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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001778-MR

RONALD MYERS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 04-CI-00522

BLUE DIAMOND COAL COMPANY AND
JAMES RIVER COAL COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Ronald Myers was employed by Private Investigations and Counter Intelligence, Inc. (PICI), which provided temporary labor to Blue Diamond Coal Company (Blue Diamond). Blue Diamond was the contract mining company engaged by James River Coal Company (James River) to

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

operate the mine where Myers was working. Myers was operating a machine called a battery scoop when the canopy on the machine came loose and a bolt struck him, injuring his head and neck. He was taken to the hospital, kept for observation overnight, and released.

Myers filed an action naming Blue Diamond and James River as defendants alleging negligence and violations of federal and state mine safety regulations. After limited discovery, Blue Diamond and James River filed a motion for summary judgment. The trial court conducted a hearing on the motion and determined that the work being performed by Myers “at the time of the accident was a regular and recurrent part of the work or trade of the Defendants.” The trial court determined that Myers offered nothing to contradict this. Based on that determination, the trial court found there was no genuine issue of material fact. The trial court found the action was barred by provisions of Kentucky Revised Statutes (KRS) 342.610 and KRS 342.690 and granted the request for summary judgment. Myers then sought our review. We agree with the trial court’s determination and reasoning and affirm.

“The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment cannot be defeated absent “some affirmative evidence

indicating that there is a genuine issue of a material fact.” *Id.* Myers was unable to provide any contradicting evidence that his employment “at the time of the accident was a regular and recurrent part of the work or trade of the Defendants.” That uncontested fact made it impossible for Myers to prevail at trial and summary judgment was appropriate.

Summary judgment is appropriate when it is impossible for the party opposing the motion “to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). No amount of additional discovery would have enabled Myers to overcome the uncontroverted fact that his employment was a regular and recurrent part of the work or trade of the defendants. As the trial court correctly determined, Myers’ only recovery was through the Workers’ Compensation procedures established by KRS 342.610 and KRS 342.690.

Myers would have us extend the holding of *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2006), to include situations as here where there is some evidence that but for violations of state and federal mine safety rules and regulations, the injury may not have occurred. We remain bound by the holding of the Kentucky Supreme Court, and our review of Myers’ accident convinces us that *Hargis* does not apply to his claim. In *Hargis*, the widow of a truck driver sought damages for a wrongful death claim when her husband was killed because of violation of regulations regarding how a load was secured to a shipping vehicle. The Supreme Court reviewed the Kentucky Occupational Safety And Health Act (KOSHA) and

found “a violation of KOSHA does not affect the exclusive remedy provision of the Workers’ Compensation Act. KRS 342.690(1).” *Id.* at 45. The Court also found that “KOSHA, itself, does not create a private right of action for a violation of one of its provisions.” *Id.* The Supreme Court went on to hold, however, that a violation of KOSHA was actionable by a person for whose benefit it was enacted if the right of action arises from a source independent of KOSHA. *Id.*

Had Myers been an employee of either coal company, his action would have been barred by the exclusive remedy of the Workers’ Compensation Act. *Id.* at 42. Although Myers’ role in relation to the coal companies was acting as an independent contractor, he was in actuality an employee of PICI and his remedy as an employee of that company is through the Workers’ Compensation Act. KRS 342.690. We therefore believe *Hargis* to be distinguishable in this case because Myers was protected under the umbrella of the Workers’ Compensation recovery statutes. Summary judgment in favor of the coal companies was appropriate in this instance.

The judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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