

## Interpreting the *Entergy v. Summers* Opinion

Is jobsite safety a thing of the past?

### The law behind the decision

The Texas Labor Code makes workers' compensation benefits an employee's exclusive remedy against an employer for covered work-related injuries. In the realm of construction projects, where multiple contracts between parties to a project abound, the question becomes whether a general contractor may be considered the "employer" of a subcontractor's employees and, thus, is shielded from suit by the Workers Compensation Act's (now codified in the Texas Labor Code) exclusive remedy defense.

The Labor Code defines "general contractor" as a person who undertakes to procure the performance of work or service, either separately or through the use of subcontractors. A general contractor may enter into a written agreement with a subcontractor under which the general contractor provides workers compensation coverage for the subcontractor's employees. Such an agreement *does* make the general contractor the employer of the subcontractor and the sub's employees for purposes of workers' compensation laws.

### The case that caused a stir

In *Entergy Gulf States, Inc. v. Summers*, the Texas Supreme Court took this body of law and argument one step further, in applying the protections afforded a general contractor to a mere premises owner.

The facts of the *Entergy* case are as follows:

Entergy hired International Maintenance Corp. (IMC) to perform construction and maintenance on Entergy's premises. The parties entered a contract that referred to IMC as an "independent contractor" and an addendum to the contract recognized Entergy as the statutory employer of IMC employees, provided that Entergy would provide workers' compensation insurance to IMC's employees.

John Summers, an IMC employee, was injured on the job at Entergy's Sabine plant. He applied for and received benefits under the policy. He also sued Entergy for negligence. Based on the contract between Entergy and IMC, Entergy moved for summary judgment arguing it was effectively Summers' employer and thus shielded from suit under the Labor Code's exclusive remedy defense. The Court agreed and granted summary judgment in favor of Entergy.



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On appeal, the court determined that Entergy was not a general contractor because it had not undertaken to perform work or services and then subcontracted part of that work to a subcontractor. In making this determination, the court of appeals borrowed from *Williams v. Brown & Root, Inc.*, which held that an entity that did not contract with an owner, but instead *was* the owner, was not protected by the exclusive remedy provision. Further, the appellate court looked to *Wilkerson v. Monsanto Co.*, which also held that a premises owner was not a statutory employer, based on the definition of subcontractor in use at the time - "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." Essentially, the appellate court was declaring that an owner could not be a general contractor, because it cannot contract with itself.

The Texas Supreme Court, in reaching its decision in *Entergy*, looked directly to the Labor Code's current definitions of general contractor and subcontractor, and reasoned that this definition does not preclude a premises owner who "undertakes to procure the performance of work or service" from serving as its own general contractor.

#### Opposition to the decision

There is significant opposition and criticism of the Supreme Court's decision. In one of a number of amicus curiae briefs, the Texas AFL-CIO, Asian Pacific Labor Alliance, A. Phillip Randolph Institute, Coalition of Labor Union Women, League of United Latin American Citizens, Labor Council on Latin American Advancement, Texas State Association of Electrical Workers, Texas Watch, and the United Steelworkers of America joined together in arguing that the Supreme Court's decision has fatally undermined the right of Texas workers to expect to return home safely from work each day.

According to the aforementioned groups, the threat of litigation accountability has long provided the single most powerful incentive to make dangerous workplaces safer. Without it, worker injuries and deaths become just a cost of doing business. By limiting injured workers' recovery to workers compensation alone, the Court has created new incentives to ignore process safety. The Court has broadly expanded statutory terms without legal authority or grounding in plain English. The result is that injured Texas workers are left with only workers compensation, which is often inadequate, as it was never intended to be a sole and exclusive remedy. In contrast to the fault-based tort system that addresses both compensation and prevention, the workers' compensation system addresses compensation alone. This decision forces workers exclusively into a no-fault system, thereby removing all incentives for wrongdoers to correct their negligent behavior and make their workplaces safer.



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Although employing entirely different reasoning than the labor unions and workers' rights groups mentioned above, the Texas Trial Lawyers Association (TTLA), in its own amicus curiae brief, arrived at the same result - that the Supreme Court had reached the wrong decision.

The TTLA's argument focused primarily on the statutory language, rather than the effect of the decision on Texas' workers. Specifically, the TTLA argued that the Legislature used a very peculiar locution in defining "general contractor" – a person who *undertakes to procure* the performance of a work or service, either separately or through the use of subcontractors. By using the term "undertakes," the Legislature signaled its intent that the general contractor procure services for someone else ... like the premises owner. Again, it all goes back to the fact that pursuant to the statute, a premises owner may not also be the general contractor.

### Conclusion

So what does this mean for contractors and laborers? What effect will this decision have on your trade? Essentially, it is a warning. Remember that no one else will ever be as concerned about your safety as you are and the best way to protect yourself and your employees is to personally ensure jobsite safety. Although this decision may appear to have a negative impact on the precautions that a premises owner takes to make a site safe, it can also have a positive effect on the industry as a whole by bringing contractors and subcontractors closer together in fight to ensure jobsite safety.

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