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WHO'S MY EMPLOYER? MAYBE WE SHOULD BE ON THE MAURY POVICH SHOW

In a recent Texas Supreme Court decision, the Court was faced with the question of whether a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act. *Entergy Gulf States, Inc. v. Summers.*, 2009 Tex. LEXIS 123; 52 Tex. Sup. J. 511 (Tex. 2009).

The Court held that the exclusive remedy defense for qualifying general contractors was, likewise, available to premises owners who met the Act's definition of "general contractor," and who also provided workers' compensation insurance to lower-tier subcontractors' employees.

Facts Of The Case

Entergy Gulf States, Inc. (Entergy) was both the premises owner and the general contractor at its facilities. Entergy contracted with International Maintenance Corporation (IMC) for certain maintenance, repair and other technical services. Essentially, IMC was the subcontractor to Entergy.

The contract between Entergy and IMC provided that Entergy would provide, at its own cost, workers' compensation insurance for IMC's employees. Entergy complied with this contractual obligation and purchased the coverage. Unfortunately, an IMC employee, John Summers, was injured while working at Entergy. He applied for, and received, workers' compensation benefits under the Entergy policy. However, Summers also filed a lawsuit against Entergy for negligence.

The Court found for Entergy on summary judgment, holding that Entergy was statutorily immune from common-law tort suits based on its status as an employer. Summer, obviously confused because he believed IMC was his employer, appealed. The Court of Appeals reversed the trial court. The case then wound its way to Austin.

Texas Workers' Compensation Act and Its Applicability to Owner/General Contractors

The Texas Workers' Compensation Act is codified in the Texas Labor Code. The Act outlines a process by which a general contractor can qualify for immunity from common-law tort claims brought by the employees of its subcontractors. To qualify for the immunity, the general contractor and subcontractor must enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.

When the general contractor provides this coverage, recovery of workers' compensation benefits is the *exclusive remedy* of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee. Thus, § 408.001(a) provides for this immunity when the employer invokes the "exclusive remedy" defense, which limits the employee's "exclusive remedy" to recovery of workers' compensation benefits.

The biggest hurdle in this case is the finding that a premises owner can be deemed a general contractor for the purposes of obtaining the statutory immunity under the Workers' Compensation Act. The dissent in this case, and the court of appeals, contend that the only way to qualify as a "general contractor" is to be included in a "tripartite" relationship in which a general contractor in the middle of the transaction has, first, undertaken to perform work for an owner, and second, contracted part of that work to a subcontractor.

But the statute is not written so restrictively as to encompass *only* a three-party relationship. Undoubtedly, premises owners often are employers who carry workers' compensation insurance. Premises owners also frequently contract with others to perform work on their premises. There has never been a requirement that an owner must first engage a general contractor to have work done on its premises. The owner is free to do the work with its own employees, to directly contract with others to do the work, or to do the work using some combination of the two.

Where Do We Go From Here?

This case has spurred a reaction from all sides of the fence. In fact, this opinion prompted the Texas lawmakers in the Legislature to introduce new laws to eviscerate this opinion. Two bills filed in the current session, S.B. 2063 by Senator Duncan and H.B. 1657 filed by state Representative Helen Giddings, address the Supreme Court's ruling in *Entergy*.

S.B. 2063 would change the definition of "subcontractor" in the Texas Labor Code, so that a premises owner could not qualify as a general contractor. Likewise, H.B. 1657 seeks to alter the definitions of "general contractor" as well as "subcontractor."

Currently, H.B. 1657 has made its way out of committee and is awaiting a vote by the House. S.B. 2063 has not been as lucky. It is still pending in committee. It appears that the Legislature wants H.B. 1657 to be voted on in the House before S.B. 2063 is tackled.

For now, in order for a premises owner to qualify for the statutory immunity, it is important to comply with the requirements of the Texas Labor Code:

- (1) First, enter into a written contract with the subcontractor mandating that you provide workers' compensation insurance to all employees on the premises, and
- (2) Second, file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed. If the general contractor is a certified self-insurer, the copy must be filed with the division.

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