

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2005-SC-000242-DGE
(2002-CA-001399)

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SUPREME COURT

DEBBIE ELLEN REHM, Individually and as Ex'x of the
ESTATE OF JAMES DAVID REHM, et al.,

APPELLANTS,

vs:

NAVISTAR INTERNATIONAL CORP., ET AL.,

APPELLEES.

APPEAL FROM JEFFERSON CIRCUIT COURT,
DIV. 10, CIVIL ACTION NO. 01-CI-01344


BRIEF ON BEHALF OF APPELLEE, ALLIED
CHEMICAL CORPORATION

This to certify, pursuant to C.R. 76.12(6), that the within Brief of Behalf of Appellee, Allied Chemical Corporation, has been served upon all proper parties by mailing a true and correct copy of same by U.S. Mail, postage prepaid, to: (1) Hon. Susan Stokley-Clary, Clerk of the Kentucky Supreme Court, 209 Capitol Building, 700 Capitol Avenue, Frankfort, KY 40601; (2) Hon. Joseph D. Satterley, Sales, Tillman, Wallbaum, Catlett & Satterley, 325 W. Main Street, Suite 1900, Louisville, KY 40202; (3) Hon. Thomas B. Wine, Judge, Jefferson Circuit Court, Div. 10, 8th Floor Judicial Center, 700 W. Jefferson Street, Louisville, KY 40202; (4) Hon. George M. Geoghegan, III, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; and, (5) All other counsel of record per the attached service list.

This 18th day of January, 2006.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

The Court has scheduled oral argument in the subject action on March 15, 2006.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT i

COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

 KRS §342.690 1,3

 KRS §342.610 1,3

ARGUMENT 3

I. ALLIED QUALIFIES AS A CONTRACTOR UNDER KRS §342.610(2)(B) 4

 KRS §342.690 4,7

 KRS §342.610(2)(B) 4,7,8,9,10

Fireman’s Fund Insurance Co. v. Sherman & Fletcher,
 705 S.W.2d 459 (Ky. 1986) 7

Daniels v. Louisville Gas & Elec. Co., 933
 S.W.2d 821 (Ky.App. 1996) 8

Thompson v. The Budd Co., 199 F.3d 799 (6th Cir. 1999) 9

Granus v. North American Philips Lighting Corp.,
 821 F.2d 1253 (6th Cir. 1987) 9

Sublett v. Tennessee Valley Authority, 726 F.Supp. 1077
 (W.D.Ky. 1989) 9

Gesler v. Ford Motor Co., 185 F.Supp.2d 724 (W.D.Ky. 2001) 9,10

II. ALLIED DEMONSTRATED THAT IT MAINTAINED WORKERS’ COMPENSATION COVERAGE 10

III. CONCLUSION 10

APPENDIX

COUNTERSTATEMENT OF THE CASE

Appellee Allied Chemical Corporation (Allied) was named as a "property owner" defendant in a complaint filed by James Rehm and his wife. The Rehms alleged that Mr. Rehm was injured due to occupational exposure to asbestos. Allied asserted in its answer that the Rehms' claims are barred by the exclusive remedy provisions of the Workers' Compensation Act ("Act"). (RA Vol. 3, 332).

Mr. Rehm's deposition was taken on 3/30/01 and 3/31/01. Rehm testified that from 1975-1982 he was employed as a millwright by Rapid Installation. (Rehm 3/30/01 Dep.17, 123-124). Rehm testified that while employed by Rapid he worked on only one occasion for 2 months as part of a 20 man crew at Allied's metallurgical coke plant located in Ashland, Kentucky.¹ (Rehm 3/30/01 Dep. 120 and 3/31/01 Dep. 22). Rehm testified that Rapid's work at Allied consisted of repairing, removing and replacing 10-15 pumps and pump motor assemblies. (Rehm 3/30/01 Dep. 74 and 3/31/01 Dep. 25-33). Rehm stated that with the exception of the pumps and pump components being worked on, the rest of Allied's plant remained fully operational during Rapid's work. (Rehm 3/31/01 Dep. 26-27).

Allied moved for summary judgment based on the exclusive remedy provisions of KRS §342.690 for the reason that Allied qualifies as a "contractor" under KRS §342.610(2) because the work performed by Rapid was of a kind which is a regular or recurrent part of the work of Allied's business at its coke plant. (RA Vol. 13, 1799, 1854). In support of its motion, Allied submitted an affidavit from H.D. Fuller who had engineering responsibilities for Allied's coke plants including the Ashland plant for more than 30 years both as an Allied engineer and thereafter as an engineering

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Allied's Ashland coke plant processes coal into metallurgical coke and other by-products.

consultant. (RA Vol. 13, 1866) (Appx. "A"). In his affidavit, Fuller testifies:

- ▶ Allied's Ashland coke plant contained numerous pumps, pump motors and associated pipes and these pumps and their components were required in the process of converting coal into coke;
- ▶ Pumps, pump motors and piping played an important and integral role in the coke production process and the repair, periodic removal and replacement of old pumps, pump motors and associated piping and the installation of new pumps, pump motors and associated piping were a necessary element of the maintenance and operation of Allied's Ashland coke plant;
- ▶ The repair, periodic removal and replacement of pumps, pump motors and associated piping, as well as the setting and installation of new pumps, pump motors and related piping, were **regular** and **recurring** activities performed at Allied's Ashland coke plant at times by Allied's own employees and at times by outside contractors.²

Allied also submitted an affidavit from Lois H. Fuchs who is employed by Honeywell International Inc. (successor by merger to Allied) as Assistant Treasurer, Risk Management. (RA Vol. 34, 5042). In her affidavit, Fuchs testified that Allied maintained workers' compensation coverage for the period 1/1/75 to 12/31/82 through Travelers Indemnity Company and for the period 1/1/01 to 3/3/01 with Zurich Insurance Company through its successor by merger, Honeywell International Inc. (RA Vol. 34, 5056). Accordingly, Allied demonstrated that it maintained workers' compensation coverage for the time period during which Rapid worked at Allied as well as the time Rehm was diagnosed with an alleged occupational related injury/disease (February 2001).

Judge Thomas Wine sustained Allied's motion for summary judgment determining as a matter of law that there is no genuine of material fact that: (1) the work performed for Allied by Rapid was of a kind which is a regular or recurrent part of the work of Allied's business and therefore, Allied

2

At his deposition on 8/1/01, Fuller testified that pump removal and replacement work was done at Allied's coke plant at times by Allied's own employees and at times by outside contractors. (Fuller Dep. 50-52, 73). According to Fuller, even on so-called larger "renovation" projects which involved outside contractors removing and replacing pumps at the coke plant, Allied's own employees still performed some of the pump work. (Fuller Dep. 52).

qualifies as a contractor under KRS §342.610(2); and, (2) as a result of Allied's status as a contractor, the appellants' claims against Allied are statutorily barred by the exclusive remedy provisions of KRS §342.690. (RA Vol. 36, 5375). Specifically, Judge Wine stated:

[w]hile Rehm produced the affidavits of his co-workers, none of those affidavits state that the co-workers worked at Allied or had personal knowledge of the maintenance procedures at Allied. Furthermore, Rehm testified that he worked on 10 to 15 pumps and motor assemblies during one "scheduled shutdown"....Thus Rehm admits to performing the same type of work that was performed by Allied's own employees. **Thus, Rehm has failed to produce any affirmative evidence that the work he performed, removing, replacing and installing motors and pumps, was not of a type that was regular or recurrent to Allied's work. In fact, the evidence submitted by Rehm supports only the conclusion that the type of work he performed [at Allied's plant] was recurring....** (Emphasis added). RA Vol. 36, 5392.

The Court of Appeals affirmed the Jefferson Circuit Court stating:

Allied Chemical's affidavit in support of summary judgment reflects that this equipment [pumps and pump motor assemblies] is required in the process of converting coal to coke, which is part of the business of Allied Chemical. The affidavit also reflects that the periodic repair, removal, and replacement of these pumps and pump motors is a regular and recurring part of Allied Chemical's business. The appellants have failed to produce affirmative evidence refuting these sworn statements. While James [Rehm] did produce the affidavits of co-workers to the effect that the work performed by Rapid Installation at Allied Chemical was not regular or recurring, we agree with the trial court that these co-workers did not demonstrate sufficient qualifications to establish that they had personal knowledge of the maintenance procedures at Allied. (Ky.App.Op., 27).

The Court of Appeals recognized that Allied established that it maintained workers' compensation coverage during the relevant time periods and that the appellants failed to present evidence to the contrary. (Ky.App.Op., 63).

ARGUMENT

Allied adopts Sections I, II, III, IV and V of the Appellees' Joint Brief and adds as follows:
The Court of Appeals' Opinion should be affirmed because there is no genuine issue of material fact

that: (1) Allied qualifies as a contractor under the provisions of KRS §342.610(2) because the work performed by Rapid at Allied's Ashland plant was of a kind which is a regular or recurrent part of the work of Allied's business; and, (2) Allied is relieved from tort liability by KRS §342.690 because it maintained workers' compensation coverage.

I. Allied Qualifies As A Contractor Under KRS §342.610(2)

KRS §342.690 - "Exclusiveness of Liability", provides in pertinent part in subsection (1):

If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife ... on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610 whether or not the sub-contractor has in fact, secured the payment of compensation.

KRS §342.610(2)(b) defines the term "contractor" as it is used in KRS §342.690(1):

[a] person who contracts with another...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 combined effect of these statutes is to insulate from tort liability an entity (Allied) which contracts with another party (Rapid) to have work performed of a kind which is a regular or recurrent part of the work of the business of that entity (Allied). Accordingly, the tort action against Allied for alleged injuries sustained by Rehm while working for Rapid at Allied's facility, is statutorily barred if Rapid's work was of a type which is a regular or recurrent part of the work of Allied's business.

The trial court and the Court of Appeals correctly concluded that as a matter of law the work Rapid performed at Allied's plant was of a kind which is a regular and recurring part of the work of Allied's business. Rehm testified that Rapid's work at Allied consisted of the repair, removal and replacement of 10-15 pumps and pump components. As shown by the Fuller affidavit, the work

described by Rehm was a regular and recurring part of the work of the business of Allied's plant. The Fuller affidavit demonstrates that Allied's plant was in the business of processing coal into coke and resulting by-products. Fuller states that Allied's plant contained numerous pumps, pump motor assemblies and connecting pipes which were located throughout the plant, the purpose of which was to transport fluids and gases, and that these pumps and their components were required in the process of converting coal into coke and the resulting by-products. Fuller further states that these pumps and their components played an important and integral role in this process and that the repair, periodic removal and replacement of old pumps, pump motor assemblies and associated piping as well as the installation of new pumps, pump motor assemblies and associated piping were a necessary element in the maintenance and operation of Allied's Ashland coke plant.

Fuller also testifies that among Allied's own employees at the Ashland plant were millwrights, the same job classification as Rehm. Significantly, Fuller testifies that the repair, periodic removal and replacement of pumps, pump motor assemblies and connecting piping, as well as the installation of new pumps, pump motor assemblies and related piping, were *regular and recurring* activities performed at the plant at times by Allied's own employees, including millwrights, and at times by outside contractors.³ (RA Vol. 13, 1867; Fuller Dep. 50-52, 74). Fuller testified at his deposition:

[T]ear out and installation of pumps was just part of the operation [of Allied's plant]. You know, we may be doing one down here today and another one up here tomorrow and maybe nothing for a couple of days or week or two weeks or a month, and then we'd have a series of them would require our maintenance. The tear-out and installation of pumps, whether it be handling or repair or maintaining of pumps was...a regular part of the operation of the plant....I know that it occurred regularly in the operation of the plant. (Emphasis added). Fuller Dep. 50-51.

3

Fuller's affidavit evidences that all of the aforesaid factors were applicable at Allied's Ashland coke plant during 1975-1982.

To varying degrees, appellants attempt to rely on the affidavits of James O. King, Jr. and Mr. Rehm in an effort to create a factual issue as to whether the work which Rapid performed at each appellees' plant was a regular or recurrent part of its business.⁴ With regard to Allied, however, an examination of those two affidavits shows that they do not create an issue of material fact.

The first affiant is an accountant, James O. King, Jr. Appellants through King's affidavit attempt to convince the Court that the regular or recurrent issue should turn on accounting principles. However, for the reasons set forth in Section II of the appellees' joint brief, this contention should be rejected. Moreover, as to Allied, King in his affidavit offers *no* opinions about Allied or the type of work Rapid performed at Allied's plant. (Appellants' Brief, Appx. 10). In fact, at his deposition, King admitted his lack of knowledge about whether the work performed by Rapid at Allied's plant was a regular or recurrent part of the work of Allied's business:

Q: Do you have any knowledge as to the type of business that Allied Chemical Corporation is concerned with, or involved in?

A: No.

Q: Do you have any personal knowledge of the type of work that Mr. Rehm performed at Allied Chemical's Ashland coke plant?

A: No.

Q: So it is fair to say you're not able to offer an opinion, whether the work performed by Mr. Rehm at...Allied Chemical's Ashland Coke Plant was a **regular or recurrent part of Allied Chemical's business?**

A: **That's correct.** (King Dep. 116-117, 117 and 118-119).

As to Mr. Rehm, in his affidavit he states that his work at Allied's plant did not occur at fixed intervals and was not part of the regular or routine maintenance of Allied's plant. However, Rehm at his deposition testified that he did not know what purpose Rapid's work at Allied's plant played

4

At the trial court and Court of Appeals levels, the appellants contended that the affidavit of Dr. Suraj Alexander created an issue of material fact as to whether Rapid's work at Allied's plant was regular or recurrent. However, Alexander in his affidavit offers *no* opinion whatsoever about Rapid's (or Rehm's) work at Allied. Furthermore, Alexander admitted at his deposition that he holds no opinion regarding Rapid's (or Rehm's) work at Allied's plant. (Alexander Dep. 131-136).

in the functioning of the plant or even what Allied made at its plant:

Q: You spoke about working at an Allied Chemical facility in Ashland. Do you know what type of facility that was and what...did it manufacture?

A: Some type of chemicals or products. I'm not—I'm not sure what they produced.

Q: What type of work went on in that area of the plant [where you worked]? I mean, what do you recall was the purpose of that part of the facility?

A: No. We were installing some pumps....pumps and motor assemblies.

Q: Do you know what those pumps were used for [at the Allied facility]?

A: No, sir.

Q: Did you ever get an understanding from anyone on your crew or anyone from Allied what the entire purpose of all that project was as far as its role in the operation of the plant?

A: No, sir. (Rehm 3/31/01 Dep. 21-22, 25-26 and 36).

Rehm admitted he had no basis for the opinions he offered in his affidavit. Rehm's affidavit was conclusory and does not create a genuine issue of material fact on the regular and recurrent issue.

Numerous cases from Kentucky's state and federal courts support the conclusion that the trial court and Court of Appeals were correct in determining as a matter of law that the work Rapid performed for Allied was a regular or recurring part of the work of Allied's business. In *Fireman's Fund Ins. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986), the plaintiff contended that a real estate developer was not entitled to immunity under KRS §342.690 and §342.610(2) because the rough framing carpentry it contracted out was not of a type it did for itself. However, this Court held that the developer was a contractor under KRS §342.610(2) because the work it contracted out to the plaintiff's employer was a regular or recurrent part of the work of the developer's business. *Id.* at 462. The other important factor in *Sherman* is the type of project on which the sub-contractor was working: the construction of townhouses. In the case at bar, the appellants attempt to persuade this court to adopt the myopic interpretation of "regular or recurrent" as encompassing only "routine maintenance". Besides the fact that the appellants offer no case law to support their narrow interpretation, the work

in the *Sherman* case, (i.e., carpentry frame work), cannot be classified as routine maintenance, yet it qualified as regular or recurrent. However, even assuming *arguendo* that the appellants were correct that the only type of work that qualifies under the statute as regular or recurrent is maintenance, Allied is still entitled to judgment as a matter of law because Fuller testified that the repair, periodic removal and replacement of pumps and pump components were not only regular and recurring activities at Allied but that such work was a "necessary element of the maintenance and operation" of its plant.

In *Daniels v. Louisville Gas & Elec. Co.*, 933 S.W.2d 821 (Ky.App. 1996) LG&E had contracted with another company to perform E.P.A. mandated emissions testing. The evidence showed that LG&E had performed the emissions tests only 14 times from 1966-1996. LG&E received summary judgment dismissing the tort claim of the subcontractor's employee because emissions testing was a regular or recurrent part of its business. The Court of Appeals affirmed, finding that as a matter of law the emissions testing was a regular or recurrent part of LG&E's business even though the tests were performed sporadically and infrequently. The *Daniels* court defined "recurrent" and "regular" as used in KRS §342.610(2):

"Recurrent" simply means occurring again or repeatedly. "Regular" generally means customary or normal, or happening at fixed intervals. However, neither term requires regularity or recurrence with the preciseness of a clock or calendar. *Id.* at 824.

Now compare the above-quoted definitions from *Daniels* of "regular and recurrent" with Fuller's deposition testimony in the case at bar:

[T]ear out and installation of pumps was just part of the operation [of Allied's plant]....[W]e may be doing one down here today and another one up here tomorrow and maybe nothing for a couple of days or week or 2 weeks or a month, and then we'd have a series of them would require our maintenance. The tear-out and installation of pumps, whether it be handling or repair or maintaining of pumps was...a regular part of the operation of the plant....I know that it occurred regularly in the operation of the plant. (Fuller Dep. 50-51).

In *Thompson v. The Budd Co.*, 199 F.3d 799 (6th Cir. 1999) the plaintiff was an employee of a company who had been hired by Budd to work on its cooling system at its automobile part stamping plant. The plaintiff was injured while changing air conditioning filters and sued Budd. The case was dismissed because Budd qualified as a contractor under KRS §342.610(2). The *Thompson* court noted that “Kentucky case law is clear that activities beyond one’s primary business objective may qualify under Section 342.610.” *Id.* at 805. As examples of this principle, the court cited *Sherman, supra*, *Daniels, supra*, and *Granus v. North American Philips Lighting Corp.*, 821 F.2d 1253 (6th Cir. 1987).⁵

The *Thompson* court then stated:

[g]iven this case law, “part of....the business of such person” incorporates more than the primary task of Budd’s company. Its business of stamping automotive parts, therefore, may include more than the actual assembly line production of auto parts....[S]ection 342.610 encompasses regular maintenance of [a] manufacturer’s physical plant....It is undisputed that changing air conditioning filters was a regular element of Budd’s plant maintenance....Budd’s HVAC system plays an important role in its manufacturing process. *Thompson*, 199 F.3d at 805.

The importance of *Thompson* is that it recognized the principle that Budd still qualified as a contractor under KRS §342.610(2) even though the work it had contracted out to Thompson’s employer was only indirectly connected to Budd’s business--making automobile parts. In the case at bar, the kind of work performed by Rapid (repairing, removing and replacing pumps and pump components) are an integral part of Allied’s business of processing coal into coke.

The appellants rely heavily on *Gesler v. Ford Motor Co.*, 185 F.Supp.2d 724 (W.D.Ky. 2001).

However, the appellants’ reliance on *Gesler* is misplaced because of one key fact which distinguishes

5

In *Granus* a tort action was brought against a glass manufacturer by the employee of another company which had contracted to reline a furnace. The defendant contended that the action was barred because it was a contractor under KRS §342.610(2). The Sixth Circuit Court of Appeals found that the relining of furnaces was a recurrent part of the defendant’s manufacturing business and as a result, the action was precluded. *Granus*, 821 F.2d at 1258. See also *Sublett v. T.V.A.*, 726 F.Supp. 1077 (W.D.Ky. 1989) (tort claim of employee of subcontractor working on conveyor belt barred because TVA showed such work was done regularly at its plant).

Gesler from the case at bar: the parties in *Gesler* agreed that the subject work was not “regular or recurrent”. In *Gesler*, the plaintiff’s employer had been hired by Ford to replace a coating line and the plaintiff was injured in the course of the work and filed an action against Ford. Ford contended it was a “contractor” under KRS §342.610(2) and thus entitled to tort immunity. The *Gesler* court noted that the parties agreed that the work was not a regular or recurrent part of Ford’s business. Unlike in *Gesler*, however, Allied has demonstrated through the evidence of record that the work performed by Rapid at Allied’s plant was of a kind which is a regular or recurrent part of its business.

II. Allied Demonstrated That It Maintained Workers’ Compensation Coverage

Allied also meets the second requirement for tort immunity. Allied demonstrated that it maintained workers’ compensation coverage. The affidavit of Lois Fuchs established that Allied maintained workers’ compensation coverage from 1/1/75 to 12/31/82 through Travelers Indemnity Company and from 1/1/01 to 3/3/01 with Zurich Insurance Company through its successor by merger, Honeywell International Inc. Accordingly, Allied demonstrated that it maintained workers’ compensation coverage both for the time period during which Rapid worked at Allied as well as the time period when Rehm was diagnosed with an alleged occupational related injury/disease (February 2001).

CONCLUSION

Accordingly, Allied requests that the Court of Appeals’ Opinion be affirmed.

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