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WE SAY WHAT WE MEAN, AND WE MEAN WHAT WE SAY:
THE 1984 AMENDMENTS TO SECTIONS 904 AND 905
OF THE LHWCA

On September 28, 1984 Congress amended sections 904¹ and 905² of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to comport with what was considered to be "the proper rules governing contractor and subcontractor liability and immunity."³ The amendments to these sections were made largely in response to a recent United States Supreme Court decision⁴ which drastically altered third-party actions under the Act. The amendments, however, do not deal

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1. Former section 904 states:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 904 (1978).

2. Former section 905 states in part:

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. § 905(a) (1978).

3. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Ad. News 2734, 2774.

4. Washington Metropolitan Area Transit Auth. v. Johnson, 104 S. Ct. 2827 (1984) [hereinafter cited as *WMATA*].

exclusively with the problems created by that case.⁵ The purpose of this comment is to discuss the reasons for the amendments of sections 904(a) and 905(a), and the present status of general contractor immunity from third-party tort actions arising under the Act.

BACKGROUND: THE WMATA CASE

In *Washington Metropolitan Area Transit Authority v. Johnson*⁶ (WMATA), the United States Supreme Court granted a District of Columbia general contractor immunity from tort suits initiated by its subcontractors' injured employees. The employees had already received their workers' compensation remedies from a "wrap-up" policy procured by the Transit Authority (general contractor) to cover both its own and the subcontractors' statutory liabilities,⁷ and were seeking full compensation from the Transit Authority through a third-party tort action.⁸ The subcontractors had been told by the Transit Authority to reduce their bids in proportion to the price normally included for the expense of obtaining workers' compensation insurance, but were advised that if they thought it necessary they could obtain their own workers' compensation insurance at their own expense. By reducing their bids

5. Two other issues dealt with were the liability of shipbuilders and the viability of mutual indemnity agreements between employers and vessels. As amended, these sections now grant shipbuilders exclusive immunity under the Act by prohibiting 1) maritime tort actions initiated directly against the shipbuilders and 2) third-party actions based upon theories of contractual or tort indemnification or contribution. Also, the new sections now expressly permit mutual indemnity agreements. See Longshore & Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §§ 4-5, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1639, 1641 (codified as amended by 33 U.S.C. §§ 905(b), (c)).

6. 104 S. Ct. 2827 (1984).

7. Although the Transit Authority and the subcontractors were both named insureds on the policy, the Transit Authority's own employees were covered by virtue of the fact that the Transit Authority was self-insured. The "wrap-up" policy was purchased mainly to insure that a subcontractors' employees were covered by an insurance program, to simplify the Transit Authority's monitoring of such insurance coverage, and to allow minority subcontractors, unable to afford or qualify for their own workers' compensation policies, to competitively bid on the project in pursuance of the Transit Authority's affirmative action program.

8. The LHWCA was applied in the District of Columbia as the workers' compensation act of that jurisdiction at the time the plaintiffs' claims arose. See D.C. Code §§ 36-501, 502 (1973). Sections 904 and 905 allow the filing of tort suits against non-employer third parties. See *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5th Cir. 1961). The District of Columbia has since enacted its own workers' compensation statute. See D.C. Code §§ 36-303, 304 (1981); *District of Columbia v. Greater Washington Central Labor Council*, 442 A.2d 110, cert. denied, 460 U.S. 1016, 103 S. Ct. 1261 (1983). However, claims arising prior to the enactment of the District of Columbia statute in 1980 will still be governed by the LHWCA. See *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984).

accordingly, the Court found that the subcontractors had fulfilled their statutory duty⁹ to secure compensation for their employees.¹⁰

In granting the Transit Authority immunity from the third-party tort suits, the Court used a strained interpretation of Congressional intent¹¹ and a slanted reading of prior jurisprudence¹² to define the section 905(a) "employer." Specifically, the Court in *WMATA* stated that it was "clear that Congress must have meant the term 'employer' in other sections of the LHWCA to include contractors" and that it was "reasonable to infer that Congress intended the term 'employer' to have that same broad meaning in § 5(a)."¹³ Thus, even though the Transit Authority was not the direct employer, the Court treated it as an "employer" for purposes of section 905(a) immunity. Having concluded the term "employer" subsumed the term "general contractor," and having found that the Transit Authority had fulfilled its statutory

9. 33 U.S.C. § 904 (1978).

10. The subcontractors were named insureds on the "wrap-up" policy procured by the Transit Authority. The Court noted that "WMATA never gave respondents' employers the opportunity to default on their statutory obligations to secure compensation; WMATA pre-empted its subcontractors through its unilateral decision to purchase a 'wrap-up' policy covering all subcontractor employees." *WMATA*, 104 S. Ct at 2831. Compare this with the holding in *Clanagan v. Washington Metropolitan Area Transit Auth.*, 558 F. Supp. 209 (D.D.C. 1982), in which the opposite conclusion was reached. *Clanagan* was an earlier District of Columbia District Court decision involving another tort suit against the Transit Authority under the same "wrap-up" policy involved in *WMATA*. In *Clanagan*, the Transit Authority's sole liability was held to be the remedies under the LHWCA, and the court stated that it saw "no reason why, in the present situation where plaintiff received compensation from the general contractor, a 'third-party' suit could not be brought against the subcontractor who has contributed nothing towards plaintiff's compensation." *Clanagan*, 558 F. Supp. at 212.

11. Our only difficulty in adopting the majority view is that it requires a slightly strained reading of the word "employer." . . . However, upon reviewing the use of the term "employer" elsewhere in the Act, we find ample evidence to infer that Congress intended the term "employer" to include general contractors as well as direct employers.

WMATA, 104 S. Ct. at 2833.

12. The Court cited three cases supporting the statement "that § 5(a)'s tort immunity can extend to general contractors, at least when the contractor has fulfilled its responsibilities to secure compensation for subcontractor employees in accordance with the requirements of § 4(a)." *Id.* at 2832. However, the Court failed to point out that the cases cited also state that the general contractor is not obligated, pursuant to § 904(a), to obtain workers' compensation insurance where the subcontractor has already done so. Also, the cited cases state that voluntarily procured insurance will not grant a general contractor immunity from tort suits. See *Johnson v. Bechtel Assoc. Professional Corp.*, 717 F.2d 574 (D.C. Cir. 1983), *rev'd sub nom.*, *Washington Metropolitan Area Transit Auth. v. Johnson*, 104 S. Ct. 2827 (1984); *DiNicola v. George Hyman Constr. Co.*, 407 A.2d 670 (D.C. Cir. 1979); *Thomas v. George Hyman Constr. Co.*, 173 F. Supp. 381 (D.D.C. 1959).

13. *Id.* at 2834.

duty¹⁴ to secure compensation for the subcontractors' employees, the Court granted the immunity.

LHWCA JURISPRUDENCE PRIOR TO WMATA

The holding in *WMATA* was in opposition to established LHWCA jurisprudence. In two fifth circuit cases involving a subcontractor's employee's tort suit against the general contractor, the courts held that the exclusive liability of section 905 does not operate for the benefit of non-employer third parties. In the first case, *Pure Oil Co. v. Snipes*,¹⁵ the plaintiff worked for a drilling company which had subcontracted to drill two oil wells on a fixed platform owned by Pure Oil. Snipes was injured when he fell from the top of a water tank through a hole in the platform, which had been caused by the removal of grating. The court refused to dismiss the third-party tort suit against Pure Oil, stating that "[t]he provisions of § 905 prescribing that the Longshoremen's Act is the exclusive liability of the employer does not operate for the benefit of anyone else and certainly not for a third party."¹⁶ In the second case, *Bertrand v. Forest Corp.*,¹⁷ the decedent worked for a partnership, in which Forest Oil was a partner, which performed maintenance on offshore fixed platforms. Bertrand, after being brought to one of Forest Oil's platforms by helicopter, mysteriously disappeared. The pilot, after noticing his passenger had been gone for an inordinate amount of time, searched the entire platform but was unable to locate him. His body was never recovered. Bertrand's representative filed a tort action against Forest Oil which was dismissed because as a partner, Forest Oil was the employer of the decedent. However, in a footnote the court pointed out that "[t]he right of recovery is limited by Section 905 only as against the employer; the employee remains free to sue non-employer third parties for damages."¹⁸

Prior to *WMATA* a general contractor was considered a third party amenable under the LHWCA to a subcontractor's employees' tort suits when the subcontractor has secured compensation for the injured employees. In *Probst v. Southern Stevedoring Co.*,¹⁹ the court allowed a tort suit against the general contractor. The plaintiff in *Probst* was employed by a subcontractor who had contracted to perform part of

14. 33 U.S.C. § 904 (1978).

15. 293 F.2d 60 (5th Cir. 1961).

16. *Id.* at 68.

17. 441 F.2d 809 (5th Cir. 1971).

18. *Id.* at 811 n.2.

19. 379 F.2d 763 (5th Cir. 1967). The court considered the obligation of the general contractor to secure workers' compensation benefits to be a secondary, protective one. *Id.* at 766.

the preparation and loading of a cargo of grain. He was injured when he fell through a false deck constructed of plywood sheets supplied by the general contractor. In allowing the third-party negligence action, the court pointed out that "[t]he act does not make the general contractor the 'employer.' It is only the 'employer' who can get under the immunity umbrella of [section] 905."²⁰

The question of when a general contractor is obligated to secure workers' compensation benefits for subcontractor employees was addressed in *DiNicola v. George Hyman Construction Co.*²¹ In *DiNicola*, the plaintiff was employed as a tile setter for a subcontractor. He was injured when he fell through an open space on a scaffold which had been partially dismantled by the general contractor's employees. Plaintiff received workers' compensation benefits from his employer and filed a third-party negligence action against the general contractor. In allowing the negligence action, the court approvingly quoted from an earlier case²² and stated: "The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance only if the subcontractor fails to do so."²³ Thus, the court was letting the general contractor know that he is not required to duplicate coverage of LHWCA benefits, and that such duplication will not preclude third-party tort actions.

This interpretation of section 905 has been exhibited in cases dating from 1959 up until the *WMATA* decision. In *Johnson v. Bechtel Associates Professional Corp.*,²⁴ the District of Columbia Court of Appeals decision which *WMATA* reversed, the court cited *DiNicola* and *Thomas v. George Hyman Construction Co.*²⁵ for the proposition that "courts have allowed a general contractor to invoke the statutory immunity only when he was legally required to, and did in fact, provide workmen's compensation insurance."²⁶ The court in *DiNicola* cited *Probst* and *Thomas* as supporting its refusal to grant the general contractor immunity from third-party tort suits when the subcontractor had provided compensation payments. The fifth circuit stated in *Probst* that it "reached the same conclusion as"²⁷ the *Thomas* case. *Thomas* was a District of Columbia District Court case in which a subcontractor's injured em-

20. *Id.* at 767.

21. 407 A.2d 670 (D.C. Cir. 1979).

22. *Id.* at 673 (quoting *Thomas v. George Hyman Constr. Co.*, 173 F. Supp. 381, 383 (D.D.C. 1959)).

23. *Id.*

24. 717 F.2d 574 (D.C. Cir. 1983), rev'd, 104 S. Ct. 2827 (1984).

25. 173 F. Supp. 381 (D.D.C. 1959).

26. *Johnson*, 717 F.2d at 581, rev'd, 104 S. Ct. 2827 (1984).

27. *Probst*, 379 F.2d at 767.

ployee, who had received compensation benefits from his employer, was allowed to file a third-party tort action against the general contractor. The *Thomas* court stated that:

The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance only if the subcontractor fails to do so. In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, voluntarily take out insurance that the law does not require and thereby secure freedom from liability for negligence.²⁸

This line of cases appears not only to withhold immunity from the general contractor when the subcontractor has secured LHWCA benefits, but it also hints at the fact that the general contractor might be granted immunity if he has secured such benefits when the subcontractor has not.

The *Thomas*, *Probst*, *DiNicola* and *Johnson* decisions appear to lead to the conclusion that a general contractor will be granted immunity only if he was required to secure LHWCA benefits and actually did so. However, the fifth circuit specifically stated in *Probst* that it was not addressing the issue of "what ought to be done if the general contractor, or general employer, is actually required to pay compensation benefits to the injured employee of the subcontractor under § 904."²⁹ Because this issue has been left open, other courts have reached inconsistent results.

In *Perry v. Baltimore Contractors, Inc.*,³⁰ the court allowed a subcontractor's employee to sue a general contractor even though the general contractor had secured LHWCA benefits for the subcontractor's employees, and the subcontractor had not. The court allowed the tort suit against the general contractor under the theory that the plaintiff would otherwise be deprived of his absolute right to sue third parties.³¹ Reaching results similar to those in *Perry*, the court in *Fiore v. Royal Painting Co.*³² allowed a wrongful death action against a general contractor who had actually begun paying LHWCA benefits to the decedent's widow. The court cited *Probst* and *Smith v. Chevron Oil Co.*³³ for the proposition that the LHWCA "did not make the general contractor the

28. *Thomas*, 173 F. Supp. at 383.

29. *Probst*, 379 F.2d at 767.

30. 202 So. 2d 694 (La. App. 1st Cir. 1967).

31. *Id.* at 702.

32. 398 So. 2d 863 (Fla. Dist. Ct. App. 1981).

33. 517 F.2d 1154 (5th Cir. 1975).

employer for the purpose of common law liability” and “that the Act did not immunize or exclude general contractors from common law suits.”³⁴ However, in *Clanagan v. Washington Metropolitan Area Transit Authority*,³⁵ the court expressly declined to follow *Fiore*. The *Clanagan* court found that the general contractor had provided compensation benefits when obligated to do so, and was therefore entitled to section 905 immunity. The plaintiff had been receiving LHWCA benefits from the same “wrap-up” policy that was involved in *WMATA*. As will be seen, the amendments have destroyed the basis of the *Clanagan* decision, but they have also answered the issue left open in *Probst*.

The LHWCA jurisprudence prior to *WMATA* can be summarized as follows: (1) The general contractor is liable as a third party when the subcontractor has secured workers’ compensation payments; (2) the general contractor is not obligated to obtain workers’ compensation insurance if the subcontractor has done so; (3) payment of workers’ compensation benefits by a subcontractor will not preclude a tort suit against the general contractor; and (4) the general contractor *may* be granted immunity in tort from injured subcontractor employees when the general contractor was obligated to secure and actually did provide workers’ compensation payments.³⁶

THE AMENDMENTS

In *WMATA* the Court interpreted section 905 as granting immunity to a general contractor when he had secured workers’ compensation benefits for the subcontractor’s employees, regardless of whether he was required to, or did in fact provide workers’ compensation benefits to an injured employee. Congress disagreed with the Court’s interpretation

34. *Fiore*, 398 So. 2d at 864.

35. 558 F.Supp. 209 (D.D.C. 1982).

36. See *DiNicola*, 407 A.2d at 670; *Probst*, 379 F.2d at 763; *Thomas*, 173 F. Supp. at 381. However, the fifth circuit has recognized that a general contractor will be granted immunity if, depending on the circumstances, the injured worker meets the requirements of the borrowed employee doctrine. See *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), cert. denied, 436 U.S. 913, 98 S. Ct. 2253 (1978). In *Gaudet*, the majority opinion stated that in determining whether the worker is a borrowed employee the principle focus should be whether the general contractor exercised direction and control of the worker, and whether the work performed under the control of the general contractor was of such duration to allow the worker to evaluate the risks of the work situation and acquiesce thereto. The court stated that the other factors enumerated in the *Ruiz* test may be helpful in the decision of whether or not the worker was a borrowed employee, but should not be considered essential. See *Gaudet*, 562 F.2d at 357; see also, *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969). Note that this is an entirely different basis of immunity, as it proceeds under the fiction that at the time of the injury the worker was an employee of the general contractor.

of section 905, and amended the LHWCA to overrule the decision. Section 904(a) has been amended to read:

Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.³⁷

Section 905(a) has been amended by adding: "For purposes of this section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4."³⁸ The new language in sections 904 and 905 resolves the problems created by *WMATA*. The amendments only allow a general contractor to qualify for section 905's grant of immunity if he was obligated to secure compensation benefits, and did in fact provide such benefits. The comments to the House Conference Report leave no doubt as to the intent behind the amendments:

The Conference substitute, in disapproving *WMATA v. Johnson*, achieves the following: First, the obligation of the contractor to secure compensation for the employee of the subcontractor is a contingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own employees. Second, the contractor remains amendable [sic] to suit by its subcontractors' employees in those instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees. Third, however, where the subcontractor defaults in securing compensation, thus triggering the contractor's obligation, and the latter fulfills that obligation, the contractor is deemed an "employer" for purposes of section 5(a) and therefore entitled to immunity from suit by the subcontractor's employees. Fourth, if the contractor utilizes a "wrap-up" insurance policy to provide insurance coverage for the benefit for satisfying the subcontractor's primary obligation to secure compensation, the contractor still remains amenable to suit by

37. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1639 (codified as amended by 33 U.S.C. § 904(a)).

38. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1639 (codified as amended by 33 U.S.C. § 905(a)).

employees of the subcontractor; the contractor does not enjoy the immunity afforded by Section 5(a) of the Act.

The Conference substitute also provides a special effective date, so that these amendments apply to pending suits. This will avoid the dismissal, under WMATA, of third-party suits which were pending or on appeal on the date of enactment. (Any suit which has gone to final judgment from which no appeal lies as of date of enactment would not be subject to the amendments). WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretation from 1927 through 1983. The case should not have any precedential effect.³⁹

The retroactive application of the amendments to sections 904(a) and 905(a) have returned general contractor immunity to its status prior to the *WMATA* decision.

The amendments also provided an answer for the issue left open in *Probst*. The amendments to section 905(a) confer upon the general contractor the status of employer upon the default of the subcontractor to obtain LHWCA benefits, and if the general contractor has secured such benefits, he will be granted immunity.⁴⁰ As can be seen in the comments to the House Conference Report set out above, the third intended purpose behind the amendments was to grant immunity to a general contractor in this limited situation. Thus, Congress has resolved the question left open in *Probst* contrary to the *Perry* and *Fiore* decisions.

THE MARTIN AND DOUCET CASES

The first case to reach the fifth circuit concerned with the status of general contractor liability in wake of the 1984 amendments was *Martin v. Ingalls Shipbuilding, Inc.*⁴¹ In *Martin* the plaintiff worked for a subcontractor hired to sand and paint fixtures inside a vessel under construction. She was injured when she fell from a defective ladder left on the vessel and was receiving LHWCA payments from her employer when she filed suit against the general contractor. Plaintiff brought suit in federal court under diversity jurisdiction and only alleged negligence in her complaint. The district court, applying Mississippi law, granted summary judgement in favor of the general contractor. On appeal to the fifth circuit, she argued that her complaint was governed by the LHWCA not the law of Mississippi. The court agreed, and stated that the recent amendments "confirmed that [the general contractor] is not

39. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Ad. News 2734, 2774.

40. 33 U.S.C. § 905(a).

41. 746 F.2d 231 (5th Cir. 1984).

Martin's statutory employer under the LHWCA, and is therefore not entitled to immunity."⁴² The district court decision was reversed and the case remanded.

A later case which interpreted the effect of the 1984 amendments upon *WMATA* was *Doucet v. Atlantic Richfield Co.*⁴³ In *Doucet*, the plaintiff worked as a driller for a subcontractor hired to perform the drilling operations on a platform in the Gulf of Mexico. He was injured when he slipped and fell on a stack of casing and he filed suit against the general contractor alleging that his injuries were caused by a defective thing in the general contractor's custody.

WMATA was decided after *Doucet's* injury had occurred but before his case had come to trial. The district court dismissed *Doucet's* action against the general contractor in light of the rule established by *WMATA*, but the case was pending appeal in the fifth circuit when the amendments were passed. The fifth circuit heard arguments⁴⁴ regarding the effect of the amendments on the *Doucet* case and released a *per curiam* opinion which reversed and remanded the trial court's decision. The brief opinion cited *Martin* and simply stated that "Congress overturned the Washington Metro holding by an amendment applicable to pending claims such as Mr. *Doucet's*."⁴⁵

The fifth circuit in *Martin* and *Doucet* reestablished the rule that the general contractor is liable as a third-party defendant in a tort action initiated by a subcontractor's employee when the subcontractor has provided workers' compensation benefits for the injured employee.⁴⁶

42. *Id.* at 232.

43. *Doucet v. Atlantic Richfield Co.*, No. 83-0351 (W.D. La. July 30, 1984).

44. *Doucet v. Atlantic Richfield Co.*, 753 F.2d 1074 (5th Cir. 1985) (*per curiam*), cert. denied, 105 S. Ct. 2705 (1985).

45. *Id.* at 2.

46. The holding in *WMATA*, if it had been allowed to stand, would have made general contractor immunity under the LHWCA similar to the immunity granted to general contractors under Louisiana's compensation statute. See La. R.S. 23:1021-32 (1985). Louisiana's statute grants general contractors immunity from tort suits initiated by subcontractors' employees when the work being performed by the subcontractor is part of the "trade, business, or occupation" of the general contractor. See *Blanchard v. Gulf Oil Corp.*, 696 F.2d 395 (5th Cir. 1983); *Coco v. Winston Industries, Inc.*, 330 So. 2d 649 (La. App. 3d Cir.), rev'd on other grounds, 341 So. 2d 332 (1976); *Massey v. Rowan Drilling Co.*, 368 F.2d 92 (5th Cir. 1966). This grant of immunity is more commonly known as the "statutory employer doctrine," and until *WMATA*, had no recognized counterpart under the LHWCA. The basic difference between the two grants of immunity is that *WMATA's* grant of immunity depended upon the general contractor securing "back-up" compensation for the subcontractor's employees, whereas Louisiana's workers' compensation statute only requires that the work being performed be part of the general contractor's trade, business or occupation, and does not require any affirmative duties upon the general contractor to qualify for the grant of immunity. Despite these differences, both grants of immunity effectively closed off a possible source from which a worker might recover losses due to job related injuries.

DISCUSSION

The 1984 amendments to sections 904 and 905 have adopted the sounder view towards general contractor liability and immunity.⁴⁷ Allowing general contractors to be sued as third parties will promote safer working conditions for subcontractors' employees. General contractors will not be able to cloak themselves with immunity from injuries caused by their negligence and at the same time avoid responsibility for the payment of workers' compensation benefits to a subcontractor's injured employee, a result which would have been allowed under *WMATA*. Instead, general contractors remain liable for injuries to subcontractors' employees caused by the general contractors' fault, as long as the subcontractors have procured workers' compensation payments. Direct liability for their own negligence will give general contractors a strong economic incentive to correct unsafe working conditions.

If a general contractor remains liable in a third-party action by the subcontractor's employee, the burden of compensating work related injuries will be placed on the party actually at fault. A grant of immunity to general contractors, as in *WMATA*, places liability for all work related injuries on the individual subcontractors' insurers.⁴⁸ The subcontractors' operating costs would in turn be increased due to the need for greater insurance coverage, and this overall increase would be spread to the general contractor in the form of higher bids. However, a subcontractor who has already compensated an employee injured by a general contractor may have insurance costs which would not be reflected in his bid. For instance, a subcontractor who has entered into agreements with a general contractor whose fault leads to a high rate of injuries may cause future insurance costs for this particular subcontractor to

47. This paper deals with "general contractors" in the abstract meaning of that term. It should be pointed out that there may often be factual questions as to whether a particular defendant is in fact a general contractor. This was one of the issues argued in *Doucet*. See Brief for *Amicus Curiae*, *Doucet v. Atlantic Richfield Co.*, No. 84-4536, slip op. (5th Cir. Jan. 30, 1985). Because of the diversified nature of offshore drilling, the issue of "who is a general contractor" can present difficult factual questions to resolve. For example, in an offshore platform setting in which there is a platform owner, a general drilling contractor, and a general labor contractor, if the general labor contractor subcontracts out of all or part of the labor requirements, and an employee of one of the labor contractor's subcontractors gets injured, who is the general contractor for purposes of the LHWCA?

48. If a wrap-up policy is utilized, as it was in *WMATA*, no one subcontractor will be unduly burdened by general contractor negligence. The risk associated with the general contractor's negligence will only increase the cost of the wrap-up policy, which is shifted to the general contractor. However, in situations where the subcontractors are required to secure LHWCA compensation on their own, there is the possibility that general contractor negligence will be compensated by a subcontractor, thereby increasing their operating costs while the general contractor and other subcontractors remain unaffected.

skyrocket. This higher cost of insurance would be reflected as a higher bid price, but other subcontractors who have dealt with safe general contractors will not have the high insurance cost and will therefore be able to underbid the other subcontractors. The competitiveness of any given subcontractor would largely be dependent on the record of job related injuries of his prior general contractors.

General contractors would be able to remain competitive by soliciting bids and replacing subcontractors whose operating costs have been increased. Through the general contractor's third-party liability, a subcontractor's insurer will be able to recoup the amounts it was obligated to pay because of the general contractor's negligence. This will prevent subcontractors' insurance premiums from increasing when they are not at fault, and thereby enable subcontractors with good records of job related injuries to remain competitive.

Having the general contractor compensate the victim of his negligent acts spreads the risk of the loss in a more equitable manner. If an injured employee is not allowed to recover from the party at fault, the difference between the compensation he has received and the actual amount of his losses will have to be borne by the worker. Should this difference prove too much for the worker to bear, the loss may ultimately fall upon the taxpayers in the form of federal or state compensation programs. Having the taxpayers compensate these losses would spread the risk, but the class of taxpayers includes individuals who may not be the actual beneficiaries or users of the product offered by the general contractor. Even if the worker is capable of bearing the shortfall in recovery, the risk of a third party's negligence is still placed upon a party not capable of spreading risk to the ultimate consumer of the product which led to the loss.

Holding general contractors liable through third-party tort actions will ultimately spread the loss for all damages caused by the fault of the general contractor to the ultimate consumer of the product. The injured employee will have the opportunity to recover the total amount of his actual damages in such a tort suit, unlike the limited recovery afforded him under the LHWCA. The amount of tort damages obtained from the general contractor merely increases his operating expenses, which are then passed along to the consumer by increasing the price of the product. In doing so, the consumer who derives the benefits of the product will also pay for *all* of the risks associated with its manufacture.

Allowing third-party tort actions against general contractors who have provided no direct compensation to an injured employee is consistent with the concept of *quid pro quo*. This concept, which forms the basis of workers' compensation statutes,⁴⁹ involves the employee

49. 2A A. Larson, *The Law of Workmen's Compensation* § 65.11 (1983).

giving up the right to sue his employer in exchange for a guaranteed fixed amount of pay for work related injuries regardless of fault. The employer in turn agrees to provide a set compensation with the understanding that the payments will be the employee's exclusive remedy against the employer.

If the subcontractor has secured LHWCA benefits for his employees, an injured employee will receive compensation benefits from his subcontractor employer, and in exchange the subcontractor employer is entitled to immunity. However, under the reasoning of *WMATA*, the general contractor who also secures LHWCA benefits for the subcontractor's employees receives the same immunity without having to provide any compensation to the injured employee. The securing of benefits which have already been secured are of little value to an injured worker. It is difficult to explain the granting of immunity to a general contractor who has provided no tangible benefits in terms of the rationale upon which workers' compensation was established.

The majority opinion in *WMATA* spoke in terms of immunity being "the reward for securing compensation."⁵⁰ It is perhaps more accurate to say that immunity is the reward for paying compensation. As has already been pointed out, the jurisprudence prior to *WMATA* did not give general contractors the option of securing compensation benefits, when not obligated to do so, in order to avoid tort liability to subcontractors' employees.⁵¹ Thus, even though section 905 grants immunity to an employer who "secures" compensation, it should be obvious that Congress intended that the payments be "secured for and paid to" the injured employee.

The use of the term "secured" in section 905 raises additional questions. Upon a subcontractor's failure to secure compensation benefits for one of his employees, will a general contractor's tendering of compensation benefits amount to securing benefits? Or is something more required, such as the existence of insurance coverage or qualification as a self-insured? Although this problem could be dismissed as merely a matter of semantics, section 905 does give an injured employee whose "employer" has not "secured" compensation the choice of claiming compensation under the Act or maintaining an action at law.⁵² This language implies that Congress intended the securing of benefits to be something more than mere payment of them.

50. *WMATA*, 104 S. Ct. at 2833.

51. See *DiNicola*, 407 A.2d at 670; *Probst*, 379 F.2d at 763; *Thomas*, 173 F. Supp. at 381.

52. See 33 U.S.C. § 905(a) which reads in part: "[I]f an employer fails to secure payment of compensation . . . an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages."

Although the amendments lend certainty to the law, they fail to provide adequate guidance to general contractors wishing to apply the law. The amendments make it clear that a general contractor is not obligated to secure compensation benefits until the subcontractor fails to do so. However, general contractors who have numerous subcontractors working for them may not be able to determine at any given moment which subcontractors have fulfilled their statutory obligation to secure compensation. Since most subcontractors are going to prefer to maintain insurance coverage, the general contractor will not be able to qualify for section 905 immunity unless the subcontractor's policy has lapsed, been canceled, or for some other reason was not in effect when the injury occurred. Without further guidance from the courts or Congress, general contractors will have to "secure" compensation even though not required to do so in order to be sure that they can qualify when given the opportunity.⁵³

General contractors of course could avoid the expense of securing compensation for the subcontractors' employees by procuring "wrap-up" policies covering the subcontractors' statutory duty to secure compensation, thereby unilaterally insuring that the general contractor's statutory duty will never arise. However, a general contractor may have little incentive to do this, as it would effectively leave him liable as a third party in *all* tort suits filed by a subcontractor's employee alleging general contractor fault. Thus, a general contractor is left with two choices: (1) secure compensation for subcontractors' employees when not obligated to do so in order to qualify for statutory immunity if given the opportunity, or (2) insure that the subcontractors' statutory duty to secure compensation is fulfilled by purchasing a "wrap-up" policy, thereby negating the necessity of the general contractor securing such compensation.

General contractors opting for the first choice will still be liable in tort for damages caused by their own fault as long as the subcontractors have secured compensation. However, in instances in which subcontractors have neglected to secure compensation, general contractors will be able to qualify for immunity. Those opting for the second choice will avoid the expense of securing compensation, but will remain liable for *all* injuries to the subcontractors' employees caused by the general

53. Insurance policies purchased by general contractors, generally referred to as employer liability policies, typically allow credits or refunds of premium payments which reflect the amount of insurance coverage procured by the subcontractors for their own employees. The general contractor will usually require the subcontractors to present certificates proving the existence of insurance coverage, which can then be used as proof to obtain the credits. Thus, even though general contractors may choose to procure insurance covering LHWCA benefits for their subcontractors' employees, the premiums paid by the general contractor are adjusted to more accurately reflect the risk being insured.

contractor's fault. Economical considerations will no doubt affect this decision.

CONCLUSION

At this time neither *Doucet* or *Ingalls* has been reargued at the district court level, however, there can be little doubt that the Congressional amendments to section 904 and 905 have achieved their purpose. The *WMATA* Court's interpretation of section 905 immunity has been legislatively overruled.⁵⁴ The amendments make it clear that the general contractor cannot be considered the employer of a subcontractor's employee when the subcontractor has fulfilled its statutory obligation under section 904. By granting a general contractor immunity from the subcontractor's employees' tort suits when the general contractor was obligated to and did in fact provide LHWCA benefits to those employees, the amendments have answered the question left open in *Probst*.

In conclusion, the amendments have, for all practical purposes, returned the LHWCA to its former status. Now that the *Probst* issue has been resolved, a needed clarification in the jurisprudence has been achieved. Even though some confusion still exists as to what a general contractor must do in the every day operations of his business to qualify for section 905 immunity, this author is of the opinion that it is better to provide an injured worker an opportunity for recovery of his work-related injuries, which in many cases will remain with him for life, than to afford industry a method of reducing operating expenses. While the LHWCA does not always allow an injured worker the opportunity for 100% recovery of his loss, it does afford the class of injured workers as a whole an equitable modern approach to an age old problem.

Kraig Thomas Strenge

54. See also, *Weathersby v. Conoco Oil Co.*, 752 F.2d 953 (5th Cir. 1984); *Trussell v. Litton Systems, Inc.*, 753 F.2d 366 (5th Cir. 1984).

