A License To Kill

Statutory Employer Immunity Puts Workers in the Danger Zone

By Richard M. Jurewicz

You have been contacted by a mother of three young preschool children whose husband, a carpenter, was recently killed on a construction site project. Your client's husband met his unfortunate and untimely death when early one morning he fell down an elevator shaft on the 25th floor. During your interview with the widow, you learn that the general contractor's safety officer did his inspection the day before the accident, but forgot to inspect the 25th floor. You further discover that the general contractor had removed the barricade to the elevator shaft on that floor at the end of the work day preceding the accident. To make matters more egregious, your client hands you a copy of OSHA's citation that was issued to the general contractor. Sounds like a very strong case against the general contractor right?

According to the Superior Court, the general contractor is immune to any claim your client may have for its negligence in causing her husband's death if it had any of its employees "present" at the job site.

In recognizing the statutory employer defense as a complete immunity to any civil liability, our courts, and the Superior Court in particular, have provided general contractors with the parental shield of protection insulating them from any liability, thereby permitting general contractors to engage in unsafe work practices and provide unsafe work conditions with impunity. However, a review of the historical development of the statutory employer doctrine reveals that its intended purpose—provide compensation to injured workers—has been converted by the Superior Court into an inequitable and unjustifiable weapon for general contractors.

In 1911, the Pennsylvania Legislature commissioned a study to investigate the implementation of a workers' compensation system modeled after systems in other states that had developed upon recognition of similar systems in Europe. In 1913, the Pennsylvania Legislature resolved to amend the Pennsylvania constitution to give it the power to enact laws requiring the payment by employers of compensation for injuries and occupational diseases to employees that arose in the course of their employment. This constitutional amendment, which was the enabling act for the workers' compensation system, was adopted in November 1915. In essence, this amendment empowered the General Assembly

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to enact a law that provided compensation benefits to workers injured in the course of their employment regardless of fault or wrong doing on the part of either the employer or the injured worker. However, this enabling act also specifically limited the General Assembly from restricting the amount to be recovered by workers for their injuries against parties or entities responsible for those injuries.[1]

The constitutionality of this act was upheld by the Pennsylvania Supreme Court in *Anderson v. Carnegie Steel Co.*, 255 Pa. 33 (1916), wherein it was found that it did not deprive citizens of their right to a jury trial since participation in the act was consensual.

As discussed below, since the 1974 amendments have removed the element of consent from Sections 302 and 303 of the Worker's Compensation Act, the question remains as to whether these statutes are still constitutionally viable or whether, through Section 203, they exceed the bounds of the enabling amendment and violate the constitutional right to trial by jury.

A "statutory employer" is not a common law employer who has control over the methods and means by which a worker completes his tasks. Instead, a statutory employer is a statutory fiction, the product of the Pennsylvania Workers' Compensation Act made part of the original Act by statute in 1915. Section 203 originally read:

> An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe.

In 1937 the Pennsylvania Legislature amended Section 203 to apply to injuries to workers engaged "in services furthering the employer's regular business entrusted to such employe or contractor * * * whether said injury . . . occurred upon premises occupied or controlled by the employer or not, provided only that the injury occurred in the course of employmen," *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 7 A.2d 302, (1939).

The Pennsylvania Supreme Court in *Rich Hill* held that this amendment, in effect extending a contractor's responsibility for workers' compensation benefits to accidents occurring off premises that it did not occupy or control, was unconstitutional because it went beyond the power originally delegated to the legislature. In reaching this conclusion, the court emphasized the necessity for control as being the basis for liability under the act. This constitutional requirement for control has been recognized as being the key to statutory employer status by the Pennsylvania Commonwealth Court. *See, Perma-Lite of Pennsylvania v. W.C.A.B.*, 38 Pa. Cmwlth. 481, 393 A.2d 1083 (1978).

Rich Hill is the only circumstance in which Section 203 was ruled unconstitutional. Consequently, the legislature redrafted the act to read as originally passed in 1915, which is set forth above. The statute reads this way today.

The consequence of being a "statutory employer" under the original Sections 203 and 302(b) was that the general contractor was deemed to have accepted the application of article three of the Workers' Compensation Act. Thus, if a subcontractor's employee was injured on the job site, unless the general contractor had formally posted notices rejecting application of the act under the pre-1974 amendment to Section 302(b), it was then conclusively presumed to have accepted financial responsibility under the act to pay workers' compensation

1. Article III, Section XXI, Pennsylvania Constitution, *Purdon's Constitution*, Article III, Section XVIII.

benefits. *Qualp v. James Stewart Co.*, 266 Pa. 502, 109 A. 780 (1920); *Byrne v. Henry A. Hitner's Sons Co.*, 290 Pa. 225, 138 A. 826 (1927).

Section 302(a), found at 77 P.S. Section 461, originally provided a means by which the injured worker's actual employer/subcontractor could reject the application of the Pennsylvania Workers' Compensation Act. By posted written notice "from either part to the other" the employer or employee could reject Article three (workers compensation coverage) and maintain any common law rights and defenses that each had against each other. However, if no action was taken, the employer and employee were conclusively presumed to have accepted coverage under the Act and to have waived their common law remedies.

When the Pennsylvania Legislature amended Section 302(a) in 1974, it removed the element of consent and unequivocally placed the obligation and responsibility of securing worker's compensation directly on the actual employer. A contractor could only be secondarily liable in the event the actual employer failed to carry worker's compensation.

Section 302(b) provided the means by which a "statutory employer" could reject the application of the Workers' Compensation Act. Because this section applies to statutory employers, its text closely follows the language of Section 203, which defines this term. This section originally read:

> After December 31st, 1915, an employer who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, unless the employer shall post in a conspicuous place, upon the premises where the laborers or assistant's work is done, a notice of his intention not to pay such compensation, ***. And in such cases, where article three binds such employer and such laborer or assistant, it shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed.

In 1974, Section 302(b) was amended to read as follows:

> Any employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employe or contractor, shall be liable for the payment of compensation to such laborer or assistant unless such hiring employer contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act. Any employer or his insured who shall become liable hereunder for such compensation may recover the amount thereof paid in any necessary expenses from another person if the latter is primarily liable therefor.

Similar to Sections 302(a) and 77 P.S. 461, Section 302(b) 1974 amendments clearly place the responsibility to secure worker's compensation benefits on the actual employer and not the statutory employer. The statutory employer is considered at most to be liable for their benefits in a reserve role.

It soon became clear that only foolish general contractors would reject application of the act. In *Gallivan v. Wark Co.*, 288 Pa. 443, 146 A.223 (1927) a general contractor formally posted notices rejecting the act in accordance with Section 302(b). A subcontractor's employee, who had been badly burned in an explosion at the job site, brought an action against the general contractor for its alleged negligence which contributed to the accident. A jury returned a verdict for the plaintiff and the general contractor appealed, contending that the plaintiff's exclusive remedy was workers' compensation benefits which he had received from his actual employer, a subcontractor at the site. The Pennsylvania Supreme Court rejected this argument and held that Section 203 of the Workers' Compensation Act did not apply because the contractor had formally rejected the act in accordance with Section 302(b).

As the *Gallivan* court noted in interpreting Sections 203 and 302:

> By this section [203], the legislature took hold of independent groups (employers on one hand and employees on the other) which had never borne the relation of employer and employee as to each other, and created that relation for the purposes of the act . . .. This is the most drastic interference with individual rights to be found in the act. The relation is of purely statutory origin and as it forces liability [or an election for remedies] upon parties who are not in privity of contract . . . its effect must receive close consideration.

These 1974 amendments removed entirely the ability of the aforementioned parties to volunteer or acquiesce to accepting workers' compensation coverage, which previously was the basis for upholding its constitutionality.

Therefore, there is no longer an ability to agree to the Workers' Compensation Act's application because, under amended Sections 302(a) and (b), 77 P.S. Sections 461 and 462, the employee, actual employer and contractor can no longer reject the act, which is now mandatory. This raises two legal questions: First, since by amending Section 302(a), 77 P.S. Section 461, the subcontractor and its employees can no longer reject Article III, there is a constitutional question as to whether the application of the statutory employer doctrine violates a worker's constitutional right to a trial by jury. Article I, Section VI. This has never been answered. Second, since Section 203 and 302(b) have always been applied together, many commentators have questioned whether the amendments to Section 302(b) legislatively limited the appli-

cation of the exclusivity defense provided by Section 303 to situations where the principal contractor, who has satisfied the requirements for being deemed a "statutory employer," is actually financially responsible for the payment of workers' compensation benefits.

This second question was answered in the negative by the Pennsylvania Superior Court in a divided opinion in *Cranshaw Construction, Inc. v. Ghrist*, 290 Pa. Super. 286, 434 A.2d 756 (1981). This decision involved an appeal by a defendant general contractor, which the lower court found to be a statutory employer under Section 203, but nevertheless concluded it was not immune from liability because of the application of the 1974 amendment to Section 302(b), and on that basis, denied the defendant's motion for summary judgment. In the plurality opinion written by Justice Brosky, the Pennsylvania Superior Court reversed the lower court by finding that there is "no evidence of legislative intent to alter the result in cases like *Capozzoli*, in which compensation was paid by a party other than the statutory employer," *Id.*, 434 A.2d at 759.

Clearly, however, as discussed above, the Pennsylvania Workers' Compensation Act was never intended to provide a shield to liability for negligent general contractors in civil actions brought by injured employees of subcontractors at these projects. *See, Stipanovich v. Westinghouse Electric Corporation*, 210 Pa. Super. 98, 231 A.2d 894 (1967). It was passed instead to protect injured workers and to ensure their coverage under the Pennsylvania Workers' Compensation Act. *See, Qualp, Byrne.*

The *Cranshaw* dissent, as well as the *Bartley* dissent discussed below, applies the same Pennsylvania statutory construction statutes applied by Justice Brosky for the logical proposition that extension of statutory employer immunity status under amended Sections 302 and 303 to the general contractor defeats the real purpose of the statutes. This is properly reflected by the proviso to Section 302(b) which relieves application of that section where a subcontractor has procured workers' compensation coverage. These arguments are consistent with applying Sections 203 and 302(b) as they have historically been applied to affectuate the legislature's intent of protecting the Pennsylvania worker.

In *Cranshaw*, the lower court and Judge Shantz concluded that, pursuant to such a construction, Section 302(b), 77 P.S. Section 462, which provides that article three will apply "unless such hiring of an employee or contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act," is similar to the rejection provision provided by the original Section 302(b) which removed the statutory employer from article three coverage and exemption. This is the interpretation provided by Judge Bartle in *Weinerman v. City of Philadelphia*, 785 F. Supp. 1174 (E.D. Pa. 1992) where he concluded that, where the injured employee's actual employer had procured workers' compensation coverage pursuant to Section 302(b), statutory immunity would not apply.

Nevertheless, since *Cranshaw*, the Superior Court has consistently rejected this argument. In 1983, it rejected this argument in *Bartley v. Concrete Masonry Corporation*, __ Pa. Super. __, 469 A.2d 256 (1983) (where the parties stipulated to defendant's statutory employer status) and again in a unanimous decision in *O'Boyle v. J.C.A. Corp.*, __ Pa. Super. __, 538 A.2d 915 (1988). In *Bartley*, Judge Brosky, citing his opinion in *Cranshaw*, and writing for the majority, rejected the legislative repealer argument advanced by the parties by affirming the lower court's granting of summary judgment to the defendant general contractor as a Section 203 statutory employer. Justice Hester dissented from this opinion and cited the same reasons and arguments advanced by Justice Shertz's dissent in *Cranshaw*, pointing out that the majority's application of this statute defeated its protective, humanitarian purposes to Pennsylvania workers.

In his concurring opinion in *Travaglia v. C.H. Schwertner & Son*, 570 A.2d 513 (Pa. Super. 1989), Judge Melinson candidly voiced the inequity and unfairness of the statutory employer defense. Judge Melinson stated that the statutory employer immunity had outlived its usefulness and "is contrary to the basic tenets of American law."

The dissents in *Cranshaw* and *Bartley*, together with Judge Bartle's decision in *Weinerman* and Judge Melinson's concurring opinion in *Travaglia* demonstrate a judicial intolerance toward providing immunity to negligent general contractors even though they may arguably satisfy the requirements of Section 203, since the underlying statutes through which such immunity would be provided are intended to protect and benefit the injured party bringing the action. These judges and several commentators legitimately question why such immunity should be permitted. As Judge Friedman of the Allegheny Court of Common Pleas recently observed in *Wallis v. AEG Westinghouse, slip op.*, C.A. No. GD-93-9312 (1996), *what has the general contractor given up in exchange for such a statutory shield?*

> Under the [Workmens Compensation Act], it seems clear that the employee's right to sue his undisputed actual employer [or another standing at the position of his employer] is only eliminated because of that employer's having obtained workers' compensation insurance coverage. The act itself does not expressly extend the bar to suit to those such as a [general contractor] who are in privity of contract with the actual employer.

Moreover, since the 1974 amendments have removed the "statutory employer's" ability to affirmatively reject the application of the workers' compensation statute, Judge Friedman's question is naturally followed by the question of what the general contractor, found to be a statutory employer, gains from this immunity status aside from using it as a shield from suits for its job site negligence. In addition to the legislative basis for enforcing the requirement for all subcontractors to maintain workers' compensation coverage, most general contractors require in their standard agreements and contracts with subcontractors that a subcontract will not be awarded unless the subcontractor provides proof that it has workers' compensation insurance coverage. As a result, the general

contractor does not assume the risk of being responsible for the subcontractor's employees workers' compensation benefits.

As Judge Melinson correctly pointed out, not only is the general contractor absolved from all grossly negligent conduct, but it does not even assume the responsibility of paying the injured worker his worker's compensation benefits.

Unfortunately, the Superior Court feels very comfortable relying upon a Pennsylvania Supreme Court opinion issued 44 years before the 1974 amendments and during the height of the Great Depression.

In *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 295, 153 A. 424 (1930), our state Supreme Court diagrammed, what was then Section 203, by separating it into five component parts and holding that a defendant bears the burden of affirmatively establishing that it qualifies under each part of this five prong test. These elements include:

(1) An employer who is under contract with an owner or one in the position of an owner;

(2) Premises occupied by or under the control of such employer;

(3) A subcontract made by such employer;

(4) Part of the employer's regular business entrusted to such contractor; and

(5) The injured party was an employee of the subcontractor.

Over the years since the *McDonald* decision, the five criteria have been mechanically applied. Elements 1, 3, 4 and 5 were easily satisfied by a general contractor providing contracts it had with the owner and the other one it had with the subcontractor. It was only in very rare circumstances where the work subcontracted to the subcontractor by the general contractor was not part of its regular business. The critical element in the *McDonald* test, therefore, was satisfying element 2 that is the "occupancy or control" issue. Sensing that this element provided an open back door for general contractors, the Superior Court in *Stipanovich v. Westinghouse Elec. Co., supra,* forewarned in 1967 that "the statutory employer provision, which had been enacted for the purpose of extending workmens compensation coverage to employees whose immediate employees were not covered, [is being] seized upon by employers as a possible defense against common law negligence liability."

The *Stipanovich* Court further warned that " . . . [V]ery great care . . . must be exercised before allowing an employer to avoid its liability at common law by asserting that he is a statutory employer. Section 203 of the Workmens Compensation Act, which was designed to extend benefits to workers, should not be casually converted into a shield behind which negligent employers may seek refuge."

Until our courts impose a legal obligation on general contractors to exercise reasonable care for workers' safety, construction workers will continue to be killed, maimed and seriously injured

It became apparent that the legislature headed this admonishment by the amendments to the act in 1974 when it clearly spelled out that a contractor would only be liable in the event that the subcontractor or actual employer failed to obtain workers' compensation insurance coverage. Rather than follow the clear language in the act, the Superior Court took it upon itself to further dilute the requirements in *McDonald.* First, when it was confronted with the issue of adding a sixth requirement to the *McDonald* test — that the general contractor actually pay workers' compensation benefits to the injured employee before enjoying immunity — it chose not to do so despite the clear language in the statute. Secondly, in the decisions it has handed down since the 1974 amendments on the "occupancy or control issue." the Superior Court has greatly liberalized that element.

Prior to its decision in *Zizza v. Drescher Mechanical Contractors, Inc.*, 358 Pa. Super. 600, 518 A.2d 302 (1992), courts required that actual control of the job site and work performed was necessary to establish this element. Merely having the right to control was insufficient. *Donaldson v. Commonwealth, DOT,* 141 Pa. Cmwlth. 474, 596 A.2d 269 (1991). It was clear from the Pennsylvania Commonwealth Court opinions that that appellate court had viewed actual control as a constitutional pre-requisite to the application of Sections 203 and 302(b) pursuant to the Supreme Court's 1939 decision in *Red Hill Coal Company. See, Perma-Lite of Pennsylvania v. W.C.A.B.*, 38 Pa. Cmwlth. 41, 393 A.2d 1083 (1983); *Sears v. Fischel,* 6 Pa. Cmwlth. 384, 295 A.2d 345 (1972).

What the Superior Court did in *Zizza* was to create a "either or test" virtually certain of being satisfied in any case. No longer did the general contractor have to prove it had actual control over the premises or work that was being performed. The second element could also be satisfied under a less stringent occupancy standard. Occupancy did not require a general contractor to physically inhabit or have physical possession of a property, much like a homeowner does. Rather, the mere presence of general contractor's employees on the job site no matter how incidental to the general contractor's undertaking would be sufficient to satisfy the occupancy requirement. Consequently, having a trailer on a job site would satisfy the occupancy requirement. So too would the presence of a general contractor's laborers on the job site.

The only way a general contractor might not satisfy the statutory employer requirements is if it simply acted as an intermediate party between the property owner and subcontractors by subcontracting all of the work out and then not

going to the job site. For once a general contractor sends laborers or supervisors to a job site, the requirements of occupancy or control fall into place according to the Superior Court.

Once the *McDonald* elements are satisfied, then it is a complete bar to any negligence claim that may be brought against a general contractor despite how outrageous and wanton its negligence was in causing an accident. This is true despite the fact that when the *McDonald* decision was handed down in 1930, most contractors and subcontractors did not carry workers' compensation insurance coverage let alone liability insurance coverage.

But a lot has changed in Pennsylvania in the last 67 years. We escaped the Great Depression and have seen our country led by different presidents over the years since the *McDonald* decision. We have walked the moon. Our legislature recognized those changes in construction and insurance practices when the amendments were passed in 1974. Yet, an obsolete test has been faithfully and blindly applied that has no meaningful application in today's world.

It is truly unfair and unjust for general contractors to enjoy a immunity defense that neither rhyme nor reason would support their continued enjoyment. The whole purpose in providing compensation for injured workers has been converted by general contractors into a shield against any civil liability. In virtually every construction project in which subcontracts are being awarded, a subcontractor will not be issued a contract unless it furnishes proof of workers' compensation insurance coverage before a contract can be awarded. As a matter of fact, AIA contracts have a standard clause requesting proof of workers' compensation insurance coverage. That being the case, then the general contractor contractually does not assume the legal undertaking of paying an injured subcontractor's employee workers' compensation benefits.

This was pointed out by Judge Shantz in his dissenting opinion in *Cranshaw Construction, Inc. v. Ghrist, supra,* in which he articulately reasoned "since 1974, the basis for immunity has been eliminated since the amendments specifically provide that the general contractor is not liable, even in a reserved status, if the subcontractor secured the requisite payment of compensation."

Even though the Superior Court refuses to reconsider this proposal, just on a plain equity and common sense basis, a sixth requirement should be added to the *McDonald* formulation to include the following:

> Such subcontractor has failed to secure the payment of compensation, as provided for in the Workers' Compensation Act, for such employee.

Therefore, in the event that the general contractor does assume responsibility for the payment of workers' compensation benefits to the injured employee, then it would rightfully enjoy statutory immunity status since it would be unfair to have it liable to plaintiff both for workers' compensation benefits and civil liability.

The Associated General Contractors of America is an organization that represents the General Construction Contractors of America. Since 1927, that organization has published the manual of *Accident Prevention and Construction.* This manual is aimed at persuading construction contractors that active safety measures are urgently needed and recommended. Yet while those interested in construction site safety are busy establishing standards for safe practices, construction workers still continue to be killed and seriously injured because of the illogical and unwarranted immunity provided to general contractors at work sites who profit by unsafe construction practices. The Superior Court has failed to understand that construction accidents can be greatly reduced or minimized to the fullest extent possible, but this is a sophisticated task and by its decisions, is probably the greatest single hindrance to construction safety in Pennsylvania.

If our common law develops as it must by placing legal responsibility on those whose lack of care causes construction injuries and death, then and only then will we see the death and injury toll greatly reduced. As soon as the Superior Court adopts the simple common law rule which imposes on every person engaged in an activity or event the obligation to use due care to govern his actions, so as not to be unreasonably endangering the person and property of others, then and only then will safety exist on construction sites.

Safety on construction sites should be of paramount importance. Until our courts impose on general contractors a legal obligation to exercise reasonable care for the safety of workers on construction sites, by stripping away the statutory immunity shield that they have so unjustly enjoyed, construction workers' will continue to be killed, maimed and seriously injured. General contractors must have their license to kill revoked. The legislature has already spoken; it is not too late to do something about it.■