IN THE SUPREME COURT OF TEXAS

NO. 06-0418

HCBECK, LTD., PETITIONER,

v.

CHARLES RICE, RESPONDENT

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

Argued October 18, 2007

JUSTICE JOHNSON, joined by JUSTICE MEDINA, dissenting.

The workers' compensation system is bottomed on a voluntary trade. Employers provide workers' compensation insurance coverage in exchange for statutory immunity from suit by employees injured on the job. Employees accept workers' compensation insurance coverage in exchange for releasing their common law rights to sue the employer for injuries on the job. In *Texas Workers' Compensation Commission v. Garcia*, we described the exchange when considering a challenge to the constitutionality of the Texas Workers' Compensation Act (TWCA):

> [T]he Act—carrying forward the general scheme of the former act—provides benefits to injured workers without the necessity of proving negligence and without regard to the employer's potential defenses. In exchange, the benefits are more limited than the actual damages recoverable at common law. We believe this quid pro quo, which produces a more limited but more certain recovery, renders the Act an adequate substitute for purposes of the open courts guarantee.

893 S.W.2d 504, 521 (Tex. 1995).

Today the Court says "[a] general workplace insurance plan that binds a general contractor to provide workers' compensation insurance for its subcontractors and its subcontractors' employees achieves the Legislature's objective to ensure that subcontractors' employees receive the benefit of workers' compensation insurance." ___ S.W.3d ___, ___. It also says HCBeck qualifies as a statutory employer because its subcontract with Haley Greer incorporated the general workplace insurance plan. *Id.* at ___. The Court's decision extends statutory immunity to HCBeck without requiring a corresponding substantive quid pro quo from it as was intended by the Legislature. The decision enlarges the number of entities that can claim that which an employee ostensibly provides by releasing his or her common law right to sue—immunity from suit—by merely *contracting* for someone else such as the subcontractor or the owner of a project to secure and maintain insurance for the subcontractor. All HCBeck did here was facilitate communications between FMR and Haley Greer and agree that HCBeck might in the future provide workers' compensation insurance for Haley Greer. That goes beyond what the Legislature intended.[1] Accordingly, I dissent.

Pursuant to its contract with HCBeck, FMR elected to provide insurance through its OCIP and arranged for an agency to secure individual insurance policies for contractors and subcontractors, including both HCBeck and Haley Greer. The insurance covered only on-site construction activities at FMR's office campus in Westlake. The contractors and subcontractors were contractually

[1] The issue of whether HCBeck has immunity on some basis other than as an employer is not before us. *See* TEX. LAB. CODE § 408.001(a) ("Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.")

required to maintain and furnish proof of separate insurance for their off-site activities. As to the OCIP insurance, FMR paid the premiums. Each contractor and subcontractor adjusted its individual contract price to reflect the premiums FMR paid for the coverage of the individual contractor or subcontractor. Under HCBeck's agreement with FMR, if FMR elected not to provide insurance via an OCIP, then "upon thirty (30) days written notice from the Owner," HCBeck was required to perform the actions FMR actually performed in this case: securing insurers to write coverage for the contractors' on-site Westlake construction activities, paying for the coverage, and then adjusting contract prices of the contractors, if necessary, to reflect the insurance premiums.[2] But because FMR both secured Haley Greer's insurance and paid for it, HCBeck did neither as to the workers' compensation policy in effect when Rice was injured. Nor had HCBeck undertaken any obligation or commitment that assured the coverage was in place. HCBeck's substantive function as to the insurance was (1) contractually requiring the subcontractor to obtain workers' compensation insurance through FMR's plan, and (2) agreeing that it might in the future actually secure and pay for coverage if FMR did not.

Under HCBeck's subcontract with Haley Greer, HCBeck did not agree to procure the workers' compensation insurance in force for Haley Greer, nor did it agree to pay or somehow obligate itself to pay the premiums, or otherwise assure the workers' compensation coverage Haley Greer had in effect when Rice was injured. Haley Greer's subcontract incorporated the contract between FMR and HCBeck. In that contract, HCBeck only agreed to secure and pay for insurance

[2] Rice disputes this point and asserts that the agreements required Haley Greer to provide its own insurance if FMR did not. Because I would reach the same conclusion regardless of whether HCBeck or Haley Greer was required to provide the insurance if FMR did not, I assume the documents required HCBeck to do so.

if FMR notified HCBeck that FMR was unable or unwilling to furnish the coverage under an OCIP. The latter contingency did not occur before Rice was injured.

Citing section 406.123(a) of the TWCA, the Court says that HCBeck "complied in all respects with the provision in the Act that expressly allows it to enter into a written agreement to provide workers' compensation insurance to its subcontractors and their employees." ___ S.W.3d at ___. The Court is wrong. Section 406.123 states that a general contractor and a subcontractor may enter into a written agreement under which the general contractor *provides* workers' compensation insurance for the subcontractor and its employees, not under which it agrees *to provide* the insurance at some point. TEX. LAB. CODE § 406.123(a). The Act must speak of insurance in effect at the time of an employee's injury as opposed to some possible future date; if not, there would be no argument about immunity because there would be no injured employee suing the general contractor. The statute is clear. If the general contractor and subcontractor enter into a contract under which the general contractor provides the insurance, not just promises to provide it at some future time, then the general contractor is classified as the employer of the subcontractor and the subcontractor's employees for purposes of the TWCA:

> § 406.123. Election to Provide Coverage; Administrative Violation
>
> (a) 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.
>
> . . . .
>
> (d) If a general contractor . . . elects to *provide* coverage under Subsection (a) . . . the actual premiums, based on payroll, *that are paid or incurred* by the general

> contractor or motor carrier for the coverage may be deducted from the contract price or other amount owed to the subcontractor . . . .
>
> (e) 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.
>
> (f) A general contractor shall file a copy of an agreement entered into under this section with the general contractor's workers' compensation insurance carrier not later than the 10th day after the date on which the contract is executed. If the general contractor is a certified self-insurer, the copy must be filed with the [Workers' Compensation] division.
>
> (g) A general contractor who enters into an agreement with a subcontractor under this section commits an administrative violation if the contractor fails to file a copy of the agreement as required by Subsection (f).

TEX. LAB. CODE § 406.123 (emphasis added).

In construing statutes, we ascertain and give effect to the Legislature's intent as expressed by the statutory language. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired; otherwise, we construe the statute's words according to their plain and common meaning unless a contrary intention is apparent from the context or such a construction leads to absurd results. *Id.* at 625-26; *see* TEX. GOV'T CODE § 311.011.

The Legislature did not define "provides" or "provide" as those words are used in section 406.123. Looking to the common meaning of "provide," we find the definition includes to "supply," "furnish," or "make available." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1556 (1996); *see* TEX. GOV'T CODE § 311.011(a). The "make available" part of the definition is of little applicability when the key to obtaining statutory employer status is a quid pro quo. *See Garcia*, 893

S.W.2d at 521. To "make available" the insurance, all a general contractor would have to do is refer the subcontractor to an insurer or agent who would write the coverage or require the subcontractor to apply for insurance with an owner such as FMR. The general contractor does not trade anything of value in such a situation. Section 406.123 does not express Legislative intent to change the fundamental quid pro quo concept underlying relationships between workers and those who could be subject to common law liability for on-the-job injuries to workers. *See* TEX. LAB. CODE § 406.123. Therefore, the "supply" or "furnish" part of the definition is applicable here. The two words essentially are the same: "supply" means to "furnish or provide with what is lacking or requisite," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1912 (1996), while "furnish" means to "provide or supply" with something. *Id.* at 777.

The Court views HCBeck as having provided, that is, supplied or furnished, Haley Greer's insurance by contractually requiring Haley Greer to participate in FMR's OCIP. For the same reasons expressed above as to making the insurance "available," even if HCBeck's actions fall within an expansive construction of supplying, furnishing, or providing the insurance, its actions do not warrant statutory employer status because HCBeck still did not contribute anything of value—a quid pro quo—to the trade Haley Greer's employees made for workers' compensation coverage. Moreover, HCBeck's actions simply do not equate to supplying or furnishing the insurance. By contractually requiring Haley Greer to enroll in the OCIP, HCBeck supplied or furnished Haley Greer with the opportunity and obligation to apply for insurance; it did not provide the insurance itself. FMR supplied or furnished the insurance when FMR secured the agency to place the insurance and paid the premiums. Absent payment of, or incurring liability for, premiums by FMR,

the insurance that covered Rice when he was injured would not have gone into effect and been in place.

The parties, the Court, and I agree this matter should be determined by what actually happened, not what might have happened. As to what actually happened, HCBeck substantively functioned only as a conduit through which FMR's insurance requirements were communicated to and imposed on Haley Greer. Otherwise, HCBeck played no part in locating the agent who placed the insurance or in securing and making certain the insurance remained in effect. For a general contractor such as HCBeck to "provide" workers' compensation insurance to a subcontractor under section 406.123 and in exchange receive the significant benefit of statutory employer status, the Legislature surely intended that the general contractor must do more than communicate insurance requirements or contractually require other parties to maintain the insurance in effect, even if the contract requires a subcontractor to enroll in a program in which the project owner contractually agrees to purchase the subcontractor's insurance.

The Court's opinion could be interpreted as allowing a general contractor to claim statutory employer status by agreeing in a subcontract to provide workers' compensation insurance, yet also requiring the subcontractor to provide coverage if the contractor does not. Then, so long as the subcontractor maintains coverage, the general contractor would have contributed nothing to the trade by the subcontractor's employees of their common law rights, yet may claim statutory immunity because it contractually "provided" the insurance. The Court's holding might even be interpreted as giving a general contractor statutory employer status if it contractually required a subcontractor to provide workers' compensation insurance on its own, so long as the subcontractor maintained

coverage. Again, the general contractor would have exchanged nothing for the subcontractor's employees' release of their common law rights against the general contractor. Section 406.123 of the TWCA does not reflect legislative intent that general contractors should have statutory immunity when their involvement in assuring workers' compensation insurance coverage for the subcontractor and its employees is so minimal. *See* TEX. LAB. CODE § 406.123. I would hold that in order for a general contractor to be afforded statutory employer status because it "provides" workers' compensation insurance to a subcontractor, the general contractor must be more substantively involved in securing and maintaining the subcontractor's workers' compensation insurance coverage than was HCBeck, and that contracting for another to place and maintain insurance, whether to be done in the present or the future, is not enough to qualify for the status.

I would hold that under section 406.123, a general contractor "provides" workers' compensation insurance if the general contractor "puts something in the pot," that is, if it contributes something of value for statutory immunity. It could do that by taking actions to assure (1) the subcontractor is insured, and (2) the insurance will not lapse without the contractor allowing it to do so. Such actions would equate to substantive involvement by the general contractor in obtaining and maintaining the subcontractor's insurance. But for the general contractor's actions to reach a level of substantive involvement warranting statutory employer status, coverage would have to actually be assured by the general contractor and not be dependent merely on the fulfillment of a contractual obligation or the payment of premiums by another party, such as a subcontractor that might be under financial pressure to save money by stopping payment of its insurance premiums or an owner that might run short of funds and stop paying insurance premiums. In other words, the general contractor

would have to place itself in a position to have actual control over the workers' compensation insurance becoming effective and remaining in force.

There could be flexibility in how such substantive involvement requirements are met. For example, as to the first requirement referenced above, the statute specifically contemplates a situation in which the subcontractor's insurance is "provided" if a general contractor adds the subcontractor and its employees as insureds under the general contractor's workers' compensation policy. *See id.* § 406.123(f) (requiring a general contractor to file a copy of an agreement under section 406.123 with its workers' compensation carrier or, if self-insured, the Workers' Compensation Division); *id.* § 406.123(g) (making the failure to file a copy of the contract in accordance with subsection (f) an administrative violation). But the requirement might also be fulfilled by the general contractor requiring the subcontractor or its insurer to furnish a certificate of insured status from the insurance company, or a copy of a policy showing coverage for the job activities in question. As to the second referenced requirement, the essential element to keeping insurance in force is payment of premiums. That requirement is most clearly fulfilled when the general contractor is directly liable for the policy premiums so the insurer either receives premiums from the general contractor or the insurer has an unqualified guaranty from the general contractor that the premiums will be paid. *See, e.g.*, *id.* § 406.123(d) (stating that a general contractor that provides coverage to a subcontractor under a written agreement to do so may deduct the actual premiums, based on payroll, that the general contractor pays or incurs for the coverage from amounts owed to the subcontractor). There are methods by which the general contractor could become directly liable for premiums and assure the insurance does not lapse other than by directly paying

premiums—for example, by letter of credit that the insurer could draw against if premiums were not paid otherwise. It is worth noting here that section 406.123 does not specify who must finally absorb the subcontractor's premium cost. The statute authorizes premiums paid or incurred for a subcontractor's insurance to be deducted from amounts owed to the subcontractor. *Id.* But the statute does not preclude the owner from bearing the premium cost, as FMR did in this case. And clearly, the general contractor could absorb the cost without looking to any other party for reimbursement.

The Court says "the reality is that HCBeck was actually paying for the workers' compensation insurance" because HCBeck contracted to pay the "Subcontract Amount" that did not include premiums FMR paid for Haley Greer's insurance as opposed to contractually deducting the premiums from Haley Greer's subcontract. ___ S.W.3d at ___. It concludes there is no real distinction between the two methods of paying the insurance premiums because it is "simply accounting." *Id.* at ___. In this case, though, the distinction matters. Insofar as the workers' compensation insurance that covered Rice, HCBeck was a bystander. It was an interested bystander to be sure; but it was a bystander. FMR bought and paid for Haley Greer's insurance. It received and checked Haley Greer's wage reports on which the compensation insurance premiums were calculated. It determined the amount by which Haley Greer's subcontract was adjusted for the premiums. And the money to pay Haley Greer's subcontract came from FMR. HCBeck did not actually pay Haley Greer's premiums, FMR did. HCBeck had no more involvement in "providing" the workers' compensation insurance covering Rice for his injury on FMR's Westlake job than it had in "providing" Haley Greer's workers' compensation insurance for off-site operations. In both

instances HCBeck contractually required Haley Greer to have the insurance in place, but HCBeck neither secured placement of the insurance nor assured its being in force at the time of Rice's injury.

The question before us is not whether OCIPs are the best or most efficient and economical way to secure insurance—including workers' compensation insurance—for all workers on job sites. Nor is it how OCIPs interface with workers' compensation law. Those matters are significant, but they are more in the nature of policy issues better left to the Legislature to balance and address. The question before us is limited to whether under these particular circumstances the Legislature extended statutory immunity from suit by an injured worker—the major incentive for an employer to carry workers' compensation insurance—to an entity that is not the injured worker's direct employer. Under the Court's decision, that important inducement for carrying workers' compensation insurance is extended to HCBeck even though it did not substantively participate in the transaction that resulted in Rice being covered by workers' compensation insurance.

I would hold that HCBeck was not Rice's statutory employer. I would affirm the judgment of the court of appeals.

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Phil Johnson
Justice

OPINION DELIVERED: April 3, 2009