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TLR Opposes The *Entergy* Bill, HB 1657

The Texas Supreme Court's opinion in *Entergy Gulf States v. Summers* has spurred a debate over the legislative intent of the Texas Workers' Compensation Act ("the Act") and the place of common-law tort remedies in compensating injured workers. The Court held that the plain language of the Act, the legislative history, and the underlying policy behind workers' compensation all support the holding that where a premises owner serves as its own general contractor and provides workers' compensation insurance for the workers on the jobsite, an injured worker should be compensated exclusively through the workers' compensation system.

H.B. 1657 by Giddings will eliminate tort immunity for owners of a jobsite who provide workers' compensation insurance coverage and serve as their own general contractor. The bill would push Texas law backwards towards a 19th Century-style reliance on the common-law tort system that compensates only those injured workers who can prevail in litigation.

WORKERS' COMPENSATION IS A NO-FAULT SUBSTITUTE FOR TORT LAWSUITS, WHICH BENEFITS BOTH EMPLOYERS AND WORKERS

- Workers' compensation laws were enacted across the nation almost one hundred years ago because the common-law tort system was recognized as inadequate to provide speedy and just compensation to injured workers.
- The basic premise behind workers' compensation is that workers give up their right to bring a lawsuit against their employer in exchange for a system in which they do not have to prove that their employer was responsible for the injury to obtain compensation for that injury. In fact, under workers' compensation, the employee can get full recovery for medical expenses and also recover lost wages even if his own negligence wholly or partly caused his injury, which would not be true in a tort lawsuit by the employee.
- In return, employers who provide workers' compensation insurance are given immunity from common-law tort lawsuits brought by covered employees.

"STATUTORY EMPLOYER" EXTENDS WORKERS' COMPENSATION TO THE MODERN JOBSITE

When the Workers Compensation Act was initially passed in Texas in 1913, workplace relationships were usually directly between employers and employees. Many modern jobsites, however, have multiple tiers of contractors and subcontractors. Texas law accommodates this reality by conferring immunity against tort lawsuits to a general contractor when the general contractor has agreed in writing with its subcontractors to provide workers compensation insurance for the subcontractors' employees. The gen-

eral contractor is the “employer” of the subcontractors’ employees for the sole purpose of providing their workers’ compensation coverage – this legal concept is called “statutory employer.” In this situation, an injured employee of a subcontractor is covered by workers’ compensation and cannot bring a tort lawsuit against his own employer (the subcontractor) or against the general contractor who provided the workers’ compensation policy.

THE *ENTERGY* DECISION HOLDS THAT A PREMISES OWNER CAN BE A STATUTORY EMPLOYER

On April 3, 2009, the Texas Supreme Court reaffirmed its original decision in *Entergy*, holding that a premises owner which serves as its own general contractor and contracts with its subcontractors to provide workers’ compensation insurance to cover the subcontractors’ employees can be considered the “statutory employer” of those subcontractors’ employees and, in return, is entitled to the same immunity from negligence lawsuits as any other general contractor would get.

The *Entergy* decision says essentially this: If a person who owns land and wants to construct a building on it, or owns a building and wants to remodel it, she can act as her own general contractor, using her own employees (if any) and hiring subcontractors as well. If that owner provides a workers’ compensation policy for her own employees (if any) and the employees of the subcontractors who work on the project, then the exclusive remedy for all of these workers is provided by the workers’ compensation policy. The Court’s decision puts the premises owner who acts as her own general contractor in the same position as other general contractors who provide a workers’ compensation policy to its employees and its subcontractors’ employees. The decision gives full effect to the explicit state policy of encouraging enrollment of workers in the workers’ compensation system.

THE *ENTERGY* DECISION WAS BASED ON THE LANGUAGE OF THE WORKERS’ COMPENSATION ACT AS ADOPTED BY THE 1989 LEGISLATURE

- The statutory employer question was discussed at length in the Texas Senate in the second called session in 1989, when the Legislature undertook a major rewrite of the Act. The following exchange between Senators Temple Dickson and Chet Edwards demonstrates that the Senate understood the law to provide tort immunity—as the Supreme Court concluded in *Entergy*—to the owner of a jobsite:
 - Sen. Edwards: ...If you had a petroleum comp—refinery, a company owned a refinery and you had a, an accident and subcontractor employees were killed in that accident uh, without the passage of [Senator Dickson’s] amendment would those deceased employees families be limited in terms of going after the refinery owner or operator... ?
 - Sen. Dickson: Yes sir it seems to me it would... .
 - Sen. Edwards: So in a case like the Phillips refinery explosion if Phillips has been negligent and your amendment wasn’t law even though, dozens of people were killed Phillips wouldn’t be liable in any way for their negligence?
 - Sen. Dickson: [Phillips] would be immune. Would not be liable, uh, according to Senator Glasgow’s construction and uh my reading of, of uh, this new statute.

- The amendment which the Senators were discussing was intended, in part, to amend the Act to *prevent* a premises owner from serving as a general contractor and receiving statutory employer immunity to negligence lawsuits. The amendment was added in the Senate by a vote of 16-15. However, the amendment was stripped out in the House and was not in the law as signed by the Governor. Since the amendment denying statutory employer protection to an owner was in the Senate bill, stripped in the House, and the bill was enacted into law without the amendment, the presumption is that the Act as amended in 1989 *does allow* a premises owner statutory employer protection, which is consistent with the *Entergy* ruling.
- There is a misconception that the *Entergy* decision was based on language in the 1993 Recodification of the Workers' Compensation Act. This is not accurate. The relevant language (or more precisely, the specific deletion of language from the Act) was done by the 1989 Legislature, which substantively rewrote the Act. The relevant language in the 1989 Act was unchanged in the 1993 Recodification.

THE *ENTERGY* DECISION ENCOURAGES WORKSITE SAFETY

Premises owners typically provide workers' compensation coverage to all workers on a construction site through an Owner-Controlled Insurance Policy (OCIP), which includes a professionally developed safety program. The elements of the safety program include: covering the entire worksite; providing safety education; promoting safe-work attitudes; increasing awareness of factors which create dangerous situations; promoting better use of safety equipment and clothing; monitoring compliance with governmental and contractual safety regulations; and providing better inspections and enforcement actions.

ALLOWING THIRD-PARTY LIABILITY SUITS AGAINST OWNERS UNDERMINES THE WORKERS' COMPENSATION SYSTEM

- H.B. 1657 would change the Act to exclude owners of a jobsite from statutory employer immunity.
 - This change destroys the powerful incentive in the law for owners to ensure that all workers at their jobsites are covered by workers' compensation.
- Reliance on the common-law tort system to compensate injured workers represents a return to the random, costly and lengthy lawsuit system which workers' compensation superseded almost a century ago. The public policy that drives workers' compensation insurance is that an injured worker should receive definite and immediate compensation for medical care and lost wages, without the time, expense and uncertainty of a tort lawsuit.
- Owners that are subject to tort lawsuits by injured workers often require contractors and sub-contractors to assume responsibility for these damages—even for the owner's own negligence.
 - Accordingly, contractors at all levels must buy additional and redundant insurance policies to cover these indemnity agreements, thus reducing the benefit of the workers' compensation system as a whole and adding unproductive costs to construction projects.
 - Owner immunity from tort lawsuits, on the other hand, eliminates the need for indemnity agreements and for redundant insurance, leaving more resources that can be used to increase benefits to injured workers.