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Education

Hampden-Sydney College B.A. 1982
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Kevin Hubbard was admitted to practice in the State of Virginia in 1985 and has handled Claimant's Workers' Compensation cases for over 30 years. His practice is currently focused on the representation individuals injured due to other's negligence as well as workplace injuries. His practice also includes general civil litigation and real property disputes. His transactional practice includes real estate and business matters.

Memberships:

Virginia Bar Association 1985- Present (general section)
Chesapeake Bar Association, Past President
Virginia Trial Lawyers Association
Virginia Worker's Compensation American Inn of Court

Community involvement
Chesapeake Airport Authority, Past Member and Chairman
TowneBank, Advisory Board
Chesapeake Ducks Unlimited, Member and Past President

DANIEL E. LYNCH is a principal with the Richmond law firm of Lynch Hays Seli, P.C., where he practices primarily in the area of insurance defense litigation, with emphasis on workers' compensation claims, motor vehicle liability claims, premises liability claims, and other liability matters. He earned his B.B.A. degree from James Madison University and his J.D. degree from the University of Richmond School of Law. Mr. Lynch is licensed to practice before all state and federal courts in Virginia and the U.S. Supreme Court. He is a member of the Virginia State Bar, the Virginia Bar Association, the Richmond Bar Association (member, Board of Directors, 2007-2011; 2012-2016; Executive Committee, 2016-), and the Virginia Association of Defense Attorneys. Mr. Lynch has been included in *Virginia Super Lawyers* for workers' compensation.

I. Va. Code § 65.2-302 -- STATUTORY EMPLOYERS

A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

D. 1. Liability for compensation pursuant to this section may not be imposed against any person who, at the time of an injury sustained by a worker engaged in the maintenance or repair of real property managed by such person, and for which injury compensation is sought:

a. Was engaged in the business of property management on behalf of the owners of such property and was acting merely as an agent of the owner;

b. Did not engage in and had no employees engaged in the same trade, business or occupation as the worker seeking compensation; and

c. Did not seek or obtain from such property's owners, or from any other property owners for whom such person rendered property management services, profit from the services performed by individuals engaged in the same trade, business or occupation as the worker seeking compensation.

II. INDEMNITY OF PRINCIPAL FROM SUBCONTRACTOR

Pursuant to Va. Code § 65.2-304, when a principal contractor is liable to pay compensation under Va. Code § 65.2-302 or Va. Code § 65.2-303, such principal contractor 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 accordingly. This code provision further states that a principal contractor when sued by a worker of a subcontractor shall have the right to join that subcontractor or any intermediate contractor as a party. See Mark Five Construction, Inc., v. Castle Contractors, et al., 274 Va. 283, 645 S.E.2d 475 (2007) (Virginia Supreme Court held that a party can only seek indemnification under Va. Code § 65.2-304 from persons who would have been liable to pay compensation under the Virginia Workers' Compensation Act and thus are subject to the jurisdiction under the Virginia Workers' Compensation Act.)

III. HOW DO YOU DETERMINE A STATUTORY EMPLOYER?

Va. Code § 65.2-302 prevents employers from escaping coverage of the Workers' Compensation Act by doing through independent contractors and subcontractors, what they normally would do through their own employees. However, not every owner or every general contractor is a statutory employer. Many factors determine whether or not an employer is a statutory employer under this section. In most cases, it is a mixed decision of fact and law.

Developing the appropriate test and determining whether activities fall within or without an entity's trade, business, or occupation is not a simple, straightforward exercise. Deciding what is the trade, business, or occupation of an entity is a mixed question of law and fact and is a question that does not readily yield to categorical or absolute standards. Henderson v. Central Tel. Co., 233 Va. 377, 355 S.E.2d 596 (1987). This section contemplates that an owner can subcontract all of its work yet remain liable under the Workers' Compensation Act.

A. FIRST INQUIRY: The inquiry should start with who is the potential statutory employer? If it is the State, municipal corporation, government, or political subdivision, this section may not apply. "Any person", does not include the state or political subdivisions. See City of Portsmouth v. Daniels, 157 Va. 614, 162 S.E. 324 (1932); Anderson v. Thorington Construction Co., 201 Va. 266, 110 S.E.2d 396 (1959). The test for governmental entities entails looking at what activities the putative statutory employer is mandated to do by statute or regulation. In other words, any activity which a government entity is authorized or required to do is considered its trade, business, or occupation. Perry v. United States, 882 F. Supp. 537 (E.D. Va. 1995).

B. SECOND INQUIRY: The next inquiry is to look at the type of work the Claimant was performing for the potential statutory employer.

In Shell Oil Co. v. Leftwich, 212 Va. 715, 187 S.E.2d 162 (1972), the Virginia Supreme Court set forth the test the Court must use in determining whether claimant was engaged in owner's trade, business, or occupation:

> "The test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory 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 the business, normally carried on through employees rather than independent contractors."

TYPES OF TESTS APPLIED:

1. Subcontracted-fraction test:

Under this test, a general contractor was the statutory employer of an employee of a subcontractor and was obligated to provide benefits to the claimant where the general contractor was hired to repair and re-shingle a flat roof, and to re-shingle the rest of the roof and build a new front porch. The general contractor had subcontracted the fraction of the contract requiring

the replacement of the roof to the claimant's employer. The general contractor's trade, business, or occupation was general home repair, which includes roof repair. It had entered into a single contract to repair the porch and roof of a residence and, when the claimant was injured while working on the subcontracted fraction of the work involving the replacement of the roof, he was found to have been engaged in the general contractor's trade or business. See Mt. Vernon Builders, Inc. v. Rotty, 28 Va. App. 511, 507 S.E.2d 95 (1998). Additionally, in the case of F. Richard Wilton, Jr., Inc. v. Gibson, 22 Va. App. 606, 471 S.E.2d 832 (1996), it was noted that although the Commission did not specifically analyze the subcontractor's status using the subcontracted-fraction test, it was not error for the Commission to require the subcontractor to pay benefits to the claimant. In that case, the divit installation was determined to clearly be a subcontracted fraction of the main remodeling contract and not part of the trade, business, or occupation of the owner, whose business was operating a restaurant. The subcontractor was the claimant's statutory employer and liable for benefits under this code section.

2. Normal-Work Test:

The so-called "normal-work test", relates to the determination of statutory-employer status as defined in Va. Code § 65.2-302(A). As the language of the statute makes clear, that prong relates to an owner who engages an independent contractor to perform certain work. If the work out of which the industrial accident arose is, in the language of Shell Oil, work "normally carried on through [the owner's] employees rather than independent contractors", it is, in the language of the statute, a "part of [the owner's] trade, business or occupation". In such case, the owner is the statutory employer of the injured worker, whether directly employed by the independent contractor or by a subcontractor. Evans v. B.F. Perkins Co., a Div. of Standex Intern Corp., 166 F.3d 642 (4th. Cir. 1999).

C. **THIRD INQUIRY:** Finally, there are some special circumstances that have to be considered in the analysis of whether this section applies to a Claimant.

1. DELIVERY AND LOADING/UNLOADING

The Virginia Supreme Court consistently has held that there is no statutory employer/employee relationship where the injured independent contractor was delivering a third-party's or the contractor's own materials to the job site. See, e.g., Rice v. VVP America, Inc., 137 F. Supp. 2d 658 (E.D. Va. 2001); Crocker v. Riverside Brick & Supply Co., 273 Va. 235, 639 S.E.2d 214 (2007); Stevens v. Ford Motor Co., 226 Va. 415, 309 S.E.2d 319 (1983); Burroughs v. Walmont, Inc., 210 Va. 98, 168 S.E.2d 107 (1969); Buffalo Shook Co. v. Barksdale, 206 Va. 45, 141 S.E.2d 738 (1965). See also, Clean Sweep Prof'l Parking Lot Maint., Inc., 267 Va. 210, 591 S.E.2d 79, 83 (2004) (truck driver employed by trucking company to deliver asphalt between defendant's asphalt plant and its worksite, injured at worksite, was engaged in essential part of defendant's work, distinguishing the case from those where trucking company was "merely delivering its own independently manufactured parts.").

The operative factual distinctions regarding the relationship between premises owner and contractor for purposes of the applicability of the Act are whether the transportation was intra-company, or between two separate companies, with the former properly being held to be part of the owner's trade, business, or occupation, and whether the product delivered was independently manufactured, with such products being held not to be within the defendant's trade, business or occupation.

Determinative issues:

A. Is delivery part of the work?

B. Does driver take part in the work upon delivery. Ie concrete delivery (dropoff vs. working the material.) Removal from chute vs. hoe on the ground at end of chute. See **Bergen v. Fourth Skyline Corp.** 501 F. 2d 1174 (4th Cir 1974)

C. Immunity from civil suit if other than 3rd party materialman delivery.

D. Grocery Delivery: Driving vs. Driving + Stocking

2. STRANGER TO THE BUSINESS

This often arises when a company decides to build a new shop or plant. If the Claimant is working on the project to build the new shop or plant, the Company that contracted to have the shop or plant built would not be a statutory employer. In the manufacturing industry, construction work is typically outside the custom of the trade, and when manufacturers who use their employees for such work generally do so only infrequently and irregularly. The Courts have largely agreed that such manufacturers are not statutory employers of the employees of independent contractors hired for such work. Bassett Furniture Industry, Inc. v. McReynolds, 216 Va. 897, 224 S.E.2d 323 (1976). The key here is how infrequent or irregularly it is. For example, a subcontracted janitor who is used daily is an essential nature of the subcontractor's function to properly maintain the premises. McGowan v. ABM Janitorial Services, Northeast, Inc., 2011 U.S. Dist. LEXIS 70621 (E.D. Va. June 29, 2011).

Determinative issues:

A. Is the worker contributing to the "OVERALL UNDERTAKING" of the Employer?

If so, coverd by the Act.

If not, Stranger is subject to civil liability.

B. Querry: Do regular maintenance requirements for an Owner's facility bring subcontractor's work within the regular trade, business or occupation of owner? See **Masterson v. Am Heavy Indus.** , 84 Va. Cir. 432, 2012 Va. Cir. LEXIS 126 . (2012)

IV. CASE STUDIES FOR DISCUSSION:

SITUATION A:

Claimant is delivering cement to a construction site. The general contractor oversees the safety and maintenance of the construction of the building site. The Claimant works for a cement company that has been subcontracted to bring cement to the site and pour it for construction purposes. While delivering the cement, the Claimant is injured.

What facts do we need to decide this case?

Is the Claimant merely unloading or delivering?

SITUATION B:

At the time of his accident, Claimant was working to rebuild a historical site. Members of the community formed the Historical Society to "purchase, restore, preserve, and maintain" the historical site. The ultimate goal of the Historical Society was to restore the site to its original condition and register it as an official historical site. The Historical Society also planned to establish a visitor's center on the site containing exhibits about the local community. The Historical Society planned to hire contractors to renovate the building on the site.

The Historical Society did not tell the contractor how to reconstruct the building or provide any instructions regarding specific aspects of the project. The contractor requested permission from the Historical Society to hire the Claimant to help him.

Is the historical society the statutory employer of the Claimant?

What facts do we need to determine?

STATUTORY EMPLOYER Exceptions: Va. Code § 65.2-302(D)

Property Managers are not liable for compensation if they were only the Agent of Fee Owner or legal occupant, and did not have employees engaged in same occupation, and did not seek a profit from the subcontractor's work. They must be engaged as a manager only and may have no work in common with Worker.

Not seeking profit for engaging Worker for Owner, The Management fee is not considered profit.

SITUATION C:

Owner Home Flipper, LLC (Flipper) hires Usual Contractor, LLC (Contractor) to rehabilitate a HUD home for resale. Flipper always uses only Contractor for this work and always has at least one project in progress.

Contractor hires Electrician, an individual who he uses regularly on these projects.

Electrician arrives at the home one morning, no one else is on the site. He opens the front door and steps inside and as he steps, his leg goes through a hole in the floor,

cut and left uncovered by someone on the job. Electrician makes claim against Contractor and Flipper who both tell him he should make claim under his own Workers Compensation Policy.

1. Is Electrician covered under the act? Does his scope of work make a difference?
2. Should Flipper have carried WC coverage?
3. Is Flipper civilly liable? Contractor?
4. If Electrician agreed to carry coverage and did not, may he claim as a statutory employee of Contractor?
5. If Contractor has only 1 member/employee and Electrician is a solo independent contractor. Does that make a difference? See **Powell v. Up Front Painting,** 76 O.W.C. 55 (1997)
6. Electrician's helper is injured instead of Electrician? Who is liable under the Act?

   Who may have civil liability?

   Consider: What if Contractor's payment is tied to Flipper's profit upon sale?

   Does a Joint Venture bring Flipper within the Act?

V. **INDEPENDENT CONTRACTORS**:Test:

4 Prongs: Selection and engagement of the worker; the payment of wages; power of dismissal; the control Of Work by Employer;

Also determinative: provision of tools for the work, transportation and schedule, tasks assignments, oversight/ inspection.

The relationship of Statutory Employer does not transform an independent contractor to that of Statutory Employee. See **Race Fork Coal Co. v. Turner,** 5 Va. App. 350, 363 S. E. 2nd 423 (1987).

However, Independent Contractor is afforded civil immunity as to his employees due to Workers Compensation coverage by Statutory Employer. See **Vess v. Davis Electric Constructors, Inc.** 613 F. Supp. 1047 (1985).

Independent Contractor is covered as an employee only if the Statutory Employer and Workers' Compensation Carrier agree in writing. See **Reynolds v. Yellow Cab Co**. 75 O. W. C. 76 (1996).