

DOCTRINE OF VICARIOUS LIABILITY

Subcontractor Injuries

determining liability and the responsible party

By Thomas M. Buckley

In today's legal landscape, contractors need to be on guard against claims for an injury to the employee of a subcontractor. Construction work is fraught with risks of injury, and unfortunately injuries during construction work are not an uncommon occurrence. Normally, the employee can turn to his or her employer for workers' compensation benefits, but additional redress is often sought from the upstream contractors who hired that employer. Normally, such a claim is brought under the doctrine of vicarious liability—in other words, the idea that a party is responsible for the acts of its agents' employees.

A SAFE WORKPLACE

On the other hand, a party is normally not responsible for the acts of an independent contractor. In general, the question of whether a subcontractor is an independent contractor for whose actions the hiring contractor can be relieved of liability is a question of control. Does the hiring contractor maintain sufficient control of the work by the injured party or his employer to impose a duty of care on the contractor? This is because, in most jurisdictions, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and also to provide proper safeguards against the dangers of the work. This sometimes runs contrary to common thinking on the subject. Injured employees and their counsel often begin these cases with the concept of a non-delegable duty of safety for the general contractor. While some jurisdictions do maintain these sort of

strict liability standards, the majority look to the actual conduct of the contractor in question to determine liability. In other words, the duty to perform safely is not delegable, but many aspects of the conduct required to maintain safety on the job often can be. Again, in most jurisdictions, an employer has the duty to maintain a safe workplace for its employees. A subcontract can require that active safety monitoring and compliance be performed by the subcontractor. The hiring contractor's duties, in such a situation, would be limited to the extent to which they are involved in those safety operations.

***Note:** In the case of OSHA investigations, significant complications can arise in this matter with regards to the multi-employer responsibility doctrine, and OSHA counsel should be consulted in such a situation. This article, however, deals with the civil liability of contractors for the injuries to the employees of their subcontractors.*

THE INDEPENDENT CONTRACTOR

Liability can arise where the hiring contractor entrusts work to an independent contractor, but retains control of the work and fails to use reasonable care to control the work in a safe manner. The overriding question is whether or not the subcontractor is free to perform its job according to its own independent skill, knowledge, training, and experience. Typically, where the hiring contractor does not actively supervise the work, participate in the work, or direct its means and methods, the independent contractor is seen to be a truly independent contractor and sufficient control over the work to impose liability for the independent



contractor's actions is not found. On the other hand, where the general contractor retains day-to-day control over every aspect of the work, it may well be liable for its failure to supervise the work properly if that results in injury. A hiring contractor will normally not be seen to have this level of control if it merely retains the right to order the work to be stopped or resumed, to inspect the progress of the work, to receive reports, or to require that the work be completed pursuant to the general terms of the contract. General safety requirements or overall safety programs on the job are also not typically a sufficient level of control to impose liability in most cases. Rather, in order for liability to attach, it must be shown that the hiring contractor maintained control over the specific methods and means of the independent contractor's work, rather than relying on the independent contractor's expertise to decide how to perform that work safely.

MAINTAINING CONTROL

A typical subcontract often requires the subcontractor to be "solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of work under the subcontract," and "to be



responsible for shading, maintaining, and supervising all safety precautions and programs in connection with the performance of the subcontract.” Provisions like that would be additional evidence that the subcontractor, rather

than the hiring contractor, maintained control over the means and methods of its work. Normally, in a situation like that, the hiring contractor would not be directly responsible.

CLOSING THOUGHT

Every jurisdiction is different, of course, and some states do not follow this general rule. The majority, however, follow the traditional rule that a party is not directly responsible for the actions of an independent contractor. Typically, this analysis is based on a question of whether or not sufficient control is exercised over the subcontractor. There may also be instances in which the general contractor is directly liable for its own actions, not those of the subcontractor, such as cases in which it negligently hires or supervises the subcontractor or engages in inherently difficult dangerous activities like blasting. Nevertheless, especially given the increased prevalence of actions

for injuries to the employees of the subcontractor against an upstream contractor, it is important to be sure that the contract spells out the control issues, and that, in order to protect against liability, care is taken to document the extent to which the injured worker’s employer maintained control over the manner of work, particularly as to safety precautions that may have been violated, resulting in the accident. ■

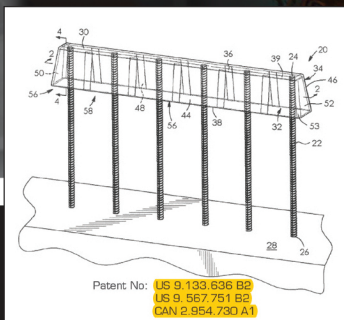
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