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RENDERED: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000746-WC

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000767-WC
WORKERS' COMPENSATION NO. 09-00834

HOWARD RITCHIE; UNITED INC;
IMAGE POINT, INC.; KIRK AND
BLUM MANUFACTURING; INTERCHEZ
LOGISTICS SYSTEMS, INC.; GTI ROLL
TRANSPORTATION SERVICES, INC.;
HONORABLE LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Commonwealth of Kentucky Uninsured Employers' Fund, ("UEF") appeals from a decision of the Court of Appeals which held that it was liable to pay workers' compensation benefits to Appellee, Howard Ritchie. The UEF does not contest the fact that Ritchie is entitled to workers' compensation, but argues that both the Court of Appeals and the Workers' Compensation Board misapplied KRS 342.610(2)(b) and *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007) by holding that Appellees, Image Point, Inc. and

Interchez Logistics Systems, Inc., were not Ritchie's up-the-ladder employers. We affirm for the following reasons.

Ritchie was employed as a truck driver for United, Inc. While hauling a load of goods cross country, Ritchie was injured in an accident in Nebraska. The goods Ritchie was transporting at the time of the accident included a sign manufactured by Image Point.[1]

Image Point contracted with Interchez to arrange for the delivery of its goods. Interchez does not itself own any trucks or other transportation modes. Instead it found independent shipping companies to haul loads on behalf of its clients. Image Point electronically sent information to Interchez every fifteen seconds about what products it needed shipped and where they needed to be sent. After receiving the information, Interchez organized the data and determined which transportation mode best fit the product to be shipped. Interchez allowed carriers to bid on the specific shipment and then selected the bidder who won the contract to ship the goods. After completion of the shipment, Interchez paid the carrier and then billed Image Point. Prior to contracting with Interchez, Image Point arranged for the transportation of its goods in-house. There is no evidence that Image Point ever owned a delivery truck or employed anyone to deliver its products.

Ritchie filed for workers' compensation benefits as an employee of United. United argued that Ritchie was actually an independent contractor

[1] Ritchie was also transporting duct work manufactured by Kirk & Blum. However, Kirk & Blum and its transportation broker, GTI Roll were dismissed from the case. Their liability is not before this Court.

and therefore it did not carry workers' compensation coverage for him. Accordingly, the Administrative Law Judge ("ALJ") joined the UEF as a defendant to the action.

The ALJ found that United was Ritchie's employer and that he was entitled to workers' compensation benefits. In regard to which party was liable to pay for those benefits, the ALJ held that:

> [t]he evidence of record shows that Image Point Inc. was in the business of making signs that had to be delivered to buyers. To do that it contracted with Interchez Logistics to provide transportation for the products that Image Point Inc. made. In turn, Interchez Logistics subcontracted with the defendant United, Inc., to haul the signs made by Image Point. As the UEF pointed out in its brief, both United Inc. and Interchez are in business to ship products. Interchez made money by subcontracting work to United Inc. However, neither had workers' compensation insurance. Since Image Point Inc., did have insurance it comes within the definition of an up the ladder employer pursuant to KRS 342.610(2). Furthermore, from this ALJ's review of the evidence, there is insufficient proof to find any of the other parties liable.

Image Point and Interchez appealed to the Workers' Compensation Board. The Board rendered a decision affirming Ritchie's workers' compensation award but reversing the ALJ's determination that Image Point and Interchez were up-the-ladder employers. The Board stated:

> [w]e believe the ALJ erred in determining either Interchez or Image Point was subject to statutory liability pursuant to [KRS] 342.610(2). Interchez merely received electronic information from Image Point when it had a product needing pick-up and delivery. Interchez provided no actual transportation service. Likewise, no evidence was introduced establishing Image Point was regularly involved in transportation service as a 'regular and recurrent' part of its business. In *General Electric Company v. Cain*, 236 S.W.3d 579, 586-587 (Ky. 2007), the Kentucky Supreme Court defined what is meant by the phrase 'regular or recurrent' as used in KRS 342.610(2)(b). The Court explained, for purposes of KRS 342.610(2) governing workers' compensation liability of

contractors, 'regular' means the type of work performed is a 'customary, usual or normal' part of the trade, business, occupation, or profession of the contractor, including work assumed by contract or required by law, and 'recurrent' means the work is repeated, though not with the preciseness of a clock.

Image Point is a manufacturer of goods. There is no evidence it was directly involved in shipping, other than to contact Interchez of (sic) the need for pick-up and delivery of a product it had manufactured. There is no evidence Image Point leased, owned or operated any trucks for use in transportation or was physically responsible for the actual shipping and delivery of goods and merchandise other than through contacting a broker.

Interchez acted as an agent on behalf of Image Point, but was not engaged in the business of transporting products. Further, as is the case with Image Point, there is no evidence Interchez leased, owned or operated any trucks for use in transportation or was physically responsible for the shipping and delivery of products. Similarly, there is no evidence establishing Interchez was subject to any guarantee, warranty, financial or legal liability, to or on behalf of, any of its patrons at any time concerning appointments arranged through its services. Rather, Interchez acted as an electronic and telephonic switchboard for the posting, coordination, scheduling and exchange of information regarding the timetables for an availability of potential hauls by independent truckers and trucking companies, and, as in the case of Image Point, companies needing goods and merchandise transported by truck to other businesses and localities. Interchez also acted as a conduit for price negotiation, payment processing, and money transfers between the seller of goods and the truck drivers and trucking companies who transport those goods.

Pursuant to the Supreme Court's holding in *Cain, supra*, because Interchez is not equipped with the skilled manpower and tools to perform the actual transportation of goods and merchandise, and does not engage in shipping and delivering of products, as a matter of law it cannot be held liable based on a contractor/subcontractor relationship with either Image Point or United, and is therefore not a statutory employer or subcontractor for purposes of imposing up-the-ladder liability pursuant to KRS 342.610(2).

Thus, the Board held that the UEF was liable to pay for Ritchie's workers' compensation award because United did not maintain insurance. The Court of Appeals affirmed the Board's decision and this appeal followed.

The UEF argues in its appeal that the Board and Court of Appeals misapplied KRS 342.610(2)(b) and *Cain*, 236 S.W.3d 579, by holding that Image Point and Interchez were not up-the-ladder employers. KRS 342.610(2)(b) states in relevant part:

> A contractor who subcontracts all or any part of a contract and his or her 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 or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefore. 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.

As noted in the Board's opinion, *Cain* defines what type of work is regular or recurrent as used in KRS 342.610(2)(b). "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." 236 S.W.3d at 586-587. "Recurrent" means that the work "is repeated, though not 'with the preciseness of a clock.'" *Id.* at 587 (citing *Daniels v. Louisville Gas & Electric Co.*, 933 S.W.2d 821, 824 (Ky. App. 1996)).

Cain further elaborated that:

> [w]ork of a kind that is a 'regular or 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 business, improve or expand its business, or remain or become more competitive in the market. *Larson's* [] at §70.06[10]. 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.
>
> The test is relative, not absolute. 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. Larson's, [] at §70.06[5]. . . . Stated simply, KRS 342.610(2)(b) refers to work that is customary, usual, normal, or performed repeatedly and that the business or a similar business would perform or be expected to perform with employees.

236 S.W.3d at 588-589.

There is sufficient evidence in this matter that the shipment of signs manufactured by Image Point to its purchasers was a regular and recurring part of its business. Image Point informed Interchez of its shipping needs every fifteen minutes each business day, indicating that Image Point frequently shipped its products. The shipment of products also was a part of the contracts Image Point entered into with its customers. However, while shipping was regular and recurring, there is no evidence that Image Point, or a similar business, would use or be expected to use its own employees to perform that task. There is nothing in the record to indicate that Image Point ever owned a fleet of delivery trucks or employed individuals to transport its signs. While there is evidence that Image Point used to perform the same tasks in-house that Interchez now performs, no evidence exists to show that Image Point employees physically transported its goods to purchasers. Further, there is also no evidence that Interchez was ever equipped with the skilled manpower

or tools to actually ship products. Interchez is only a conduit to connect manufacturers with shipping companies. We agree with the Court of Appeals that Interchez and Image Point are not Ritchie's up-the-ladder employers.

The UEF additionally argues that it was error for the Board to find it solely responsible to pay for Ritchie's workers' compensation benefits. The UEF correctly notes that it only has secondary liability and that the primary benefit obligation rests with United. *Davis v. Goodin*, 639 S.W.2d 381 (Ky. App. 1982). The UEF contends that it only becomes responsible to pay for Ritchie's benefits once it has been shown that United is either bankrupt or has not paid the claim within thirty days. However, the record reflects that United does not have workers' compensation insurance, and there is no indication that it has made any payment on Ritchie's claim. Thus, we cannot conclude that the Board erred in holding the UEF liable for the payment of all benefits.

For the reasons stated above, we affirm the decision of the Court of Appeals.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., concurs in result only.

COUNSEL FOR APPELLANT,
COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND:

Elizabeth Ann Myerscough, Assistant Attorney General
Jack Conway, Attorney General

COUNSEL FOR APPELLEE,
HOWARD RITCHIE:

McKinnley Morgan

COUNSEL FOR APPELLEE,
UNITED INC.:

Eric E. Ashley

COUNSEL FOR APPELLEE,
IMAGE POINT, INC.:

Douglas Anthony U'Sellis
Richard Edwin Neal

COUNSEL FOR APPELLEE,
KIRK AND BLUM MANUFACTURING:

James Burke Cooper

COUNSEL FOR APPELLEE,
INTERCHEZ LOGISTICS SYSTEMS, INC.:

Roberta Kaye Kiser

COUNSEL FOR APPELLEE,
GTI ROLL TRANSPORTATION SERVICES, INC.:

Laurie Goetz Kemp