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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001640-MR

CHRISTOPHER GIBSON — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 00-CI-00639

LEECO, INC. AND HERSHEL ASHER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,[1] SENIOR JUDGE.

ACREE, JUDGE: Christopher Gibson (Gibson) appeals from a July 11, 2006, summary judgment of the Perry Circuit Court dismissing his negligence claim against Leeco, Inc. (Leeco) and Herschel Asher (Asher), the operator and the superintendent, respectively, of the coal mine where Gibson was injured during the course of his employment for Fultz Construction, Inc. (Fultz). The circuit court's summary judgment was premised upon the

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

exclusive remedy provision set forth in KRS 342.690(1). For the reasons hereinafter stated, we affirm.

Leeco is the operator of several coal mines located in Perry and Leslie Counties, Kentucky. Leeco produces coal through the use of its own employees and other contract laborers that it hires on an hourly basis. Fultz contracted with Leeco to provide those contract laborers. On June 5, 2005, Fultz entered into a Master Service Contract with Leeco agreeing to provide to Leeco all equipment, tools, materials, supervision, and labor by fully trained personnel. The contract also required Fultz to carry suitable insurance and worker's compensation coverage.

On November 17, 1999, Gibson was working for Fultz at a Leeco mine, when a forklift he was operating, tipped up, trapping his head between the mine roof and the machine. The forklift's protective canopy was not in use at the time of the accident. Asher was Leeco's superintendent at the mine.

Gibson filed a claim for workers' compensation benefits and is currently receiving benefits through Fultz.

On November 16, 2000, Gibson filed a negligence suit in Perry Circuit Court against Leeco and Asher. Thereafter, Leeco and Asher filed a motion for summary judgment arguing that the Workers' Compensation Act provided Gibson the exclusive remedy against them. They pointed out that at the time of his injury, Gibson was performing work that was a regular or recurrent part of its trade or business and, as such, Leeco was a statutory employer of Gibson under KRS 342.610(2). Relying upon the exclusive remedy provision of the Act, Leeco and Asher maintained that the negligence action was barred and should be dismissed.

Gibson responded with a motion for a declaration of rights that Leeco was not entitled to the protection of the exclusive remedy provision because Fultz was an independent contractor. On January 22, 2002, the circuit court responded and issued an order finding Fultz and its employees to be independent contractors under its agreement with Leeco and thus denying Leeco the protection of the exclusive remedy provision. The circuit court did not address the issue of whether Gibson's work was a "regular or recurrent" part of Leeco's business.

Leeco subsequently filed a writ of prohibition with this Court arguing that the circuit court was without jurisdiction to proceed in the case. This Court denied the writ finding the jurisdictional argument was not ripe for consideration and the Supreme Court affirmed.

On June 28, 2006, Leeco and Asher moved for summary judgment again. In their motion, Leeco and Asher, noted Gibson was a contract employee who performed work that was a regular or recurrent part of the work of the trade, business, occupation or profession of Leeco and as such KRS 342.690 barred Gibson's claim.

In a July 11, 2006, summary judgment, the circuit court agreed with Leeco and Asher, finding the work Gibson was performing at the time of his accident was a regular and recurrent part of the work or trade of Leeco, and dismissed Gibson's action. This appeal followed.

A summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). In this case, the material facts are undisputed and resolution of this appeal turns upon a question of law: whether the

Workers' Compensation Act shields Leeco and Asher from liability for their alleged negligence as employers. Accordingly, our review is *de novo* and without deference to the interpretation of the statute made by the circuit court. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998).

Our Workers' Compensation Act clearly provides the exclusive remedy to a covered employee for injuries caused by his employer's negligent acts. KRS 342.690; *Edwards v. Louisville Ladder*, 957 S.W.2d 290, 294 (Ky.App. 1997). Stated differently, the Act extends to an employer an exemption from common-law liability for a work-related injury suffered by a covered employee. The exclusivity provision of the Act is codified in KRS 342.690(1) and provides, in part:

> (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, 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. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. . . .

KRS 342.610 identifies those employers who are liable for payment of workers' compensation benefits to employees who suffer work-related injuries or occupational diseases. It provides, in pertinent part:

> (1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.

> (2) 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. . . .

Gibson focuses his argument on the specifics of the Master Service Contract between Leeco and Fultz. He contends the contract categorized Fultz and its employees as independent contractors of Leeco. Gibson urges this Court to conclude that because he is an employee of an independent contractor, Leeco cannot avail itself of the protection of the exclusive remedy provision of the Workers Compensation Act. We disagree.

Our Supreme Court recently detailed the relevant case law interpreting KRS 342.610(2)(b) in *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007).

> Kentucky case law interpreting KRS 342.610(2)(b) is limited to two primary Supreme Court opinions and three Court of Appeals opinions. Noting in *Elkhorn-Hazard Coal Land Corp. v. Taylor*, 539 S.W.2d 101, 103-4 (Ky. 1976), that an owner ordinarily is not liable for workers' compensation benefits to the employee of an independent contractor, this court explained that the statute's purpose is to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits. The court then held that a lessor of mineral rights to coal was not liable for payment of workers' compensation benefits to the lessee's employees because the lessor was in the business of leasing, not mining. In *Fireman's Fund Insurance Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986), the court held that an employee of a rough framing subcontractor who was killed while performing that

> work on premises owned by a business engaged in constructing a building complex thereon was the premises owner's statutory employee because the owner was in the building construction business and "rough framing carpentry is work of a kind which is a regular or recurrent part of the work of the business of building construction." And, albeit in dicta, the court in *Krahwinkel v. Commonwealth Aluminum Corp*., 183 S.W.3d 154, 158 n. 5 (Ky. 2005), expressed the view that the installation of a "fluid capture system was not 'a regular or recurrent' part of Commonwealth's business, trade or occupation."
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> In *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky.App. 1980), a coal mining company was under contract to sell and deliver coal to its customers. The Court of Appeals held that the mining company was the statutory employer of truck drivers, employed by a contractor and hired by the mining company to haul the coal to the coal company's customers, because delivering the coal to its customers was a regular or recurrent part of the business of the mining company under its contracts to both mine and deliver. *Id*. at 249. Under similar reasoning, in *Wright v. Dolgencorp*, *Inc.*, 161 S.W.3d 341, 354 (Ky.App. 2004), the Court of Appeals held that an employee of a trucking company hired to haul merchandise from a business retailer's main distribution center to its retail stores was the statutory employee of the retailer.
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> In *Daniels v. Louisville Gas & Electric Co.*, 933 S.W.2d 821 (Ky.App. 1996), the Environmental Protection Agency (EPA) had ordered LG & E and other coal-fired utility companies to conduct emissions testing of its coal-fired furnaces on specified occasions. LG & E contracted with an emissions testing company to conduct the tests, and an employee of that company was severely burned while conducting such tests at the LG & E plant. Because the EPA required LG & E to conduct the emissions testing upon the occurrence of specified events, the Court of Appeals held that the emissions tests were a regular or recurrent part of LG & E's business. *Id.* at 823-24.

General Electric at 585-86. Leeco was in the business of operating coal mines. As a part of operating its mines, Leeco utilized a track hauling system to transport workers and supplies into the mine. Without the track hauling system, the mine would not be able to

operate. Additional track was laid to extend the track hauling system as the mining advanced. Fultz was hired to lay the track in one of Leeco's mines. Gibson was injured when he was laying track in that mine.

Laying track to extend the track hauling system is a regular and recurrent part of Leeco's business in operating its coal mines. Leeco, therefore, is the statutory employer of Gibson under KRS 342.610(2)(b) and, as such, is protected by the exclusive remedy provision of KRS 342.690. Consequently, Asher is Gibson's fellow servant and, as such, he is also protected by the same provision. *Black v. Tichenor,* 396 S.W.2d 794, 795-96 (Ky. 1965)("[O]ne cannot maintain a common law negligence action against his fellow servant for injuries sustained in the course of or arising out of his employment. The only remedy for such an injury is under the Workmen's Compensation Act." Citation and quotation marks omitted).

For the foregoing reasons, the order of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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