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CASES NOTED

WORKMEN'S COMPENSATION — GENERAL CONTRACTOR'S LIABILITY

Plaintiff, an employee of a subcontractor engaged by the defendant general contractor in construction work, was injured by reason of the defendant's negligence. The applicable workmen's compensation statute¹ required the contractor to procure workmen's compensation insurance protection in the event the subcontractor failed to do so. The defendant obtained compensation insurance coverage for the employees of the subcontractor even though the subcontractor had provided such coverage. *Held*, the general contractor was not released from liability for negligence merely because he volunteered to carry compensation insurance that the law did not require. *Thomas v. George Hyman Constr. Co.*, 173 F. Supp 381 (D.D.C. 1959).

Forty-one states presently have provisions in their workmen's compensation laws which require a general contractor to provide, either *directly* or *indirectly*, compensation to the employee of a non-insured subcontractor doing work which is part of the business, trade or occupation of the general contractor.² The effect of such legislation is to make the general contractor the "statutory employer" of the employee of the subcontractor when the latter does not carry workmen's compensation insurance; essentially, the purpose of these "statutory employer" clauses is to give the

1. 36 D. C. CODE § 501 (1951): "[T]he contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payments."

2. ALA. CODE ANN. tit. 26, § 253 (1940); ARIZ. REV. STAT. § 23-902 (1956); ARK. STAT. § 81-1306 (1947); COLO. REV. STAT. ANN. § 81-9-1 (1953); CONN. GEN. STAT. § 7423 (1949); FLA. STAT. § 440.10 (1957); GA. CODE ANN. § 114-112 (Supp. 1956); IDAHO CODE ANN. § 72-811 (1947); ILL. REV. STAT. ch. 48, § 138.1 (1957); IND. ANN. STAT. § 40-1204 (1952); KAN. GEN. STAT. ANN. § 44-503 (Supp. 1957); KY. REV. STAT. § 342.060 (1953); LA. REV. STAT. § 23.1061 (1950); ME. REV. STAT. ANN. ch. 31, § 2 (1954); MD. ANN. CODE art. 101, § 62 (Supp. 1957); MASS. GEN. LAWS ch. 152, § 18 (1958); MICH. COMP. LAWS § 411.10 (1948); MINN. STAT. § 176.215 (Supp. 1958); MO. REV. STAT. § 287.040 (1949); MONT. REV. CODES ANN. § 92-604 (1947); NEB. REV. STAT. § 48-116 (1943); NEV. REV. STAT. § 616.270 (1955); N. J. STAT. ANN. § 34:15-79 (1957); N. M. STAT. ANN. § 59-10.4 (1953); N. Y. WORKMEN'S COMPENSATION LAW § 56; N. C. GEN. STAT. § 97-9 (1958); OHIO GEN. CODE ANN. § 1465-61 (1946); OKLA. STAT. ANN. tit. 85, § 11 (1951); ORE. REV. STAT. § 656.124 (1957); PA. STAT. ANN. tit. 77, § 1205 (1952); S. C. CODE § 72-112 (1952); S. D. CODE § 64.0108 (1939); TENN. CODE ANN. § 6866 (1934); TEX. REV. CIV. STAT. art. 8307, § 6 (1956); UTAH CODE ANN. § 35-1-42 (1953); VT. STAT. § 601 (1947); VA. CODE ANN. § 65-27 (1950); WASH. REV. CODE § 51.08.050 (1957); WIS. STAT. ANN. § 102.06 (1957); WYO. STAT. ANN. § 27-60 (1957); California, Delaware, Iowa, New Hampshire, North Dakota, Rhode Island, and West Virginia do not have this statutory provision; 2 LARSON, WORKMEN'S COMPENSATION LAW 72.31 (1952).

employee a compensation remedy against the general contractor.³ Without this provision, "an employer subject to the Workmen's Compensation Act could escape liability for injuries received by persons in carrying on his trade or business by the simple expedient of hiring an independent contractor to do the work and letting him employ and direct the workmen."⁴

A few jurisdictions impose a *direct* duty upon the general contractor in that he alone must provide compensation benefits for the employees of the subcontractor.⁵ Where this unqualified duty exists, the general contractor is granted immunity from "third party"⁶ tort suits by the subcontractor's employees.⁷ However, most jurisdictions impose an *indirect* duty upon the general contractor in that the general contractor is to obtain compensation coverage if the subcontractor fails to do so.⁸ In this situation, the courts have generally granted the general contractor (who alone secures coverage) the same tort immunity prevailing in the *direct* duty jurisdictions.⁹ However, when the above fact pattern has been reversed, viz., when the subcontractor does carry compensation coverage and the general contractor does not, a pronounced split of authority exists as to the general contractor's liability to the subcontractor's employees for injuries sustained in the course of employment. A narrow approach is indicated by *Anderson v. Sanderson*,¹⁰ wherein it was held that under Arkansas law the general contractor is, as regards employees of his insured subcontractor, a "third party" who may be sued for common law negligence.¹¹

3. *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 160 P.2d 703 (1945).

4. *Id.* at 261, 160 P.2d at 703-704.

5. TENN. CODE ANN. § 6866 (1934): "A principal, or intermediate contractor . . . shall be liable for compensation to any employee injured while in the employment of any of his subcontractors and engaged upon the subject-matter of the contract to the same extent as the immediate employer."; KAN. GEN. STAT. ch. 44, § 44-503 (Supp. 1957).

6. The phrase "third party" or "third person" in a workmen's compensation context has reference to persons who do not bear the relationship of employer toward the injured employee, or who are not adjudged employers by the specific act; see 101 C.J.S. *Workmen's Compensation* § 985 (1958).

7. *McEvilly v. L. E. Myers Co.*, 211 Ky. 31, 276 S.W. 1068 (1925); *Adams v. Hercules Powder Co.*, 180 Tenn. 340, 175 S.W.2d 319 (1943); Note, 39 VA. L. REV. 958 (1953).

8. E.g., FLA. STAT. § 440.10 (1957); OHIO GEN. CODE ANN. § 1465-61 (1946); N.Y. WORKMEN'S COMPENSATION LAW § 56: "A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such hazardous employment, unless the subcontractor primarily liable therefor has secured compensation for injuries to all employees employed to perform work under the subcontract as provided in this chapter."

9. *Davis v. Starrett Bros., Inc.*, 39 Ca. App. 422, 147 S.E. 530 (1929); *Gaiennie Co. v. Chisholm*, 3 La. App. 358 (1926); *Fox v. Dunning*, 124 Okla. 228, 255 Pac. 582 (1927); *Swartz v. Conrades*, 298 Pa. 343, 148 Atl. 529 (1929). *Contra*, *Sweezy v. Arc Elec. Constr. Co.*, 259 N.Y. 306, 67 N.E.2d 369 (1946).

10. 146 F.2d 58 (8th Cir. 1945).

11. *Anderson v. Sanderson*, 146 F.2d 58 (8th Cir. 1945); *Boyd v. Humphrey*, 117 Neb. 799, 223 N.W. 658 (1929); *Clark v. Monarch Eng'r Co.*, 248 N.Y. 107, 161 N.E. 436 (1928); *State v. E. W. Wylie Co.*, 79 N.D. 471, 58 N.W.2d 76 (1953); *Ohio Public Serv. Co. v. Sharkey*, 117 Ohio 586, 160 N.E. 687 (1927); *Trumbull Cliffs Furnace Co. v. Shackousky*, 111 Ohio 791, 146 N.E. 306 (1924); *Travelers Ins. Co. v. Blackburn*, 161 Okla. 140, 17 P.2d 467 (1932); *Cernak v. Milwaukee*

The court expressed the view that since the general contractor was not the "employer" of the employees of the subcontractor, he could not enjoy the tort immunity of an "employer."¹² Other jurisdictions,¹³ including Florida, in construing the same type of statute, apply a diametrically opposed rule. In *Brickley v. Gulf Coast Construction Co.*,¹⁴ the Florida Supreme Court, in holding the general contractor relieved of *all common law liability* to the employees of his subcontractor, stated: "If payment of compensation insurance has been secured by the general contractor, *either directly or through the subcontractor*, (the employee's remedy) is exclusively under the Workmen's Compensation Act. . . ."¹⁵ (Emphasis added.)

The Longshoremen's and Harbor Workers' Act¹⁶ has been made applicable to the District of Columbia as its Workmen's Compensation Act.¹⁷ The federal act is, in form, a typical act, based on the New York Workmen's Compensation Act,¹⁸ and includes a "statutory employer" provision.¹⁹ The cases²⁰ interpreting the Longshoremen's Act with reference to the liability of the general contractor where the subcontractor alone has provided coverage seem to follow the strict rule of *Anderson v. Sanderson*.²¹ Thus, in *Liberty Mut. Ins. Co. v. Goode Construction Co.*,²² it was held that since the District of Columbia provision is an adaptation of the Longshoremen's Act, it will be interpreted by analogy to render a general contractor liable as a "third person" to an employee of a subcontractor who *alone* carried compensation coverage. What remained

Air Power Pump Co., 192 Wis. 44, 46, 211 N.W. 354, 356 (1926): "[T]he act preserves to the injured workman his interest in the damages recovered in the tort action, regardless of whether he claims compensation or sues in tort. If he sues in tort, the entire recovery belongs to him. If he accepts compensation and his employer sues in tort, all that is recovered belongs to the injured employee after his employer has been paid the sums spent by him."

12. *Anderson v. Sanderson*, *supra* note 11, at 60.

13. E.g., *Missouri-New Amsterdam Gas Co. v. Boaz-Kiel Constr. Co.*, 115 F.2d 950 (8th Cir. 1940); *Brickley v. Gulf Coast Constr. Co.*, 153 Fla. 216, 14 So.2d 265 (1943); *Maryland Cas. Co. v. Gulf Ref. Co.*, 231 La. App. 714, 110 So.2d 784 (1959); *Bruner v. Patti*, 343 Mo. 274, 121 S.W.2d 153 (1958); *Deep Rock Oil Corp. v. Howell*, 200 Okla. 675, 204 P.2d 282 (1949).

14. 153 Fla. 216, 14 So.2d 265 (1943).

15. *Id.* at 219, 14 So.2d at 266.

16. 44 Stat. 1424 (1927), 33 U.S.C. § 904 (1958).

17. 36 D.C. CODE § 501 (1951).

18. N.Y. WORKMEN'S COMPENSATION ACT § 56.

19. 44 Stat. 1424 (1927), 33 U.S.C. § 904 (1958): "[T]he contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment." Cf. FLA. STAT. § 440.10 (1957): "In case a contractor sublets any part or parts of his contract work to a subcontractor or subcontractors . . . the contractor shall be liable for and shall secure the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment."

20. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Continental Gas Co. v. Thorden Line*, 186 F.2d 992 (4th Cir. 1951); *Casbon v. Stockard S. S. Corp.*, 173 F. Supp. 845 (E.D. La. 1959); *De Vincenzi v. Waterman S. S. Corp.*, 156 F. Supp. 481 (N.D. Cal. 1957).

21. 146 F.2d 58 (8th Cir. 1945).

22. 97 F. Supp. 316 (E.D. Va. 1951).

unanswered was whether the general contractor could obtain tort immunity by duplicating the insurance which the subcontractor carried.

The court, in the *Thomas*²³ case, regarded the general contractor as "a volunteer in taking out insurance . . ." ²⁴ that the law did not require. It was pointed out that the employee was not benefited by the fact that two persons carried compensation insurance for his benefit. The court concluded that immunity "is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. . . ." ²⁵ By its decision, the court has further restricted the concept of tort immunity as applied to the general contractor.

It is to be questioned whether the strict "no immunity" rule makes sufficient allowance for the fact that one of the objectives of "statutory employer" provisions is to give the general contractor an incentive to require his subcontractors to carry insurance.²⁶ If the general contractor does compel his subcontractors to provide the coverage, the general contractor's reward, under the "no immunity" rule, is loss of exemption from "third party" suits. Certainly, "a sounder result would seem to be a holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of a 'third party'."²⁷ Thus, the general contractor is under a *continuing potential liability* and has assumed a burden in exchange for which he should be entitled to immunity from all "third party" damage suits.

JOSEPH P. METZGER

DUE PROCESS OF LAW — SUIT CLAUSES AS A DEFENSE

Defendant issued to plaintiff, in Illinois, a personal property floater policy on chattels then located in that state. Plaintiff subsequently moved to Florida where his insured property was destroyed or stolen. A clause in the policy required that suit be brought within twelve months after discovery of the loss. Defendant denied liability and plaintiff brought suit more than two years later in a federal court in Florida. The district court held the clause void under the public policy of the state as declared in a Florida statute which made illegal stipulations in *any* contract that

23. *Thomas v. George Hyman Constr. Co.*, 175 F. Supp. 381 (D.D.C. 1959).

24. *Id.* at 383.

25. *Ibid.*

26. 2 LARSON, WORKMEN'S COMPENSATION LAW § 72.31 (1952).

27. *Ibid.*