The Statutory Employer Defense In Pennsylvania Third-Party Actions

Plaintiff's Perspective

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INTRODUCTION

The statutory employer defense has outlived its usefulness. As discussed herein, it is based entirely upon a statute which was originally passed—nearly 82 years ago—to help the Pennsylvania worker by assuring coverage under the Pennsylvania Worker's Compensation Act (hereinafter the "Act"). Instead, the statute's remedial purpose has become transmuted into a shield against liability at common law. The defense is completely contrary to our judicial system, which is founded upon a concept of accountability.

As discussed below, even Pennsylvania courts, which uphold the defense, do so in a mechanical fashion. The issues now collect into five (5) neat "boxes" which are analyzed with relative ease. However, in the meantime, where applicable, the Pennsylvania worker, for whom the Worker's Compensation Act was originally designed to protect, is prevented from presenting legitimate claims at common law.

This article examines its history and development and the present law regarding the statutory employer doctrine. It provides an analytical framework for defeating this defense by: (1) preventing the defendant from attaining "statutory employer" status and (2) by preserving arguments against immunity should statutory employer status be conferred.

PENNSYLVANIA LAW ON STATUTORY EMPLOYER

The History of the Statutory Scheme

A statutory employer is a legislative fiction created by Sections 203[1] and 302(b)[2] of the Pennsylvania Worker's Compensation Act. As stated above, its purpose is to extend coverage under the Act to subcontractor employees injured in the course of employment at a construction project. It accomplishes this goal by holding the general contractor secondarily responsible for all work site injuries, thereby providing a direct economic incentive to assure that subcontractors hired for the project maintain adequate worker's compensation coverage for their employees.[3]

Section 302(b) carries into effect the statutory employer definition set forth in Section 203. When originally drafted, Section 302(b) was elective in application.[4] General contrac-

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[1] 77 Pa.C.S.A. Section 52 (1939).

[2] 77 Pa. C.S. A. Section 462 (1974).

[3] *Qualp* v. *James Stewart Co., Inc.*, 266 Pa. 502, 109 A. 760 (1920).

[4] Section 302(b) originally provided as follows:

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

tors which satisfied the element of Section 203, defining a statutory employer, could reject responsibility for worker's compensation coverage by posting notices which stated their refusal to pay worker's compensation benefits. However, if this was not done, pursuant to Section 302(b) it was conclusively presumed that the general contractor had accepted responsibility to provide such coverage.

It soon became clear that only foolish contractors would reject the Act in this fashion, since acceptance of worker's compensation financial responsibility provided concomitant immunity to common law negligence claims, pursuant to Section 303[5] of the Act, whereas rejection preserved such common law claims against the general contractor. In 1927, the Pennsylvania Supreme Court provided a more practical alternative to general contractors, through *dictum* stated in *Gallivan* v. *Wark Co.*[6] There, in response to upholding a jury verdict against a general contractor which otherwise qualified as a "statutory employer," the Court observed that defendant could have averted workmen's compensation liability and liability at common law by expressly agreeing "with the contractor that the latter carry insurance under Section 302(b). . . ."[7] This side stepping from liability under the Act became law in *Swartz* v. *Conradis*,[8] wherein the Pennsylvania Supreme Court held that a general contractor, established to be a statutory employer under Section 203 and which required the plaintiff's actual employer to maintain worker's compensation coverage, was immune from liability at common law pursuant to Section 303 because it did not reject the Act pursuant to Section 302(b).[9]

Consequently, in the end, the elective provisions of the Act were illusory. General contractors no longer rejected the Act. Instead, they contractually required subcontractors on the site to do what they were already legally bound to do by law—maintain adequate worker's compensation coverage for their employees. Moreover, most contracts indemnified the general contractor in cases were coverage was not provided.

A further imbalance was observed in 1930, when the Pennsylvania Supreme Court held that the Act did not preclude common law actions by general contractor employees for injuries caused by subcontractor negligence.[10] Consequently, general contractors found to be statutory employers may maintain common law actions against subcontractor employees for negligence even though Section 203 may preclude similar subcontractor actions against the general contractor.[11]

These inequities in the application of immunity to general contractors satisfying the Section 203 requirements for statutory employer prompted the Pennsylvania Supreme Court and courts throughout the state to restrictively interpret the definition of a statutory employer at common law. In *McDonald* v. *Levinson Steel Co.*,[12] the Pennsylvania Supreme Court diagramed Section 203 into five component parts and held that the defendant in a third-party action at law, bears the burden of affirmatively establishing that it qualifies under each of this five prong test. This holding has been applied in every statutory employer decision since 1930 and is known as the *McDonald* test. Pursuant to this test, the proponent of the statutory employer defense bears the burden of affirmatively establishing that:

(1) It is under contract with an owner or one in the position of an owner;
(2) It occupies the premises in question or is in actual control;
(3) It made a subcontract with the injured party's employer;
(4) It subcontracted to that actual employer part of its regular business; and
(5) The injured party was an employee of the subcontractor.[13]

Pennsylvania courts have consistently held that all of these individual components must be satisfied and are strictly scrutinized to prevent the remedial purposes of the Pennsylvania Workers Compensation Act from being

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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.

[5] 77 Pa. C.S.A. Section 481 (1974).

[6] 288 Pa. 443, 146 A. 223 (1927).

[7] *Id.*

[8] 298 Pa. 343, 148 A. 529 (1929).

[9] A similar result was reached by the Court in *Capozzoli* (p. 7, n. 15).

[10] *Robinson* v. *Atlantic Elevator Co.*, 302 Pa. 287, 153 A. 424 (1930).

[11] *Id.*

[12] 302 Pa. 287, 295, 153 A. 424 (1930).

[13] *Id.* at 295, 153 A. at 426.

defeated where negligence is established.[14] Further, the Pennsylvania Superior Court in *Stipanovich* v. *Westinghouse Elec. Co.*,[15] appropriately recognized that significant caution was necessary before conferring immunity status as follows:

> [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.

In 1974, Sections 302 and 303 were amended to their present form, to remove the elective component of the original Act. Consequently, the parties to a construction site no longer can opt out of coverage—and back into their respective common law roles—by posting appropriate notices at the work site. Instead, general contractors which qualify as statutory employers, under Section 203, are liable for worker's compensation coverage, under Section 302(b), unless the injured worker's actual employer, the subcontractor, has secured payment for compensation as required by the Act. However, as previously stated, this is now standard form since AIA form contracts routinely require subcontractors to maintain such coverage, as does the Act itself.

Since Sections 203 and 302(b) both include identical language which define the elements of statutory employer status and were historically applied together before the amendments to determine general contractor immunity under Section 303, the amendments sparked considerable debate over whether Sections 302(b) and 203 would be applied *in pari materia*, as a matter of public policy, to limit immunity status to general contractors which otherwise satisfy the prerequisites to becoming a "statutory" employer pursuant to Section 203. As a result, several courts and commentators construed the 1974 amendments as adding a sixth requirement to the *McDonald* test, described above—the requirement that the injured worker's actual employer, the subcontractor at the site, did not provide worker's compensation benefits under the Act.[16]

However, this construction was rejected in 1981, by a divided Pennsylvania Superior Court in *Cranshaw Construction, Inc.* v. *Ghrist*.[17] *Cranshaw* involved an appeal by a defendant general contractor which the lower court found to be a statutory employer under Section 203, but nevertheless concluded was not immune from liability pursuant to the 1974 amendment to Section 302(b), because the plaintiff's actual employer had paid worker's compensation benefits. In a plurality opinion, the Pennsylvania Superior Court reversed the trial court by finding that there is "no evidence of legislative intent to alter the result in cases like *Capozzoli*,[18] in which compensation was paid by a party other than the statutory employer."[19]

In dissent, Justice Shertz applied the Pennsylvania statutory construction statute to conclude that Sections 203 and 302 "can and ought to be read together" and that such a reading requires that, for immunity to apply, it is necessary for the plaintiff's actual employer to have failed to have secured appropriate compensation coverage under the Act.[20]

Nevertheless, in 1983, a panel decision in *Bartley* v. *Concrete Masonry Corporation*,[21] solidified *Cranshaw's* construction of the amendments. In *Bartley*, the Pennsylvania Superior Court applied *Cranshaw* to affirm summary judgment where the plaintiff stipulated to the defendant's status as a statutory employer under Section 203, but nevertheless argued that immunity should be denied because the plaintiff's actual employer had provided worker's compensation benefits pursuant to the Act. In dissent, Justice Hester cited Justice's Shantz's

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[14] *Donaldson* v. *Commonwealth, DOT*, 141 Pa. Cmwlth. 474, 596 A.2d 269 (1991); *Rolick* v. *Collins Pine Co.*, 975 F.2d 661 (3d Cir. 1991); *Travaglia* v. *C.H. Schwertner & Son, Inc.*, 391 Pa. Super. 61, 570 A.2d 513 (1989).

[15] 210 Pa. Super. 98-101, 106, 231 A.2d 894, 896, 898 (1967).

[16] Feldman, *Trial Guide*, Section 21.46, 137-140.

[17] 209 Pa. Super. 286, 434 A.2d 756 (1981).

[18] In *Capozzoli* v. *Stone & Webster Engineering Corp.*, 352 Pa. 183, 42 A.2d 524 (1945), the Pennsylvania Supreme Court, in applying the pre-amended Sections 203 and 302(b), held that, where a defendant general contractor, found to be a statutory employer under Section 203, does not reject the application of article three of the Pennsylvania Workers Compensation Act pursuant to Section 302(b), it thereby becomes bound by the terms of article three which includes the exclusivity section, Section 303 which provides immunity for actions at law. *Accord, Swartz* v. *Conradis, supra*. In reaching this holding, the *Capozzoli* court rejected the argument that the general contractor had removed itself from application of the Pennsylvania Workers Compensation Act by agreeing with the plaintiff's employer/subcontractor for the plaintiff to provide coverage for workers compensation benefits.

[19] *Id.*, 434 A.2d at 759.

[20] *Id.* at 765.

[21] 469 A.2d 256 (Pa. Super. 1983).

dissent in *Cranshaw* and further pointed out that, under the facts presented, the defendant contractor was not even remotely at risk to bearing any worker's compensation liability under the Act and that, consequently immunity defeated the remedial purpose of the Act.[22]

In 1988, the Superior Court again refused to add a sixth requirement to the *McDonald* test by restricting statutory employer immunity to situations where there was inadequate coverage, in *O'Boyle* v. *J.C.A. Corp.*[23] This time, the Court unanimously cited *Cranshaw* and *Bartley* and summarily rejected the plaintiff's construction argument by stating that it is more appropriately directed to the legislature.

These decisions demonstrate that mechanical application of the statute alone defeats the ultimate purpose of the Act which is to help the Pennsylvania worker. In *Cranshaw*, the plaintiff sustained severe injuries when he was crushed by a concrete wall. The court did not even reach the question of negligence because it concluded in mechanical fashion that the five *McDonald* prongs were satisfied. In *Bartley*, the plaintiff conceded these factors. Consequently, the court never considered the liability issues surrounding the decedent's accident. However, these decisions have not prevented the courts from continuing to question the purpose of Section 203 or from narrowly construing its provisions in their deliberations.[24]

Further, as discussed below, it is important to keep in mind the constitutional limitations to the Act. In fact, the Act's enabling legislation is an amendment to the Pennsylvania Constitution, which expressly limits the legislative authority to limit or restrict common law actions.[25] Further, in 1916, the Pennsylvania Supreme Court held that the Act permissibly interfered with the right to trial by jury, conferred by Article I, Section 6 of the Pennsylvania Constitution,[26] but nevertheless justified this ruling upon the Act's *elective* component as follows:

> Sections 301, 302 and 303 of Article III do not deprive citizens of the rights of trial by jury in violation of Article I, Section VI, of the constitution, as neither employer nor employe is deprived of a trial by jury *except by his own consent*, conclusively presumed to have been given unless withheld in the manner prescribed by the act.[27]

The question, therefore, remains as to whether these statutes are still constitutional as applied or whether, by failing to limit their application after removal of the Act's elective component in 1974, these statutes exceed the bounds of the enabling amendment and violate an individual's right to a trial by jury of his common law claims.

A third constitutional limitation is established by the Pennsylvania Supreme Court's 1937 decision in *Rich Hill Coal Co.* v. *Bashore*,[28] a case wherein Section 203, albeit in a different form, was found to be unconstitutional. *Rich Hill* concerned a 1937 amendment to Section 203 which rendered it applicable 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 employment."[29] The Pennsylvania Supreme Court held that this amendment exceeded the bounds of the Act's enabling amendment and therefore was unconstitutional. In reaching this holding, the court emphasized the necessity for *control* as being the basis for liability under the act.[30] This constitutional requirement for actual control continues to be recognized as the key to statutory employer status by the Pennsylvania Commonwealth Court.[31]

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[22] *Id.* at 261.

[23] 538 A.2d 915 (Pa. Super. 1988).

[24] *See*, e.g., *Wallis* v. *AEG Westinghouse*, *slip. op.*, C.A. No. GD-93-9312 (1996) (applying an equitable estoppel analysis to preclude statutory immunity); *Donaldson* v. *Commonwealth, DOT*, 141 Pa. Cmwlth. 474, 596 A.2d 269 (1991); *Weinerman* v. *City of Philadelphia*, 785 F.Supp. 1174 (E.D.Pa. 1992); *Travaglia* v. *C.H. Schwertner & Son, Inc.*, *supra*, at 518-19 (concurrence by Justice Melinson).

[25] This amendment provides, in material part that:

> The general assembly may enact laws requiring the "*payment by employers*," or employers and employee jointly, of reasonable compensation for injuries to employee arising in the course of their employment, and for occupational diseases of employee, whether or not such injuries or diseases result in death, and regardless of fault of employer or employe, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; *but in no other cases shall the general assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted.*

[26] *Anderson* v. *Carnegie Steel Co.*, 255 Pa. 33 (1916).

[27] *Id.*

[28] 334 Pa. 449, 7 A.2d 302 (1939).

[29] *Id.*, 7 A.2d at 310.

[30] *Id.*, 7 A.2d at 310-311.

[31] *See, Perma-Lite of Pennsylvania* v. *W.C.A.B.*, 38 Pa. Cmwlth. 481, 393 A.2d 1083 (1978) (actual

In the end, it is critical for counsel to evaluate any case involving a statutory employer defense against the *McDonald* factors. These factors are discussed below.

The McDonald Test Analyzed

The Requirement of a Contract With the Property Owner

The Pennsylvania Supreme Court's decision in *McDonald* provides an example of the necessity of establishing a contract *with the property owner* as a pre-requisite to obtaining statutory employer status under Section 203 of the act. In particular, *McDonald* holds that the property owner can never be a Section 203 statutory employer.[32]

In *Smith* v. *W.C.A.B. (Miller),*[33] the Pennsylvania Commonwealth Court reversed the Workers Compensation Appeal Board which awarded workers' compensation benefits to a subcontractor's employee at a work site. Claimant's employer contracted with the defendant property owner who acted as its own general contractor. On appeal, the injured worker argued that the property owner was acting at a "dual capacity" and thereby satisfied Section 203 as a statutory employer. The court disagreed and reversed, citing *McDonald* and holding that the Pennsylvania courts have not accepted dual capacity as a basis for satisfying the first requirement that there be an actual contract with an owner of the property.

In most cases, it will be apparent whether the necessary vertical privity relationship has been established. Where there is a general contractor who has contracted with the owner of a property to perform construction and this general contractor, in turn, has a contract with an injured worker's employer, the first prong of the *McDonald* test is satisfied. As discussed below, however, this scenario does not necessarily satisfy the fourth and fifth prongs of the *McDonald* test.[34]

Occupation or Control

Occupation v. *Control*

The second *McDonald* element is satisfied only where there is evidence which establishes that the general contractor has actually occupied the premises or controls the work site. In *Davis* v. *City of Philadelphia,*[35] a workers compensation case, the Pennsylvania Supreme Court concluded that the use of the term "or" in Section 203 was intended to be applied in the disjunctive so that evidence of either occupation or control would satisfy this requirement so that both elements—occupation and control—need not be established to obtain statutory employer status.

This holding was applied in *Zizza* v. *Dresher Mechanical Contractors. Inc.*,[36] wherein the Pennsylvania Superior Court affirmed a trial court's award of summary judgment in favor of a general contractor, Dresher Mechanical Contractors, Inc., ("Dresher") pursuant to the statutory employer defense. In *Zizza*, the plaintiff was injured in the course of employment while digging in an excavation during the construction of a PECO power plant. PECO, the property owner, contracted with the defendant, Dresher, which, in turn, had subcontracted with the plaintiff s employer for excavation work at the project. The Pennsylvania Superior Court, rejected the plaintiff s arguments which asserted that defendant Dresher was required to present evidence, establishing both its occupation and control of the area where plaintiff was injured. The court found that evidence of occupation alone would be sufficient to sustain this defense and affirmed

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control is necessary to preserve constitutionality under *Rich Hill Coal Company*) (*citing, D'Alessandro* v. *Barfield*, 348 Pa. 328, 35 A.2d 412 (1944)). *See also, Sears Roebuck & Co.* v. *Fishel*, 6 Pa. Cmwlth. 384, 295 A.2d 345 (1972) ("since the *Rich Hill* holding . . . the courts have adhered to a rule of actual as opposed to the right to control as a requisite to the applicability of Section 203").

[32] In *McDonald* the defendant, the Levinson Company, was erecting a steel crane shed for its own occupancy on ground that it possessed through a lease. To this end, it contracted with a company, called Uhl, to do the steel work with another company, Dunn, to construct concrete piers and with a third company to do the roofing required for the project. Plaintiff's decedent, an employee of Uhl, was killed in the course of his employment at the construction site when a concrete pier broke. Decedent's employer paid his workers compensation benefits. The plaintiff brought an action against Levinson for damages at law, alleging that it was negligent in providing a defectively constructed pier on which decedent's work was to be performed. The case was presented to a jury which returned a verdict in plaintiff's favor. Upon denial of post-trial motions, the defendant appealed. The Pennsylvania Supreme Court affirmed by concluding that the defendant had failed to satisfy the first requirement under Section 203 which was that it be in contract with *the* owner of the property. The court rejected the defendant's argument that it operated in a "dual capacity" by holding that an owner cannot contract with itself.

[33] 152 Pa. Cmwlth. 77, 618 A.2d 1101 (1992).

[34] *See, Grant* v. *Riverside Corporation*, ___ Pa. Super. ___, 528 A.2d 962 (1987).

[35] 348 Pa. 407, 35 A.2d 77 (1944).

[36] 358 Pa. Super. 600, 518 A.2d 302 (1972).

summary judgment since Defendant Dresher submitted undisputed evidence that established that the defendant had occupied the site in fulfillment of its contract. Accordingly, in light of *Zizza* to successfully defend against a summary judgment motion, one must obtain counter evidence in the form of statements and testimony which preserves a genuine dispute regarding whether the general contractor has, in fact, "occupied" the construction premises.

However, the Superior Court's decision in *Zizza*—like its mechanical application of Section 203—is not universally accepted. In fact, the Pennsylvania Commonwealth Court has repeatedly held that actual control is necessary to establish a statutory employer in workers compensation matters.[37]

In fact, as discussed above, the Pennsylvania Commonwealth Court views actual control as an essential prerequisite to the constitutional application of Sections 203 and 302(b) pursuant to the Pennsylvania Supreme Court's 1939 decision in *Rich Hill Coal Company*.[38]

Consequently, the need for control should always be emphasized in response to a motion for summary judgment on this issue. If there is any dispute, the case should proceed to the jury. In fact, even the Pennsylvania Superior Court now recognizes the need for evidence of actual control, as demonstrated in *Dougherty* v. *Conduit & Foundation Corp.*[39] In *Dougherty*, Justice Cirillo, writing for a unanimous Superior Court, held that the trial court abused its discretion by not directing a verdict in favor of defendant Conduit where the record revealed that defendant Conduit actually controlled the work site. Although, the Superior Court cited *Zizza* for the proposition that evidence of occupation alone would satisfy the second prong of the *McDonald* test, the court actually based its decision upon a finding of actual control, to satisfy the second prong in the *McDonald* test. It further concluded that the mere right to control is insufficient for satisfying this requirement. As such, the *Dougherty* decision, actually supports the requirement for "actual control" since that was a predicate for its decision and holding.[40]

Evidence of Occupation: Mere Presence v. Actual Dominion Over The Premises

Significantly, *Zizza* stands alone in holding that the second prong of the *McDonald* test is satisfied through mere evidence of occupation without evidence of actual control. In *Davis, supra*, there is evidence of both occupation and control by the party found to be a statutory employer. In that case, the entity found to be a statutory employer was physically present at the premises where work was being performed, was thoroughly familiar with all the machinery being removed, was in physical possession of the premises at all times and directed all work on the premises to be performed. The court further concluded that the defendant was in control of the premises since it directed which pieces of parts of the machinery in question were to be removed and made all arrangements for their removal.

In *Dougherty, supra*, there was also evidence of actual occupation and control. The contract for the job required the defendant general contractor to supervise, direct the work and be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the work at the owner's premises. In fact, the contract further required that the defendant general contractor was to employ a superintendent to be in attendance at the project during the progress of all work. This superintendent testified that he selected the work areas for the plaintiff's employer, gave the plaintiff's employer a "punch list" which told them exactly where they should be working, scheduled all work and controlled the only source of access to the station for these workers. These areas of access were secured by padlocks and chains installed by the defendant general contractor. This control over the means of access and egress for the work area along with the constant physical presence established the defendant general contractor's actual domination over the premises. This is distinct from a mere presence where, over a broad construction site involving several buildings, the general contractor makes pass-by inspections only. In *Dougherty*, all the work was performed at Philadelphia's 30th Street Station, which is a single, isolated building and unit.

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[37] *See, Wright Demolition and Excavating Co.* v. *Workmen's Compensation Appeal Board (Manuel)*, 61 Pa. Cmwlth. 479, 482-83, 434 A.2d 234 (1981) (actual control over the construction site is necessary for statutory employer status); *Donaldson* v. *Commonwealth, DOT*, 141 Pa. Cmwlth. 474, 596 A.2d 269 (1991) (the mere right to control the premises or the subcontractors is insufficient); *Caldarelli* v. *W.C.A.B.*, 115 Pa. Cmwlth. 611, 542 A.2d 181 (1989) (same).

[38] *See, Perma-Lite of Pennsylvania* v. *W.C.A.B., supra; Fischel* v. *Sears, supra.*

[39] 449 Pa. Super. 405, 674 A.2d 262 (1996).

[40] The issue on appeal is whether the superior court improperly substituted its conclusion on an issue of fact—control—where the trial court deferred to the jury's determination for this issue and, if so, whether me. e occupation is enough.

In *Dougherty*, the evidence also revealed that defendant general contractor had retained the power and exerted actual control over the subcontractors which included plaintiff's employer. The contract expressly stated that the defendant general contractor was to supervise and direct all work and the contract itself specified that this work would include painting, the job sublet to plaintiffs employer. As stated previously, the evidence of actual occupation and domination was also evidence of actual control. In addition, the evidence revealed that the defendant general contractor supplied the specifications to the plaintiff's employer and the defendant's employees testified that they were to make sure that the subcontractors were following the specs and painting at the proper degree on the surface. In addition, the defendant's employees controlled when plaintiff's employer conducted its work, regulating this activity pursuant to weather conditions and humidity.

Actual Control v. *The Mere Right to Control*

Through *Dougherty*, the Pennsylvania Superior Court's interpretation of *McDonald* is consistent with the Pennsylvania Commonwealth Court's interpretation of Section 203 with regard to the second prong, to the extent that the Superior Court now requires evidence of actual control in order to sustain a finding that a defendant general contractor is a statutory employer. The distinction between the mere right to control and evidence of actual control is made by the Pennsylvania Commonwealth Court in *Donaldson* v. *Commonwealth, DOT*.[41]

In that case, the plaintiff was severely injured when he fell a distance of 65 feet from a bridge under construction as part of work being performed on 14 bridges pursuant to a renovation and repair contract obtained by the defendant Dick Corporation ("Dick") from the Department of Transportation on behalf of the Commonwealth of Pennsylvania. Defendant Dick had subcontracted a portion of the demolition and removal work for certain bridges to the plaintiff's actual employer, Joseph B. Fay Co. ("Fay"). Plaintiff was injured while walking on planking on one of the bridges, to remove debris, pursuant to his job duties, when the planking broke and he fell through to an embankment below. Defendant Dick raised, among other defenses, the defense of statutory employer. A judgment notwithstanding the verdict was granted to the defendant and the plaintiff appealed. The Pennsylvania Commonwealth Court reversed because there was no evidence that defendant Dick had exercised actual control over the construction site. In fact, defendant Dick conceded that it did not have actual control but argued that it was sufficient that it maintained a right to control through its contract. The court rejected this argument by concluding that actual control is necessary to satisfy the Section 203 statutory employer definition. In reaching this conclusion, the court relied upon *Perma-Lite of Penna.* v. *W.C.A.B.*,[42] which, specifies that actual control is a constitutional prerequisite to a finding of statutory employer status. The court further expressly declined to follow *dictum* in *Mitchell* v. *W.S. Cumby & Son. Inc.*,[43] which indicated that a mere right to control would be sufficient to satisfy the second prong of the *McDonald* test. In so doing, the court stated that such a finding is contrary to the well established rule in Pennsylvania that actual control is necessary.[44]

Actual control was also established in *Cranshaw, supra*, where the plaintiff's co-worker testified that the defendant general contractor was considered to be "the boss of the job site" and was "completely the general of the whole thing'. Similarly, in *Colloi* v. *Philadelphia Electric Co.*,[45] there was evidence that the defendant general contractor exercised actual control over the injured plaintiff's activities by actually directing the injured worker to dig at a certain spot whereupon, in compliance with this directive, he made contact with PECO's submerged electrical conduit lines and was electrocuted. The court held that the general contractor's direction of the injured worker to the particular spot where he performed the activity was evidence of actual control which was not contradicted by the plaintiff at trial. Consequently, the court affirmed a directed verdict in favor of the defendant general contractor.[46]

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[41] 141 Pa. Cmwlth. 474, 596 A.2d 269 (1991).

[42] 38 Pa. CmWlth. 481, 393 A.2d 1083 (1978).

[43] 704 F.Supp. 65 (E.D.Pa. 1989).

[44] *Donaldson*, 596 A.2d at 277.

[45] 332 Pa. Super. 284, 481 A.2d 616 (1984).

[46] *See also, McGrail* v. *W.C.A.B.*, 145 Pa. Cmwlth. 595, 604 A.2d 1109 (1992) (where private electrician was under supervision of assistant director of public service for county, county was considered statutory employer because director, who told claimant to remove wires and place them on a plate, was considered to be in a supervisory position that satisfied the second prong) and in *Wright Demolition and Excavation Co.* v. *W.C.A.B.*, 61 Pa. Cmwlth. 479, 434 A.2d 234 (1981) (a general contractor was physically present throughout the operation and

However, given the *Colloi* facts, the court should be able to consider why statutory employer immunity should apply. Clearly, such immunity should not have applied under these facts. As Justice Melinson candidly stated in *Travaglia*, *supra*, such immunity serves no logical purpose and its contrary to the basic tenets of American law.[47]

Contracts With the Actual Employer

When defending against the statutory employer doctrine, it is critical to remember that Section 203 is based upon privity of contract. Where there is no vertical privity connection between the owner and the injured worker, Section 203 is not satisfied. This requirement is embodied in the third prong of the *McDonald* test which requires evidence of a contract between plaintiff's employer and the defendant. Where no contract exists, the statutory employer defense fails.

In *Grant* v. *Riverside Corporation*,[48] an ironworker's widow filed suit against the defendant, a subcontractor at a Pittsburgh construction site, where plaintiff's decedent was killed. This defendant did not subcontract part of its contracted duties to the plaintiff's employer. There was no contract between these entities. The general contractor at this site was Turner Construction Company, which was not a party to this lawsuit. Plaintiff's decedent was killed while working on a materials hoist, designed and installed by the defendant at the construction site. The defendant argued that it was the plaintiff's statutory employer and moved for a judgment notwithstanding the verdict, which was denied. On appeal, the defendant argued that, pursuant to its contract with the general contractor, it was entrusted with the general contractor's regular business and thereby should have been afforded protection under the Pennsylvania statutory employer doctrine. The Pennsylvania Superior Court disagreed holding that the defendant did not establish the necessary privity relationship between itself and the plaintiff because it did not have a contract with the plaintiffs employer finding this to be a necessary element.

In addition to Justice Melinson's concurring opinion, the Pennsylvania Superior Court's decision in *Travaglia* v. *C.H. Schwertner & Son*,[49] is notable because it highlights the different roles of a construction manager and a general contractor. In *Travaglia*, the property owner, PECO, contracted with defendant, United Engineers and Contractors ("United"), as a project manager, to oversee and direct construction at the Eddystone Power Station. On behalf of and as agent to PECO, defendant United signed a contract for the plaintiffs employer to provide iron work for this project. summary judgment on the statutory employer defense. The trial court granted the motion. The Pennsylvania Superior Court reversed because there was no contractual privity between the plaintiffs employer and defendant. The court emphasized that defendant was not a actual party to the contract between PECO and the plaintiffs employer.[50]

In *Dume* v. *Elkom Co., Inc.*,[51] this prong was established because there was a direct contract with the defendant general contractor. The Superior Court concluded, *in dictum*, however, that this privity relationship need not be direct and cited the Pennsylvania Supreme Court's decision in *Qualp* v. *James Stewart Co., Inc.*,[52] a workers compensation case, as an example. In *Qualp*, the claimant's decedent was employed by a subcontractor on a construction site. The defendant general contractor was not aware that the subcontractor it hired had further subcontracted this work to the plaintiff's employer. The Pennsylvania Supreme Court held that the general contractor was the decedent's statutory employer under Section 203.[53]

The "Regular Business" Requirement

The phrase "regular business" in Section 203 is at the heart of the fourth prong of the *McDonald* test. Principally, the question of

directed the claimant to perform activities which the contractor actively supervised); *See also, Fishel* v. *Sears, supra*, (the subcontractor/installer used his own tools and apparatus and took directions from another and this did not establish actual control).

[47] *Travaglia* v. *C.H. Schwertner & Son, supra.*

[48] 364 Pa. Super. 593, 528 A.2d 962 (1987).

[49] 391 Pa. Super. 61, 670 A.2d 513 (1989).

[50] *See also, Cox* v. *Turner Construction Co.*, 373 Pa. Super 214, 540 A.2d 944 (1988) (general contractor which did not actually contract with the plaintiff's employer, not statutory employer; project manager had actually contracted with plaintiff s employer and paid this subcontractor).

[51] 368 Pa. Super. 280, 533 A.2d 1063 (1987).

[52] 266 Pa. 502, 109 A. 780 (1920).

[53] The Pennsylvania Superior Court again recently applied *Dume* and *Qualp* to hold that statutory employer immunity will be conferred whenever there is a direct privity line between the owner and defendant and, in turn, the defendant and the plaintiff's employer. *See, Lascio* v. *Belcher Roofing Corp., slip. op.* 1997 Pa. Super. LEXIS 3349 (October 30, 1997).

"regular business" is based upon the defendant's underlying contract with the property owner. If it is not within the express language stated within this contract, then it is not part of the defendant's "regular business."[54] This prong was satisfied in *Wright Demolition and Excavating Co.* v. *W.C.A.B.*,[55] and in *O'Boyle* v. *J.C.A. Corp.*, discussed above.[56] Consequently, it is critical to carefully analyze the owner's contract with the defendant to determine whether the task undertaken by the plaintiff's employer is a matter that is a part of the defendant's contract with the property owner.

This prong was not satisfied in *Stipanovich* v. *Westinghouse Elec. Corp.*,[57] where the plaintiff's employer contracted with defendant for renovation and relocation services. The defendant argued that this contract was made in satisfaction of its underlying contract with the property owner, the United States government, through the Atomic Energy Commission. The underlying contract with the United States, however, was for research and development and not for renovation services. The Pennsylvania Superior Court affirmed the lower court's decision which declined to find defendant to be a statutory employer by concluding that the work entrusted to the plaintiff's employer was not part of the defendant's regular business, but it was merely collateral to it.[58] Consequently, the key issue with regard to this prong of the *McDonald* test is to distinguish between services that are required by the defendant's underlying contract from those which are collateral to that contract.

The Injured Worker's Status: Independent Contractor or Other Exception

The issue with regard to this last prong is whether the plaintiff is an employee or an independent contractor. First, it must be established that the plaintiff is eligible for coverage under the Pennsylvania Worker's Compensation Act or whether it would otherwise preclude a remedy at law. For example, in *D'Alessandro* v. *Barfield*,[59] the plaintiff was a minor who thereby was not precluded from a common law action against his actual employer. Accordingly, immunity was not conferred under Sections 203 and 302(b).

Similarly, if it can be established that the plaintiff is an independent contractor of the subcontractor, then the statutory employer status should also not be conferred. *Rolick* v. *Collins Pine Company*,[60] provides such an example. In *Rolick*, the parties had stipulated to the first four elements of the *McDonald* test and the only question was whether the plaintiff was an employee or an independent contractor. Because the evidence established that the plaintiff used his own tools and exercised his sole judgment over the manner and methods of his work, he was found to be an independent contractor consistent with Pennsylvania common law. Consequently, pursuant to *Rolick*, it is important to investigate and establish the plaintiff's relationship with his employer since it is relevant in evaluating the statutory employer defense.

CONCLUSION

These cases establish that the Pennsylvania statutory employer is a legal anachronism. Its original purpose has long been satisfied, by assuring subcontractor financial responsibility for Worker's Compensation coverage. This is required separately by the Act and by most construction contracts. Now, nearly eighty-two years later, it is clear that the cost of this assured coverage is too great for the Pennsylvania worker. The Pennsylvania statutory employer now has harmed more workers that it helps by depriving them of legitimate claims at common law. Part of the solution clearly must come from the legislature which must rectify the improper transmutation of an intended humanitarian measure into a statutory shield against legal responsibility. In the meantime, however, our courts must vigilantly protect against the misapplication of Section 203's artificial constrained "employer" relationship. Not only does this artificial statutory relation present constitutional limitations, it is fraught with practical problems which work to the

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[54] *See, O'Boyle* v. *J.C.A. Corp., supra.*

[55] *Supra* (general contractor, in charge of demolition and debris removal, was in the business of providing this service, and had contracted with plaintiff's employer for the demolition portion of the underlying contract and had retained responsibility for debris removal).

[56] *See also, Werner* v. *Big Sky Shop, supra,* (general contract required work performed by plaintiff's employer); *Dougherty* v. *Conduit & Foundation Corp., supra,* (same).

[57] *Supra.*

[58] *See also, Jamison* v. *Westinghouse Elec. Corp.*, 375 F.2d 465 (1967) (same). *See also, Allen* v. *Babcock & Wilcox Tube Co.*, 356 Pa. 414, 52 A.2d 314 (1947) (requiring evidence that defendant actually regularly engaged in activity for which plaintiff's employer contractually retained).

[59] 348 Pa. Super. 328, 35 A.2d 412 (1944).

[60] 975 F.2d 661 (3d Cir. 1991).

detriment of the Pennsylvania worker. Until the legislature amends this statute, courts and counsel must continue to question *what the general contractor given up in exchange for such a statutory shield* and strictly apply the *McDonald* components to limit its application where general contractor negligence is established.