[J-91-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JOHN PECK, Appellee	:	No. 3 MAP 2002
v.	:	Appeal from the Order of the Commonwealth Court entered January 22, 2001, at No. 3148 C.D. 1999, reversing and remanding the Order of Delaware County Court of Common Pleas, entered November 9, 1999, at No. 97-15878.
DELAWARE COUNTY BOARD OF PRISON INSPECTORS, Appellant	:	ARGUED: May 16, 2002

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: DECEMBER 31, 2002**

I would find merit in appellant Board's argument that the first element of the interpretive test for statutory employer set forth in McDonald v. Levinson Steel Co., 153 A. 424, 428 (Pa. 1930), was satisfied by the Act of the General Assembly setting forth the Board's obligations and responsibilities. But, more importantly, I fear that the Court's overly technical approach to the statutory employer question presented fails to adequately account for the governmental employment situation at issue here. For both reasons, I respectfully dissent.

On its face, this case may appear to be relatively benign and narrow, involving as it does the workers' compensation consequences of a County electing to privatize a traditional governmental function, *i.e.*, prison services. But the question has far broader implications given the increasingly common phenomenon of governmental privatization of services. This revolution in the traditional way in which governmental services are

delivered and governmental obligations are discharged embraces prison services, educational services, legal services, welfare services, engineering services, landfill operations, wastewater treatment, and airport services and security, just to name a few. In determining the consequences to the workers' compensation system of these unique and increasingly complex situations, this Court should be mindful of both the purpose of such compensation and the practical effect of our decision. I am not so sure that rigid adherence to a judicial paradigm that was devised to address a different and simpler reality, such as the classic building contractor/subcontractor relationships that have been the predicate for the lead decisions in this area, adequately account for today's world.

In holding that the Board is not appellee's statutory employer, the lead opinion begins by noting that, because actual payment of compensation benefits (as opposed to potential secondary liability for compensation payments) is not a prerequisite to eligibility for statutory employer immunity under § 203 of the Act, statutory employer status will be found only where all five elements of the 1930 McDonald test are **strictly** satisfied.[1] In this regard, the lead opinion pursues what I believe to be an unnecessarily hostile approach to statutory employer claims. The lead opinion justifies its prejudice against such claims by citing with approval two Superior Court decisions -- Travaglia v. C.H. Schwertner & Son, Inc., 570 A.2d 513 (Pa. Super. 1989), *appeal denied*, 590 A.2d 758 (Pa. 1990) and Stipanovich v. Westinghouse Electric Corp., 231 A.2d 894 (Pa. Super. 1967) -- for the proposition that we are required to employ "close scrutiny" of claims of statutory employer immunity. According to these cases, the Workers' Compensation Act was designed to

[1] As the lead opinion notes, McDonald set forth the following formula for determining whether statutory employer status exists: "(1) An employer who is under contract with an owner or one in the position of an owner. (2) Premises occupied by or under the control of such employer. (3) A subcontract made by such employer. (4) Part of the employer's regular business intrusted [sic] to such subcontractor. (5) An employee of such subcontractor." 153 A. at 426.

benefit workers, and thus courts must be careful not to allow employers to use the Act as a "shield." Slip op. at 5.

Superior Court cases, of course, do not bind this Court. But, more importantly, to the extent they suggest that we must approach these claims with a bias in favor of the employee, rather than in light of the competing interests balanced by the Act, I believe they are simply wrong. As this Court recently noted in Thompson v. W.C.A.B. (USF&G Co.), 781 A.2d 1146 (Pa. 2001), a case involving subrogation rights:

> We have consistently held in the past that the purpose of the Act was to provide the employee an exclusive right to benefits without the necessity of proving fault in exchange for abrogation of the employee's common law negligence remedies….
>
> * * *
>
> The Workers' Compensation Act balances competing interests. The Act obliges subscribing employers to provide compensation to injured employees, regardless of fault, either through insurance or self-insurance. See 77 P.S. § 501. In exchange, employers are vested with two important rights: the exclusivity of the remedy of worker's compensation and the concomitant immunity from suit by an injured employee, see 77 P.S. § 481, and the absolute right of subrogation respecting recovery from third-party tortfeasors who bear responsibility for the employee's compensable injuries. … This leads to the conclusion that an employer who complies with its responsibilities under the Workers' Compensation Act should not be deprived of one of the corresponding statutory benefits based upon a court's *ad hoc* evaluation of other perceived "equities."

Id. at 1151, 1153 (citations omitted). Accord Kohler v. McCrory Stores, 615 A.2d 27, 30 (Pa. 1992) (employee surrenders common law right to damages for injuries sustained in course of employment as result of employer's negligence in exchange for employee's statutory right to compensation for all such injuries regardless of employer's negligence) *citing*, Socha v. Metz, 123 A.2d 837, 839 (Pa. 1956).

Applying its skeptical approach under the McDonald checklist, the lead opinion concludes that, although the Board is a legal entity distinct from the County, it nevertheless is not appellee's statutory employer. The lead opinion reasons that, because the Board's responsibilities to oversee the prison results from legislation rather than an independently negotiated agreement between the Board and the County, there is no "contract" for purposes of the first element of the McDonald test. As a result, the Board is not entitled to statutory employer immunity.

To the extent that a finding that the Board is a statutory employer must always be squared with the archaic seventy-year old language in McDonald, as opposed to squaring it with the governing statute, see discussion *infra*, I see no deficiency here. As the lead opinion notes, the General Assembly passed enabling legislation, which sets forth the Board's responsibilities and obligations. I believe that these statutory provisions adequately form the "contract" under which the Board performs the work of managing the County's prison, and satisfy the "contract" contemplated by McDonald in the more common contractor/subcontractor relationship paradigm.

I do not dispute the lead opinion's statement that traditional notions of contract law presume that "the parties themselves must agree upon the material and necessary details of the bargain." Slip op. at 10 (citation omitted). But for purposes of the "contract" element created by this Court in McDonald, I do not believe that we are obliged to slavishly adhere to formalistic contract notions. This is particularly so in situations where legislation serves the same purpose as a contract. This case illustrates this point. If the Board and the County had entered into a "traditional" contract for the management of the prison facility, with all "i's" dotted and "t's" crossed, that contract would have specified the Board's obligations and duties in the four corners of the written instrument. But the enabling statutes already set out those very same obligations and duties -- the details of the bargain -- for the Board's operation and management of the prison. Those statutory obligations

should be recognized as the "contract" existing between the County as the owner of the premises and the Board for purposes of the first element of the McDonald test.

To the extent that the lead opinion's approach suggests that the McDonald test is to be viewed as a straitjacket from which no deviation is permitted, I believe that such an approach will lead us farther and farther afield from the actual language and purpose of the statute and fails to recognize contemporary work situations. The governmental entity in this case is not some mere bystander or potential third party tortfeasor. If the Board had not privatized these services, it unquestionably would be liable for compensation benefits and it would enjoy the concomitant protection of tort immunity. Moreover, if for some reason Wackenhut were unable to pay appellee for the injury here -- now, or in the future -- it is a safe bet that appellee would be looking directly to the Board as the logical secondary source for compensation payments, under section 302(b) of the Act, 77 P.S. § 462. The Court's decision today exposes statutorily-created governmental entities to potentially massive tort exposure merely because of privatization -- notwithstanding that the injured employee is covered and is reimbursed under the workers' compensation system for the work injury and that the government exists as a potential secondary workers' compensation insurer. In light of these realities, I would hold that the Board is the statutory employer of appellee under the Act and, therefore, is entitled to tort immunity.

Section 203 of the Act provides, by its terms, as follows:

> An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe.

77 P.S. § 52. Section 203 thus creates secondary or contingent liability in a party who is not the direct employer of the injured worker. It acts "to hold a general contractor

secondarily liable for injuries to the employees of a subcontractor, where the subcontractor primarily liable has failed to secure benefits with insurance or self-insurance." Dougherty v. Conduit & Foundation Corp., 674 A.2d 262 (Pa. Super. 1996), *appeal denied*, 683 A.2d 883 (Pa. 1996), *quoting* Caldarelli v. Mastromonaco, 542 A.2d 181 (Pa. Cmwlth. 1988), *appeal denied*, 551 A.2d 181 (Pa. 1988) and 551 A.2d 218 (Pa. 1988). With that potential liability, however, came the counterbalancing benefit of immunity from common law negligence suits arising from the work injury. It was because of the fact that secondary "employers" could invoke that immunity that this Court, over seventy years ago, set forth its five-part test in McDonald to determine when the vicarious "statutory" employer relationship should be deemed to exist.

It is important to remember and recognize, however, that it is the statute itself which controls and nothing in the language of § 203 requires the existence of a formal contract, as opposed to the sort of employment relationship that such a formal contract suggests. The McDonald test only interprets the statute; it does not control the statute. There is something incongruous in a judicial interpretation that would arguably permit secondary workers' compensation **liability** in the absence of a formal contract, but would not recognize statutory employer **immunity** without one. This point was cogently and persuasively made by the late Vincent A. Cirillo, former President Judge of our Superior Court, and I reproduce his analysis here:

> Initially, it is imperative to recall the underlying purposes of the [Act,] as stated in Qualp [v. James Stewart Co., 109 A. 780 (Pa. 1920)]:
>
> > The legislature wanted to definitely fix some responsible party with the obligation of paying compensation to injured workmen, and the party selected was the first whose duty it was to assume control of the work. It selected the first in succession from the owner, believing the owner would contract with none but responsible persons. He was the first in the field and in the contracting scheme of work, the head of the endeavor, the person to whom an employee would naturally look.... The act

> intended to throw the burden on the man who secured the original contract from the owner to the end that employees of any degree doing work thereunder might always be protected in compensation claims.

> Qualp, … 109 A. at 782. Thus, an immediate contractual relationship is not required between the general contractor and an employee of a subcontractor before the general contractor is liable for the payment of workmen's compensation benefits to that employee. … Likewise, since a direct contractual relationship is unnecessary to expose a general contractor to liability for workmen's compensation benefits, such a contractual relationship should not be required to achieve the status of a statutory employer.

Travaglia v. C.H. Schwertner & Son, Inc., 570 A.2d 513, 521 (Pa. Super. 1989) (Cirillo, P.J., dissenting) (citations omitted). President Judge Cirillo found further support for this proposition in Judge Barbieri's well-respected treatise on Pennsylvania's workmens' compensation law:

> [I]n negligence cases, the general contractor has the full immunity from suit by the employe of a subcontractor which an immediate employer would have. He is the statutory employer and is the injured employe's employer for negligence immunity purposes and is secondarily liable for compensation even though the immediate employer or some other intermediate subcontractor ... is insured and responds fully on the injured employe's claim. The reason for this difference cannot be found in the language of the statute, but the rationale must be that, since the general contractor remains statutorily liable, although only in a reserve status, in return for this he has the statutory employer's immunity from statutory employe negligence suits in all events.

Id., citing 1 Barbieri, *Pennsylvania Workmen's Compensation & Occupational Disease,* § 4.09(3) (1975) (footnotes omitted).

I agree with the considered observations of President Judge Cirillo and Judge Barbieri. I think that argument has substantial force where, as here, the relationship at issue does not fall into the traditional construction contract paradigm. Here, the governmental entity is the logical secondary source for compensation. When a party, such as the Board here, is either primarily or secondarily liable for workmens' compensation benefits to an injured employee, that party should enjoy the concomitant tort immunity

contemplated by the Act. Such an approach accounts for contemporary realities and maintains the balance built into the workers' compensation system. Because I would conclude that the Board remains potentially liable for workers' compensation benefits under the Act in a reserve status if Wackenhut defaults on its obligation, the Board should be entitled to statutory employer immunity.

Under the lead opinion's approach, appellee here, solely by virtue of the contract between the Board and Wackenhut, is permitted to seek a dual recovery for the same work injury. The Board thus loses immunity, even though it could face the prospect of liability under the Act. I would hold that a statutory employer relationship exists between the Board and appellee such that the Board is immune from appellee's negligence suit. I believe such a holding is commanded by the Act and is consistent with the McDonald test. Hence, I respectfully dissent.

Mr. Justice Saylor joins this dissenting opinion.