

THE WORKERS' COMPENSATION DEFENSE IN TORT CASES

By

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Many states provide immunity from common law actions for employers under workers' compensation statutes. Often, especially in construction accidents, the employer's negligence is the cause of an employee's injuries¹. Accidents at construction sites cause serious injuries that are attractive cases for plaintiffs' lawyers because of the potential of large awards and large contingent fees. Plaintiffs' counsel become very imaginative in formulating theories of recovery against other contractors on the job site.² Many times they create a scenario where another contractor has control over the injured party in addition to the real tortfeasor, the injured party's employer, in order to establish that the other contractor has responsibility. Often, counsel tries to prove that the other contractor was responsible for the safety of the injured person not realizing that this establishes the contractor's control over the employee. This then creates an opportunity for that defendant to assert that it was also the employer of the injured party at the time of the accident and enjoy the immunity provided by the workers compensation act.

This defense is not limited to construction accidents. Anytime that a plaintiff contends that a defendant had control over him or her or when the plaintiff claims that the defendant was responsible for the safety of the plaintiff raises the issue of whether that puts the plaintiff in the status of an employee vis-à-vis the defendant.

It is beyond the scope of this article to discuss this defense in the 50 states of the union. It will focus mainly on Pennsylvania.

Section 303(a) of the Pennsylvania Workers' Compensation Act provides as follows:

¹ Certainly, OSHA makes the employer responsible for the safety of its employees and others on the job site.

² See, e.g. Brigham and Bencivenga, *Third-Party Liability for Workplace Injuries*, Trial, March, 2003

The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

77 P.S. § 481.

Indeed, an employer can not be held directly or vicariously liable to an employee in a common law action because when Section 303(a) of the Workers' Compensation Act applies, it deprives the court of jurisdiction. *Noyes v. Cooper*, 579 A.2d 407, 410-11 (Pa. Super. 1990), appeal denied, 527 Pa. 667, 593 A.2d 842 (1991).

Since at least 1935, the essential test for determining the existence of an employer-employee relationship has been that of control. In *Venezia v. Phila. Electric Co.*, 317 PA 557, 177 A2d 25 (1935), the Supreme Court stated:

"The vital test in determining whether the workmen furnished by Tinaglia were servants of the defendant is whether they were subject to its control or right of control not only with regard to the work to be done but also with regard to their manner of performing it."

Venezia, 317 PA at 559.

As in *Venezia*, the issue of whether a person has the status of employee is raised constantly in the context of "borrowed servant." There, "one who is in the general employ of one employer may be transferred to the service of another in such a manner that the employee becomes an employee of the second employer." *Red Line Express Co., Inc. v. Workmen's Compensation Appeal Board (Price)*, 588 A.2d 90, 93 (Pa. Commw. 1991)(citations omitted). The Superior Court has recently reiterated the test for determining whether an employee has become a borrowed employee serving an employer other than the initial employer as follows:

[T]he crucial test in determining whether a servant furnished by one person to another becomes the employe (sic) of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it.*

A servant is the employe (sic) of the person who has the right of controlling the manner of his performance of the work, irrespective of whether he exercises that control or not.

Wilkinson v. Kmart, 603 A.2d 659, 661 (Pa. Super. 1992), *citing Ashman v. Sharon Steel Corp.*, 448 A.2d 1054, 1058 (Pa. Super. 1982)(internal citations omitted)(emphasis in original).

Even where there may be other factors present which might weigh against finding that an employee has been transferred from the employ of the initial employer to the employ of the borrowing employer, "the right to control the performance of the work is the overriding factor." *JFC Temps, Inc. v. Workmen's Compensation Appeal Board (Lindsay)*, 545 Pa. 149, 156, 680 A.2d 862, 865 (1996). Thus, the Pennsylvania Supreme Court has held that a borrowing of an employee has occurred because the borrowing employer had the right to control the employee's performance of the work at issue notwithstanding that the employee continued to be paid by the initial employer and reported to the initial employer in the event he would be late or out sick. Id.

Courts have routinely concluded as a matter of law that an employee has become a borrowed servant of an employer other than the initial employer in cases where it is either determined as a matter of fact, or uncontroverted, that the other employer can control, or has controlled, the work to be done and also the manner of performing it. Thus, truck drivers have routinely been held to be borrowed servants of the companies that directed the drivers concerning the route to take. See, e.g., JFC Temps, Inc. v. Workmen's Compensation Appeal Board (Lindsay and G&B Packing), 545 Pa. 149, 680 A.2d 862 (1996); *Wilkinson v. Kmart*, 603 A.2d 659 (Pa. Super. 1992); *Lego v. Workmen's Compensation Appeal Board* 445 A.2d 1324, 1326-1327 (Pa. Commw. 1982). Similarly, laborers have routinely been held to be borrowed servants of the companies that have the right to direct what work the laborers perform and the manner in which the work is to be performed. See, e.g., Keller v. Old Lycoming Township, 428 A.2d 1358 (Pa. Super. 1981) (Although agency paid laborer's wages and provided laborer

with insurance benefits, laborer was determined to be the borrowed servant of the township for whom he was excavating a ditch, and under whose supervision he was working, at the time he sustained fatal injuries when the ditch collapsed); *English v. Lehigh County Authority*, 428 A.2d 1343 (Pa. Super. 1981) (Although laborer had applied to, and was paid by employment agency, laborer was nonetheless considered to be borrowed servant of the County because the County controlled the laborer's activity on the worksite). As a result of the facts in both *Keller* and *English* that the right to control the work being performed was vested in an entity other than the agency that paid the laborers' wages, the laborers' were deemed as a matter of law to be the employees of the entity to which they were furnished by the agencies, and Section 303(a) of the Workers' Compensation Act barred any civil suit by the laborers against the borrowing employers.

In *Wetzel v. City of Altoona*, 152 Pa. Commonwealth Ct. 309, 618 A.2d 1219(1992), plaintiff's decedent participated in the Summer Youth Employment Program in the Altoona area. This was funded by the Federal Comprehensive Employee Training Act, CETA. The Altoona Area School District was the program administrator for Blair County. It referred the decedent to a City of Altoona highway crew directed by a city employee. The agreement between Altoona and the School District provided that Altoona was the employing agency and it was to provide "(1) proper and adequate supervision of the participant, (2) jobs appropriate for youth, with instruction in the relevant tasks and (3) a safe and healthy work environment." Decedent was killed when a city employee operating an earth moving machine backed into him. Suit was brought against Altoona and others. Altoona filed a Motion for Summary Judgment claiming that it enjoyed the immunity of the Workers' Compensation Act. The lower court agreed and dismissed Altoona from the lawsuit.

On appeal, a co-defendant, Deere, argued that the decedent was more than a laborer. His work focused on how to obtain a job, keep a job and plan for a career. Deere claimed that since the District administered the program and monitored attendance, punctuality etc., it was really the employer, not Altoona. The court, in affirming the lower court, replied:

The existence of an employer/employee relationship is a question of law based upon findings of fact. *Bacon v. Tucker*, 128 Pa. Commonwealth Ct. 575, 564 A.2d 276 (1989). Although there is no standard approach or formula for the determination of this relationship, we have held that "the most important factor in determining the existence of an

employer/employee relationship is evidence of actual control of or the right to control the work to be done and the manner of its performance."

Frederico Granero Company v. Workmen's Compensation Appeal Board, 43 Pa. Commonwealth Ct. 308, 311, 402 A.2d 312, 314 (1979).

Wages and who pays them are not always relevant. The Superior Court has stated: "But the fact that wages are not paid is not determinative if the appellant has the right of control." *Rugh v. Keystone-Lawrence Transfer and Storage Company*, 197 Pa. Super. 526, 530, 179 A2d 242, 245 (1962). "Valuable consideration" as set forth in 77 P.S. § 21, the section of the Workers' Compensation Act which defines who is an employee, does not necessarily mean money. For example, in *Schreckengost v. Gospel Tabernacle*, 188 Pa. Super. 652, 149 A2d 542 (1959) Schreckengost was killed when he fell from the roof of a church being constructed by the Gospel Tabernacle. Schreckengost had volunteered his services as a carpenter to construct the church. The pastor testified that he supervised the work and had the right to fire anyone. Even though this volunteer labor could be used to pay tithes, the court held that mutual promises made by other members of the congregation to join in the construction of the church was sufficient "valuable consideration." See also, *Berg v. Rosefsky*, 202 Pa. Super. 598, 198 A2d 334 (1964) (doing work as a favor is enough. "However, the vital test in determining whether a workman is the servant of persons engaging him is whether he is subject to such persons' control or right of control with regard to both work done and the manner of performing it." 198 A2d at 338.)

In *Linda Arriaga v. County of Alameda*, 9 Cal.4th 1055, 892 P.2d 150 (1995), Linda Arriaga was assigned to work for the Department of Transportation of California to work off a four-year old speeding ticket. CalTrans assigned Arriaga to clean greasy walls of a ventilation duct connected with the Posey tube connecting the City of Alameda to Oakland. She was injured and sued the City of Alameda. The Court believed that persons who performed work pursuant to a Court Order are not performing "voluntary service". Arriaga was performing maintenance work and was under the control of the County that assigned her the task she was performing when injured. The Court went on to state that remuneration does not have to be in a monetary form. Arriaga received credit for the work she performed towards the Court imposed-fine. Thus, there was consideration and the court concluded that Arriaga was an employee and the Workers' Compensation Act barred her tort claim.

It is important to examine the facts closely when an issue of control by a defendant over a plaintiff arises. Most people believe that the payment of wages is what determines the employer-employee relationship. It is not. Control is the important indicia and control is often an element of establishing a relationship between the plaintiff and the defendant. If there is sufficient control by a defendant over a plaintiff to argue that the plaintiff is, in reality, an employee, the defense of the immunity of the workers' compensation act should be raised. The defense is a powerful defense since it takes away jurisdiction from the court. One note of caution: if the statute of limitations has not run on filing a claim for workers' compensation benefits, the plaintiff could then file for such benefits. Workers' compensation benefits usually are much less than what can be recovered in a common law tort action so there is great incentive to stay in the common law court. However, this issue should be discussed thoroughly with the client so that it is aware of any problems that might be created by pushing the claimant into a compensation claim.

John F. Ledwith was graduated from the College and Law School of the University of Pennsylvania. After service in the U.S. Coast Guard, he was admitted to practice in Pennsylvania, New York, Eastern District Federal Court, Third Circuit Court of Appeals and U.S. Supreme Court. He is Ex Officio of the Construction, Fidelity Surety & Public Contract Section of the FDCC.