CONTRACTORS, SUB-CONTRACTORS AND STATUTORY EMPLOYEES

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I. Procedural Issues

A. 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. 65.2-600 (c) states that knowledge on the part of the employee, his agent or representative is a sufficient substitute for written notice. 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.

With regards to statutory employers, code section 65.2-600 provides that

> " if 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 60 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."

65.2-600 appears to mandate that notice of the accident 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, 470 S.E. 2d 32 (1991)(decided under former Code § 65.1-85) If the claimant is employed by a sub-contractor, 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).

The statute attempts to fashion a threshold inquiry specific to a determination of responsibility of a statutory employer who did not receive timely notice within 30 days of the accident. 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 they will still be responsible. The end result is that the legislature has distinguished statutory employers from actual employers and the considerations of 65.2-600 (D). The uncertain and sometimes remote relationship between the statutory employer and the actual worker along with 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 (2000). The end result was that although the legislature still mandates notice of the accident within 30 days of the occurrence to both the statutory and actual employer, they went on to create an exception that does not prejudice those employees who were not aware of who their statutory employers are that there was any statutory employer relationship. Yet they balance the interest of the 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.

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 their inability to obtain indemnification. See *Batal Builders v. High Tech Concrete, Inc.*, 18 Va. App. 401 (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 they had already made payments to their sub-contractor, PNP. They were unable to withhold said payments to satisfy any liability they 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 of the hook for Batal's injuries and the Court of Appeals reversed the opinion of the Full Commission in favor of the claimant.

Make note that the statutory change to 65.2-600 was made on July 1, 1997 distinguishing statutory employers from actual employers. 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 that they could not have known of it within 30 days. (See *Race Fork*).

Parts i. and ii. of 65.2-600 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 Va. WC 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.) Predjudice flowing from the employers inability to provide immediate medical treatment to reduce the seriousness of the injury OR (2.) Prejudice to the statutory employer's inability to

sufficiently investigate a claim or prepare a defense because of delay. See *Kosma v. Bellany*, 79 Va. WC 10 (2000).

II. Indemnity under 65.2-304

Virginia Code § 65.2-304 provides that when the statutory employer is liable to pay compensation under 65.2-302 or 65.2-303 they 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 sub-contractor they shall have a right to join that sub-contractor 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 Enterprises, Inc. v. Brooks*, 12 Va. App. 890, 47 S.E. 2d 32 (1991). It is also interesting to note that under *Crews v. Alvarado Construction Company*, 96 WC UNP 1690297 (1996) the Commission determined that it does have jurisdiction to determine whether indemnification should be allowed.

III. Third party actions

The rights and remedies of the act exclude all other rights and remedies of the employee against his employer or statutory employer on an account of injury or death

covered by the act. See Virginia Code § 65.2-307. However, the exclusivity provision only applies if the employer has accepted the provisions of this act. The act does not mention anything about the rights and remedies against third parties. Therefore, employees still have the right to bring an action at common law against strangers to the employment (i.e. negligence, intentional tort, etc.).

If the employee is performing the duties of his employer and is injured by a stranger to the business, the compensation provided by this act is still available to him. That does not deprive him of his ability to seek a full remedy from the stranger to his employment. The essential purpose of the act is to limit the recovery of all persons engaged in the "business under consideration" to compensation provided for by the act and to deny an injured person the right of recovery against any other person unless that person is a stranger to the business. See *Rea Administratrix v. Ford*, 198 Va. 712 (1957).

Any other right of action an employee may have against an employer remains intact unless precluded by the provisions of the Workers' Compensation Act. In other words, if the injury does not arise out of or in the course of employment the employee may pursue a common law action against the employer, co-workers or statutory employer. See *Griffith v. Red Ash Coal Company*, 179 Va. 790 (1942). See also *Lloyd v. America Motor Inns, inc.*, 231 Va. 269 (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 juicata with regards to the issue of causation in the claimant's

subsequent common law action against the defendant employer. Another exception to the exclusivity doctrine is where the employer subject to the act has failed to comply with the terms of the act. See Virginia Code § 65.2-805. This applies for the direct employee or the statutory employer.

Va. Code § 65.2-805 also provides that when the employer fails to comply with the coverage requirement of the act, not only may the claimant bring a common law lawsuit against the employer, the employer may not defend on the grounds that the plaintiff was contributory negligent or that the injuries were caused by the negligence of a fellow employee or that the employee assumed the risk of injury. In addition, the employee is not explicitly required to make an election of remedies. Meaning they can pursue a workers compensation case and may later still opt to pursue a common law action against the employer.

In essence, to determine whether a third party defendant is a stranger to the business or not, one must undergo the statutory analysis discussed earlier in this seminar. Typically, the "other parties" who are subject to civil actions for injuries occurring within the scope of employment arise in product liability cases, motor vehicle accidents, or accidents resulting from negligence of mere delivery men.

Just as the workers' compensation act bars the employee's common law claim versus the employer, it also bars such claims against fellow employees of the injured claimant. The original "stranger to the business" test for whether a particular defendant

was out of the scope of the employer/ employee relationship was developed in *Feitig v. Chaulkly*, 185 Va. 96 (1946).

In *Fetig* the claim involved circumstances where one employee attempted to sue a co-worker for damages based on the co-workers negligent conduct. This action was denied by the general bar of 65.2-307. However, the court went on to indicate that the employee is not deprived of his common law action when the accident is caused by "strangers of the business". *Feitig* subsequently elaborated on in *Rea v. Ford*, 198 Va. 712 (1957). In *Rea*, the injured worker was killed when a truss fell on him. The truss was being moved by a crane. The crew of the crane and the crane were rented by the general contractor and the crew was supervised by a superintendent of the general contractor. The question arose whether the employee of the principle contractor had a right to maintain an action at law against the sub-contractor. The court in *Rea* held that the defendant sub-contractor was engaged in an essential part of the work in which the principle contractor had to perform, i.e. erecting steel structures. As a result the common law action by the general contractors employee against the sub- contractor was barred.

The rational of *Rea* means that immunity from a common-law claim suit runs both up the food chain of employee relationships and down the food chain of employee relationships. However, compensation under the act only runs up the food chain, i.e. general contractor employee is barred from bringing suit against the sub-contractor if the sub-contractor is performing the general contractor's regular business. Yet if the general

contractor has no workers compensation the injured worker can not make a workers compensation claim against the sub-contractor below him.

IV. Independent contractors

The issue has arisen whether the employee of one independent contractor can sue the employee of another independent contractor, at common law for negligence. The Virginia Supreme Court addressed that in *Kramer v. Kramer*, 199 Va. 409 (1957). In that case the court held that such an action was maintainable. The evidence was that the defendant contracted to perform carpentry work on a church as well as supervise the work of other independent contractors. An employee of the crane rental company moving trusses was struck and fatally injured by a falling truss. The court held that the work being performed by the injured worker's employer was not included in the carpentry contract of the defendant and neither was it a part of the trade business or occupation of the defendant.

This general principle was clearly stated in *Sykes v. Stone Webster Engineering Corp.*, 186 Va. 116 (1947) when the Virginia Supreme Court held that:

> "when the employee reaches an employer in the ascending scale, of whose trade business or occupation the work being performed by the employee is not a part, then the employer is not liable to the employee for workers compensation".

At that point the employees' right of action returned to the common law principles. The distinctions can be best illustrated by some of these so called "supplier cases". In *Scott v. Onorati*, 221 Va. 143 (1980) a truck driver was injured delivering heavy

equipment. The court held the truck driver's exclusive remedy was workers' compensation. The truck driver was delivering heavy construction equipment to the defendant at their 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.

This case is distinguishable from *Verbourghs v. Walmonth, Inc.*, 210 Va. 98 (1969). There an employee of Ode Trucking Company was delivering sheet rock to the site of a home under construction. While they were carrying 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.

As these cases illustrate, an employer becomes an "other party" who can be sued at common law when the vertical employment relationship does not exist because there is a failure to satisfy "the trade, business or occupation test" used to define a statutory employer.

Besides 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 principle company, thus barring a tort action. However, major or specialty repairs are distinguished. See *Farish v. Courion*, 722 F 2d 74 4th Cir. (1983).

V. 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 65.2-301. A sexual assault victim may elect to pursue an at law action for damages against the attacker regardless whether he is an employer or co-worker. In addition, with assaults, the focus turns upon whether the assault rose out of the injured employees employment. For the assault to be compensable under the act, the assault must be proven to have its origin and a risk connected with the employment. See *Shumate v. Marion Dinver*, 70 WC 100 (1991). The test is essentially whether the assault was directed at the employee because of their status as an employee or was the assault was of a personal nature.