, and such work could therefore not be a "regular and recurrent" part of its business. Again, we must disagree. It has long been accepted that the regular and recurrent part of a contractor's business need not be performed by its own employees. Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 462 (Ky. 1986).

The final argument on Newton's behalf is that E.L. Pipe is not entitled to the "exclusive remedy" defense because

his direct employer, B&B, actually carried workers' compensation insurance, and therefore E.L. Pipe was under no risk of having to pay benefits. There is no basis for this argument in the statute or any decisions interpreting it.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard M. Guarnieri
Johnson, True & Guarnieri, LLP
Frankfort, Kentucky

BRIEF FOR APPELLEE:

John F. Parker, Jr.
William P. Swain
M. Trent Spurlock
Phillips Parker Orberon &
Moore, PLC
Louisville, Kentucky