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Workers' Compensation Immunity for Texas Staffing Customer Affirmed – With a Surprising and Troublesome Twist

By George Reardon

A recent opinion of the Supreme Court of Texas raises important considerations for the management of workers' compensation risk in connection with jointly employed workers.

The basic bargain of workers' compensation schemes is that an injured worker loses his right to sue his employer in exchange for the virtual certainty of recovering benefits rationally related to his injuries, without going through the expense, risk, and delay of litigation. The employer loses the opportunity to defeat injury claims in court and becomes obligated to pay the scheduled benefits but gains the certainty that the benefits will be limited by law and also gains immunity from further suits or claims for those injuries. This immunity is called the "exclusive remedy" defense, meaning that the benefits paid by the workers' compensation program will be the only remedy available for the injuries.

The exclusive remedy defense typically applies to claims that would otherwise be based on regular negligence. Claims for injury caused by an employer's gross negligence or intentional misconduct are usually not negated by it, and suits for additional damages may be won on those theories even after workers' compensation benefits are fully paid. In most states, workers' compensation programs are mandatory, and most states have some version of the exclusive remedy defense.

When a worker is jointly employed by two employers, most state codes and case law operate so that, as long as one of the employers (usually the payroll employer) covers the worker with compliant workers' compensation benefits or insurance, the exclusive remedy defense is available to both employers. Nevertheless, challenges to the exclusive remedy defense are still made, often ancillary to claims for gross negligence or intentional misconduct.

The Case

Port Elevator-Brownsville v. Casados, 358 S.W.3d 238 (Tex. 2012), a temporary employee was assigned by a staffing firm to work at Port Elevator-Brownsville ("PEB") and was killed in an accident on that assignment. No one disputed that the worker was a joint employee of both PEB and the staffing firm.

As is typical in such arrangements, the staffing firm carried workers' compensation insurance on its temporary workers that paid full benefits for the worker's death, but the worker's family then sued PEB for regular negligence, negligence *per se*, and gross negligence. The trial court found

that only regular negligence had occurred, so the remainder of the case turned on the ability of PEB to assert the exclusive remedy defense for its regular negligence.

Texas employers are allowed to choose whether to “subscribe to” (participate in) a workers’ compensation program or to be “non-subscribers” and take their chances with the tort system. An employer in Texas may assert the exclusive remedy defense only if it was an employer of the injured worker and was a subscriber to workers’ compensation when the injury occurred.

PEB carried workers’ compensation insurance on its workforce, but the skill codes used for determining its policy premiums did not include codes for the type of work done for it by temporary agency employees. Testimony confirmed that neither PEB nor its insurance company consciously intended PEB’s insurance to cover temporary agency employees. And the staffing firm’s policy did not list PEB as an additional insured.

The worker’s family argued that, with respect to the injured worker, PEB was a non-subscriber, because neither PEB nor the staffing firm had purchased workers’ compensation insurance for PEB’s employment relationship to him. The trial court agreed and awarded \$2.7 million to the estate.

At all levels of the case, PEB argued that its status as a subscriber to workers’ compensation insurance did not require proof that it paid for coverage of the particular injured worker. Its position was that, under Texas law, its general subscriber status and its joint employment relationship to the worker were enough to support its exclusive remedy defense, especially considering that workers’ compensation benefits, indirectly financed by PEB’s payments to the staffing firm, had been fully paid by the staffing firm’s insurance company. The trial and appellate courts disagreed with this position, holding that PEB was not a subscriber with respect to the injured worker, could not assert the exclusive remedy defense, and was therefore vulnerable to liability for the worker’s death.

Reversing the appellate court and holding that PEB was entitled to assert the exclusive remedy defense, the Supreme Court of Texas focused on another principle of Texas law that PEB had raised but had not relied on in the lower courts. Aside from certain exceptions not present in this case (separate lines of business, owners and executives, and staff leasing), Texas law forbids employers to split their workforces by providing workers’ compensation insurance to some workers while leaving others without coverage. Arguably, PEB had split its workforce by failing to insure joint employees.

So the issue at the Supreme Court of Texas became, “What effect does the no splitting rule have when an employer insures only a portion of its workforce?” The three apparent possible answers to this question would be that: 1) the employer is not a subscriber at all; 2) the employer is a subscriber, but only with respect to the expressly covered employees; or 3) the employer is a subscriber for all employees anyway, whether or not it is the employer that provides workers’ compensation benefits for all of them.

PEB and its staffing firm hoped for answer #3, which would have resolved the case favorably for them and also had the general operational effect that staffing customers in Texas could rely on their staffing firms’ workers’ compensation insurance to cover the regular negligence risk of injury to temporary agency employees.

Surprisingly, the Supreme Court of Texas backed into a completely different interpretation. It interpreted the no splitting rule to create insurance coverage where none had been intended, written into the policy, or paid for. Instead of finding that PEB and its insurance company had failed to observe the no splitting rule and fashioning some consequence for that failure, it found that PEB and its insurance company must have covered all direct and joint employees, because the no splitting rule says they were supposed to do so. The no splitting rule thus becomes impossible to violate. In effect, the court confirmed that PEB’s insurance company had unintentionally insured an unknown number of temporary workers employed (and also insured) by a third party with which the insurance company had no relationship – for free. There is no apparent reason why this holding would not similarly expand the coverage of all Texas staffing customers who are subscribers.

The court found PEB to be a subscriber entitled to assert the exclusive remedy defense against its joint employee’s family. It described the omissions of the joint employees from the policy documents and premium calculations as issues between PEB and its insurance company that have no effect on the coverage or rights of the injured worker or on PEB’s defenses against them. Since the claim had been fully compensated under the workers’ compensation law by the staffing firm’s policy, PEB would not owe additional money to the worker’s estate.

What the Decision Means for Employers and Staffing Firms

This was a good result for PEB, the staffing customer, in this case, but the decision raises serious practical issues going forward. Now that workers' compensation policies have been held to cover entire workforces regardless of underwriting and premium details, insurance companies providing workers' compensation coverage to staffing customers in Texas now must worry about how much uncompensated exposure they may have for injuries to temporary agency workers. It would not be surprising for insurance companies to start charging for this risk.

Staffing firms should also worry, because if their workers' compensation insurance does not automatically confer the exclusive remedy defense on their customers, staffing firms might ultimately be liable to indemnify their non-subscribing customers for negligence suits by temporary employees, even after the staffing firms pay full workers' compensation benefits.

Staffing firms are not likely to drop workers' compensation coverage, because that is part of their traditional value proposition and because they do not want to be exposed to tort liability any more than their customers do. It would seem that some redundancy of coverage and premium is inevitable.

Staffing firms might obtain general or specific endorsements adding customers as insureds on their workers' compensation policies. They could provide separate point-of-sale policies covering their customers (like rental car damage waivers). Or the insurance industry could work out a coordination of benefits protocol that would make staffing firms' coverage primary or exclusive for all of their workers, so that the customers' coverage of temporary workers, though technically in force, would theoretically not generate any extra cost. Yet staffing customers and their carriers would still need to deal with the residual risk that those coverage and policy strategies would not always be followed by every staffing firm supplier. Covering that risk is likely to have an associated price.

Staffing customers and staffing firms in Texas and elsewhere should seek advice and guidance about how the exclusive remedy defense works in their jurisdictions. Local law should be compared with the contracts and insurance arrangements of the customers and the staffing firms. In some places, specific interaction with the workers is part of the practical solution.

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