IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5109

Summary Calendar

Andrew Duncan, et al., etc.,

Plaintiffs-Appellants,

versus

U O P Inc., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(CA 91 2327)

(March 19, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Andrew Duncan sued UOP for damages received while Duncan was removing asbestos insulation from a pipe at UOP's plant. Finding that UOP was Duncan's statutory employer under Louisiana law, the district court granted summary judgment in UOP's favor. We affirm.

In December 1990, Duncan was employed by J. Graves Insulation Co. UOP contracted with Graves for the removal of asbestos

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

insulation at UOP's plant in Blanchard, Louisiana. Graves sent Duncan, who began removing insulation from a pipe located in one of UOP's two catalyst manufacturing units. Duncan alleges that while doing this work, a hot gas emitted from the pipe into his face and injured him.

We review the grant of summary judgment de novo and "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." FDIC v. Laguarta, 939 F.2d 1231, 1236 (5th Cir. 1991) (citations omitted). In this case, summary judgment was proper if the pleadings, affidavits, and deposition on file show that there is no genuine issue as to any material fact and that UOP was entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Duncan, as the non-moving party, may not rely upon allegations in his pleadings to oppose summary judgment. Fed. R. Civ. P. 56(e); Larry v. White, 929 F.2d 206, 211 n.12 (5th Cir. 1991).

UOP asserts that it was entitled to judgment on its affirmative defense that it was Duncan's statutory employer as defined by LSA-R.S. 23:1061. Under Louisiana law, a statutory employer is immune from civil liability for its employee's injuries. LSA-R.S. 23:1032. Under 23:1061, a principal that hires a contractor to perform work that is "part of his trade, business, or occupation" is the statutory employer of persons employed to do that work. As amended in 1989, 23:1061 provides that the fact that a task is specialized, non-routine, or beyond a principal's capacity does not mandate a finding that the task is outside of the principal's trade, business, or occupation. Pierce v. Hobart

Corp., 939 F.2d 1305, 1307 (5th Cir. 1991).[1] "The 1989 amendment rejects the Berry . . . analysis and returns the law to the old 'integral relation' test." Becker v. Chevron Chemical Co., 983 F.2d 44, 46 (5th Cir. 1993); see also Salsbury v. Hood Industries, Inc., 982 f.2d 912, 914-16 (discussing effect of the 1989 amendment). For the purposes of determining statutory employer status under the integral relation test, the "work" at issue is the removal of asbestos insulation.

Undisputed summary judgment evidence shows that Duncan was injured while removing asbestos insulation from a pipe. Insulation on the pipes conserves heat in the lines and prevents burns on persons working around them. Asbestos insulation is removed only when required for maintenance. Duncan was removing insulation from a pipe so that the pipe itself could be replaced. UOP periodically replaces pipes on the manufacturing units for maintenance purposes.

UOP employs trained asbestos removers and holds permits to remove some quantities of asbestos. The removal job on which Duncan worked required a special permit because its quantity exceeded UOP's standing permit. Occasionally UOP uses outside contractors for asbestos removal due to manpower needs or the quantity of asbestos involved. At the time of Duncan's injury, the UOP employees trained in asbestos removal were doing work elsewhere in the plant. The only evidence submitted by Duncan in opposition to UOP's motion for summary judgment was his affidavit. It stated

[1]This amendment was considered a rejection of the analysis of R.S. 23:1061 created in Berry v. Holston Well Service, Inc., 488 So. 2d 934 (La. 1986). See Pierce, 939 F.2d at 1307.

that workers in Louisiana are required to obtain licenses and certifications to be qualified to removed asbestos.

On appeal, Duncan contends that a genuine issue of material fact exists regarding whether or not insulation removal is integrally related to UOP's trade, business, or occupation. He maintains that the undisputed facts are insufficient to establish this conclusion. We disagree. UOP is engaged in the business of manufacturing catalysts at its Blanchard plant. The evidence demonstrates that insulation removal is necessary in order to perform maintenance on the pipes of UOP's catalyst manufacturing units. Such maintenance is necessary and integrally related to UOP's business. Compare Salsbury, 982 F.2d at 917 ("replacing wornout and obsolete sawmill equipment that is necessary to operate a sawmill was an integral part of Hood's business of milling and selling lumber").

Duncan tries to place this conclusion in doubt by referring to testimony that asbestos was not necessary to UOP's business. Specifically, the evidence shows that once asbestos is removed for maintenance purposes, it is replaced with a different form of insulation. Since manufacturing could continue with or without asbestos, Duncan reasons, asbestos removal was not integrally related to the catalyst manufacturing. His conclusion, however, is a non sequitur. Regardless of what replacement insulation is used, the periodic removal of insulation, including the existing asbestos insulation, is required to perform necessary maintenance on UOP's manufacturing units.

Finally, Duncan contends that his affidavit regarding licensing requirements demonstrates that asbestos removal is a specialized task. According to Duncan, this factor must be considered in the analysis, preventing summary judgment on the basis of evidence that insulation removal was a routine and necessary part of UOP's catalyst manufacturing. We rejected this contention in Salsbury, holding that Berry factors such as specialization "cannot be used by themselves or in combination with other factors to defeat statutory employer status." Salsbury, 982 F.2d at 916. This applicable test is whether insulation removal was integrally related to UOP's trade, business, or occupation. We hold that it was.

AFFIRMED.