[J-50-97]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WILLIAM FONNER,	:	No. 49 W.D. Appeal Docket 1996
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered February 22, 1996 at No.
	:	0437PGH95, affirming the Order of the
v.	:	Court of Common Pleas of Allegheny
	:	County, Civil Division entered on January
	:	31, 1995 at No. GD 93-5319.
SHANDON, INC. AND JENDOCO	:	
CONSTRUCTION CORPORATION,	:	
	:	
	:	ARGUED: March 4, 1997
Appellees	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: JANUARY 21, 1999**

Since I find that the Majority's holding is contrary to the legislative intent of the 1974 amendments to the Act and allows for an unjust and inequitable result, I must dissent. The purpose of the 1974 amendments was to prohibit an employer, contractor or employee from rejecting application of the Act. In eliminating the "elective compensation" language from the Act, its application became mandatory. The impetus of this change was to afford protection to employees. The Legislature never intended that the amendments would allow a general contractor to escape civil liability if it did not pay for the injured employee's workers' compensation insurance. I find the clear meaning of the 1974 amendments was to place responsibility for workers' compensation benefits upon the general contractor *only where* the subcontractor or direct employer failed to do so. In reality, application of these

amendments rarely, if ever, will result in the general contractor assuming responsibility for providing workers' compensation insurance because in the modern construction workplace, general contractors will rarely, if ever, award a contract absent the subcontractor showing proof of workers' compensation coverage. Common sense and logic dictate that a general contractor should not reap the benefits of civil liability immunity unless it undertakes responsibility of compensation coverage. If, however, a general contractor does assume responsibility for the payment of workers' compensation, then it should be afforded statutory employer immunity.

In the present matter, application of the 1930 McDonald five part test leads to the conclusion that Appellee should be deemed the statutory employer and thus immune from civil liability. I submit, however, that in order to properly effectuate the legislative intent of the 1974 amendments and not foster an inequitable result, a sixth element should be considered. This sixth element requires the general contractor to show proof it assumed responsibility for providing workers' compensation to the injured employee before statutory employer immunity attaches. I believe the Legislature by its amendments essentially added this sixth element in order to prevent the type of inequitable result which occurred today.

As Judge Hoffman stated more than thirty years ago,

> . . . very great care . . . must be exercised before allowing an employer to avoid its liability at common law by asserting that he is a statutory employer. Section 203 of the Workmen's Compensation Act, which was designed to extend benefits to workers, should not be casually converted into a shield behind which negligent employers may seek refuge.

Stipanovich v. Westinghouse Electric Corporation, 210 Pa. Super. 98, 106, 231 A.2d 894, 898 (1967).