

Please note this is a proactive approach to notify you of this latest decision. If you hire independent contractors on a regular basis or Property owners who act as their own “general contractors” for major construction or renovation projects:

### **Supreme Court Interprets WC for Independent Contractors**

The Texas Supreme Court has changed interpretation of the independent contractor provisions in the workers’ compensation law since the law was overhauled in 1991.

In its Aug. 31 decision in *Entergy Gulf States, Inc. v. John Summers*, the Court said a business can be a “general contractor” when it procures the services of an independent contractor for work on its own premises, and can shield itself from liability if it purchases workers’ comp insurance for the subcontractor and the subcontractor’s employees.

Prior to this decision, most insurance insiders, including lawyers in the TDI Division of Workers’ Compensation, thought the law required a 3-party relationship – owner, general contractor and subcontractor – in order to take advantage of independent contractor provisions in the law. Those provisions allow a general contractor to declare itself to be the employer of the subcontractor and the subcontractor’s employees and cover those employees under its workers’ compensation policy by using a special form (DWC Form 81). The Court’s decision opens this option to all employers, but it may also require businesses to pay additional premium to provide workers’ comp coverage for independent contractors who don’t have employees.

This decision potentially impacts virtually all workers’ comp policyholders other than traditional general contractors, including those who hire contractors as well as those who are contractors.

The current law - An independent contractor who meets the definition set by law and enters a prescribed agreement with the general contractor verifying the independent relationship is not eligible for benefits under the general contractor's policy, unless the parties agree otherwise. There is one exception: A subcontractor without employees is deemed by law to be the employee of the general contractor and covered by the general contractor’s workers’ compensation policy. In that case, the only decision to be made is whether the general contractor will deduct the resulting premium from the amount owed the subcontractor.

The law prescribes the use of forms developed by the Division of Workers' Compensation (DWC) to clearly establish these relationships and affirm the parties’ intent when they have agreed that the general contractor will provide workers’ compensation to the subcontractor and the subcontractor’s employees. When there is such an agreement, the law deems the subcontractor and the subcontractor’s employees to be employees of the general contractor for the purposes of the workers’ compensation law. And that means workers’ comp benefits provide the exclusive remedy for an employee’s on-the-job injuries, with no right to sue the general contractor for negligence in causing those injuries.

Three categories of independent contractor relationships are covered by the law:

- motor carriers and owner operators in the motor transportation industry
- contractors and independent subcontractors performing residential and small commercial construction work
- all other general contractors and their subcontractors in construction as well as other industries

The Court's decision does not appear to have any practical application to motor carriers or residential contractors.

The law defines "general contractor" to mean "a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors." In response to an inquiry from IIAT in 1991, a lawyer at the Texas Workers' Compensation Commission (predecessor of the current Division of Workers' Compensation at TDI) interpreted the definition to mean "that a general contractor agrees with another party to perform a particular job and then either performs the job itself or hires a subcontractor to perform the work which the general contractor agreed to do."

### ***Entergy v. Summers Changed Everything***

John Summers sued Entergy Gulf States, Inc. for injuries he sustained while working at Entergy's plant as an employee of International Maintenance Corp. (IMC). IMC had contracted with Entergy to perform construction and maintenance on Entergy's premises. The contract referred to IMC as an independent contractor and provided that Entergy would provide and pay for workers' compensation insurance to IMC's employees. Summers applied for and received benefits under the policy and then sued Entergy for negligence. Entergy moved for summary judgment, arguing that it was a general contractor and thus deemed an employer shielded from liability under the Workers' Compensation Act. To make a long story short, the Texas Supreme Court ultimately agreed with Entergy, saying that the law's definitions of "general contractor" and "subcontractor" do not preclude a dual role for premises owners and others who procure the services of an independent contractor to perform work for their own benefit. Thus, Summer's lawsuit against Entergy was barred by the exclusive remedy provision of the Workers' Compensation Act.

### **What This Means to you.....**

This decision has two implications for workers compensation policyholders who hire independent contractors to perform some work or service, even though the policyholder is not considered a general contractor in the traditional sense. For the purposes of the workers' compensation law, the Supreme Court says the policyholder is a general contractor and is subject to the independent contractor provisions in the law.

First, the policyholder can effectively shield itself from lawsuits arising out of injuries incurred on the job by an independent contractor's employees. This can be done by

executing an agreement with the independent contractor whereby the policyholder agrees to provide workers' compensation coverage to the independent contractor's employees. DWC Form-81 (<http://www.tdi.state.tx.us/forms/dwc/dwc81.pdf>) can be used for this purpose. In this form, the parties also declare whether the policyholder will withhold the cost of the coverage from the contract price. DWC Form-81 must be filed with the policyholder's workers' compensation insurance carrier within 10 days of execution. The carrier of course will then pick up the independent contractor's labor costs as part of the policyholder's payroll when computing the premium. Once this form is executed and filed with the carrier, the policyholder becomes the employer of the independent contractor's employees for the purposes of workers' compensation. If an employee is injured, he or she can collect workers' compensation benefits but will not be able bring a lawsuit against your client – the workers' compensation policyholder.

The second implication may not be as well-received as the first. Under the same independent contractor provisions that formed a basis for this decision, a policyholder who hires a contractor without employees is treated as the employer of the contractor. That means the contractor's labor cost can be picked up as part of the employer's payroll to determine the workers' compensation premium. The employer and the contractor can enter into an agreement (DWC Form-81) to declare whether the policyholder will withhold the cost of the coverage from the contract price.

Consider carefully the ways this second factor may impact policyholder's policy premium by thinking about the many scenarios where businesses hire independent contractors that don't have employees. A property owner hires a yard man. A store hires a moonlighting painter to paint the store interior walls. A business hires a computer consultant to work out some bugs in the office network. An insurance agency uses independent contractor producers. A law firm hires an expert witness. Under the law as interpreted by the Supreme Court, all of these businesses are considered "general contractors" and must pay for workers' compensation coverage on the independent contractors they hire. (Note: This part of the law does not apply to an independent contractor without employees who performs services for an oil or gas well operator. These workers are subject to a specific exception from this provision in the workers' compensation law.)