

RENDERED: OCTOBER 14, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000054-WC

OLD TAYLOR PARTNERS, LLC

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
WC-06-00928

OSBALDO RUEDA; G & B DEMOLITION, LLC;
UNINSURED EMPLOYERS' FUND; HON. EDWARD
D. HAYS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: CAPERTON, MOORE AND STUMBO, JUDGES.

STUMBO, JUDGE: Old Taylor Partners, LLC appeals from an Opinion of the
Workers' Compensation Board, which reversed and remanded an Opinion, Award
and Order of the Administrative Law Judge. The Board determined that Old

Taylor Partners was an “up the ladder” employer pursuant to KRS 342.610 and was therefore liable under Kentucky’s workers’ compensation law for the payment of workers’ compensation benefits to injured worker, Osbaldo Rueda. We conclude that because Old Taylor Partners did not engage in demolition on a regular and recurrent basis, it was not a statutory employer or contractor for purposes of Kentucky workers’ compensation law. As such, we reverse the Opinion on appeal.

The facts are not in controversy. Old Taylor Partners is an investment group formed by three corporate entities and one individual for the purpose of purchasing a used distillery in or near Frankfort, Kentucky and generating income from the salvage and sale of wood, stone, brick and other materials and resources located on the property. After purchasing the parcel, Old Taylor Partners executed a written contract with G&B Demolition, LLC providing that G&B would salvage wood from two barrel warehouses, which Old Taylor Partners would then sell to third parties.

G&B employed Rueda, along with four or five other individuals, to do the demolition work. On January 19, 2006, Rueda was tying a bundle of wood when a crane operator lifted the bundle before Rueda was ready. Rueda’s right hand was crushed between a cable and the bundle, severely injuring two fingers. He was transported to Frankfort Regional Medical Center and then to a Louisville hospital for hand surgery. His thumb became infected and had to be removed, and

he underwent at least two surgeries and skin grafts. Rueda would later state that he continues to experience throbbing pain in his right hand and is unable to use it.

Rueda subsequently filed a claim for workers' compensation benefits. On July 26, 2010, the ALJ rendered an Opinion, Award and Order finding in relevant part that Rueda was employed by G&B and that KRS Chapter 342 was applicable. He went on to find that Rueda cannot use his right hand for any kind of work or significant physical activity and suffers from a 43% permanent impairment to the body based on the AMA Guidelines and the medical evidence. Due to the nature of the injury and Rueda's lack of occupational skills other than manual labor, the ALJ determined that Rueda was 100% occupationally disabled.

The ALJ went on to address the issue of whether Old Taylor Partners was a statutory "up the ladder" employer of Rueda for purposes of applying KRS 342.610. That statute provides that a person or entity which "contracts with another to have work performed of the kind which is a regular and recurrent part of the work of the trade, business, occupational profession of such person shall for purposes of this section to be deemed a contractor, and such other person is a subcontractor." The issue, then, was whether Old Taylor Partners engaged in demolition as a "regular and recurrent" part of its business. If answered in the affirmative, Old Taylor would be characterized as a contractor and would be responsible for providing workers' compensation benefits to Rueda. If Old Taylor Partners was found not to be an up the ladder employer, G&B or the Uninsured Employers Fund ("UEF") would be responsible for the benefits.

Upon taking proof, the ALJ determined that Old Taylor Partners did not engage in demolition as a regular and recurrent part of its business. Applying *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007), the ALJ concluded that Old Taylor Partners was an investment group which was not in the demolition business. It noted that Old Taylor Partners had no employees, no tools or other equipment, and no experience in demolition. The ALJ went on to find that while Old Taylor Partners had applied for workers' compensation coverage and in fact issued a check for \$11,000 to an insurance agent, such coverage became effective only after Rueda was injured. Consequently, and pursuant to KRS 342.760, the ALJ ruled that the UEF shall have financial responsibility for any benefits awarded in the event that G&B defaulted in the payment of such benefits. Finally, the ALJ awarded permanent total disability benefits and medical benefits until Rueda qualified for Social Security retirement. Rueda was approximately 48 years old at the time of the award.

The UEF then appealed to the Board. By way of an Opinion rendered on December 9, 2010, the Board determined that the ALJ erred in concluding that Old Taylor Partners was not a statutory up the ladder employer for purposes of applying the Act. In reaching this conclusion, the Board relied on the testimony of investors Ira Scott Brady and Rock A. Morphis to conclude that Old Taylor Partners was formed for the sole purpose of purchasing the distillery and generating income from four sources: 1) the demolition and salvage of wood from two buildings; 2) selling spring water found on the property; 3) harvesting wood

from a wooded area; and 4) selling the property for redevelopment. The Board found from the deposition testimony that the distillery project was Old Taylor Partners' only venture. As the demolition and salvaging of wood on the property was one of the four key purposes for the formation of Old Taylor Partners, the Board concluded “. . . this activity, as a matter of law, must be characterized as a ‘regular or recurrent’ part of Old Taylor Partners. KRS 342.610(2).” This conclusion was bolstered by the Board’s examination of *Cain, supra*, in which the Kentucky Supreme Court defined in part the phrase “regular and recurrent” as including work which is “customary, usual or normal” to the business. The Board also found significant the partnership’s adoption of the name “Old Taylor” from the distillery property as that of its incorporated name. In sum, the Board concluded that the ALJ erred in finding that Old Taylor Partners was not an “up the ladder” employer of Rueda for purposes of KRS Chapter 342. The Board ruled that as an up the ladder employer or contractor, Old Taylor Partners was liable for workers’ compensation benefits to Rueda. This appeal followed.

Old Taylor Partners now argues that the Board erred in reversing the ALJ’s determination that Old Taylor Partners was not an “up the ladder” employer of Rueda. It contends that though the Board relied on the purpose of the partnership’s formation as controlling, neither KRS 342.610 nor the relevant case law look to an entity’s purpose as an element of establishing up the ladder liability. It goes on to argue that even if its purpose is an element of such an analysis, Old Taylor Partners’ purpose was not to engage in demolition but to generate a return

on investment. Old Taylor Partners maintains that the Board's determination that the partnership could have just as easily hired its own employees to do demolition has no relevance to the issues at bar and defies both logic and the definition of "regular and recurrent." Ultimately, it contends that the record and the law do not support the Board's determination that demolition was a regular and recurrent part of the partnership's business, and that the Board's opinion should be reversed and the ALJ's award reinstated.

We are persuaded by Old Taylor Partners' contention that it did not engage in demolition as a regular and recurrent part of its business, and that as such the partnership was not an "up the ladder" employer of Rueda. Pursuant to *Cain, supra*, the dispositive inquiry is whether the demolition of buildings or other structures was a "customary, usual or normal" activity of Old Taylor Partners. A number of factors found in the record lead us to the conclusion that this question must be answered in the negative. It is uncontroverted that Old Taylor Partners had no employees. That is to say, it was not engaged in the business of employing persons to disassemble physical structures, to move pallets of wood or other materials nor to operate a crane of the type which injured Rueda. Additionally, Old Taylor Partners owned no equipment or tools to carry out demolition, did not own the crane which injured Rueda, and did not direct or supervise any of the individuals who carried out the demolition. The deposition testimony further reveals that in addition to not engaging in demolition, Old Taylor Partners did not know how to engage in demolition. Old Taylor Partners' investor and chief

manager Rock Morphis testified “. . . you know, as investors, we didn’t have that expertise, so we outsourced the demolition aspect to G&B. I think its G&B Salvage or Demo - - G&B, whatever the name is.”

Old Taylor Partners sought to generate a return on investment by selling scrap materials and other resources to third parties. It did not have the employees, equipment, experience or expertise necessary to demolish the two warehouses and salvage these materials, so it hired G&B to carry out this task. Given the totality of the evidence and testimony of record, and viewed in light of KRS 342.610 and *Cain, supra*, we must conclude that the ALJ properly determined that Old Taylor Partners did not engage in demolition as a regular and recurrent part of its business. The question of law presented to the Board was whether the evidence compelled a result, which was different from that reached by the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The evidence did not compel a different result, and accordingly, we reverse the Opinion of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy P. O’Mara
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Patrick M. Roth
Assistant Attorney General
Uninsured Employers’ Fund
Frankfort, Kentucky

