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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2013-SC-000371-WC

DATE 10-9-14 Ella G Crout-P.C.

COMMONWEALTH OF KENTUCKY,
UNINSURED EMPLOYERS' FUND — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001963-WC
WORKERS' COMPENSATION NO. 08-01113

TY COLWELL; KELLY GRIFFITH;
RONALD LAMB, D/B/A RON'S ELECTRIC;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Uninsured Employers' Fund ("UEF"), appeals from a Court of Appeals decision which held that Appellee, Kelly Griffith, was not liable to pay up-the-ladder workers' compensation benefits. The UEF argues that Griffith acted as a contractor when he hired Ron's Electric, an uninsured employer, and therefore is liable to pay up-the-ladder benefits to Ron's employee, Ty Colwell, who was injured while performing work on Griffith's premises. For the reasons set forth below, we affirm the Court of Appeals.

Griffith, a licensed motor vehicle dealer, is the owner and operator of Auto Connection Used Trucks and Cars. In 2007, he purchased land in

Junction City, Kentucky, where he planned to construct a building to house his dealership. Griffith did not hire a general contractor to oversee the project, but instead performed that work himself to save approximately ten to fifteen percent on construction costs. There is no evidence that Griffith acted as a general contractor for any person other than himself.

Griffith employed various companies and individuals to build the new facility. One of the individuals Griffith hired was Ron Lamb d/b/a Ron's Electric, who was hired to complete electrical work which was left unfinished by a different subcontractor. Lamb in turn hired Colwell to assist him. Griffith did not provide any tools to Lamb or Colwell for them to complete the job.

While Colwell was climbing an extension ladder to pull wire from a panel box in the attic, the ladder slipped, causing him to fall. As he fell, Colwell grabbed a piece of metal which punctured both of his wrists and the middle finger of his left hand. Colwell has undergone several surgeries to repair the injuries caused by this fall. He filed for benefits from the UEF because Lamb did not have workers' compensation insurance. The UEF joined Griffith as a party, alleging that he was a contractor who had up-the-ladder liability pursuant to KRS 342.610(2) and 342.700(2).

KRS 342.610(2) states:

> 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 therefor. A person who contracts with another:
>
> (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or
>
> (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.

Additionally, KRS 342.700(2) states in pertinent part, "[a] principal contractor, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer. . . . This subsection shall apply only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management."

The Administrative Law Judge ("ALJ") made the following findings in an interlocutory order regarding Griffith's liability as an up-the-ladder employer:

> The undersigned will first note that liability for general contractors when an employee of an uninsured sub-contractor is injured is statutory. If Kelly Griffith is determined to be a general contractor and Ron Lamb, d/b/a Ron's Electric, is determined to be a sub-contractor of Kelly Griffith for the purposes of this claim it is not otherwise necessary to prove that the Plaintiff was the legal or effective employee of Griffith, nor is it necessary to show Griffith's customary work was neither electrical nor building.
>
> In this claim Griffith, by his own uncontradicted testimony, was in the process of constructing his own building and place of business to sell cars. To that end he intentionally chose to not retain or hire a general contractor. By his own admission he chose

> to act as his own general contractor. He did this in order to save the 10-15% surcharge that he believed a separate general contractor would charge. To further this end he contacted multiple sub-contractors and had them perform work for him in furtherance of the construction of his building.
>
> In other words, and regardless of whether or not this is the first and last time he will ever do such a thing, he did everything that a general contractor would do to construct a building. Further, he knowingly and intentionally was acting in the place of a general contractor as a business decision to reduce his costs. The undersigned can accept that Griffith acted in good faith and knows he strenuously objects to even being involved in this claim. Nonetheless, given the statute and the facts it is clear that Griffith was acting, within the meaning of the Workers' Compensation Act, as a general contractor. He is therefore liable under the Workers' Compensation Act for the benefits payable to the Plaintiff.

The Board affirmed the finding that Griffith was liable as an up-the-ladder employer.

The Court of Appeals in a two to one decision reversed the Board and remanded the matter to the ALJ for further proceedings. The majority held that Griffith did not meet the definition of a contractor pursuant to KRS 342.610(2)(b) because he did not hire Lamb to perform a part of the work which is a recurrent part of his business, trade, or occupation as a used car dealer. *General Electric Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007). Judge Combs in dissent concluded that while Griffith was primarily a used car dealer, he undertook a second occupation as a general construction contractor. She also found that since Griffith hired a subcontractor to excavate a portion of his property for the new building, he fell within the definition of a contractor under KRS 342.610(2). This appeal followed.

The sole issue the UEF raises is that the Court of Appeals erred by finding that Griffith was not liable to pay for Colwell's benefits as an up-the-

ladder employer. The UEF argues that Griffith was acting as a general contractor by selecting the companies and individuals who performed work on his new building and therefore up-the-ladder liability attaches to him pursuant to KRS 342.610(2) and 342.700(2). We disagree.

For up-the-ladder liability to attach, Colwell would need to have been hired to perform work "of a kind which is a regular or recurrent part of the work of [Griffith's] trade, business, occupation, or profession."[1] KRS 342.610(2)(b). *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,

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[1] Although Judge Combs would have held otherwise, KRS 342.630(2)(a) is inapplicable because Colwell was not hired to perform work consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land.

> 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.

It is clear in this matter that while Griffith undertook duties that a general contractor would perform, he only did so to expand his own business. As stated in *Cain*, work which is undertaken to expand a business is not a regular or recurrent part of the owner's "trade, business, occupation, or profession." *Id.* at 588. Also, there is no evidence that Griffith has hired an electrician since the work was completed by Lamb or that Griffith would normally employ individuals to do electric work. Accordingly, general contracting work or electrical work are not a regular or recurrent part of Griffith's "trade, business, occupation, or profession." KRS 342.610(2)(b). Instead, the record reflects that Griffith's occupation is a used car dealer. Accordingly, Lamb was not hired by Griffith to perform work which is a recurrent part of his business and therefore up-the-ladder liability does not attach to him pursuant to KRS 342.610(2)(b) or KRS 342.700(2).

For the reasons set forth above, we affirm the Court of Appeals.

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

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