How the Law of "Statutory Employer" Relates to Personal Injury and Workers' Compensation Laws as Both a Sword and a Shield

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I. Statutory Employer

The statutory employer provision of the Virginia Workers' Compensation Act, Virginia Code § 65.2-302, has essentially created a framework where it can either be used as a sword or as a shield. It is used as a sword in the context of workers' compensation to find the injured workers some available workers' compensation coverage. It is used as a shield in the context of personal injury litigation to prevent the injured worker from bringing a personal injury claim against certain potential defendants,

Va. Code §65.2-302 addresses the rights of subcontracted workers. Under §65.2-302(A), a person who hires a contractor to perform work which is part of the person's trade, business, or occupation is liable for compensation payments to any worker injured in the performance of such work just as if the person were the direct employer of the worker. Section 65.2-302(B) makes a contractor who hires subcontractors liable for compensation to any worker engaged in the work performed under the agreement between the contractor and the subcontractor. Section 65.2-302(C) makes a subcontractor who hires other subcontractors liable for compensation payments to injured employees performing the agreed-upon work as if the subcontractor were the direct employer of the worker. Va. Code §65.2-307 makes the Workers Compensation Act the exclusive remedy. In combination §65.2-302 and §65.2-307 have created this sword vs. shield dichotomy.

a. The Statutory Employer Tests

Whether a person or entity is the statutory employer of an injured worker is a jurisdictional matter presenting a mixed question of law and fact that must be determined under the facts of each case. Burch v. Hechinger Co., 264 Va. 165, 563 S.E.2d 745 (2002). Four primary tests have arisen for determining who the statutory employer is.

i. Stranger to the Business Test: The original "stranger to the business" test for determining whether a particular defendant was outside of the scope of the employer/employee relationship was developed in Feitig v. Chaulkly, 185 Va. 96, 38 S.E.2d 73 (1946). In that case, one employee attempted to sue a co-worker for damages based on the co-worker's negligent conduct. The action was denied by the general bar of § 65.2-307. However, the court indicated that the employee is not deprived of his common-law action when the accident is caused by "strangers to the business." Also see Whalen v. Dean Steel Erection Co., 229 VA. 164, 327 S.E.2d 102 (1985). In Whalen, since the defendant, a steel subcontractor was not a stranger to the work or the plaintiff's employer, the General Contractor, the plaintiff's action was barred. See also Stone v. Door-Man Manufacturing Co., 206 VA., 406, 537, S.E.2d 305 (2000), where because the contractors and subs constructing an addition to the manufacturing plant were strangers to the work of the plaintiff's employer, a manufacturer and seller of motor vehicles, the action could proceed. (In Stone, the Court specifically held the "normal work test" did not apply when employees of general contractors or owners make a claim against a subcontractor.)

Application of this "other party" analysis is best illustrated by so-called "delivery cases" in which the obligation of the "other party" ends with the delivery of its own goods to a job site. For example, in Burroughs v. Walmont, Inc., 210 Va. 98, 168 S.E.2d 107 (1969), an employee of Ode Trucking Company was delivering sheet rock to the site of a home under construction. While he was helping to carry the sheet rock into the home, the claimant fell down an open stairwell. A tort action was instituted against the general contractor and the court permitted the suit to proceed on the basis that the stacking of sheet rock constituted the final act of delivery, not an act of construction. Therefore, the claimant was not part of the trade, business, or occupation of the contractor.

Likewise, in Hipp v. Sadler Materials Corp., 211 Va. 710, 180 S.E.2d 501 (1971), the court allowed the employee of a subcontractor to pursue a common-law claim against Sadler Materials, another subcontractor on the job site, for injuries sustained when the plaintiff was struck and injured by a truck driven by a Sadler employee. Sadler's contract provided that it would furnish and pour concrete at the job site, but it was not required to spread or finish the concrete. Thus, Sadler was engaged in delivery of a product, not construction, which was the trade, business, or occupation of the general contractor. See also Bosley v. Shepherd, 262 Va. 641, 554 S.E.2d 77 (2001) (employee of subcontractor hired to supply sheet rock for a construction site was not barred from suing the general contractor and the steel fabrication and erection subcontractor for injuries sustained when the employee delivering sheet rock to the job site, even though the employee used a boom crane under the general contractor's direction to accomplish the delivery); Yancey v. JTE Constructors, Inc., 252 Va. 42, 471 S.E.2d 473 (1996) (general contractor hired to build a sound barrier was not the statutory employer of an employee of a subcontractor which supplied and delivered sound barrier wall panels to job site, who was

injured while inspecting the panel after it was unloaded from the delivery truck, since the employee was not engaged in the trade, business, or occupation of the general contractor at the time of the injury).

In contrast, in Clean Sweep Prof'l Parking Lot Maint., Inc. v. Talley, 267 Va. 210, 591 S.E.2d 79 (2004), the court found that the common-law suit of an employee of a trucking company hired to deliver asphalt to a roadway paving job site against another subcontractor hired to clear the roadway of asphalt milled by the general contractor was barred by the exclusivity provision of the Virginia Workers' Compensation Act. The employee in Clean Sweep loaded fresh asphalt at the general contractor's plant, delivered it to the job site, dumped the asphalt into the paving machine, and reloaded his truck with paving millings. He was examining a disabled vehicle owned by his employer/subcontractor, which was at the site, when he was struck by a vehicle operated by an employee of the other subcontractor. The court disagreed with the employee's argument that the trucking company was acting solely as a deliverer of goods, pointing out that the company was hauling asphalt millings from the job site to the general contractor's plant and delivering the recycled asphalt back to the site, both of which were essential tasks undertaken by the general contractor.

Similarly, in Stout v. Onorati, 221 Va. 143, 267 S.E.2d 154 (1980), a truck driver was injured delivering heavy construction equipment to the defendant at its storage site. The driver assisted in unloading the cargo with some of the defendant's employees. During the unloading a piece of equipment rolled off of the truck bed and struck the driver, killing him. The court noted that both parties were obligated by contract to help in the unloading of the equipment. The court held that the decedent worker had become involved in an essential part of the defendant's

business and was not merely performing an act which was tangentially related to the defendant's other activities of dealing in equipment. From this, the court concluded that the decedent was performing work that was part of the defendant's trade business or occupation. Thus, the truck driver's exclusive remedy was workers' compensation. See also Peck (exclusivity provision of Workers' Compensation Act barred a wrongful death action brought by the estate of a construction worker employed by the general contractor who died when he fell off scaffolding supplied by the defendant subcontractor because the subcontractor spent over 5,000 hours erecting, modifying, and dismantling the scaffolding and responded to several change orders by the general contractor, and, thus, the subcontractor's work went beyond mere delivery); See also Bosher v. Jamerson, 207 Va. 539, 151 S.E.2d 375 (Va. 1966) (trucking company, which was hired to deliver and spread sand at the construction site of the general contractor, was not an "other party" for purposes of a common-law claim brought by an employee of the general contractor who was injured when he was struck by a vehicle driven by the trucking company, because spreading sand was part of the work of the general contractor).

In addition to the delivery cases, there is a string of cases involving "maintenance." As a general principle, employees performing "maintenance functions" are considered to be within the trade, business, or occupation of the principal company, thus barring a tort action. See, e.g., Anderson v. Dillow, 262 Va. 797, 553 S.E.2d 526 (2001) (exclusivity provisions of the Workers' Compensation Act barred a negligence action by the employee of a general contractor who was injured at the work site by the subcontractor's employee, because the subcontractor's obligation to remove shipping debris and waste from the airplane terminal was not a stranger to the duty of the general contractor to operate and maintain an airplane terminal in clean, safe, and orderly

manner). However, major or specialty repairs are distinguished. See Farish v. Courion, 722 F.2d 74 (4th Cir. 1983).

ii. Subcontracted Fraction: Even where the work is not a part of the trade, occupation, or business of a contractor as long as it is a "subcontracted fraction" of the contract for work undertaken by the contractor, the contractor is the statutory employer of the employees of all subcontractors hired by the contractor for performance of the work. Cooke v. Skyline Swannanoa, Inc,., 226 VA. 154,307 S.E.2d 246 (1983). This test is frequently applied in construction projects to bar remedies against contractors that are not the immediate employer of the plaintiff.

iii. The Normal Work Test: In Shell Oil Co. v. Leftwich, 212 V. 717,187 S.E.2d 162 (1972), the Supreme Court enunciated the "normal work" test:

> The test is not one of whether the subcontractor's activity is useful, necessary, or even indispensable to the employer's business since, after all, this could be said of practically any repair, construction, or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, normally carried on through employees rather than independent contractors.

Under the "normal work test," if the facts establish that an individual performs activities that are normally performed by a defendant's employees, rather than by independent contractors,

then the individual is considered the defendant's statutory employee for purposes of the Act. Shell Oil Co. v. Leftwich, 212 Va. 715, 187 S.E.2d 162 (1972); see also Carmody v. F.W. Woolworth Co., 234 Va. 198, 361 S.E.2d 128 (1987) (licensee portrait photography business inside a Woolworth's store was engaged in work that Woolworth's normally conducted through its employees, and, thus, the licensee's employee was a Woolworth's statutory employee).

This test is NOT applied in the context of employees of owners or general contractors being injured by subcontractors (see Stone Manufacturing.)

Interestingly, at times the Supreme Court has backed away from the "normal work" and "subcontracted fraction" tests and described these concepts as "corollary guides" or "merely an approach" useful in determining an employer's trade, occupation, or business. Cinnamon v. IBM Corp., 238 Va. 471, 384 S.E.2d 618 (1989); Henderson v. Central Telephone Co., 233 Va. 377,355 S.E.2d 596 (1987).

See also, Fowler v. International Cleaning Service, 260 Va. 421, 537 S.E.2d 312 (2000). In Fowler, the Supreme Court again declined to apply the "normal work" test. In determining whether an employee of a retailer could maintain an action against a service contractor who cleaned the store, the Court stated the inquiry involved whether the contractor was "performing an essential part" of the retailer's business. Since cleaning was an essential part of the business, the action was barred.

iv. Statutory Duty: Where statute or regulation impose a duty on an entity, all activities imposed on such entity are considered a part of the entity's trade occupation or

business, irrespective of whether such entity normally carries on such work through its employees. See Henderson; Anderson v. Thorington Construction Co., 201 Va. 266,110 S.E.2d 396 (l959) appealed dismissed, 363 U.S. 719 (1960).

II. EXCLUSIVITY

As long as the employer has accepted the provisions of the Act, the right to remedies of the Virginia Workers' Compensation Act exclude all other rights and remedies of the employee against his employer of the statutory employer on account of injury of death caused by the accident. Va. Code §65.2 -307.

a. Other Party

In general, the only exception to the exclusivity provision exists for actions maintained against an "other party." Id. §65.2-309(A). Injured employees are not barred from bringing suit against such parties based on their common-law rights (*i.e.*, negligence or intentional tort). *See* Rea v. Ford, 198 Va. 712, 96 S.E.2d 92 (1957). In order to be an "other party," a tortfeasor must fall outside within the scope of one the tests enunciated above. The basic principal being "when the employee reaches an employer in the descendent scale of his trade business or occupation, the work being performed by the employee is not a part, and that employer is not liable to the employee for compensation" See Sykes v. Stone Webster Eng'g Corp., 186 Va. 116, 41 S.E.2d 469 (1947).

b. Failure to comply with Act

Another "exception" to the exclusivity doctrine exists when the employer subject to the Act has failed to comply with the terms of the Act by having workers' compensation insurance. See Virginia Code §65.2-805. This applies to the direct employer and the statutory employer. Under that provision, not only may the injured worker bring a common-law lawsuit against the employer, but the employer may not defend on the grounds that the employee was contributory negligent, that the injuries were caused by the negligence of a fellow employee, or that the employee assumed the risk of injury. Va. Code §65.2 -805. See also Delp v. Berry, 213 VA, 786, 195 S.E. 2nd 877(1993). In addition, the employee is not explicitly required to make an election of remedies. This means the employee can pursue a workers' compensation case and may later still opt to pursue a common-law action against the employer. Likewise, an employee who unsuccessfully pursues a civil action is not barred from seeking compensation under the Act. See Va. Used Auto Parts, Inc. v. Robertson, 212 Va. 100, 181 S.E.2d 612 (1971) (decided under former Code § 65-102).

c. Outside Scope of Employment

Of course, if an employee's injury does not arise out of or in the course of employment, and, thus, is not subject to the remedies of the Act, the employee may pursue a common-law action against the employer, co-workers, or statutory employer. See Griffith v. Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942); see also Lloyd v. Am. Motor Inns, Inc., 231 Va. 269, 343 S.E.2d 68 (1996) (holding that if the Commission finds that the claimant's injury did not arise out of and in the course of employment, any subsequent finding by the Commission of a lack of causation between the accident and injury is not res judicata with regards to the issue of causation in the claimant's subsequent common-law action against the defendant employer).

d. Intentional Torts

Generally, workers' compensation is still the exclusive remedy for employees who suffer injuries as result of an intentional tort of their fellow employees. One exception to the fellow-employee doctrine is that found in Virginia Code § 65.2-301. A sexual-assault victim may elect to pursue an action for damages against the attacker regardless of whether the assailant is an employer or coworker. The focus turns upon whether the assault rose out of the injured employee's employment. For the assault to be compensable under the Workers' Compensation Act, the assault must be proven to have its origin in a risk connected with the employment. See Shumate v. Marion Diner, 70 O.W.C. 100 (1991). The inquiry is essentially whether the assault was directed at the employee because of her status as an employee or whether the assault was of a personal nature. See, e.g., Carr v. City of Norfolk, 15 Va. App. 266, 422 S.E.2d 417 (1992) (holding that sexual assault of police officer by another police officer was not compensable because the assault did not arise out of her employment, but was personal in nature).

III. Estoppel – Effect of a Virginia Workers' Compensation Commission Determination of Employment Status

Under Virginia Code § 65.2-706.1, "A final unappealed award by the Virginia Workers' Compensation Commission that a person is or is not an employee of another for the purpose of obtaining jurisdiction shall estop either of said parties from asserting otherwise in any subsequent action between such parties upon the same claim or cause of action in a court of this Commonwealth."

Va. Code § 801-420.5 is the corresponding Civil Statute which states that "a final unappealed order entered by the Circuit Court of this Commonwealth that a person is or is not an employee of another for the purpose of obtaining jurisdiction shall estoppel either of said parties from asserting otherwise in any subsequent action between such parties on the same claim or cause of action before a court of this Commonwealth or the Virginia Workers' Compensation Commission" The question arises whether these statues apply in a determination of the statutory employer/employee relationship. The statutes do not specifically recite address the statutory employee context and it does not appear that this issue has been specifically addressed by the Commission or a Circuit Court

A recent case of interest is the case of Skopic v. Tate, 19 Circuit, CL-2005-1319, a 2009 case from the Circuit Court of the County of Fairfax. In Skopic first heard by the Virginia Workers' Compensation Commission the decedent, Ho, was killed in an automobile accident. The vehicle was being driven by his co-worker, Tate. Tate was responsible for picking the decedent up and driving him to work. The decedent, Ho, did not have any beneficiaries who would qualify for death benefits under the Workers' Compensation Act. He had no total or partial dependents. The employer apparently paid burial expenses to the decedent. The employer filed an application with the Commission seeking a determination whether the accident did arise out of Ho's employment. The Commission found that Ho was an independent contractor and was not in the course of his employment. The employer appealed. The Court of Appeals remanded it back to the Commission for determination of whether the injury arose in the course of employment. On remand, a different Commissioner found the injury did arise out of the course of the employment. The decision was appealed to the Court of Appeals which affirmed the Commission.

The estate then filed a personal injury claim in Fairfax County Circuit Court. There the employer filed a Special Plea in Bar alleging that the exclusive remedy was workers' compensation and that the decision of the Commission under § 65.2-706.1 had a preclusive effect on the determination in Circuit Court. The Circuit Court judge interestingly enough, determined that the Commission did not have jurisdiction to determine or make a decision that was binding on the Circuit Court.

The rationale of the Circuit Court is interesting to examine. Typically an employer cannot file a claim with the Commission for what is essentially a declaratory judgment action, seeking a determination of compensability. Virginia Code Section § 65.2-702 allows the employer to file such a claim when there is a disagreement (and only if there is a disagreement) between the employee and employer. There was no dispute that there was no compensation to be awarded because there were no qualifying dependents. There was no dispute about the burial expenses being paid to the Estate. Therefore the Circuit Court judge noted that the employer did not have a basis to file their application for a determination by the Commission. Because the VWC had no jurisdiction to hear the claim, the court concluded it was not bound by the VWC's decision.

In addition the court went on to note that the no compensation could be awarded because the employee had no dependents. He had no qualifying dependents. The employer asserted that deceased employees, without dependents, are provided for under subsection D of the Workers' Compensation Act, where the "employer shall also pay burial expenses." The court went on to note that the Act only allows for filing by a guardian or trustee under limited circumstances, i.e., "If an injured employee is incapacitated or is under eighteen years of age at the time when any

right or privilege accrues to him under this title, his guardian, trustee or conservator may in his behalf claim and exercise such right or privilege." Va. Code § 65.2-527. The Court ruled that because Ho was neither injured nor incapacitated nor under the age of 18, nor did he have any dependents; there was no possible way to file any claim with the Commission. As a result the Commission has no jurisdiction.

The Court went on to hold that here the employer has filed a claim with the Commission with the result, whether intended or not, that the Act became a shield with little to no exposure for benefits. The public policy behind the act was to protect the employee. Here only the employer benefited by filing a claim with the Commission, yet they paid no costs associated with Ho's death. To allow such a practice would "confound the entire rationale of workers' compensation. Neither the policy behind the Workers' Compensation Act nor it jurisdictional bases provide a statutory framework for resolutions of these claims under the Act." Therefore, the Court held that the employer's special plea in bar to claim was denied and the claim could go forward.

IV. Indemnity Under Virginia Code §65.2-304

Virginia Code §65.2-304 provides that when the principal contractor employer is liable to pay compensation as a statutory employer under §65.2-302 or under §65.2-303, it shall be entitled to indemnity from any person who would have been liable to pay compensation to the worker independently of such sections or from an intermediate contractor and shall have a cause of action therefore. The statute goes on to state that when the principal contractor is sued by a worker of a subcontractor, it shall have a right to join that subcontractor or any intermediate contractor as a party.

The injured worker is not required to file a claim against his immediate employer, but may elect to file a claim against any statutory employer in the ascending employment hierarchy who received timely notice of the acts as required by statute. See Wagner Enters., Inc. v. Brooks. It is also interesting to note that under Cruz v. Alvarado Constr. Co., VWC File No. 169-02-97 (1996) (unpublished), the Commission determined that it does have jurisdiction to determine whether indemnification should be allowed.

IV. Notice

Virginia Code §65.2-600 requires that notice of the accident be given in writing by the injured employee immediately on the occurrence of an accident or as soon as thereafter is practicable. Virginia Code §65.2-600(A). The notice should state the name and address of the employee, the time and place of the accident, and the nature and cause of the accident. Id. §65.2-600(B). Knowledge of the accident on the part of the employer or his agent or representative is a sufficient substitute for written notice. Id. §65.2-600(C).

Pursuant to Virginia Code §65.2-600(D), notice of the accident must be given within 30 days of the occurrence to both the *actual employer* and the *statutory employer*. See Wagner Enters., Inc. v. Brooks, 12 Va. App. 890, 407 S.E.2d 32 (1991) (decided under former Code §65.1-85). If the claimant is employed by a subcontractor, notice to that employer will *not* be effective to notify the general contractor if he is a statutory employer. See Race Fork Coal Co. v. Turner, 237 Va. 639, 379 S.E.2d 341 (1989).

Notwithstanding the 30-day-notice requirement, with regards to statutory employers, the statute specifically provides that

> [i]f notice of accident is not given to any statutory employer, such statutory employer may be held responsible for initial and additional awards of compensation rendered by the Commission if (i) he shall have had at least *sixty days'* notice of the hearing to ascertain compensability of the accident, and (ii) the statutory employer was not prejudiced by lack of notice of the accident.

Id. §65.2-600(A) (emphasis added). In effect, there is an exception to the 30-day-notice rule for statutory employers. As long as the statutory employer received notice of a hearing 60 days prior to the hearing and suffered no prejudice from the lack of notice, the statutory employer still will be responsible. Apparently the legislature was prompted to distinguish statutory employers from actual employers for purposes of notice because of the uncertain and sometimes remote relationship between the statutory employer and the actual worker. The need to preserve the rights and responsibilities of each required a balance of competing interests through a distinct procedural course. See Uninsured Employer's Fund v. Edwards, 32 Va. App. 814, 531 S.E.2d 35 (2000). This exception does not prejudice those employees who are not aware of who their statutory employers are or that there is any statutory employer relationship. Yet it addresses the interests of statutory employers by requiring that they have 60 days' notice of the hearing so they can actually come to a hearing to challenge any issues they wish to dispute.

Parts (i.) and (ii.) of Virginia Code § 65.2-600 (A) are presented in the conjunctive, meaning both conditions must be established before the statutory employer can retain relief for lack of notice. See Kosma v. Bellamy, 79 O.W.C. 10 (2000). Procedurally, the burden of establishing prejudice for untimely notice rests upon the statutory employer. Prejudice

contemplated by §65.2-600 typically falls within either of two categories: (1) prejudice flowing from the employer's inability to provide immediate medical treatment to reduce the seriousness of the injury or (2) prejudice from the statutory employer's inability to sufficiently investigate a claim or prepare a defense because of delay. See Kosma.

With regards to the prejudice suffered by the statutory employer, it is interesting to note that the Court of Appeals has held that such prejudice does not include a statutory employer's economic loss due to its inability to obtain indemnification from the employee's direct employer. See Batal Builders v. High Tech Concrete, Inc., 18 Va. App. 401, 444 S.E.2d 555 (1994). In Batal, High Tech Concrete was the statutory employer of Batal. PNP was the claimant's direct employer. High Tech sought to show prejudice by alleging that it had already made payments to its subcontractor, PNP. High Tech was unable to withhold said payments to satisfy any liability it had to the claimant for the workers' compensation injury because of the delay by the claimant in giving High Tech notice. The Court of Appeals held that this type of prejudice was not sufficient to justify letting High Tech off the hook for the claimant's injuries and the Court of Appeals reversed the opinion of the full Workers' Compensation Commission (the "Commission") in favor of the claimant.

The statutory exception for notice to statutory employers became effective on July 1, 1997. Prior to that change, if no notice was given to the statutory employer within 30 days, the statutory employer was not responsible unless there was a reasonable excuse for the failure to give such notice, such as the claimant being unaware of the relationship of the statutory employer and unable to discover it within 30 days. The older case law reflects this prior law. See Race Fork.

Summary

V. CONCLUSION

In conclusion, these cases are always complicated. They are all very factually specific. Each one of them requires the practitioner to go back and examine the four separate statutory employer requirement tests. The VWCC has more familiarity with these issues and is more likely to understand those issues. In Circuit Court, when the issues are raised, it may be the first time that a Circuit Court judge has dealt with a workers' compensation bar much less a determination of whether the statutory employer rule applies. Careful consideration must be made of which test will apply and whether a claim should be heard first by the VWC, or by a circuit court.