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TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2006-CA-000883-WC

CITY OF SALYERSVILLE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-02186

MARTY SMITH;
E & D MOUNTAIN VIEW CONSTRUCTION;
HONORABLE JOHN W. THACKER,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
AND
THE UNINSURED EMPLOYERS' FUND — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: "Kentucky courts have not mapped precisely the contours of section 342.610." *Thompson v. The Budd Co.*, 199 F.3d 799, 805 (6th Cir. 1999). The case now before

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

this court presents yet another unique fact situation involving the application of Kentucky Revised Statute (KRS) 342.610(2)(b) and the "up the ladder" defense. Based on the facts here, we are constrained to reverse and remand.

The City of Salyersville provides sewer services to its residents. It undertook a sewer system project and arranged financing by grant monies through the Big Sandy Area Development District.[2] Summitt Engineering was hired to design the project, and E & D Mountain View Construction was hired by the City to install the sewer lines. E & D's primary business was the construction and installation of water and sewer lines. In the contract between the City and E & D, the City was stated to be the owner and E & D was stated to be the contractor.

Marty Smith was employed by E & D to work on the City's sewer project. On September 23, 2003, Smith was injured. Although E & D was required by its contract to have workers' compensation liability insurance, its insurance policy had lapsed at the time of Smith's injury.

Smith filed a claim for benefits, and an administrative law judge (ALJ) awarded him income benefits and medical expenses from E & D. The ALJ also held that the City was liable for the payments to Smith "as the up the ladder

[2] We are unable to determine from the record the exact nature and extent of the project. It appears to us, however, that the project was a substantial one. Although we are unable to ascertain when the project began, it had apparently been ongoing for seven and one-half years when the case was being litigated before the ALJ.

contractor to the extent that the defendant/employer, E & D Mountain View Construction, has not obtained coverage, pursuant to KRS 342.610." The ALJ further held that "(t)he Uninsured Employers' Fund [UEF] is entitled to reimbursement of all benefits paid to the plaintiff, with such reimbursement to be made by the defendant/employer, E & D Mountain View Construction, or by the defendant, City of Salyersville, to the extent the City of Salyersville is responsible for payment under KRS 342.610." In support of his order, the ALJ, referring to KRS 342.610, found that "the City of Salyersville is in the regular or recurrent business of providing utility services and the work of E & D Mountain View Construction was to facilitate the utility services and the activity of E & D Mountain View Construction consisted of the removal and excavation of soil in the laying of the utility lines."

The City appealed the ALJ's decision to the Workers' Compensation Board (Board). The Board affirmed the ALJ's decision. In doing so, the Board held as follows:

> Here, the evidence established the City was not, nor ever has been, capable of installing or maintaining a sanitary sewer system. Nonetheless, the evidence revealed the City was engaged in the business of delivery of that type utility to its residents and created a Water and Sewer Board to achieve that end. The business of providing utilities per force requires the installation and maintenance of the utility system, even though the City was incapable

> of constructing the project using its own manpower. Furthermore, as argued by the UEF and found by the ALJ, the City contracted with E & D to have work performed that consisted of the removal and excavation of soil, pursuant to KRS 342.610(2)a. The City has not addressed this portion of the ALJ's decision or the UEF's argument and we are hard pressed to conclude this subsection of the statute does not mandate that the City be deemed a contractor.

This petition for review by the City followed.[3]

One of the purposes of the Kentucky Workers' Compensation Act is to "discourage owners and contractors from hiring fiscally irresponsible subcontractors and thus eliminate workers' compensation liability." *Matthews v. G & B Trucking, Inc.,* 987 S.W.2d 328, 330 (Ky.App. 1998). *See also Elkhorn-Hazard Coal Land Corp. v. Taylor,* 539 S.W.2d 101, 103 (Ky. 1976). The Act "accomplishes this purpose by imposing liability upon the 'up the ladder' contractor for compensation to the employees of a subcontractor unless the subcontractor has provided for the payment." *Matthews*, 987 S.W.2d at 330, *citing Tom Ballard Co. v. Blevins*, 614 S.W.2d 247, 249 (Ky.App. 1980). *See also* KRS 342.610(2).

KRS 342.610(2), which sets forth the liability of a contractor for benefits, defines "contractor" as:

A person who contracts with another:

[3] This appeal is litigated between the City and the UEF. Smith has filed a brief that takes no position on the issues herein.

> (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.

The City argues in this appeal that the ALJ and the Board erred in determining that it was an up the ladder contractor responsible to Smith for workers' compensation benefits under KRS 342.610(2). Specifically, the City argues that the ALJ and the Board erred in finding that Smith and E & D were performing work that was a regular or recurrent part of the City's business. While the City acknowledges that the installation of a sewer system is a prerequisite of providing sewer services to its residents, it maintains it does not follow that the installation of sewer systems is a regular or recurrent part of the City's business. To support its position, the City notes that the last sewer system built in the city was in the 1940s or 1950s.

The only case addressing this issue cited by either party is *Daniels v. Louisville Gas & Elec. Co.,* 933 S.W.2d 821 (Ky.App. 1996). That case involved emission testing at LG&E's coal-fired generators. The testing, mandated by the U.S.

Environmental Protection Agency, was required at the initial start-up of any pollution control equipment and upon completion of any major up-grade work to pollution control equipment. The court held that "(a)lthough the testing may not be regular in the sense that it is not a task which is performed frequently, we conclude that it nevertheless is a regular or certainly recurrent part of LG&E's business[.]" *Id*. at 824. Further, the court in *Daniels* defined "regular" as generally meaning "customary or normal, or happening at fixed intervals." *Id*. It defined "recurrent" as meaning "occurring again or repeatedly." *Id.*

In reviewing the ALJ and Board's decision that E & D's work for the City was of a kind that was a regular or recurrent part of the City's business, we first consider whether this was a fact-finding or a legal conclusion based on undisputed facts. In the *Daniels* case, this court held that there was no factual dispute and that the issue was whether the trial court correctly granted summary judgment as a matter of law. 933 S.W.2d at 824. However, in *Goldsmith v. Allied Bldg. Components, Inc.,* 833 S.W.2d 378, 381 (Ky. 1992), the court held that the questions involved in the assertion of the up the ladder defense in that case presented issues of fact and precluded summary judgment.[4] Regardless of whether the ALJ and the Board in the case *sub*

[4] See also Judge Knopf's dissent in *Daniels. Id.* at 824.

*judice* decided the issue as a factual determination or as a matter of law, we conclude that the determination was in error.

The ALJ reasoned simply that because the City was in the regular or recurrent business of providing utility services and the work of E & D was to facilitate the utility services, then there was up the ladder liability. That reasoning misses the point. The issue is not whether the City was engaged in the regular or recurrent business of providing utility services, but whether the building of a sewer system was a regular or recurrent part of the City's business. Likewise, the Board erroneously determined that the construction of the sewer system was a regular or recurrent part of the City's business simply because "(t)he business of providing utilities per force requires the installation and maintenance of the utility system[.]"

The undisputed testimony was that the only prior work of this nature, the building of a sewer system, was done in the 1940s or 1950s. Thus, it cannot be said that the work was "customary or normal, or happening at fixed intervals" and was therefore "regular." *See Daniels*, 933 S.W.2d at 824. Likewise, it cannot be said that the work occurred "again or repeatedly" and was therefore "recurrent." *Id*.

The terms "regular" and "recurrent" do not include "one-time project[s]." *See Sharp v. Ford Motor Co*., 66

F.Supp.2d 867, 869 (W.D.Ky. 1998). Further, we find nothing to indicate that the work performed here was routine maintenance. *See Granus v. North American Philips Lighting Corp.,* 821 F.2d 1253 (6th Cir. 1987). In short, we conclude that the ALJ and the Board erred when they determined that the work performed by E & D and Smith was a regular or recurrent part of the City's business.[5]

The UEF also contends that this court should affirm the Board on the ground that the City has up the ladder liability for workers' compensation benefits based on KRS 342.610(2)(a). As has been noted, that part of the statute defines a contractor as one who contracts with another "(t)o have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land[.]" *Id*. Although the installation of a sewer system involves the temporary displacing of soil, we conclude that this portion of the statute does not cover the City's sewer system project.[6]

[5] The facts here are similar to those in *Gesler v. Ford Motor Co*., 185 F.Supp.2d 724 (W.D.Ky. 2001). In that case, the court held that Ford was not a contractor under KRS 342.610(2)(b) where it had hired a company to remove and replace its "E-Coat System" in its plant in Louisville, Kentucky. *Id*. at 728. The system had been installed in 1973 and was removed in 1998. Although Ford had installed new E-Coat Systems at 20 of its 22 North American facilities between 1985 and 1999, the court declined to hold that the work was a regular or recurrent part of Ford's business. *Id*.

[6] The parties neither cited any cases to support their arguments on this issue nor could we find any.

The Board's opinion is reversed, and this case is remanded for further proceedings consistent with this opinion.[7]

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Logan Griffith
Paintsville, Kentucky

BRIEF FOR APPELLEE, MARTY SMITH:

Thomas G. Polites
Lexington, Kentucky

BRIEF FOR APPELLEE, UNINSURED EMPLOYERS' FUND:

Gregory D. Stumbo
Attorney General of Kentucky

John C. Dorsey
Assistant Attorney General
Frankfort, Kentucky

[7] The City's argument that it is not a "person" within the meaning of KRS 342.610 is moot.