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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001127-MR

MARK HOGG

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CI-00367

ARCO NATIONAL
CONSTRUCTION COMPANY, INC.

APPELLEE

AND

NO. 2010-CA-002244-MR

CHARTIS, PROCEEDING IN THE
NAME OF MARK HOGG

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 09-CI-00367

MARK HOGG; ARCO NATIONAL
CONSTRUCTION COMPANY, INC.;
AND ANGEL DUSTERS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: Mark Hogg brings Appeal No. 2010-CA-001127-MR from a May 24, 2010, summary judgment, and Chartis, proceeding in the name of Mark Hogg, brings Appeal No. 2010-CA-002244-MR from a November 9, 2010, summary judgment of the Boyle Circuit Court. We affirm both appeals.

ARCO National Construction Company, Inc., (ARCO) was hired by Centre College to construct a student dormitory in 2007. In February 2008, ARCO contracted with Labor Ready Inc. to supply temporary employees to clean the dormitory before final completion of the construction project. Under the terms of its contract with ARCO, Labor Ready was required to provide the temporary employees with workers' compensation insurance. The workers' compensation insurance carrier was Chartis.¹

Hogg was hired by Labor Ready on July 31, 2008. Hogg was a temporary employee assigned to clean the student dormitory at Centre College per Labor Ready's contract with ARCO. While at the worksite, Hogg was supervised by an ARCO employee. On August 7, 2008, Hogg sustained a work-related injury when he fell from a ladder while cleaning the dormitory windows.

¹ Initially, ARCO National Construction Company, Inc.'s, workers' compensation carrier was ACE USA, but Chartis succeeded ACE, USA.

Hogg filed a claim for workers' compensation benefits and named Labor Ready as his employer. As of June 23, 2009, the record reflects that Hogg received some \$55,408.54 in workers' compensation benefits.

Hogg filed a complaint against, *inter alios*, ARCO alleging common-law negligence and violation of the Kentucky Occupational Safety and Health Act (KOSHA) in the Boyle Circuit Court. Hogg sought damages for the injuries he sustained as a result of the fall. Chartis, as the workers' compensation carrier, intervened to protect its subrogation rights under Kentucky Revised Statutes (KRS) 342.700.

ARCO filed a motion for summary judgment arguing that Hogg's claims were barred by the exclusive remedy provision of the Workers' Compensation Act. The circuit court agreed, and by summary judgment entered May 24, 2010, all claims asserted by Hogg against ARCO were dismissed. This summary judgment included complete Kentucky Rules of Civil Procedure (CR) 54.02 finality language. Subsequently, by summary judgment entered November 9, 2010, the circuit court formally held:

That Chartis' interest in the instant litigation is purely derivative of the original Plaintiff Mark Hogg, and therefore, summary judgment is GRANTED to the Defendant ARCO National Construction Company, Inc.[,] on the exact same grounds as the Court's original summary judgment order of May 24, 2010.

This summary judgment also included complete CR 54.02 language. Hogg filed a timely notice of appeal from the May 24, 2010, summary judgment, and Chartis filed a timely notice of appeal from the November 9, 2010, summary judgment.

We begin by observing that Chartis asserts no independent claims of error in its appellate brief; rather, Chartis simply adopts Hogg's allegations of error.

Hogg asserts that the circuit court erred by concluding that his claims against ARCO were barred by the exclusive remedy provision of the Workers' Compensation Act. In particular, Hogg argues that his employer, Labor Ready, was an independent contractor for ARCO; thus, ARCO is not shielded by up-the-ladder immunity under the Workers' Compensation Act. KRS 342.690(1). We disagree.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. And, all facts and inferences therefrom are to be viewed in a light most favorable to the nonmoving party. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991).

Under KRS 342.690(1), an employee's recovery in tort for a work-related injury against his employer is limited to those benefits available under the Workers' Compensation Act; hence, it is understood that the Workers' Compensation Act provides the exclusive remedy for such employee. This exclusive remedy provision (KRS 342.690(1)) effectively bars all negligence

claims brought by an employee against his employer, including employee claims under KOSHA. *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005).

Under the exclusive remedy provision (KRS 342.690(1)), an “employer” is broadly recognized as not only constituting a workers’ direct employer but also as constituting a contractor. *Beaver v. Oakley*, 279 S.W.3d 527 (Ky. 2009). As a result, a contractor is entitled to the same immunity as the workers’ direct employer (a subcontractor) if such employee sustains a work-related injury. This is commonly referred to as “up-the-ladder” immunity. *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007).

To determine if ARCO qualifies as a “contractor” and entitled to “up the ladder immunity,” it must be determined whether ARCO subcontracted with Labor Ready for Hogg to perform “[w]ork of a kind that is a ‘regular or recurrent part of the work’” of ARCO’s business at the time of his injury. *Gen. Elec. Co.*, 236 S.W.3d at 588 (quoting Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 70.06[3] (2006)); KRS 342.610. Regular or recurrent work is generally understood to encompass “all situations in which work is accomplished which [the] employer, or employers in a similar business, would ordinarily do through employees.” *Gen. Elec. Co.*, 236 S.W.3d at 588 (quoting Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 70.06[3] (2006)).

In this case, the record reflects that ARCO contracted with Labor Ready to provide temporary workers to clean the student dormitory before final

completion of the construction project, and Hogg was performing such work when he was injured. And, under the specific terms of ARCO and Labor Ready's contract, Labor Ready provided these temporary workers with workers' compensation benefits, and Hogg received workers' compensation benefits for his work-related injury. Also, it is undisputed that Hogg was directly supervised by an ARCO employee and was paid an hourly wage.

Based upon these undisputed facts, we agree with the circuit court that Hogg was performing tasks that qualify as work of a kind that was regular and recurrent in ARCO's business under KRS 342.610(2). The cleaning of the dormitory was performed by ARCO in relation to the construction of the student dormitory under its contract with the university and constituted part of ARCO's regular business. Consequently, we hold that ARCO was entitled to the ladder immunity under the exclusive remedy provision of the Workers' Compensation Act effectively barring Hogg's common-law negligence and KOSHA claims. KRS 342.690(1).

For the foregoing reasons, the orders of the Boyle Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT
MARK HOGG:

Christopher H. Morris
Louisville, Kentucky

BRIEF FOR APPELLANT
CHARTIS, PROCEEDING
IN THE NAME OF MARK HOGG:

Roberta K. Kiser
Crystal L. Moore
Lexington, Kentucky

BRIEF FOR APPELLEE ARCO
NATIONAL CONSTRUCTION
COMPANY, INC.:

R. David Clark
John L. Tackett
Lexington, Kentucky