

CASE NO. 06-0418

IN THE SUPREME COURT OF TEXAS

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HCBECK, LTD.,

Petitioner,

v.

CHARLES RICE,

Respondent.

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**On Appeal from the  
Second District Court of Appeals at Fort Worth, Texas**

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**BRIEF OF AMICUS CURIAE TEXAS BUILDING BRANCH OF THE  
ASSOCIATED GENERAL CONTRACTORS OF AMERICA  
IN SUPPORT OF HCBECK, LTD., PETITIONER**

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## STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae Brief is tendered on behalf of the Texas Building Branch of the Associated General Contractors of America (the “Texas Building Branch”) in support of Petitioner’s Petition for Review. The Associated General Contractors of America is a national non-profit association comprised of more than 33,000 companies, including 7,500 general contractors. The Texas Building Branch consists of eleven commercial building chapters of the AGC located throughout the State of Texas. The membership of these eleven chapters includes approximately 370 general contractors and 3,890 specialty contractors, subcontractors and suppliers, all doing business in Texas.

Because of its unique perspective as an influential representative of a broad segment of the construction industry, the Texas Building Branch has submitted amicus curiae briefs to this Court on many occasions, including cases affecting the ability to insure the risks encountered on Texas construction projects, the most recent being *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, \_\_\_ S.W.3d \_\_\_, 2007 WL 2459193 (Tex. Aug. 31, 2007), *reh’g filed*. This is another of those cases, since workers compensation insurance has long played an important role for Texas contractors in managing the risk of worker injury on Texas construction jobsites. Whether AGC members can depend on receiving maximum protection under an owner controlled insurance program (OCIP), while at the same time providing injured workers with statutory workers compensation benefits, is a matter of continuing and urgent interest to the members of the Texas Building Branch. Consequently, although the Texas Building Branch is not a party to

this appeal, this brief has been submitted through the undersigned independent attorneys, who were paid a fee by the Texas Building Branch to prepare it.

### **ISSUE PRESENTED**

An OCIP allows the owner to insure all tiers of contractors and subcontractors on a construction project within a single program of insurance. Does the inclusion of workers compensation insurance under an OCIP constitute the providing of workers compensation coverage in a written agreement between a general contractor and a subcontractor within the meaning of §406.123 of the Texas Labor Code, so as to entitle the general contractor to the protection of the exclusive remedy rule under the Workers Compensation Act?

### **INTRODUCTION**

The members of Texas Building Branch, as well as other businesses engaged in construction within the State of Texas, confront the issue presented to this Court in their ongoing efforts to manage the many risks associated with building construction. The risk of bodily injury to workers on construction jobsites is considerable, and a concern for all employers. In order to protect their workers, contractors provide workers compensation insurance to compensate injured workers and their families, and to rehabilitate and return them to the workforce. At the same time, the workers compensation laws of the State of Texas provide significant protection to Texas employers that provide workers compensation protection to their employees in the form of the exclusive remedy rule, which prevents an injured employee from seeking tort damages from the employer over and above workers compensation benefits.

Nevertheless, the exclusive remedy under the Workers Compensation Act does not prevent an injured worker from seeking recovery against third parties for causing or

contributing to the injury. The availability of a third party action on a construction project is particularly problematic for the construction industry. Somewhat simplified, a construction project is organized into “tiers,” the uppermost tier being the owner, then the general contractor, then the subcontractors, together with any sub-subcontractors. Due to the presence of multiple tiers in close proximity, and the contractual relationships among them, the construction jobsite is an area ripe for third party claims. It is this close proximity that fosters lawsuits that may bear little relationship to the actual responsibility of another tier for a jobsite injury, unlike the prototypical third party injury, involving for example, an unreasonably dangerous piece of machinery. In that situation, such a claim involves true third party liability, as opposed to allegations of liability arising out of the number of parties at work on the construction site.

In recognition of this state of affairs, the Texas Workers Compensation Act, in TEX. LAB. CODE ANN. §406.123 (Vernon 2006), provides that a general contractor and a subcontractor (as those terms are defined in the Act) can enter into a written agreement under which the general contractor provides workers compensation insurance to the subcontractor and its employees. That agreement, and the provision of workers compensation insurance pursuant to it, renders the general contractor the employer of the subcontractor and the subcontractor’s employee for purposes of the workers compensation laws. As such, the general contractor, having provided workers compensation coverage, is protected by the exclusive remedy rule found in Section 408.001 of the Workers Compensation Act. *See* TEX. LAB. CODE §408.001 (Vernon

2006). At the same time, allowing the general contractor to provide workers compensation insurance for the benefit of its subcontractors and their employees advances the purpose of the workers compensation laws by making workers compensation more available to those subcontractors who might not otherwise be able to provide the protection for their own employees.

The salutary benefits of such an arrangement have been recognized on numerous occasions by Texas courts, including this Court. In addition, the courts have previously recognized that workers compensation may be provided to lower tiers by means of participation in an OCIP, and in that instance, the tiers are entitled to protection under the exclusive remedy rule from employees' suits involving jobsite injuries.

While one of the benefits of an OCIP is certainly savings in premiums, provision of workers compensation to subcontractors through an OCIP complies with §406.123 and entitles all tiers, including the owner, general contractor and subcontractors, to rely on the exclusive remedy to bar third party lawsuits. The reliance upon an OCIP, where the owner (usually an entity of much greater size than any subcontractor) purchases the workers compensation coverage, can only benefit participating subcontractors. Due to the size of the owner, economies of scale and amount of premium, the coverage is much more likely to remain in force, in turn, making it more likely that injured employees will receive their workers compensation benefits under Texas law.

The fact that an owner maintains the right not to ultimately provide the OCIP, or to terminate an existing OCIP, as to a project or a participant, provides no basis to



deprive the general contractor on the project of the exclusive remedy. The Court should focus on the fact that workers compensation was in fact provided to Charles Rice and benefits were in fact paid to him. It is illogical to engage in “what ifs” had coverage been cancelled, terminated or refused. Any employer, including a subcontractor that provides workers compensation to its own employees, can cancel its coverage at any time. That ability surely does not prevent that subcontractor from obtaining the protection of a single remedy to avoid lawsuits filed against it by its own employees if coverage is actually in force. Neither should it prevent the general contractor on an OCIP from obtaining that same protection from jobsite injuries to the employees of its subcontractors to whom workers compensation insurance has been provided.

### **SUMMARY OF THE ARGUMENT**

The court of appeals erroneously held that HCBeck did not provide workers compensation to Haley Greer through the FMR OCIP for the Westgate Office Complex project. As a corollary to that determination, the lower court also erroneously held that HCBeck was not entitled to the immunity of the exclusive remedy under TEX. LAB. CODE §406.123.

Texas law broadly applies §406.123 to extend the exclusive remedy throughout the tiers of participants on a construction project where workers compensation coverage is actually provided. As such, there are two means whereby HCBeck is entitled to the protection of §406.123. First, as a participant in the FMR OCIP, HCBeck entered into a contract with FMR, incorporating the OCIP, as well as a written subcontract with Haley

Greer, also incorporating the OCIP. The OCIP program required all participants to reduce their respective contract prices to reflect the cost savings in their workers compensation premiums. Those circumstances conclusively establish that HCBeck provided workers compensation to Haley Greer through the OCIP.

A second means whereby HCBeck provided workers compensation to Haley Greer arises out of the fact that FMR, even though an owner, is also considered a “general contractor” under §406.123. By virtue of the incorporation of the OCIP into the FMR-HCBeck contract and into the HCBeck-Haley Greer subcontract, HCBeck agreed to provide workers compensation to Haley Greer and is therefore entitled to the protection of the exclusive remedy.

Nevertheless, before the court of appeals, Rice argued that because of the “optional” nature of the OCIP, there was no written agreement obligating HCBeck to provide workers compensation coverage. This argument fails to recognize that even workers compensation coverage purchased by an individual subcontractor such as Haley Greer is cancellable and can be terminated for nonpayment of premium, or by the subcontractor for any reason. When the workers compensation coverage is part of an OCIP put in place on a project by a large owner such as FMR, the economic wherewithal of the owner itself lends stability to the maintenance of the insurance program, including workers compensation. In that instance, it is more likely that workers compensation will remain in place, as it clearly was on the date of Charles Rice’s injury.

The use of consolidated or controlled insurance programs such as OCIPs is becoming increasingly common, particularly as to large construction projects. Among the many risk management and financial goals of an OCIP is the reduction of costly litigation between the tiers on a construction project, litigation that saps at productivity and morale on the jobsite. This goal mirrors the statutory employer mechanism set out in §406.123 of the Texas Labor Code. The denial by the court of appeals of the protection of the exclusive remedy to HCBeck even in the face of the fact that valid workers compensation insurance was in place and provided benefits to Charles Rice, flies in the face of these goals and can only foster counterproductive third party litigation on Texas construction sites.

## **ARGUMENT**

### **I. THE INCLUSION OF WORKERS COMPENSATION INSURANCE IN AN OCIP CONSTITUTES THE PROVIDING OF WORKERS COMPENSATION TO A SUBCONTRACTOR BY THE GENERAL CONTRACTOR UNDER SECTION 406.123 OF THE TEXAS LABOR CODE**

The ability of a general contractor to provide workers compensation to the employees of subcontractors participating in an OCIP is established by the prior opinions of this and other Texas courts. Try as he might, Rice cannot distinguish this case law based upon what he portrays to be the optional nature of the OCIP program placed by the owner, FMR, for the Westgate Office Complex Project. As the statutory employer of its subcontractors' employees, including Charles Rice, HCBeck is entitled to rely upon the

exclusive remedy of the Workers Compensation Act to bar recovery by Charles Rice in his third party lawsuit against it.

**A. Section 406.123 Has Been Expansively Applied By Texas Courts To OCIP Projects**

The statutory employer status of HCBeck is accomplished under TEX. LAB. CODE §406.123 (Vernon 2006), which provides, in relevant part, as follows:

- (a) A general contractor and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor.

\* \* \*

- (d) If a general contractor or a motor carrier elects to provide coverage under Subsection (a) or (c), then, notwithstanding Section 415.006, the actual premiums, based on payroll, that are paid or incurred by the general contractor or motor carrier for the coverage may be deducted from the contract price or other amount owed to the subcontractor or owner operator by the general contractor or motor carrier.
- (e) An agreement under this section makes the general contractor the employer of the subcontractor and the subcontractor's employees only for purposes of workers' compensation laws of this state.

Section 406.123 sets out the elements that must be present in order for a general contractor to become the statutory employer of a subcontractor's employees. In this case, all of those elements were satisfied as part of the OCIP so that HCBeck was the statutory employer of the employees of Haley Greer, including Charles Rice, for purposes of the workers compensation laws.

Nevertheless, Rice disputes that there was a written agreement between HCBeck, as general contractor, and Haley Greer, as subcontractor, for HCBeck to provide workers compensation insurance coverage to Haley Greer's employees, primarily because that coverage was provided by HCBeck through the OCIP. Its arguments in this regard run counter to Texas case law. That case law has broadly applied the provisions of §406.123 to find that virtually all tiers on a construction project that have provided workers compensation insurance coverage to lower tiers are entitled to rely on the exclusive remedy rule, including under an OCIP.

One such case directly on point is *Williams v. Brown & Root, Inc.*, 947 S.W.2d 673 (Tex. App.—Texarkana 1997, no writ). In that case, Eastman, acting as owner and the general contractor, subcontracted a large portion of a construction project at its Harrison County plant to Brown & Root. Brown & Root in turn subcontracted a portion of its work to Tracer. The project was insured under Eastman's OCIP, and in the course of its analysis, the court carefully considered the relationships of the parties, vis-à-vis the OCIP, describing them as follows:

Acting under Eastman's authority, Brown & Root agreed to provide workers' compensation insurance coverage for Tracer through Eastman's 'Owner Controlled Insurance Program.' Eastman then requested its agent, Marsh & McLennan, to add Tracer as an insured.

*Id.* at 675. Tracer then received its own workers compensation policy for the project and both Brown & Root and Tracer reduced their contract prices by the cost of providing workers compensation coverage. *Id.* During the period of that coverage, and while at work on the project, Williams, a Tracer employee was injured and obtained workers

compensation benefits as a result of the claim. Nevertheless, Williams filed a third party lawsuit against Eastman and Brown & Root, alleging that they allowed the stairs, upon which he fell and was injured, to be slippery. The trial court held that based on the workers compensation insurance provided through the OCIP, Brown & Root was immune from suit, and the Texarkana Court of Appeals affirmed.

As does Rice in this case, the injured employee in *Williams v. Brown & Root* raised several arguments, none of which were persuasive to the court of appeals so as to deprive Brown & Root of the benefit of the exclusive remedy. One of those arguments was that Eastman, the owner, and not Brown & Root, provided the workers compensation under the OCIP, so that Brown & Root did not meet the requirements of TEX. REV. CIV. STAT. ANN. art. 8308-3.05(e), the predecessor statute to present day §406.123. In rejecting that argument, the court concluded that since Brown & Root had reduced its contract price with Eastman in the amount of the premium, it had paid for the workers compensation insurance. In addition, the court made the common sense observation that it is only incumbent upon the general contractor to “provide” the insurance, and not to “pay” for it under § 406.123. *Id.* at 678. The *Williams* case could not be any clearer as to the ability of a general contractor to “provide” workers compensation insurance through an OCIP that wraps all insurance coverages for a construction project into a single program for all participants.<sup>1</sup>

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<sup>1</sup> Consolidated or controlled insurance programs (“CIPs”), including OCIPs, are frequently referred to as “wrap ups” or simply “wraps” because they wrap up all insurance coverages on the project for all participants into a single insurance and safety program.

Likewise here, HCBeck provided workers compensation coverage to Haley Greer through the FMR OCIP. The terms of the OCIP were included in the contract between FMR and HCBeck, and were in turn, expressly incorporated into the subcontract between HCBeck and Haley Greer. The subcontract price of Haley Greer was reduced to account for the savings in insurance premiums, including workers compensation premiums, achieved through participating in the OCIP. Yet, despite these facts that are virtually indistinguishable from *Williams v. Brown & Root*, the court of appeals inexplicably held that HCBeck had not “provided” the workers compensation insurance coverage to Haley Greer pursuant to a written agreement. Moreover, despite the guidance from the Texarkana Court of Appeals in *Williams*, the lower court concluded that HCBeck “did not take any part in providing workers compensation coverage to Haley Greer.” *Rice v. HCBeck Ltd.*, 2006 WL 908761, \*4 (Tex. App.—Fort Worth April 6, 2006).

**B. All Tiers On A Project Are Entitled To Immunity From Suit Where Workers Compensation Is Provided Under Section 406.123**

The issue of whether HCBeck is entitled to immunity from suit has been laid to rest by this Court in *Entergy Gulf States, Inc. v. Summers*, \_\_\_ S.W.3d \_\_\_, 2007 WL 2458027 (Tex. Aug. 31, 2007). At the time the Fort Worth Court of Appeals rendered its opinion, and at the time the petition for review was filed and briefed by the parties before this Court, the *Entergy v. Summers* opinion had not yet been issued.

In that case, this Court addressed the definitions of “general contractor” and “subcontractor” in TEX. LAB. CODE §406.121, that determine entitlement to exclusive remedy immunity under §406.123(a). This Court’s analysis directly addressed whether

Entergy, a premises owner, can be a “general contractor” so as to provide workers compensation coverage to a subcontractor for purposes of entitlement to the protection of the exclusive remedy. By way of background, Summers was injured while working at Entergy’s plant as an employee of IMC, a maintenance contractor. After collecting workers compensation benefits, Summers filed a third party action to recover from Entergy, as the premises owner. Regarding the provision of the workers compensation insurance for the maintenance services, this Court described a program similar to a classic OCIP arrangement as follows:

Entergy also agreed to provide workers’ compensation insurance to IMC’s Sabine plant employees in exchange for a lower contract price. Entergy obtained an insurance policy and paid the premiums.

*Id.* at \*1. In fact, the Court recognized the existence of an OCIP-type arrangement on the project, but that any argument relating to an “owner provided insurance program” had been waived by the parties. *Id.* at \*1-\*2. However, the issue before this Court was whether an owner-general contractor relationship can satisfy the requirements of §406.123(a) so as to allow the owner to avail itself of the exclusive remedy.

Reviewing the definitions of “general contractor” and “subcontractor” as set out in §406.121, and as applied in §406.123, this Court found the necessary relationship so as to uphold exclusive remedy protection for Entergy, the project owner. The terms “general contractor” and “subcontractor” are defined in §406.121 as follows:

- (1) “General contractor” means a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a “principal contractor,” “original contractor,” “prime contractor,” or other analogous term.



The term does not include a motor carrier that provides a transportation service through the use of an owner operator.

\* \* \*

- (5) “Subcontractor” means a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform.

These definitions were last revised in 1993, and that revision applies to the claim before this Court. In *Entergy*, this Court construed the statute according to its plain and ordinary meaning, and held that Entergy was a general contractor because it “[undertook] to procure the performance of work” from IMC. In the eyes of the Court, it was beyond dispute that Entergy took on the task of procuring the performance of work from IMC and that Entergy hired IMC to supply workers to perform maintenance at its plant. Thus, Entergy was a general contractor entitled to rely upon the exclusive remedy defense. Moreover, the fact that Entergy also owned the premises where the accident occurred was immaterial. *Id.* at \*3.

While the OCIP issue in *Entergy* was waived, this Court’s description of the arrangements under that OCIP for providing workers compensation insurance are substantially identical to those in this case. Like Entergy, FMR established an OCIP to provide the insurance coverage for its project. In upholding Entergy’s status as a general contractor for purposes of §406.123, it is relatively clear that an owner that establishes an OCIP “provides” workers compensation to the subcontractors on a project and is entitled to exclusive remedy immunity for jobsite injuries. Combined with the reasoning of *Williams v. Brown & Root*, the *Entergy* opinion leads to the inescapable conclusion that a

general contractor that contracts with an owner to perform work that is wrapped under an OCIP is also entitled to immunity. As such, the court of appeals' acceptance of the proposition that HCBeck did not "provide" workers compensation through the OCIP is incorrect, both as a matter of Texas law, and industry practices regarding OCIPs, as more fully set out below.

If FMR, as a general contractor, per the reasoning of Entergy, actually provided the workers compensation insurance for the project under §406.123, the logical conclusion is that HCBeck, as the general contractor and a lower tier on the project, is entitled to exclusive remedy immunity under Texas law.

This entitlement is further established by *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). In that case, the Houston Court of Appeals held that where a general contractor provides workers compensation insurance to subcontractors on the project, all lower tiers on the project are entitled to immunity from third party suits by injured employees. There, Clark, the general contractor, provided a single workers compensation insurance policy to cover all subcontractors and their employees who worked on an Enron project. Clark subcontracted part of the work to Way Engineering, and Way Engineering, in turn, subcontracted the sheet metal work on the project to Walsh & Albert. Etie, an employee of Way Engineering, was injured at the jobsite, allegedly due to work performed by Walsh & Albert. After recovering workers compensation benefits, Etie filed a third party action against Walsh & Albert, which defended the claim, asserting that it was entitled to

immunity under Section 406.123(a). On the other hand, Etie contended that the employees of Walsh & Albert were not employees of Clark, the general contractor that had provided the workers compensation insurance, since they were employees of an independent contractor under TEX. LAB. CODE §401.012(b)(2). The court rejected this argument, holding that the provision of workers compensation insurance transforms an independent contractor into a “deemed employee.”

The Houston Court of Appeals determined that since Clark exercised an option, as part of its subcontract with Way Engineering, to provide workers compensation coverage for all employees at the jobsite, and since Way Engineering’s subcontract with Walsh & Albert incorporated by reference all of the provisions of the contract between Clark and Way Engineering, Walsh & Albert and its employees were also covered by the workers compensation insurance policy that Clark provided. As such, the court concluded that Walsh & Albert was entitled to immunity from suit. The court stated as follows:

We are persuaded that the purposes of the Act are best served by deeming immune from suit all subcontractors and lower tier subcontractors who are collectively covered by workers’ compensation insurance. We hold that the Act’s deemed employer/employee relationship extends throughout all tiers of subcontractors when the general contractor has purchased workers’ compensation insurance that covers all of the workers on the site. All such participating employers/subcontractors are thus immune from suit.

*Id.* at 768.

This triumvirate of cases establishes two alternative means through which HCBeck provided workers compensation to Haley Greer. The first means is through the OCIP under the reasoning of *Williams v. Brown & Root*. HCBeck provided insurance as a

participant in the OCIP, by (a) entering into a written agreement to participate in the OCIP, (b) requiring Haley Greer to enter into a written subcontract incorporating the terms of, and including participation in, the OCIP, and (c) Haley Greer reducing its contract price to reflect the reduction of the cost of providing workers compensation coverage. All of these facts establish the existence of a written agreement between HCBeck and Haley Greer to provide workers compensation insurance.

A second means through which HCBeck is entitled to exclusive remedy immunity as to Rice's injury is through this Court's reasoning in *Entergy v. Summers*. Under this Court's reasoning, FMR itself is a general contractor for purposes of §406.123, having procured the performance of work by HCBeck and entered into an agreement to provide an OCIP. Moreover, under *Etie v. Walsh & Albert, supra*, since FMR provided insurance pursuant to its written agreement with HCBeck, an agreement that was incorporated into the HCBeck – Haley Greer subcontract, HCBeck is entitled to workers compensation immunity.

In essence, Texas case law does not look to the labels – owner, general contractor, subcontractor – reflected in the contract documents for purposes of §406.123. Rather, Texas courts have taken a more functional approach to identifying those parties entitled to exclusive remedy protection in light of the purposes of the Workers Compensation Act. So long as workers compensation insurance is provided by one party on the project and is in effect, immunity is extended throughout the tiers on a construction project. The statutory employer status provided for in §406.123 is an integral means of furthering that

purpose. Contrary to the arguments of Rice, the fact that the policy was wrapped in an OCIP only serves to further that intent, in that the workers compensation insurance coverage is usually provided by an owner that is financially the most capable of providing it for the benefit of all workers on the construction project.

**II. OCIP CONTRACT DOCUMENTATION CONSTITUTES AN “AGREEMENT” BETWEEN A GENERAL CONTRACTOR AND A SUBCONTRACTOR TO PROVIDE WORKERS COMPENSATION UNDER SECTION 406.123 OF THE TEXAS LABOR CODE**

Despite the fact that the terms of the OCIP documents themselves, together with Texas case law, establish that HCBeck provided workers compensation insurance to the subcontractors on the project, including Haley Greer, Charles Rice managed to convince the court of appeals that there was no “written agreement” to do so, or alternatively, that the agreement contained terms that deprived it of its effect as to §406.123. Particularly, Charles Rice managed to focus the attention of the court of appeals on a termination provision in the OCIP documents that purportedly deprived HCBeck of control of providing workers compensation insurance, and that the incorporation of the OCIP documents into the Haley Greer subcontract in and of itself was insufficient to establish a written agreement.

None of these alleged deficiencies prevent the OCIP documentation, as incorporated into the Haley Greer subcontract, from constituting a “written agreement” to provide workers compensation coverage under Section 406.123(a). Rice’s arguments on this issue are belied by (a) the express terms of the OCIP documentation and the Haley Greer subcontract, (b) Texas case law, discussed above, and (c) the general purpose

behind the use of OCIPs, including the promotion of immunity from third party lawsuits on a wrapped project.

The terms and effect of the OCIP documentation and the Haley Greer subcontract, into which it is incorporated, are extensively discussed in HCBeck's principal brief and will not be reiterated here. Rather, this amicus curiae brief will focus on Texas law on the written contract issue, as extended by *Entergy v. Summers, supra*, a case that was not available to the parties at the time of briefing this appeal, and the status of the OCIP in this case as a paradigm of a program designed to further construction risk management, including the furtherance of immunity from third party suits on the construction jobsite.

**A. The OCIP Documents Are A "Written Agreement" Under Texas Law**

Inexplicably, the court of appeals found the presence of provisions making the participation in the OCIP optional on the part of FMR (but not for HCBeck), did not establish a "written agreement" to provide workers compensation insurance. That conclusion is simply mistaken. As previously discussed, a general contractor's exercise of an option in a subcontract to provide workers compensation insurance to a subcontractor constitutes a written agreement to provide such compensation under Texas law. *Etie v. Walsh & Albert*, 135 S.W.3d at 766. Of course, the common sense rejoinder to Rice's argument is that on the date of the accident, workers compensation insurance was in fact provided to Haley Greer, and Rice received his statutory benefits, clearly satisfying Rice's argument as to HCBeck's talismanic "obligation" to provide it.

Options to terminate are standard provisions in numerous contracts, including construction contracts, where the owner reserves the right to terminate the contract, whether for cause or not. Likewise, the general contractor will preserve the same right as to its subcontractor. The implication of the reasoning of the court of appeals is that the existence of an option to furnish or to terminate an OCIP on the part of the owner illustrates some sort of ulterior motive or an attempt to take advantage of the subcontractor participants. To the contrary, it is an option, nothing less nothing more, and if exercised, as it was here, the agreed upon coverage was to be provided to Haley Greer, thus satisfying the requirements of §406.123. Even the exemplar agreement promulgated by the Division of Workers Compensation of the Texas Department of Insurance sets out nothing more than a simple agreement that tracks the statutory language in which the general contractor and the subcontractor agree that the general contractor will provide workers compensation insurance and will or will not withhold the premiums from payments to the subcontractor. A true and correct copy of the Division of Workers Compensation Form DWC-81 is attached at Appendix A. In that form, there is no provision prohibiting termination of the coverage, or any other action for that matter. Rather, that simple form agreement indicates that the general contractor has agreed to provide the workers compensation insurance, the dates it has agreed to do so and the location affected by the agreement.

Logically, the written agreement between the general contractor and the subcontractor creates an “obligation” to provide workers compensation insurance that

differs little from the obligation of an employer, such as Haley Greer. Hypothetically, had an OCIP not been provided for the Westgate Office Complex project that included workers compensation insurance coverage, Haley Greer would typically have provided that coverage itself. However, there would be nothing to prevent Haley Greer from terminating its own workers compensation coverage, whether for inability to pay premiums, or any other business reason. In fact, the standard workers compensation insurance policy permits an employer to cancel or terminate its coverage for any reason upon notice to the insurer. In that instance, an employee such as Charles Rice would be left without workers compensation benefits. Note that under the terms of the OCIP, as pointed out by HCBeck in its principal brief, provide that in case of a termination of the OCIP, HCBeck itself is obligated to provide workers compensation coverage as an alternative. At any rate, the existence of an alternative insurance provision in the OCIP documents and the Haley Greer subcontract constitute a red herring, shedding light on the fact that the written agreement to provide workers compensation was performed.

**B. The Exclusive Remedy Immunity Underpins The Provision Of Workers Compensation Insurance In An OCIP**

The benefits of providing for the exclusive remedy immunity for all tiers on a construction project are well documented. Particularly, those advantages are taken into account in an OCIP that wraps all insurance coverages on a construction project. All of those considerations support the upholding of statutory employer status for HCBeck, particularly in the context of the FMR OCIP.



Numerous advantages of a wrap up program have been pointed out by courts and scholarly authors, including (a) mass buying power; (b) elimination of overlapping and duplicating coverages; (c) elimination of layers of hold harmless agreements and their ultimate costs; (d) reduced commissions and operating costs; (e) higher limits of coverage; (f) certainty of protection and reduced gaps in coverage; (g) centralized cost control and claims processing; and (h) centralized and improved safety programs. JACQUELINE P. SIRANY AND JAMES DUFFY O'CONNOR, *Controlled Construction Insurance Programs: Putting a Ribbon on Wrap-Ups*, 22 WTR CONST. LAW 30 (2002). Specifically with regard to the provision of workers compensation under a wrap up policy, savings are achieved by including a comprehensive site-specific safety program that governs all the trade in order to reduce losses, a benefit that is credited with increasing worker morale and increasing productivity. *Id.* at 33, n 2.

However, perhaps one of the greatest benefits of an OCIP, particularly as to workers compensation, is its potential to reduce third party litigation, much the same as the provision of statutory employer status for entities such as HCBeck under §406.123 of the Labor Code. Industry commentators have pointed out the advantages of a CIP, a “controlled insurance program” (whether by the owner or a contractor), as follows:

Organizations that utilize a high volume of contracted or subcontracted labor face significant third-party liability in the form of claims brought against them by injured employees of independent contractors. While the ability of injured employees to recover against their employers for pain and suffering or other unscheduled injuries is limited by the sole remedy provisions of workers compensation statutes, they can often seek redress through allegations against other parties, such as property owners or prime

contractors. These third-party-over actions commonly allege failure to provide a safe place to work or other forms of negligence.

The opportunity for cross-litigation, and the need for it, can be reduced with a properly designed CIP, where there is coordination by and input from the major project participants. While there is still a need to confirm and work with off-site or non-CIP coverage, there is less likelihood for disputes resulting from on-site work, subrogation efforts by multiple insurers, or cross-liability suits. For example, a wrap-up can provide several levels of control against third-party-over claims without foregoing the desired arm's-length relationship with contractors. First, wrap-ups typically impose an aggressive safety and loss control standard that must be adopted as a minimum level of performance by all contractors working on the project or site. The CIP sponsor has the authority to audit contractor safety programs to assure compliance with both federal and state regulations and the CIP standards, which should reduce injuries and the claims and litigation that frequently follow.

INTERNATIONAL RISK MANAGEMENT INSTITUTE, CONSTRUCTION RISK MANAGEMENT (2006), *available at* <http://www.irmi-online.com>, excerpts of which are attached at Appendix B.

Moreover, the reduction of third party actions between the tiers on a construction project, actions that sap away the morale, productivity and profitability of a project, is at the heart of the risk management behind an OCIP. In addition, the same desire to reduce that type of litigation through the exclusive remedy, and its beneficial extension through the statutory employer provisions in §406.123 of the Texas Labor Code, dovetails with the theories behind the OCIP, as set out above. Apparently, the court of appeals failed to make this connection in its analysis of the viability of an OCIP as a means for providing insurance coverage to all tiers of participants on a construction project.

Importantly, it must be noted that the court of appeals' opinion tends to remove Texas from the majority of states that have taken measures to provide for statutory employer protection that extends to construction jobsites.<sup>2</sup> As such, the elimination of statutory employer and exclusive remedy immunity on large construction projects, where OCIPs are typically used, could result in the loss of large construction projects for the State of Texas.

The same International Risk Management Institute article discussed above, and attached as Appendix B, discusses other potential benefits of a wrap up insurance program, in addition to reduced litigation, including increased compliance with regulatory standards, control of insurance coverage, solving insurance availability problems, improved productivity, cost control and enhanced ability to use smaller contractors. For the most part, all of these benefits result in increased stability on a project through the ability of a large owner to negotiate enhanced insurance coverage and to put in place safety and other programs to manage the risks of the project. Contrary to the implication of Charles Rice's and the court of appeals' opinion, these factors point to the likelihood that coverage under an OCIP will be maintained, rather than yanked out

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<sup>2</sup> The list of states that have enacted statutory employer protections that affect the construction industry continues to grow, and includes the following: Colorado, C.R.S.A. §8-41-402; Connecticut, Con. Gen. Stat. Ann. §31-291; Florida, Fla. Stat. §440.10(b); Georgia, Ga. Code Ann. §34-9-8; Kansas, Kan. Stat. Ann. §44-503; Kentucky, KRS 342.610, 342.690(i); Louisiana, La. Rev. Stat. Ann. 23:1061; Maryland, Md. Lab. & Emp. Code §9-508; Michigan, M.C.L.A. §418.171; Mississippi, Miss. Code Ann. §71-3-7; Missouri, Mo. Stat. Ann. §287.040; Nevada, Nev. Rev. Stat. §616A.210; New Mexico, N.M. Stat. Ann. §52-1-22; North Carolina, N.C. Gen. Stat. §97-10.2; Oregon, Or. Rev. Stat. §656.029; Pennsylvania, 77 Pa. Stat. §461; South Carolina, S.C. Code Ann. §§42-1-400, et seq.; South Dakota, S.D. Codified Laws §62-3-10; Tennessee, Tenn. Code Ann. §50-6-113; Vermont, 21 V.S.A. §§601(3), 622; and Virginia, Va. Code §§65.2-302, 303 and 304.

from under the participants prior to startup or even midway through construction. As such, Rice's argument as to the option not to provide or to terminate the OCIP as scuttling a true agreement to provide coverage is misplaced.

In fact, OCIP documentation in general includes standard provisions that give the owner the option to purchase the coverage, and to terminate it, as are contained in the FMR OCIP, which again, was incorporated into the subcontract between Haley Greer and HCBeck. For example, a set of model OCIP contract provisions posted on a national construction risk management website sets out a similar provision as follows:

**1.13 Owner's Election To Modify or Discontinue CIP.** The Owner may, for any reason, modify the CIP Coverages, discontinue the CIP, or request that Contractor or any of its Subcontractors of Any Tier withdraw from the CIP upon written notice.

The Owner is not required to provide the CIP. The Owner's election to terminate or not to furnish the CIP can apply to only the Contractor, a single Subcontractor of any tier, multiple Subcontractors of Any Tier, or Subcontractors of all tiers.

In the event of cancellation, Owner shall give Enrolled Contractors written notice of cancellation of any policy or policies provided by the CIP. In the event of such cancellation, Owner shall, at its sole option, (1) procure alternate insurance coverage for the policy or policies canceled; or (2) require Enrolled Contractors to procure and maintain alternate insurance coverage for the policy or policies canceled, the amounts, contents, and carriers of which shall be satisfactory to Owner who will reimburse Enrolled Contractors for the actual premiums not to exceed premiums calculated utilizing the Payroll Rate, for said Enrolled Subcontractor's alternate insurance coverage.

Enrolled Contractors shall not attempt to cancel any of the policies described herein without the express written consent of Owner, and any attempted cancellation without said express written consent shall be null and void.

GARY E. BIRD, *THE WRAP-UP GUIDE* app. D (IRMI April 2006), *available at* <http://www.irmi-online.com>, excerpts of which are attached as Appendix C. As such, an option to provide, to modify, or terminate the insurance is a standard provision in an OCIP, and the presence of such provisions in the OCIP before this Court is not at all remarkable.

What is remarkable is the significance that the court of appeals attached to such provisions. That court apparently failed to understand that based on the economies of scale, the purchasing power of a large construction owner and the centralized coverage, make it much less likely that the workers compensation policies provided to the subcontractors on the Westgate Office Complex project would be terminated, whether for nonpayment of premium or increase in the risk. Such a termination may be more likely with an individual subcontractor employer, including Haley Greer, and of course, with smaller subcontractor employers.

In any event, workers compensation coverage was placed, was maintained, was not terminated, and was fully available on the date of the injury to Charles Rice. As a result, he received the full benefits to which he was entitled under the Workers Compensation Act. Under those circumstances, to speculate as to any uncertainty interjected into the OCIP by an option to place or terminate the program is just that, mere speculation, and it cannot serve as a basis for this Court to determine that there was no written agreement by HCBeck to provide insurance through the OCIP.

**PRAYER**

Amicus Curiae, Texas Building Branch of the Associated General Contractors of America, requests that the Court reverse the judgment of the court of appeals and affirm the judgment of the trial court.

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**CERTIFICATE OF SERVICE**

I certify that on October 11, 2007, a true and correct copy of this brief was served electronically and by certified mail, return receipt requested, on the following counsel of record:

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