

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED."
PURSUANT TO THE RULES OF CIVIL PROCEDURE
PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2011-SC-000694-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2011-CA-000054-WC
WORKERS' COMPENSATION NO. 06-00928

OLD TAYLOR PARTNERS, LLC;
OSBALDO RUEDA;
G & B DEMOLITION, LLC;
HONORABLE EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Uninsured Employers' Fund, appeals from a decision of the Court of Appeals which held that Appellee, Old Taylor Partners, LLC, was not an "up-the-ladder" employer of injured worker, Osbaldo Rueda. On appeal, the Uninsured Employers' Fund argues that the determination that Old Taylor Partners did not perform demolition work on a regular and recurrent basis is not supported by substantial evidence. We disagree, and accordingly affirm the Court of Appeals.

Old Taylor Partners is an investment group formed by three different corporate entities – Heart Pine Reserve, LLC; Heritage Group Holdings, G.P.; and Whiskey Ventures, LLC. Old Taylor Partners was created with the sole purpose of finding ways to make money from their ownership of the former Old Taylor Distillery located in Woodford County. The partnership intended to accomplish this by salvaging wood and materials from two barrel warehouses, selling spring water from a source located on the property, logging certain timber, and ultimately selling the entire distillery for redevelopment.

Old Taylor Partners contracted with G&B Demolition, LLC, to demolish the two barrel warehouses and salvage the materials for sale. Rueda, who was employed by G&B, was injured while demolishing the warehouses.¹ Rueda subsequently filed for workers' compensation benefits. As a result of his injury Rueda was found by an Administrative Law Judge ("ALJ") to be 100% occupationally disabled and was awarded permanent total disability benefits and medical benefits until he qualified for Social Security retirement.

The ALJ's opinion and award also addressed whether Old Taylor Partners was a statutory "up the ladder" employer of Rueda for purposes of applying KRS 342.610. KRS 342.610(2) states in pertinent part:

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. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid

¹ Rueda's right hand was crushed which led to the amputation of his thumb.

and necessary expenses from the subcontractor primarily liable therefor. 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. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

Applying the statute, and our decision in *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007), the ALJ concluded that Old Taylor Partners was not engaged in demolition as a regular and recurrent part of its business. Instead the ALJ found that Old Taylor Partners was simply an investment group which had no employees, tools, or other equipment to perform demolition. Since at the time of Rueda's injury G&B did not have workers' compensation coverage, the ALJ found, pursuant to KRS 342.760, that the Uninsured Employees' Fund would have the financial responsibility to pay any benefits awarded to Rueda.

The Uninsured Employees' Fund appealed the ALJ's decision to the Workers' Compensation Board. The Board reversed finding that since the demolition and salvaging of wood from the warehouses was one of the primary methods Old Taylor Partners intended to use to make money on their investment, "this activity as a matter of law, must be characterized as a 'regular or recurrent' part of Old Taylor Partners." KRS 342.610(2). The Board believed that the demolition work was "customary, usual, or normal" to the Old Taylor Partners' business model and was therefore "regular and recurrent." See *Cain*, 236 S.W.3d at 588.

Old Taylor Partners appealed to the Court of Appeals which reversed the Board. The Court of Appeals was persuaded that Old Taylor Partners was not an up-the-ladder employer of Rueda because:

[i]t 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 sought to generate a return on investment by selling scrap materials and other resources to third parties.

The Uninsured Employees' Fund now appeals from that decision. The Fund primarily argues that since the demolition of the two warehouses and the salvaging and sale of materials from those warehouses was a key purpose behind the formation of Old Taylor Partners, it means that those activities are regular and recurrent parts of their business.

Cain provides a proper analysis of what KRS 342.610(2)(b) requires to determine what is a "regular and recurrent part of the work of the trade, business, occupation, or profession" of a contractor. It states that:

[w]ork of a kind that is a regular and recurrent part of the work of the trade, business, occupation, or profession" of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in the business, improve or expand its business, or remain or become more competitive in the market. It 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.

Cain, 236 S.W.3d at 588.

Applying this analysis to Old Taylor Partners leads to the conclusion that demolishing warehouses for salvage is not a “regular or recurring” part of their business. The record reflects that there were approximately twenty-seven buildings located at the Old Taylor Distillery and only those two warehouses (which purportedly were in advanced stages of decay) were slated for demolition. The demolition of two out of twenty-seven buildings can hardly be considered something which occurs with such regularity that it becomes a “customary, usual, or normal” element of Old Taylor Partners’ business. It is also undisputed that Old Taylor Partners had no employees or the means to undertake demolishing the warehouses on its own. Indeed it would be illogical for Old Taylor Partners to employ individuals and purchase equipment to perform demolition when only two warehouses were slated to be removed. Additionally, the demolition of the warehouses was only one of four ways the investment group intended to make money. Just because those other ventures have been unsuccessful² does not make the demolition of the warehouses a primary focus of Old Taylor Partners.

² The record indicates that the plan to sell spring water failed due to water quality issues, the timber was insufficient to harvest, and no one has stepped forward to purchase the distillery.

The opinion of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ.,
concur. Schroder, J., not sitting.

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