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Client Advisory

Does Your Subcontractor Carry Workers' Compensation Insurance? It Better!

Court Determines that General Contractor not Immune from Suit Even if it Pays Workers' Compensation Benefits to Uninsured Subcontractor's Employee

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If an employer pays workers' compensation benefits to an injured employee, the employer is released from all common law claims arising out of that injury. Mass. Gen. Laws c. 152, §23. In other words, employees cannot accept workers' compensation benefits from their employer, and then simultaneously bring a negligence action against that employer, though they can still sue third parties who might also be responsible for their injuries. In theory, both the employer and the employee win as a result of this statute. By immunity from common law lawsuits, the employer is rewarded for purchasing (and paying for) workers' compensation insurance, and the employee is assured of compensation for injuries without having to bring an action against the employer.

By statute, if the injured employee is an employee of an uninsured subcontractor, however, the general contractor's workers' compensation carrier is obligated to pay benefits to the injured worker, even though that worker is not an employee of the general contractor. Mass. Gen. Laws c. 152, §18. In theory, this incentivizes general contractors to only contract with subcontractors who are insured in accordance with the law, thus encouraging subcontractors to purchase the required coverage, and to ensure that if the general contractor does contract with subcontractors who do not have workers' compensation insurance, the general contractor's policy will be available to cover the injured subcontractor employees. This raises an interesting question: does a general contractor who pays benefits to a subcontractor's employee enjoy the same immunity from suit as it does when it pays benefits to its direct employee? In Wentworth v. Henry C. Becker Custom Building Ltd., the Supreme Judicial Court answered this question with an unambiguous "no." If you hire an uninsured subcontractor and one of its employees is injured, not only will you have to pay workers' compensation benefits to the subcontractor's

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employee, but you will also be subject to suit for additional damages by the injured employee. Thus, you are subjected to a double whammy!

Henry C. Becker Custom Building Ltd. (“Becker”) was the general contractor on a residential construction project. It subcontracted waterproofing work to Great Green Barrier Co. (“Great Green”). Great Green did not carry workers’ compensation insurance. An explosion on the job site killed one Great Green worker and injured another. As required, Becker’s workers’ compensation carrier made a lump sum settlement offer to the estate of the deceased worker and the other injured party, which was accepted. After the settlement, Becker found itself on the wrong end of a negligence lawsuit by these same parties. Becker moved for summary judgment, and argued that under Section 23, because it offered the workers’ compensation settlement to the employees, and it was accepted, Becker should be immune from suit by those employees. The trial judge agreed with Becker. The employees appealed, and the appeals court reversed the trial judge. The question then was transferred for final determination by the SJC.

The SJC reversed the trial court’s decision, thereby permitting the suit against Becker to proceed. It noted that the statute clearly mandates that the immunity from suit offered in exchange for payment of workers’ compensation benefits only extends to payments made to an employer’s direct employee, and not to payments for the employee of an uninsured subcontractor. The SJC explained that this policy “gives a general contractor strong incentive to retain subcontractors who have workers’ compensation benefits because it otherwise has to pay the workers’ compensation benefits and is liable for any common-law damages.” Thus, the retention of an uninsured subcontractor is at the general contractor’s own peril.

While this case arose in a construction setting, it has broad application to any industry where subcontractors are utilized. As part of the negotiation process, a prudent general contractor will require evidence that its subcontractors carry workers’ compensation insurance, and ensure that the subcontract requires that it be maintained for the duration of the project. While engaging an uninsured subcontractor may save money on the front end (though it may violate the law mandating most employers to have workers’ compensation insurance), it will undoubtedly cost significantly more money on the back end in the event of a claim. Purchasing workers’ compensation insurance is a cost of doing business and if a subcontractor balks at this requirement, especially in the face of a statute which requires such coverage, it may be an indication of larger problems, not the least of which is that the subcontractor may be financially insecure or have an awful claims history. A strong indemnity clause in a subcontract which protects the general contractor from claims caused by the subcontractor’s negligence will provide additional protection. If you are an uninsured subcontractor, given the holding in Wentworth, the number of general contractors who are willing to contract with you will be increasingly



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small. Your counsel and your insurance provider can provide the necessary guidance to ensure that all parties are protected.

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