South Carolina Workers' Compensation Update (14)

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South Carolina Supreme Court Update: *Keene vs. CNA Holdings LLC*

The South Carolina Supreme Court recently denied rehearing a case that alters the statutory employee/employer analysis. In *Keene vs. CNA Holdings LLC*, the deceased was employed by Daniel Construction Company ("Daniel"). Daniel was initially hired by CNA to construct a polyester fiber plant, then later provided all maintenance for the plant under a contract that also required Daniel to provide workers' compensation insurance for its workers. The deceased contracted mesothelioma from asbestos in the plant and his estate sued CNA in civil court, obtaining a $14 million actual damages award with $2 million in punitive damages. CNA appealed, arguing that the deceased was its statutory employee and that it was fully shielded by the exclusivity provision of the Workers' Compensation Act.

Justice Few, writing for the majority, disagreed. After tracing the history of judicial application of the statutory employee provision, the Court focused on what it deemed "the General Assembly's original purpose for enacting" the statutory provisions. The Court determined that purpose to be: "to prevent owners and contractors from subcontracting out their work to avoid liability for injuries incurred in the course of employment."

Immediately after enactment of the Workers' Compensation Act, the main concern was that employers would evade the Act by contracting out all of their work. CNA reiterated this public policy argument, also stressing that the Act favors workers as statutory employees to ensure workers' compensation coverage. However, the Court noted the initial concern has largely dissipated; it then went one step further by stating that "when the public policy favoring coverage is satisfied—as it was here—that policy has nothing to say about providing immunity to the owner."

Setting out its "new" test, the Court held that in answering "whether the work contracted out is 'part of [the owner's] trade, business or occupation,' the Court should focus initially on what the owner decided is part of its business. Increasingly, business managers are outsourcing work that formerly was handled as a part of the business, and they are doing so to meet the ever-increasing competitive challenges businesses face." In reality, therefore, the Court stated "what is or is not 'part of' the owner's business is a question of business judgment, not law. If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company's business to not include that particular work."

Two Justices dissented, urging continuation of the traditional analysis as applied in *Glass v. Dow Chemical Co, 325 S.C. 198, 482 S.E.2d 49 (1997)*. Although the Majority declined to expressly adopt a different standard of review where statutory employment is being used as a shield, Justice James pointed out that litigants will read the Majority decision in precisely that manner. Ultimately, how this "business judgement" test is to be applied and what evidence is relevant to support both sides of a statutory employment dispute remains unclear.

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