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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000665-MR

MARK A. KENNEY APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 07-CI-00708

CEMEX, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

MOORE, JUDGE: Mark A. Kenney appeals from a March 9, 2009 order of the Jefferson Circuit Court dismissing his tort claims and granting summary judgment in favor of Cemex, Inc., on the basis of the exclusive remedy provision of Kentucky's Workers' Compensation Act, Kentucky Revised Statutes (KRS) 342.0011, *et seq*. After careful review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Kenney is a journeyman ironworker by trade. At the time of this incident, he was an employee of Huelsman & Sweeney Construction, but he was assigned by that company to work at Cemex's campus during a period of time Cemex describes as its January 2006 "outage."[1] Kenney began working at the Cemex campus on January 6, 2006, performing ironwork and welding tasks, and worked there almost every day until the date of his injury, which occurred on or about January 24, 2006. By that date, Cemex's plant was scheduled to go back into full production during the day shift, and only a few contractors remained on the campus, including Kenney and two other HS Construction employees who were finishing a welding project that evening.

During Kenney's shift, a malfunction occurred in a Cemex building known as the "526 Ball Mill." As Cemex describes it, a "splitter gate," located on a tower that contained hot ash, had slipped out of adjustment and had caused the tower to become "plugged." Kenney and the other HS Construction employees were reassigned to that location to perform the necessary repairs on the splitter gate. Shortly after beginning this work, Kenney left the area to retrieve his safety glasses from his car. On his way back, Kenney came upon a concrete barrier. According to Kenney, he walked through the barrier and stepped into a knee-high

[1] Cemex is a cement manufacturer and cement manufacturing requires heavy machinery that is subjected to enormous amounts of stress. Time and materials may be lost if that machinery malfunctions. Therefore, as a preventative measure, Cemex shuts down its facility for a period of two to three weeks every year around January and performs a wide variety of repair and maintenance projects, and also some projects involving capital improvements. According to the record in this matter, more than 500 workers, employed by various contractors, assisted Cemex's maintenance department during its January 2006 outage period.

amount of hot ash that had been dumped from the malfunctioning tower. Consequently, Kenney suffered third-degree burns over the bottom third of his body.

On January 19, 2007, Kenney filed the instant action against Cemex, alleging premises liability and negligence.[2] Following a period of discovery, however, Cemex moved for summary judgment based upon the exclusive remedy provision of Kentucky's Workers' Compensation Act, Kentucky Revised Statutes 342.0011, *et seq*. In particular, Cemex argued that it was Kenney's statutory employer, per KRS 342.610(2)(b), and further argued that Kenney was barred from bringing any tort claim against it because Kenney had received workers' compensation benefits from HS Construction's insurance carrier.

The trial court granted Cemex's motion and Kenney now appeals. Additional facts will be stated as they become relevant in our analysis.

II. STANDARD OF LAW

Summary judgment serves to terminate litigation where "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." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v.*

[2] Kenney's daughter, Kayla, also filed a claim for loss of consortium in this matter. Her claim was dismissed, and she filed no appeal.

Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*., (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky.1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App.1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*.

III. ANALYSIS

In its motion for summary judgment, Cemex argued that Kenney was barred from bringing any tort claim against it because he received workers' compensation benefits from HS Construction's insurance carrier. Cemex relied on the exclusivity provision of the Kentucky Workers' Compensation Act, KRS 342.690(1). In relevant part, the exclusivity provision states:

> 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.

"The statute makes it plain that if [a company] is a contractor, it has no liability in tort to an injured employee of a subcontractor." *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 461 (Ky. 1986). This is referred to as "up-the-ladder" immunity. If a company meets the definition of "contractor" provided in the workers' compensation statutes, then it is deemed to be an "up-the-ladder" employer of its subcontractors' employees and, like any employer, is entitled to immunity from its employees' tort actions. The statutes define a "contractor" as a "person who contracts with another . . . [t]o have work performed of a kind which is a regular or recurrent part of the work of the [person's] trade, business, occupation, or profession." KRS 342.610(2)(b).

Accordingly, the dispositive issue in this matter, and the focus of Kenney's disagreement with Cemex, is whether the repairs Kenney was assigned to perform on the splitter gate at the 526 Ball Mill qualified as work that is a "regular" and "recurrent" part of Cemex's business, per KRS 342.610(2)(b).

Kentucky jurisprudence further defines these terms. In *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007), our Supreme Court held that, as used in the statute, "regular" and "recurrent" work

> is work that is customary, usual, or normal to the particular business (including work assumed by contract or required by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees."

Id. at 588.

The Court also stated that "'regular' means that the type of work performed is a 'customary, usual or normal' part of the premises owner's 'trade, business, occupation, or profession,' including work assumed by contract or required by law." *Cain*, 236 S.W.3d at 586-7. "Recurrent" means that the work is repeated, though not "with the preciseness of a clock." *Id*. (quoting *Daniels v. Louisville Gas and Elec. Co.*, 933 S.W.2d 821, 824 (Ky. App. 1996)).

The Sixth Circuit has held that work being done "periodically," as an "ordinary part of plant maintenance," is regular or recurrent. *Granus v. North American Philips Lighting Corp.*, 821 F.2d 1253, 1257 (6th Cir. 1987). In *Daniels*, a panel of this Court held that emissions testing was a regular or recurrent part of a contractor's business on the basis of its manager's affidavit stating that testing had occurred on fourteen occasions in 28 years. *Daniels*, 933 S.W.2d at 824.

Here, the record reflects that the repairs Kenney and the HS Construction employees performed for Cemex constituted a regular and recurrent part of Cemex's business. At the time of this incident, Cemex had its own maintenance department. During most of the year, its maintenance department ordinarily consists of 18 employees.[3] According to John Pacheco, Cemex's maintenance planner, Cemex's maintenance employees have various skill sets and some of them are qualified ironworkers and welders. Cemex's safety manager,

[3] During Cemex's January 2006 outage, this number was temporarily increased to 45 because Cemex supplements its maintenance department with its production-related employees at these times.

Gayle Harrison, also testified in his deposition that Cemex's qualified maintenance employees were expected to weld when necessary. Pacheco and Harrison both testified that Cemex's maintenance employees routinely adjusted and calibrated splitter gates, and had occasionally encountered and resolved the malfunction in question prior to this incident. And, while they acknowledged that the splitter gate had never malfunctioned to the extent of causing the 526 Ball Mill tower to dump out hot ash, they both testified that Cemex's maintenance department could have made the necessary repairs. Indeed, Pacheco and Harrison both testified that Cemex would have expected its own maintenance department to perform those repairs if the HS Construction contractors had been unable to do so.[4]

Kenny offers two arguments as to why the repairs that he and the other HS Construction contractors performed on the shutter gate were not part of the regular and recurrent work of Cemex: 1) These repairs involved ironworking and welding, which is a trade unrelated to the manufacture of concrete; and 2) Harrison's and Pacheco's testimony, cited above, only amount to legal conclusions and therefore does not constitute the substantial evidence Cemex needed to produce in order to prove that Kentucky's Workers' Compensation Act immunized Cemex from tort liability.

[4] Pacheco and Harrison both testified that the reason why Cemex's own maintenance employees did not handle the splitter gate malfunction was that they had just completed a twelve-hour daytime shift and had gone home for the day; the splitter gate needed immediate attention; and HS Construction's evening shift employees were immediately available. The fact that Cemex used contractors to perform these repairs in this instance, rather than its own maintenance staff, does not prevent this work from being of a kind that Cemex would normally be expected to perform with employees. *See, e.g., Cain*, 236 S.W.3d at 603 (upholding summary judgment for an employer who used outside contractors "for jobs that involved more work than employees could handle, even on an overtime basis, or for jobs that had to be performed in a tight timeframe.")

Kenney's first argument has no merit because it ignores that an essential part of manufacturing concrete is maintaining the equipment and facility that manufacture the concrete. And, while ironworking is certainly a specialized trade, this argument ignores the evidence in the record to the effect that Cemex was also equipped with the skilled manpower and tools to repair the shutter gate. *See Cain*, 236 S.W.3d at 588 ("Factors relevant to the 'work of the ... business,' include its nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform.")

Likewise, Kenney's second argument has no merit. A "legal conclusion" is generally defined as "A statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." BLACK'S LAW DICTIONARY 903 (7th ed. 1999). Here, Pacheco and Harrison testified to the facts, as they knew them, regarding Cemex's practices and procedures, its maintenance department, and the qualifications of Cemex's employees. Harrison is Cemex's safety manager, and he testified that he has worked at Cemex's plant for over thirty years. Pacheco is Cemex's maintenance planner, and he testified that he has worked at Cemex's plant since 1986. The record in this matter presents nothing to dispute their testimony or its veracity.[5]

[5] In his response to Cemex's motion for summary judgment, Kenney produced his own affidavit in which he stated that he was unaware of, and did not see, any employee of Cemex performing ironwork while he worked at the Cemex plant in January 2006. But, the record in this matter also reflects that Cemex's maintenance department worked the daytime shift, and Kenney worked during the evening. As the circuit court noted, Kenney's affidavit "does not however eliminate the countervailing evidence and may simply mean Mr. Kenney was never around the folks who were doing such work."

IV. CONCLUSION

For these reasons, the March 9, 2009 order of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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