IN THE SUPREME COURT OF TEXAS

NO. 05-0272

ENTERGY GULF STATES, INC., PETITIONER,

v.

JOHN SUMMERS, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued October 16, 2008

JUSTICE HECHT, concurring.

I think the Court's construction of the statutory text is reasonable, but so is the dissent's (though I disagree with much of its analysis), which means that the provisions are ambiguous and can be understood correctly only in the context of the Texas Workers' Compensation Act as a whole. I join in all but Part VII of the Court's opinion and write separately to explain my reasons for doing so, which come down to this: the Act encourages coverage, as does the Court's construction, but the dissent's does not.

I

Ascertaining the meaning of a statutory text (or any text for that matter) begins with the language used, and if that language is plain enough, absent some obvious error or an absurd result,

that is where the task ends.[1] It matters not what someone thinks the text may have meant to say or now hopes or wishes it said.[2] To look beyond the plain language risks usurping authorship in the name of interpretation. Construing statutes is the judiciary's prerogative; enacting them is the Legislature's. To prevent trespass, this Court and others have repeatedly stressed that statutory construction must be faithful to the plain language of the text.

But that principle is undermined when it is invoked where it does not apply — that is, when the language of the text is not, in fact, plain. To find plain meaning where it is missing suggests at best that the investigation is insincere or incompetent, at worst that the search is rigged, that the outcome, whatever it is, will always come out to be "plain". Fidelity to plain meaning is important only if the word "plain" has itself a plain meaning.

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[1] *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language, and not elsewhere. They are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain."), quoted in *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997), *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985), and *Texas Highway Comm'n v. El Paso Bldg. & Constr. Trades Council*, 234 S.W.2d 857, 863 (Tex. 1950); *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) ("These specific, unambiguous statutes are the current law and should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word, *see City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998), or application of the literal language of a legislative enactment would produce an absurd result, *see id.* (citing *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring)).").

[2] *See Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 29 (Tex. 1990) (Hecht, J., dissenting) (rejecting a "Cartesian theory" for construing insurance policies — "'I believe, therefore I am insured'").

I fear the phrase "plain language" has been overworked to the point of exhaustion. It has appeared in published Texas cases more often in the past decade than in the prior fifteen,[3] usually as the basis for resolving a dispute over meaning, though it can hardly be said that the prevalence of plain language is increasing, let alone exponentially. I detect no waning in the power of the curse at Babel. To the contrary, more and more this Court is called upon to construe statutes which opposing parties insist are unambiguous and mean very different things. A dispute over meaning does not render a text ambiguous;[4] many disputes lack substance. But when language is subject to more than one reasonable interpretation, it is ambiguous.[5] That is the plain meaning of ambiguous. Of course, reasonable people "will sometimes disagree about what reasonable people can disagree about",[6] but even so, it is difficult to maintain that language is plain in the face of a substantial, legitimate dispute over its meaning.[7]

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[3] My Westlaw research reveals 1,501 cases in the past ten years, and 1,464 in the prior 153 years, an increase on average from less than ten cases a year to more than 100 cases a year. Not all are statutory construction cases, but plain language is important in other textual construction. I offer the results only as a very general indication of how the use of the phrase has multiplied.

[4] *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 465 (Tex. 1998).

[5] *In re Missouri Pac. R.R. Co.*, 998 S.W.2d 212, 217 (Tex. 1999) ("The language of the statute could support more than one reasonable interpretation and therefore is ambiguous.").

[6] *City of Keller v. Wilson*, 168 S.W.3d 802, 828 (Tex. 2005).

[7] *See, e.g.*, *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 484 (Tex. 2001) (Hecht, J., dissenting) ("The Court touts its view as the 'plain meaning' of the 'unambiguous language' of the statute. In other words, the split in the circuits is not really a serious dispute; the Second, Third, and Fourth Circuits simply cannot (or perhaps will not) read plain English.").

Only every so often do we come right out and brand a text with the a-word,[8] as if it were a mark of shame. It seems nicer to call a statute unclear[9] or better yet, just leave that implication.[10] But the truth is that the meaning of statutory language is often reasonably disputed and therefore ambiguous to some extent, and resolving reasonable disputes with reason, rather than by denying their reasonableness, would result in a sounder jurisprudence. Two great evils attend this course. One is that judges will use analysis of reasonable disagreements over meaning as a guise for substituting their own preferences in place of the legislature's. This would trespass upon the boundary between judicial and legislative spheres that is fundamental to our structure of government. The other is that in the search for the meaning of a statutory provision, courts will grasp at all sorts of statements made before, during, and after the process of enactment, whether by legislators or others, as relevant or even authoritative. The Legislature does not speak through individuals — even its members — in committee hearings, in bill analyses and reports, in legislative debate, or in pre- and post-enactment commentary; it speaks through its enactments.

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[8] I recall four instances in the past twenty years. *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006) ("[T]he words 'sue and be sued', standing alone, are if anything, unclear and ambiguous."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 701 (Tex. 2003) ("The statute's ambiguity precludes our finding an unmistakable Legislative intent to waive sovereign immunity."); *In re Missouri Pac. R.R. Co.*, 998 S.W.2d at 217; *Stracener v. United Servs. Auto Ass'n*, 777 S.W.2d 378, 383 (Tex. 1989) ("We find that this separation of the clause [with a comma] creates an ambiguity . . . .").

[9] *E.g.*, *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex. 2001) (Owen, J., concurring and stating the opinion of the Court) ("We conclude . . . that the PURA is unclear . . . .").

[10] *E.g.*, *City of Corpus Christi v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 231, 261 (Tex. 2001) (Owen, J., concurring and stating the opinion of the Court) ("[W]hen faced with an ambiguous code provision, we give some deference to the Commission's interpretation when it is reasonable . . . . Under the circumstances presented here, we cannot say that the Commission's interpretation . . . is an unreasonable one . . . .").

Rather than struggle to understand and explain a difficult text, it might seem easier to fall back on a simple insistence that all language have a plain meaning, but doing so risks leaving the impression that the court is not being entirely honest. Courts must scrupulously guard against both evils, but in doing so, cannot ignore a statute's context that may illumine its meaning. Years ago Special Chief Justice Samuels[11] wrote for this Court:

> A statute should not be construed in a spirit of detachment as if it were a protoplasm floating around in space. The historical treatment to which a statute may be subjected is aptly set forth in Travelers' Insurance Co. v. Marshall, 124 Tex. 45, 76 S.W.2d 1007, 1012 . . . [1934], where it is said: 'Generally it may be said that in determining the meaning, intent, and purpose of a law or constitutional provision, the history of the times out of which it grew, and to which it may be rationally supposed to bear some direct relationship, the evils intended to be remedied, and the good to be accomplished, are proper subjects of inquiry.'[12]

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[11] Special Chief Justice Sidney L. Samuels of Fort Worth was designated by Governor Ross Sterling in January 1932 to sit for Chief Justice Cureton under a statute now codified as section 22.005 of the Texas Government Code. The case involved a private claim against the State to lands in the once-disputed "Alsace-Lorraine" region along the 100th meridian from the Red River to the 36° 30' parallel dividing Texas and the Indian territories that later became Oklahoma. The United States Supreme Court finally held in *Oklahoma v. Texas*, 272 U.S. 21 (1926), that the region belonged to Texas. Chief Justice Cureton was disqualified because he had represented Texas' interests in the dispute. The Court took just nine years to decide the case. Interestingly, James V. Allred had also represented Texas' interests while Attorney General, and when the case was decided, had served two terms as Governor and been nominated to serve as a federal judge, all the while being shown as counsel for the State in the case. (The most famous exercise of the designation power was surely Governor Pat Neff's appointment of a Special Supreme Court consisting of three women, Mrs. Hortense Ward, Special Chief Justice, and Miss Ruth Virginia Brazzil and Miss Hattie L. Henenberg, Special Associate Justices, to hear and determine the issues in *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925).)

[12] *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (Tex. 1939); *see also* TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision."); *id*. § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

II

The Workers' Compensation Act provides that a general contractor who agrees to furnish workers' compensation insurance coverage to a subcontractor and its employees becomes their employer for purposes of the Act — their statutory employer, if you will — so that their exclusive remedy against the general contractor for on-the-job injuries is compensation benefits. Specifically, the relevant provisions of the Labor Code state:

> A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.[13]
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> "General contractor" means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a "principal contractor," "original contractor," "prime contractor," or other analogous term. The term does not include a motor carrier that provides a transportation service through the use of an owner operator.[14]
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> "Subcontractor" means a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform.[15]
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> An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of this state.[16]
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> Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against

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[13] TEX. LAB. CODE § 406.123(a).

[14] *Id*. § 406.121(1).

[15] *Id*. § 406.121(5).

[16] *Id*. § 406.123(e).

> the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.[17]

The question is whether a person who subcontracts work to be done on his own property is a general contractor for purposes of these provisions. In the Court's first opinion, we all thought from the "plain and ordinary meaning" of the provisions the answer was clearly yes.[18] On rehearing, after reargument and a number of amicus briefs, three MEMBERS of the Court now disagree and think that the statutory language "seems clear"[19] and "compels the conclusion"[20] that the answer is no. The difficulty is this: while it is true, as the Court contends, that a person who engages subcontractors to work on his own property is often said to act as his own general contractor and certainly performs that function, more often, as the dissent contends, a general contractor is thought of as a person who works for someone else, like a property owner, subcontracting parts of a job to others as appropriate. On the face of it, either reading of the statute seems reasonable. The text, it must therefore be said, is ambiguous.

Scrutinizing the text does not resolve the difficulty. The statutory definition of "general contractor" has three components. The first is this prescription: "'General contractor' means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." A premises owner who undertakes to procure the performance of work

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[17] *Id.* § 408.001(a).

[18] 50 Tex. Sup. Ct. J. 1140, 1143 (Aug. 31, 2007) ("Construing the statute according to its plain and ordinary meaning, Entergy is a general contractor because it '[undertook] to procure the performance of work' from IMC." (brackets in original)).

[19] *Post* at ___.

[20] *Post* at ___.

or service on his property would appear to fit this definition of general contractor. A premises owner can undertake to procure work or service for himself, through subcontractors for example, or he may employ someone else to procure the work or service — the subcontractors — for him. Nothing in the statute's use of the word "undertakes" suggests any difference in its ordinary meaning.

The second component of the statutory definition is a non-exclusive list of examples: "The term includes a 'principal contractor,' 'original contractor,' 'prime contractor,' or other analogous term." The dissent asserts that "we have for decades defined a contractor as 'any person who, in the pursuit of an independent business, undertakes to do a specific piece of work *for other persons* . . . .'", quoting a 1942 decision of this Court, *Industrial Indemnity Exchange v. Southard*,[21] which in turn quoted a 1924 decision of the commission of appeals, *Shannon v. Western Indemnity Co.*[22] But the issue in *Southard* was whether the claimant was an *independent* contractor, and the quoted passage addresses that issue, as is clear from its context:

> Many definitions of what is meant by the term 'independent contractor' have been given. They all rest substantially on the same basic principle. In the case of Shannon v. Western Indemnity Co., Tex. Com. App., 257 S.W. 522, 524, this Court announced, as the basis for the opinion rendered in that case, the following definition: 'A contractor is any person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details.'[23]

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[21] 160 S.W.2d 905, 907 (Tex. 1942).

[22] 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted).

[23] 160 S.W.2d at 907.

The issue was the same in *Shannon*, a case decided by the commission of appeals. Certainly, a person could not act as his own independent contractor; his independence would be severely compromised. But nothing in either case suggests that an owner cannot act as his own general contractor. The dissent points out correctly that the Legislature has sometimes used "general contractor" in a way that excludes a premises owner.[24] But the Court cites instances in which a person who hires subcontractors directly is said to act as his own general contractor, suggesting that it is a common expression.[25] One cannot be sure from the text alone whether the Legislature meant for owners to be, or not to be, general contractors.

The list of examples is specifically non-exclusive but obviously intended to illustrate similarities.[26] The dissent argues that a premises owner cannot be a general contractor because the 1979 edition of *Black's Law Dictionary* defined a "contractor" as "a person who, in the pursuit of any independent business, undertakes to do a specific piece of work for other persons".[27] But the rest of the definition is not so restrictive:

> This term is strictly applicable to any person who enters into a contract, but is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works or services on a large scale, or the furnishing of goods in large quantities, whether for the public or a company or individual. Such are generally

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[24] *Post* at ___.

[25] *Ante* at ___.

[26] *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003) ("[T]he rule of *ejusdem generis* . . . provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.").

[27] BLACK'S LAW DICTIONARY 295 (5th ed. 1979).

> classified as general contractors (responsible for the entire job) and subcontractors (responsible for only portion of job; *e.g.* plumber, carpenter).[28]

The definitions describe someone who might or might not be the owner of the jobsite. The same dictionary gives this definition of "general contractor":

> One who contracts for the construction of an entire building or project, rather than for a portion of the work. The general contractor hires subcontractors (*e.g.* plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors. Also called "prime" contractor.[29]

It defines "prime contractor" thusly:

> The party to a building contract who is charged with the total construction and who enters into sub-contracts for such work as electrical, plumbing, and the like. Also called "general contractor."[30]

Neither of these definitions excludes a jobsite owner from acting as his own general contractor. Other dictionaries are similarly inconclusive.[31] The second component does not clearly indicate whether a jobsite owner is or is not to be treated as a general contractor.

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[28] *Id.*

[29] *Id.* at 615.

[30] *Id.* at 1072.

[31] BLACK'S LAW DICTIONARY 350 (8th ed. 2004) ("**contractor. 1.** A party to a contract. **2.** More specif., one who contracts to do work or provide supplies for another."); *id.* at 351 ("***general contractor.*** One who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all the work. — Also termed *original contractor*; *prime contractor*."); THE OXFORD ENGLISH DICTIONARY 837 (2d ed. 1989) ("One who contracts or undertakes to supply certain articles, or to perform any work or service (*esp.* for government or other public body), at a certain price or rate; in the building and related trades, one who is prepared to undertake work by contract."); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1981) ("**contractor** . . . **1 a:** one that contracts **:** a party to a bargain **:** one that formally undertakes to do something for another **b:** one that performs work (as a printing job) or provides supplies on a large scale (as to troops) according to a contractual agreement at a price predetermined by his own calculations **c:** one who contracts on predetermined terms to provide labor and materials and to be responsible for the performance of a construction job in accordance with established specifications or plans — called also *building contractor*").

The third component of the statutory definition is an exclusion: "The term does not include a motor carrier that provides a transportation service through the use of an owner operator." The Court argues that expressing only one exclusion suggests that no others exist.[32] The dissent offers this tautological explanation of the exclusion: "the Legislature likely expressly excluded motor carriers from the general-contractor definition to make it clear that, even though they might otherwise fit the general-contractor construct, they are to be treated differently."[33] I dare say that it was not merely likely but absolutely certain that by excluding motor carriers, the Legislature meant to make clear they are to be treated differently. But the dissent misses the Court's point: if the Legislature intended to make clear who should not be treated as a general contractor, as we all think it did, and it listed motor carriers but not premises owners, then premises owners should be treated as general contractors.

The statutory definition of "subcontractor" — "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform" — does not help clarify the matter. A premises owner may be a general contractor who "undertake[s] to perform" work by contracting with subcontractors.

Examined with precision, the statutory text can reasonably be read to provide that a person who undertakes to procure work or service is no less a general contractor because he also happens to own the premises where the job is to be done, and no less a statutory employer when he provides workers' compensation insurance coverage for subcontractors and their employees. That, of course,

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[32] *Ante* at ___.

[33] *Post* at ___.

is why the Court was unanimous in its first opinion. The dissenters too quickly dismiss a position they so recently embraced unreservedly; sometimes wrong, they are never in doubt. But their basic argument has weight: general contractor often refers to someone who works for the job owner. This reading of the statute is a reasonable one, in my view, but it is not the only reasonable one.

III

The disagreement in this case is not over words and cannot be resolved with dictionaries. It is over consequences and can only be settled by examining how the statutory provisions fit in the context of the Workers' Compensation Act as a whole. The issue for the Court is not whether it is good policy to treat a person who arranges for work to be done on his property as a general contractor, something we cannot decide, but whether such treatment is most consistent with the policies embedded in the Act. For four reasons, I believe it is.

First: The Act's "decided bias" is for coverage.[34] Although employees and employers can opt out, an employee has only a limited time frame in which to do so,[35] and an employer is penalized for doing so by loss of his common law defenses to an employee's claim of injury.[36] The Act's

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[34] *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 140 (Tex. 2003) ("And in examining the Labor Code's overall scheme for workers' compensation and for protecting workers, we conclude that the Act's decided bias in favor of employers electing to provide coverage for their employees supports our conclusion that the Act permits more than one employer for workers' compensation purposes." (footnote omitted)).

[35] TEX. LAB. CODE § 406.034(b) ("An employee who desires to retain the common-law right of action to recover damages for personal injuries or death shall notify the employer in writing that the employee waives coverage under this subtitle and retains all rights of action under common law. The employee must notify the employer not later than the fifth day after the date on which the employee: (1) begins the employment; or (2) receives written notice from the employer that the employer has obtained workers' compensation insurance coverage if the employer is not a covered employer at the time of the employment but later obtains the coverage.").

[36] *Id*. § 406.033(a) ("In an action against an employer who does not have workers' compensation insurance coverage to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that: (1) the employee was guilty of contributory negligence; (2) the employee assumed

encouragement of coverage is furthered by incentivizing general contractors to provide workers' compensation coverage for subcontractors and their employees.[37] No one questions that the Act does this by providing such general contractors the protection of the exclusive remedy. To refuse the incentive when the general contractor happens to own the jobsite would discourage coverage, contrary to the policy of the Act. The dissent responds that because the Act is in derogation of common law rights, it should not be "applied to cases not clearly within its purview".[38] But it has long been "the settled policy of this State to construe liberally the provisions of the [Act] in order to effectuate the purposes for which it was enacted."[39] Coverage is a fundamental purpose of the Act.

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the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee."); *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000) ("To encourage employers to obtain workers' compensation insurance, section 406.033 penalizes nonsubscribers by precluding them from asserting certain common-law defenses in their employees' personal-injury actions . . . ."). Still, about a third Texas employers choose not to subscribe to the workers' compensation system. BIENNIAL REPORT OF THE TEXAS DEPARTMENT OF INSURANCE TO THE 81ST LEGISLATURE – DIVISION OF WORKERS' COMPENSATION 3 (Dec. 2008).

[37] *Wingfoot Enters.*, 111 S.W.3d at 142 ("[S]ection 406.123 (covering general contractors and subcontractors), like other workers' compensation provisions in the Code, encourage[s] employers to obtain workers' compensation insurance coverage by providing benefits to the employer, including the exclusive remedy provision, if coverage is obtained.").

[38] *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)).

[39] *Huffman v. S. Underwriters*, 128 S.W.2d 4, 6 (Tex. 1939) (quoted in *In re Poly-America, L.P.*, 262 S.W.3d 337, 350 (Tex. 2008)); *see Millers' Mut. Cas. Co. v. Hoover*, 235 S.W. 863, 864 (Tex. Comm'n App. 1921, judgm't adopted) ("It has been thought, inasmuch as the [Act] is in derogation of the common law, that it should be given a strict construction, but the courts have very generally held that a spirit of liberality should characterize its interpretations, for the reason that it is to be classed as remedial legislation." (quotation omitted)); *Southern Sur. Co. v. Inabnit*, 1 S.W.2d 412, 413-414 (Tex. Civ. App.–Eastland 1927, no writ) ("The leading authorities . . . agree that Workmen's Compensation Laws came into existence in response to a general acceptation of the broad economic theory that industrial accidents should properly be chargeable as a part of the overhead expenses of the industries. These laws are remedial in their nature, and should be liberally construed with the view of promoting their objects. The early tendency of our courts to construe them strictly because they were thought to be in derogation of common law has long since given place to a liberal rule of construction. The rule now prevailing prevents the restriction of the scope of the laws by exceptions and exact definitions not in harmony with their spirit.").

Second: Since 1917, the Act has expressly prohibited a subscriber from using a subcontractor to circumvent coverage.[40] To prohibit a subscriber who owns the jobsite from engaging subcontractors to avoid paying compensation benefits, while at the same time discouraging the subscriber from providing compensation benefits by denying the exclusive remedy protection, would be a perverse result indeed. The dissent dismisses the policy of discouraging avoidance of coverage, contained in the Act since 1917, as "irrelevant",[41] but there is simply no reason to think that the Act has ever beckoned with one hand and shunned with the other.

Third: Since 1963, the Act has provided that a subscribing employer may agree in writing, before a worker has been injured, to assume a third party's liability for the injury.[42] Such agreements

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[40] Act approved Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, § 6, 1917 Tex. Gen. Laws 269, 284-285 ("If any subscriber to this Act with the purpose and intention of avoiding any liability imposed by the terms of the Act sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe[e] of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this Act to be the employe[e] of the subscriber, and in addition thereto such employe[e] shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the terms and provisions of this Act."); renumbered § 6(d) by Act of May 28, 1983, 68th Leg., R.S., ch. 950, 1983 Tex. Gen. Laws 5210, 5210-5211; amended by Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, § 3.05(h), 1989 Tex. Gen. Laws 1, 16, formerly TEX. REV. CIV. STAT. ANN. art. 8308, § 3.05(h) ("If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the purpose and intent to avoid liability as an employer under this Act, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall also have a separate right of action against the subcontractor, which right of action does not affect the employee's right to compensation under this Act."); codified by Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987, 1159, as TEX. LAB. CODE § 406.124 ("If a person who has workers' compensation insurance coverage subcontracts all or part of the work to be performed by the person to a subcontractor with the intent to avoid liability as an employer under this subtitle, an employee of the subcontractor who sustains a compensable injury in the course and scope of the employment shall be treated as an employee of the person for purposes of workers' compensation and shall have a separate right of action against the subcontractor. The right of action against the subcontractor does not affect the employee's right to compensation under this subtitle.").

[41] *Post* at ___.

[42] Act of May 20, 1963, 58th Leg., R.S., ch. 437, § 1, 1963 Tex. Gen. Laws 1132, formerly TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (1925); amended by Act of Dec. 12, 1989, 71st Leg., 2d C.S., ch. 1, 1989 Tex. Gen. Laws 1, 32-33, formerly TEX. REV. CIV. STAT. ANN. art. 8308-4.04; and codified by Act of May 12, 1993, 73rd Leg., R.S., ch.

appear to be common among contractors on construction jobsites.[43] If the employer is a subcontractor and the third party is a general contractor who has provided coverage for the worker, the worker's exclusive remedy against both is limited to compensation benefits. If the general contractor were not afforded the same protection because he owned the jobsite, the worker could recover common law damages against him, and he in turn could require the subcontractor to assume the liability, thereby defeating the protection of the exclusive remedy to the worker's own employer, even though he and the general contractor both provided compensation benefits. In this case, Entergy had just such an indemnity agreement with IMC.[44] If Summers can recover common law

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269, § 1, 1993 Tex. Gen. Laws 987, 1235, now TEX. LAB. CODE § 417.004 ("In an action for damages brought by an injured employee, a legal beneficiary, or an insurance carrier against a third party liable to pay damages for the injury or death under this chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless the employer executed, before the injury or death occurred, a written agreement with the third party to assume the liability.").

[43] Brief of Amicus Curiae ABC of Texas, Inc. at 5.

[44] The agreement between Entergy and IMC contained these provisions:

"18. Indemnity

"18.1 To the fullest extent allowed by applicable law, the Contractor agrees that it will indemnify and hold harmless the Entergy Companies, their affiliated and associated companies and any of their agents, officers, directors, shareholders, employees, successors and assigns from any and all claims, losses, costs, damages, expenses, including attorneys fees, and liability by reason of property damage, personal injury (including death), or both such damage and injury of whatsoever nature or kind arising out of or as a result of any negligent or wrongful act or omission in connection with the performance of the Work by the Contractor, its employees, agents, and subcontractors. THE PARTIES EXPRESSLY AGREE THAT THIS INDEMNITY SHALL APPLY EVEN IN THE EVENT OF THE CONCURRENT NEGLIGENCE OF THE ENTERGY COMPANIES.

"18.2 Further, with respect to Contract Orders being performed by Contractor as an independent contractor with sole rights to direct the Work performed by its employees, the Contractor shall be solely responsible for and shall indemnify and hold harmless the Entergy Companies, their affiliated and associated companies and any of their agents, officers, directors, shareholders, employees, successors or assigns from and against any and all claims, liability, losses, costs, damages and expenses, including attorney fees, on account of the death of or injury to the Contractor or any subcontractors, or to any employees or agents of the Contractor or any subcontractor, caused by, arising out of, or in any way connected with the Work to be performed hereunder, or while the Contractor or any such subcontractors, employees or agents are on or near any of the Sites or Owners' premises, WITHOUT REGARD TO WHETHER ANY

damages from Entergy (having already received compensation benefits, of course), Entergy can require reimbursement by IMC, Summers' direct employer. In this situation, the workers' compensation system provides nothing to any employer, even though all employers have agreed to provide compensation benefits to all employees, which the injured worker himself requested and received. This would be an even more perverse disruption of the policies of the Act. The dissent argues that the economic effect of indemnity agreements is minimal because an employer can obtain compensation coverage at a reduced cost through owner-provided policies like Entergy's and can buy general liability insurance for the increased risk of damages not limited by providing compensation coverage. But compensation insurance that provides no protection is no bargain, however reduced the cost, and having to buy two policies for an increased risk when one policy for a limited risk should do is perverse. The fact that employers often do so, the dissent says, shows they know they must, but all it shows for sure is an unwillingness to put too much trust in the fairness of the law. Anyway, according to the dissent, the problem is "a policy choice the Legislature made."[45] I would not blame the Legislature for a problem that can be avoided by a reasonable construction of the Act.

SUCH DEATH OR INJURIES ARE ALLEGED TO HAVE BEEN CAUSED BY OR ARE ATTRIBUTABLE IN WHOLE OR IN PART TO THE NEGLIGENCE OF THE ENTERGY COMPANIES, THEIR EMPLOYEES OR AGENTS, THE CONDITIONS OF THE PREMISES, OR OTHERWISE, AND NOTWITHSTANDING ANY OTHER PROVISIONS HEREIN CONTAINED TO THE CONTRARY."

[45] *Post* at ___.

Fourth: The Act creates a comprehensive system,[46] and treating similarly situated contractors and employers differently would disrupt that system unnecessarily. There is no apparent reason why a premises owner should have the exclusive remedy protection when he provides workers' compensation insurance covering his own employees engaged in particular work but not when he provides the same coverage for his subcontractors and their employees, retained to do the same work.[47] The dissent's only response is that whimsy is a legislative prerogative.

The Act, first passed in 1913, provides an injured worker guaranteed but limited wage and medical benefits quickly and without regard to fault, in exchange for which the worker foregoes common law damage claims against his employer.[48] Not long ago, we wrote: "The [A]ct, which was

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[46] *Woolsey v. Panhandle Ref. Co.*, 116 S.W.2d 675, 676 (Tex. 1938) ("The law [the Workers' Compensation Act] is comprehensive in its terms . . . .")

[47] *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 795-796 (Tex. 2001) (Hecht, J., concurring) ("The hire for a subscribing independent contractor presumably includes the cost of providing workers' compensation coverage related to the work, and the contractor's employer who pays it should have the same protection from extra liability for job-related injuries to the contractor's employees that the contractor has. The employer thus has the same economic incentive the contractor has to minimize job-related risks to workers. The employer is not like a product manufacturer or other stranger to the work relationship who has not born any part of the cost of compensation and therefore is not immune from liability for injury to the contractor's employees. Imposing liability on the employer for the contractor's negligent injury of its employee is simply inconsistent with the 'bedrock principle' that workers' compensation is an employee's exclusive remedy and full compensation for job-related injuries." (footnotes omitted) (citing *Monk v. Virgin Is. Water & Power Auth.*, 53 F.3d 1381, 1392 (3d Cir. 1995); *Anderson v. Marathon Petrol. Co.*, 801 F.2d 936, 941 (7th Cir. 1986))).

[48] *Kroger Co. v. Keng*, 23 S.W.3d 347, 349-350 (Tex. 2000) ("The Texas Legislature enacted the Act in 1913 in response to the needs of workers, who, despite escalating industrial accidents, were increasingly being denied recovery. The Act allowed injured workers, whose employers subscribed to workers' compensation insurance, to recover without establishing the employer's fault and without regard to the employee's negligence. In exchange, the employees received a lower, but more certain, recovery than would have been possible under the common law." (citation omitted)); *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 511 (Tex. 1995) ("Employees injured in the course and scope of employment could recover compensation without proving fault by the employer and without regard to their or their coworkers' negligence. In exchange, the employer's total liability for an injury was substantially limited." (citation omitted)); *Edmunds v. Highrise, Inc.* 715 S.W.2d 377, 379 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd) ("The theory behind the exclusive remedy provision of the Workers' Compensation Act is that in cases where the employee is merely injured, he be given the opportunity to relinquish common law remedies for lesser benefits which are paid more quickly and efficiently, and without proof of fault.").

part of a nationwide compensation movement, was perceived to be in the best interests of both employers and employees."[49] Much earlier, we said:

> Workmen's compensation laws have become part of our public policy. The object of the laws was to do away with the issues of negligence, unavoidable accident, assumed risk, contributory negligence, and other like issues, and to fix the amount recoverable free of any uncertainty. The old system of settling disputes was unsatisfactory, and modern business methods demanded that compensation for injuries to employees be not controlled by the fault or negligence of the employee, but should rest upon broader, more humane, and more certain rules.[50]

An owner-run jobsite is not uncommon. No one has suggested a reason why a general contractor who works for an owner can submit to the obligations and protections of the workers' compensation system as a statutory employer for all the workers on the job, while the owner himself cannot, other than to subvert the system. Of course, the Legislature needs no reason to differentiate between general contractors who do not own the jobsite and those who do. But we are required to presume that the Legislature has acted reasonably,[51] and in any event, the statutory provisions at issue draw no such distinction. While their silence on the subject may be read either way, we should assume that the Legislature intended that the treatment of general contractors be consistent with the Act as a whole. For these reasons, I conclude that of the two constructions of the statutory text, both reasonable on their face, the Court's is stronger.

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[49] *Garcia*, 893 S.W.2d at 511; *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 431-432 (1958) ("[A]s industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial employment, thus shifting to industry the 'human overhead' of doing business. For most industries this change has been embodied in Workmen's Compensation Acts.").

[50] *Woolsey*, 116 S.W.2d at 676.

[51] *See* TEX. GOV'T CODE § 311.021.

IV

The argument is made, however, that the Legislature is not likely to have intended by its definition of "general contractor" to include a person who has work done on his own property because that would have been a major change in the law that would have drawn attention when in fact it was enacted without note. The Court followed the same line of reasoning in *Energy Services Co. of Bowie, Inc. v. Superior Snubbing Services, Inc.*,[52] where we construed an amendment to the statute governing the enforceability of indemnity agreements long used in the oil patch. The industry practice was well-settled, had never been criticized, and continued unchanged after the amendment. We concluded that "[a]bsent any identifiable reason for a substantive change to have been made in the statutory provision, or any extra-textual indication that one was intended, or any resulting change in industry practice, we think the most reasonable construction of [the amended statute] is the same as its . . . predecessors."[53] The problem with the argument in this case is that it has never been clear when a person is considered the statutory employer of a subcontractor or his employees, liable to provide the workers' compensation benefits, and entitled to the exclusive remedy protection of the Act.

Before 1983, the only provision in the Workers' Compensation Act relating to coverage of a subcontractor was article 8307, section 6, which, as noted above, was enacted in 1917 and prohibited a subscriber from subcontracting work "with the purpose and intention" of avoiding the liability for workers' compensation benefits he would have if his own employees were injured doing

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[52] 236 S.W.3d 190 (Tex. 2007).

[53] *Id*. at 195.

the work.[54] In that situation, the subcontractor's injured employee was deemed to be the subscriber's employee and therefore entitled to compensation benefits.

In three consecutive legislative sessions beginning in 1977, six bills were introduced, the ostensible purpose of which was to eliminate section 6's subjective "purpose and intention" trigger and provide greater certainty in determining whether a subscriber should be treated as the statutory employer of his subcontractors and their employees. The premise of the bills was that subscribers were being treated as statutory employers already, but not always predictably or consistently. The bills proposed to amend or replace section 6 and provide, variously, either that coverage extended to subcontractors unless otherwise agreed, that coverage did not extend unless otherwise agreed, or something in between. In brief:

- HB 1584, introduced in 1977, would have amended section 6 and provided simply that "under a bona fide sub-contract made in good faith", workers' compensation coverage was not provided.[55] HB 1584 passed the House[56] but was left pending in the Senate committee.
- HB 1585, also introduced in 1977, would have replaced section 6 altogether and provided that a subscriber's coverage extended to subcontractors and their employees, absent an

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[54] Act approved Mar. 28, 1917, 35th Leg., R.S., ch. 103, § 1, Part II, § 6, 1917 Tex. Gen. Laws 269, 284-285, codified as TEX. REV. CIV. STAT. ANN. art. 8307, § 6, text quoted *supra* note 40.

[55] Tex. H.B. 1584, 65th Leg., R.S. (1977).

[56] As HB 1584 passed the House, it stated: "If any subscriber to this law sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor under a bona fide sub-contract made in good faith, then in the event the sub-contractor or any employee of such sub-contractor sustains an injury in the course of his employment, he shall be deemed to be and taken for all purposes of this law not to be the employee of the subscriber. A sub-contractor, as that term is used in this Act, means a person, firm or corporation, or any other legal entity recognized under Texas law, contracting with the principal or prime contractor for the performance, in a capacity other than as an employee, of any and all work or services which such principal or prime contractor has contracted to perform."

agreement to the contrary, unless they were already covered.[57] HB 1585 would also have provided that a subscriber could always agree to extend compensation coverage to a subcontractor and his employees and pass the cost through to the subcontractor.[58] HB 1585 was not voted out of committee.

- In 1979, SB 360 was introduced, almost identical to HB 1584, but it was rewritten in committee and passed the Senate. The committee substitute deleted existing section 6 and provided instead that a prime contractor would not be deemed the employer of a subcontractor or his employees without an agreement beforehand, but absent such an agreement, the prime contractor would be required to provide coverage if the subcontractor did not do so, and could pass the cost through to the subcontractor.[59] The House committee

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[57] Tex. H.B. 1585, 65th Leg., R.S. (1977) ("(a) As used in this Act, the term sub-contractor means a person, firm, corporation or any other legal entity recognized under Texas law, contracting with the principal, original or prime contractor for the performance of all or any part of the work or services which such principal, original or prime contractor has contracted to perform. (b) A sub-contractor and employees of the sub-contractor shall be deemed employees of the subscriber for which or for whom such sub-contractor is to perform work or services unless: (i) prior to beginning the performance of any work or services to be performed under such sub-contract, subscriber and sub-contractor have entered into a bona fide written contract expressly providing that sub-contractor undertakes such work or services to be performed thereunder as an independent contractor and not as an employee of the subscriber; or, (ii) sub-contractor has provided workmen's compensation insurance coverages for sub-contractor's employees and/or the sub-contractor during the performance of the sub-contract as evidenced by certificates of insurance issued by sub-contractor's workmen's compensation insurance carrier.").

[58] *Id.* ("(c) Notwithstanding any other provisions of this law, a subscriber may provide workmen's compensation insurance coverages for the sub-contractor's employees and/or the sub-contractor. In the event subscriber elects to provide such workmen's compensation insurance coverages, the insurance contract specifically shall include such sub-contractor's employees and/or the sub-contractor, and the elected coverages shall continue while the subscriber's policy is in effect and while the named sub-contractor is endorsed thereon. The amount of the actual premiums paid or incurred by the subscriber for workmen's compensation insurance coverages on such sub-contractor's employees and/or the sub-contractor shall constitute a legal claim by subscriber against sub-contractor and, having provided such workmen's compensation insurance, subscriber may deduct the amount of the actual premiums paid or incurred in providing such workmen's compensation insurance coverages from the sub-contract price or any other monies due the sub-contractor.").

[59] Tex. S.B. 360, 66th Leg., R.S. (1979) ("(a) As used in this Act, the term 'subcontractor' means a person, firm, corporation, or any other legal entity recognized under Texas law, contracting with the principal, original, or prime contractor for the performance of all or any part of the work or services which such principal, original, or prime contractor has contracted to perform. (b) Neither the subcontractor nor the employees of the subcontractor shall be deemed employees of the principal, original, or prime contractor for whom such subcontractor is to perform work or services unless, prior to beginning the performance of any work or services to be performed under such subcontract, the subscriber and subcontractor have entered into a bona fide written contract expressly providing that the subcontractor or the employees of the subcontractor will perform such work or services as employees of the subscriber. (c) If no contract is made pursuant to Subsection (b) of this section, the original or prime contractor shall provide workers' compensation insurance coverage for the subcontractor's employees or the subcontractor. The amount of the actual premiums paid or incurred by the subscriber for workers' compensation insurance coverage on such subcontractor's employees or the subcontractor may be deducted from the subcontractor's price or any other money due the

amended the bill, reverting to a version something like HB 1584, providing that a general contractor could not be deemed to employ a subcontractor or his employees without agreeing at the outset of the job to provide workers' compensation benefits to the subcontractor and his employees.[60] The cost could be passed through to the subcontractor. The committee substitute was tabled on the floor.

- In 1981, three bills were introduced, SB 629, HB 1662, and SB 1080, all essentially identical to the House committee substitute for SB 360 the prior session. None made it to the floor.

None of these bills defined a general contractor or distinguished between one who owned the jobsite and one who worked for the owner. All seemed to treat any subscriber who engaged a subcontractor as a general contractor, though none specifically said so. Nothing in any of the bills suggested that a subscriber who engaged a subcontractor either could not or should not be allowed to extend coverage to a subcontractor and his employees and thereby become their statutory employer, with the benefit of the exclusive remedy protection.

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subcontractor. (d) In lieu of the foregoing, the subcontractor may provide workers' compensation insurance coverages for the subcontractor's employees or the subcontractor during the performance of the subcontract as evidenced by certificates of insurance issued by subcontractor's workers' compensation insurance carrier and filed with the subscriber.").

[60] The committee substitute read:

"(a) As used in this Act, the term sub-contractor means a person, firm, corporation or any other legal entity recognized under Texas law, contracting with the principal, original or prime contractor for the performance of all or any part of the work or services which such principal, original or prime contractor has contracted to perform.

"(b) Neither the sub-contractor nor the employees of the subcontractor shall be deemed employees of the principal, original or prime contractor for whom such sub-contractor is to perform work or services unless, prior to beginning the performance of any work or services to be performed under such sub-contract, subscriber and sub-contractor have entered into a bona fide written contract expressly providing that the subscriber shall provide workers' compensation benefits to the sub-contractor or the employees of the sub-contractor while performing such work or services as if they were direct employees of the subscriber. The amount of the actual premiums paid or incurred by the subscriber for workers' compensation insurance coverage on such sub-contractor or the employees of the sub-contractor may be deducted from the contract price or any other monies due the sub-contractor.

"(c) If no contract is made pursuant to subsection (b) hereof, neither the sub-contractor nor the employees of the sub-contractor shall be deemed employees of the principal, original or prime contractor for whom such sub-contractor is to perform work or services."

In 1983, HB 1852 as introduced, like the bills the prior session, would have deleted existing section 6 and provided that a prime contractor's workers' compensation insurance coverage would not extend to a subcontractor or his employees except by agreement.[61] But the bill was amended in the House and Senate to restore existing section 6, redesignated 6(d), delete the sentence precluding a prime contractor from being deemed the statutory employer of a subcontractor and his employees, and provide that a prime contractor could agree to extend coverage to a subcontractor and his employees, passing the cost through to the subcontractor. As thus amended, the bill was enacted. The new section 6 had four paragraphs. Section 6(d) retained the 1917 text of section 6, providing that any subscriber who tried to avoid covering a subcontractor's employees would be deemed to be their employer for compensation purposes.[62] Section 6(a) expressly recognized that a prime

[61] Tex. H.B. 1852, 68th Leg., R.S. (1983) ("(a) a subcontractor and the employees of a subcontractor shall not be deemed to be employees of a prime contractor for whom such subcontractor is to perform work or services and there shall be no obligation on the part of a prime contractor for the payment to a subcontractor or to the employees of a subcontractor of workers' compensation under this law. A subcontractor and prime contractor may include in their written contract for the performance of work or services an agreement that the prime contractor will provide workers' compensation benefits to the subcontractor and to employees of the subcontractor. The amount of the actual premiums paid or incurred by the prime contractor for workers' compensation insurance coverage for the subcontractor and employees of the subcontractor may be deducted from the contract price or any other monies owed to the subcontractor by the prime contractor. (b) the term "subcontractor" means a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform. (c) the term "prime contractor" includes "principal contractor" or "original contractor" and means the person who has undertaken to procure the performance of work or services and in connection therewith may engage subcontractors to perform all or any part of the work or services.").

[62] TEX. REV. CIV. STAT. ANN. art. 8307, § 6(d) ("If any subscriber to this law with the purpose and intention of avoiding any liability imposed by its terms sublets the whole or any part of the work to be performed or done by said subscriber to any sub-contractor, then in the event any employe of such sub-contractor sustains an injury in the course of his employment he shall be deemed to be and taken for all purposes of this law to be the employe of the subscriber, and in addition thereto such employe shall have an independent right of action against such sub-contractor, which shall in no way be affected by any compensation to be received by him under the provisions of this law.").

contractor could agree to extend coverage to a subcontractor and his employees.[63] Section 6(c) defined "prime contractor" for the first time as follows:

> The term "prime contractor" includes "principal contractor," "original contractor," or "general contractor" as those terms are commonly used and means the person who has undertaken to procure the performance of work or services. The prime contractor may engage subcontractors to perform all or any part of the work or services.[64]

And section 6(b) defined "subcontractor" to mean "a person who has contracted to perform all or any part of the work or services which a prime contractor has contracted with another party to perform."[65]

By referring to a prime contractor as someone who works for another, the definition of "subcontractor" would exclude an owner. But if the meaning of "prime contractor" defined in section 6(c) is to be informed by the definition of "subcontractor" in section 6(b), it must also be informed by section 6(d), which refers to the person who engages a subcontractor as a subscriber, a term that includes an owner acting as his own general contractor. Section 6(d) applies to all subscribers. If sections 6(a)-(c) were read to address only the situation in which the subscriber and prime contractor is not the owner, no ambiguity in the meaning of "prime contractor" would exist.

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[63] *Id.* § 6(a) ("A subcontractor and prime contractor may make a written contract whereby the prime contractor will provide workers' compensation benefits to the sub-contractor and to employees of the sub-contractor. Notwithstanding the provisions of Section 12(g), Article 8306, Revised Statutes, the contract may provide that the actual premiums (based on payroll) paid or incurred by the prime contractor for workers' compensation insurance coverage for the sub-contractor and employees of the sub-contractor may be deducted from the contract price or any other monies owed to the sub-contractor by the prime contractor. In any such contract, the sub-contractor and his employees shall be considered employees of the prime contractor only for purposes of the workers' compensation laws of this state (Article 8306, Revised Statutes, et seq.) and for no other purpose.").

[64] *Id.* § 6(c).

[65] *Id.* § 6(b).

Section 6(d) would have general application, while the other sections would not. The effect of HB 1852 was to provide greater certainty in one area, even if a comprehensive solution remained beyond reach. But if sections 6(a)-(c) were also of general application and prescribed the requirements for considering any prime contractor to be the statutory employer of subcontractors and their employees, then the ambiguity in the meaning of "prime contractor" would be unavoidable. Moreover, that construction of the statute would raise the question why a prime contractor who owns the jobsite should, like all other prime contractors, be prohibited from trying to avoid liability for workers' compensation benefits, but unlike all other prime contractors, not be allowed to provide such benefits.

In any event, the law regarding statutory employers was not clear before 1983, as evidenced by the variety of efforts to clarify it, and it was not much clearer after 1983.[66] HB 1852, as introduced, amended, and finally enacted, like the six bills in the prior three sessions, never suggested that statutory authorization previously lacking was required for prime contractors to extend workers' compensation coverage to subcontractors and their employees. On the contrary, the one consistent theme in all the bills was the need to clarify *when* coverage was extended, not *whether* it could be. HB 1852, like the others, never attempted to distinguish premises owners from prime contractors, and the definition of "prime contractor" finally enacted could reasonably be read to include a premises owner acting as his own general contractor.

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[66] We have been cited only two cases that have considered whether a jobsite owner can be the statutory employer of subcontractors and their employees. One answered no, but only in dicta, *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673, 677 (Tex. App.–Texarkana 1997, no writ), and the Court's opinion explains why it is not persuasive. The other also answered no, but involved a prior version of the statute at issue. *Wilkerson v. Monsanto Co.*, 782 F. Supp. 1187 (E.D. Tex. 1991).

I do not mean to suggest for a moment that the drafting history of the 1983 statute is relevant in determining the Legislature's intent by enacting it. The various bills and amendments do not reveal even the sponsors intentions, let alone the Legislature's. But the history of the legislation does effectively rebut the argument that the law regarding the extension of workers' compensation coverage to subcontractors and their employees was clear in 1983, and that allowing a person to be the statutory employer of subcontractors working on his property was so significant a change in 1989 that it would not have occurred without comment. The history of the legislation clearly shows that existing law was at all times unclear.

Thus, the argument that the 1989 change in the definition of "subcontractor" was not substantive because it was made without comment could be correct, but it is not clear what the law was before the change. The 1983 definition referred to "work or services which a prime contractor has contracted with another party to perform". The 1989 definition referred to "work or services which a prime contractor has undertaken to perform". The dissent argues that the Legislature used "undertaken" to mean the same thing as "contracted with another party", but it is just as likely that the Legislature used "undertaken" because it was more accurate and removed an ambiguity in the 1983 statute. The point is that the argument that the 1989 change was not substantive because it was not controversial proves nothing because the backdrop against which it appeared was itself unclear.

Finally, a number of bills introduced between 1995 and 2005 would have clarified who is a statutory employer on construction jobsites.[67] The Court explains why failed bills are not indicative

[67] Tex. H.B. 2279, 74th Leg., R.S. (1995); Tex. H.B. 2630, 75th Leg., R.S. (1997); Tex. H.B. 3024, 75th Leg., R.S. (1997); Tex. S.B. 1404, 76th Leg., R.S. (1999); Tex. H.B. 3120, 77th Leg., R.S. (2001); Tex. H.B. 3459, 77th Leg., R.S. (2001); Tex. H.B. 2982, 78th Leg., R.S. (2003); Tex. S.B. 675, 78th Leg., R.S. (2003); Tex. H.B. 1626, 79th Leg.,

of legislative intent. I would also point out that the fact that six bills failed in three sessions before 1983 did not indicate a legislative intent that HB 1852 not be the law.

* * *

Respondent and the amici curiae that support his position argue that the statutory construction urged by petitioner is bad policy. We have no way to judge such matters and do not do so. Underlying many of their arguments is a conviction that the workers' compensation system is basically unfair. That issue also is not ours to judge. We must presume that the system is just and reasonable.[68] The Court's construction of the statutory provisions at issue is most consistent with that system.

Nathan L. Hecht
Justice

Opinion delivered: April 3, 2009

R.S. (2005).

[68] *See* TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that . . . (3) a just and reasonable result is intended . . . .").