BENCHMEMO: McReynolds v. Beer PreCast Concrete, Ltd., 87-0646-R

ATTORNEYS: Plaintiff: Bruce Rasmussen, Gary Kendall (Michie, Hamlett, et al., of Charlottesville, Va.)
Defendants: John S. Morris, III, John Oakey, Jr., Janet Selph (McGuire, Woods et al.)

Judge, this matter is before you on the defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56(b). The defendants assert three defenses to a construction worker's negligence action: (1) worker compensation is a bar; (2) the plaintiff was contributory negligence; (3) the causal link connecting defendants to this purported tort was broken by the intervening negligence of a third party. This motion along with several discovery motions was before you earlier. You dismissed the summary judgment motion but invited its renewal after more discovery had been conducted. The motion now appears ripe for determination. I believe you should grant the defendant's motion for summary judgment because the plaintiff received a workers' compensation award for the injury he now sues on.

The defendants also filed a motion in limine to strike some of the plaintiff's evidence for failure to comply with your scheduling order. Given the determination of the summary judgment motion, this motion is moot.

BACKGROUND

Plaintiff McReynolds filed this action in the Circuit Court for the City of Richmond, alleging injuries that resulted from a construction accident at the Main Street Centre Complex, on Sept. 16, 1985. McReynolds claims he was standing on 6th Street when some steel pipes fell from a crane, striking him. The pipes were

allegedly being lifted on a pallet by the crane; he alleges that Beer or its agents were responsible for the pipes.

McReynolds was an employee of a subcontractor at the site, Otis Elevator Company. Main Street Centre Associates was the general contractor. Beer PreCast Concrete claims it was also a subcontractor, whose job it was to supply and erect all precast concrete panels. Beer says it engaged Erection Specialties as its own subcontractor, to perform the erecting work on the site.

McReynolds has been awarded a workers comp. claim against his employer Otis Elevator. (See Beer's Exh. D)

WORKER'S COMPENSATION

Beer argues several defenses under the Workers' Compensation Act, Va. Code §§ 65.1-29 et seq. (1) McReyonld's cause of action falls within the Act and Beer has complied with the requisites of that Act; (2) even if it has not complied with the Act, it is not liable because it is not McReynold's direct employer; and (3) McReynold's complete recovery from Otis Elevators bars his current action.

1. Compliance with Workers' Compensation Act

Beer argues that both parties were statutory employees of the owner of the project. The construction of this building was part of "the trade, business or occupation of the owner." The plaintiff was an employee of a subcontractor (Otis Elevator), and therefore a statutory employee of the owner and general contractor. Beer was a subcontractor, whose work was an integral part of the construction of the building; therefore, Beer and its

employees were statutory employees of the owner and general contractor.

McReynolds asserts that Beer was merely a supplier and not a subcontractor. He relies on Garrett v. Tubular Products, Inc., 176 F.Supp. 101 (E.D. Va. 1959). In Garrett, the materials for the job were delivered f.o.b. to the job site and all on-site labor was performed by other subcontractors. Beer's subcontractor agreement with Main Street Centre Associates--the general contractor--was more extensive. Beer was responsible for furnishing "all necessary materials, tools, labor, equipment, appurtenances, etc. necessary to perform work set forth in Section 03450 'Architectual Pre-Cast-Concrete.'" (Beer's Exh. B, Rider for Article 2) Beer was to determine what hardware was necessary, and there was no separate billing to the owner for hardware. (Beer's Exh. G, 68) Beer chose a sub-subcontractor to perform most of its duties (Id.) and provided some labor from its Ontario office.

Judge, I believe as a matter of law, based upon the undisputed facts and the terms of the subcontractor agreement, that Beer is a subcontractor. As a subcontractor, Beer qualifies as a statutory employee under the Workers' Comp. Act.

Workers' Compensation is the exclusive remedy for an employee injured by a fellow statutory employee while performing work contributing to part of the owner's trade, business or occupation. Va. Code § 65.1-40. Beer notes that McReynolds has already been awarded this remedy by the Industrial Commission.

Va. Code § 65.1-41 provides that a common law action may be brought only against an "other party." However, an other party is one who is a stranger to the employment and to the work involved in the owner's trade, business or occupation. Smith v. Horn, 232 Va. 302, 351 S.E.2d 14, 16 (1986). Beer was not a stranger or "other party," because its work in supplying and erecting concrete panels was an integral part of the overall project. See Whalend v. Dean Steel Erection Co., 229 Va. 164, 327 S.E.2d 102, appeal dismissed, 106 S.Ct. 33 (1985). Therefore, Beer is immune from suit for personal injuries by a fellow statutory employee, like McReynolds. Va. Code § 65.1-40

McReynolds contends that Beer failed to comply with Va. Code §§65.1-103 and -105, which require all employers to insure payment of compensation under the Act in order to receive the protection of §65.1-40, which precludes a suit by employees. Section 65.1-105 requires every employer subject to the Act to file with the Industrial Commission evidence of compliance. McReynolds claims that Beer has failed to do this, and that therefore Beer loses the protection of the Worker's Comp. statute. As a penalty for violating these provisions, an employer is subject to suit by other employees, and is precluded from raising defenses based on contributory negligence, assumption of risk, or fellow employee negligence. Va. Code, §65.1-106.) These penalty provisions allowing employee suits are to be liberally construed in favor of the employee. Va. Used Car Auto Parts v. Robertson, 212 Va. 100, 181 S.E.2d 612 (1971); Delp v. Berry, 213 Va. 786, 789, 195 S.E.2d 877 (1973).

Beer contends, however, that it was covered by insurance and by the proper filing made by Beer's own subcontractor, Erection Specialties, Inc. Beer had some of its Ontario employees perform supervisory functions and patch and repair precast concrete panels. These employees were employed by Beer out of its Ontario office and were covered by the Ontario Workers' Compensation Statutory Program where ever they worked. (Exh. G, 28) Although Beer failed to file a certificate of insurance with the Industrial Commission for these employees, it did file a certificate with the general contractor. Most of the labor performed at the job site for erection of Beer's panels was performed by the employees of Erection Specialties, Inc. Erection provided workers' comp. insurance and the certificate of insurance on file at the Industrial Commission lists Erection Specialties as the insured and Beer PreCast as the certificate holder. (See Exhs. C and D) Beer claims it complied with the Act by filing certificates of its Workers' Compensation coverage with the general contractor and by Erection's filing its coverage at the Industrial Commission.

I believe this argument for the most part is correct. All of Erection Specialties employees, most of the subcontract's labor force, were covered by a workers' comp. policy on file at the Indust'l Com. I don't believe that policy covered Beer's own employees, but they were covered by another workers' comp. policy. Technically, however, Beer violated the Act. First, I doubt the Ontario Workers' comp. insurer is "an insurer authorized to transact the business of workers' compensation insurance in the

Commonwealth." as required by Va. Code § 65.1-104.1(a)(1). Second, Beer didn't file a certificate attesting to this insurance with the Indust'l Comm. as required by § 65.1-105(A)(1). It appears that Beer complied with the spirit of the Act but not its precise letter.

Although Beer is therefore subject to the harsh penalties imposed by § 65.1-106, I believe imposing such a penalty is inappropriate here. Section 65.1-106 appears to be designed to punish those employers whose failure to take out workers' compensation insurance threatens to disrupt the entire workers' comp. scheme. Basically, as I understand workers' comp., it is designed to by-pass litigation; compensate workers for their injuries on a timely basis without regard to liability; and to encourage safety at the workplace. Here, none of those goals were threatened. Every worker under Beer's subcontract was covered by workers' comp. in one form or another. Penalizing Beer by allowing a civil suit would serve no legitimate purpose.

2. McReynolds is not Beer's employee and cannot sue

Alternatively, Beer tries to wiggle out of the penalties imposed by §65.1-106 by arguing that the bar of §65.1-106 only applies where the injured party's employer was the one who failed to comply through lack of insurance. Va. Used Auto Parts v. Robertson, 212 Va. 100, 181 S.E.2d 612 (Va. 1971). Va. Used Auto Parts, Inc, however, does not address this issue. The question posed in that case was whether Robertson's pursuit of an unsuccessful action at law barred him from recovery under the Worker's Compensation Act. The Virginia Supreme Court held that

it did not. Since the employer had failed to comply with section 65.1-105, the employee can pursue either remedy. The court did not address the issue whether the provision applied to a subcontractor who was not the injured employee's employer.

Judge Glen Williams has addressed this issue and concluded that § 65.1-106 applies to "every" employer who fails to comply with § 65.1-105. Baldwin v. Wrecking Corporation of America, 464 F.Supp. 185 (1979). In Baldwin, an employee sought to recover in a civil action against his employer who did not comply with § 65.1-105. Workers' Compensation was available to the employee through the general contractor but the employee elected the civil action instead. In holding that the employee could proceed in his civil action, Judge Williams noted that §§ 65.1-103, 65.1-104 and 65.1-105 all state that "every employer" shall insure compensation payments. Section 65.1-106 applies to "such employer" who fails to comply with the provisions of § 65.1-105. Judge Williams concluded that "such employer" refers to "every employer" in § 65.1-105: "The Act plainly directs every employer to insure compensation payments and penalizes any employer who fails to do so." Id. at 188. The court found this conclusion "buttressed by Section 65.1-9, which states that 'nothing is this Act shall be construed to relieve any employer... from penalty for failure or neglect to perform any statutory duty.' Va. Code Ann.§ 65.1-9 (Repl. Vol 1973)(Emphasis added.)" Id.

Beer distinguishes Baldwin on the grounds that there an employee sued his direct employer. Here McReynolds was never an employee of Beer. Judge, although Baldwin is distinguishable on

its facts, the court's reasoning is not. The court read section 65.1-106 to apply to every employer as defined by the Act. Beer does not dispute that it was required to comply with § 65.1-105 in some manner. According to Baldwin, if any employer fails to comply with § 65.1-105, it is open to suit under § 65.1-106. Although this is an expansive reading of § 65.1-106, it comports with Virginia's Supreme Court's decision on the provision. See Va. Used Auto Parts v. Robertson, 212 Va. 100, 181 S.E.2d 612 (Va. 1971); Delp v. Berry, 213 Va. 786, 195 S.E.2d 877 (1973).

Although technically Beer violated § 65.1-105, it shouldn't suffer the punishment required by § 65.1-106. Nonetheless, you need not decide whether § 65.1-106 applies to Beer in these circumstances. I believe there is a firmer ground for granting Beer's motion for summary judgment: McReynolds has recovered once for his injuries and cannot recover a second time.

3. McReynolds is barred by his prior Workers' Comp. recovery

Beer contends that the plaintiff's full recovery from his own employer's insurer bars recovery in this action--even if Beer is open to civil suit under § 65.1-106. McReyonlds received two awards for his injuries from the Ind'l Comm'n. (See Beer's Exh. D and Exh. E, 67-68) This plaintiff is entitled to only one full recovery and he cannot collect more than one time. Delp v. Berry, 213 Va. 786, 195 S.E.2d 877 (1973). Under § 65.1-106, a claimant must elect whether he wishes compensation under the Act or damages at law. Id. The plaintiff has elected compensation under the Act and apparently has received payment.

McReynolds argues that Beer should not receive the benefit of the bar provided by § 65.1-106. In other words, the plaintiff argues that Beer falls outside the Workers' Compensation Act because Beer failed to obtain a contractor's license. The plaintiff's theory is that if Beer did not have a contractor's license, its contract with Main Street Centre Associates was void, and if the contract was void, Beer could not be an employer or fellow statutory employee entitled to the protection of the Act. Beer argues that (1) it was not required to obtain a contractor's license because its work was subcontracted, and (2) even if it was required to obtain a license, Section 54-142 does not prevent Beer from asserting the bar of the Act.

Section 54-113 of the Va. Code does require a contractor to hold a license in order to perform any construction, etc., in the state. This is a penal statute, claims McReynolds; any contract entered into in violation of §54-113 is void under the procedural posture of this case. See Bowen Electric Co. v. Foley, 194 Va. 92, 72 S.E.2d 388 (1952). Section 54-142 sets forth the penalties for violation of §54-113; all contracts which violate the Act are void and unenforceable unless such contract comes within the narrow exception of §54-142(D).

Beer, in contrast, claims that the plaintiff misunderstands and misstates the law on this point. Although Bowen held such contracts are totally void, Bowen is no longer good law in Virginia. The statute has since been amended to ameliorate the harsh result, and the Supreme Court has stated (even prior to the amendment) that it never intended to hold that the contract was

void for all purposes. In Cohen v. Mayflower Corp., 196 Va. 1153, 86 S.E.2d 860 (1955), the court held that such a "contract was void only in the sense that it was illegal and unenforceable by a contractor in an action on the contract against an innocent party." as cited in First Charter v. Middle Atlantic, 237 S.E.2d 145, 149 (Va. 1977). In no other way is such a contract deemed to be void or unenforceable under state law.

Section 54-142(D) states: "No person shall be entitled to assert this section as a defense to any action at law or suit in equity if the party who seeks to recover from such person gives substantial performance within the terms of the contract in good faith and without actual knowledge of this section." As the Court noted in First Charter, the statute bars the contractor's recovery (if he sues on the contract) only when the contractor had actual knowledge of §54-142. The person with whom Beer contracted had a duty to give Beer notice of the section prior to the time of entering the contract. Because Beer did not have actual knowledge of §54-142 prior to contracting, the use and enforcement of its contract are not prohibited. Also Beer claims it substantially performed its contract in good faith. Therefore the contract between Beer and Main Street Centre Associates is enforceable. Beer is a statutory employee within the meaning of the Workers' Compensation Act. And McReynolds is barred by § 65.1-106 from seeking a civil remedy after having received a workers' comp. award.

Therefore, I believe you should grant Beer's motion for summary judgment regardless of whether it is vulnerable to suit

under § 65.1-106 or not. McReynolds is entitled to only one recovery and he has received it.

Contributory Negligence

Beer contends that McReynolds should have been looking up when the steel pipes fell. Therefore, he was contributory negligent and is barred from recovery. McReynolds claims that a co-worker told him the site was clear, and his behavior conformed to the industry norm. He correctly points out that whatever the truth, it is a factual matter to be determined by the jury. Summary judgment on this ground is therefore inappropriate.

Intervening Negligence

Beer contends that the piping fell because of the negligence of several of Erection Specialties' employees. Beer argues that Erection Specialties was an independent contractor and not Beer's agent. Again, this determination appears to turn upon disputed facts. Beer claims it exercised control only over the results of Erection's work and not the manner of performance. McReynolds claims that the Beer shares some of the responsibility and that it is a jury issue as to the foreseeability of whether tons of steel being lifted 22 stories could be improperly bound or that the load of steel could slip. Since the motion can be disposed of on other grounds, I have not spent much time sorting out the law on this issue. However, it appears to me that the jury must make some factual determinations before it is possible to resolve the issue of whether Erections Specialties was a servant or an independent contractor.

Motion in limine

Although a moot point, Beer was seeking an order striking several of the plaintiff's expert witnesses on the grounds that the plaintiff did not comply with your scheduling order. Apparently McReynolds suffered another injury in July 1987 which he claims was a result of his earlier 1985 injury. The plaintiff did not inform the defendant until 6 days before discovery cutoff that he may call an expert to testify that the July 1987 injury resulted from the earlier injury. McReynolds did not state definitively that he would call such an expert until March 21, the discovery cutoff date. This expert's testimony is the only piece of evidence linking the July 1987 operation for a ruptured cervical disc to the September 1985 injury. Beer wants struck all evidence regarding the July 1987 operation and injury.

Conclusion

I believe you should find as a matter of law that Beer was a subcontractor and thus a statutory employee under Virginia's Workers' Compensation Act. As a consequence, even if Beer could be sued under § 65.1-106, McReynolds' suit is barred because he he recieved a workers' compensation award for the injury he now sues on. The Act allows the worker to chose between an award under the statute or a civil suit, but not both. Beer's failure to comply with § 54-113 does not defeat the applicability of the Workers' Compensation Act. Therefore, Beer's motion for summary judgment should be granted.

Hence, Beer's motion in limine is moot.

McReynolds, Memo
Disc. No.

BENCH MEMO: McReynolds v. Beer PreCast Concrete, L Industries, Ltd., CA No. 87-0646-R

ATTORNEYS
Plaintiff: Bruce Rasmussen (Michie, Hamlett, Charlottesville, Va.)
Defendants: John S. Morris, III (McGuire, Woods et al.)

Judge, this case comes before you on several motions: first, the plaintiff's motion to compel discovery; second, the defendant Beer's motion for summary judgment, in its Plea of Workers Compensation Act Bar; and third, the defendant AGRA's motion to quash service of process and to dismiss it, for want of personal jurisdiction over AGRA as a foreign corporation. I will first give you some factual background, then review the details of each motion.

In brief, it appears that you should GRANT the deft. AGRA's motion to quash and dismiss it; that the motion to compel will require some questioning of the parties, to determine whether it should be denied and whether it even needs to be decided now; and finally, that Beer's plea of workers' compensation act requires more factual details, and perhaps more discovery, before it can be decided.

I. BACKGROUND

Plaintiff McReynolds filed this action in the Circuit Court for the City of Richmond, alleging injuries that resulted from a construction accident at the Main Street Centre Complex, on Sept. 16, 1985. McReynolds claims he was standing on 6th Street when some steel pipes fell from a crane, striking him. The pipes were

allegedly being lifted on a pallet by the crane; he alleges that Beer or its agents were responsible for the pipes.

McReynolds was an employee of a subcontractor at the site, Otis Elevator Company. Main Street Centre Associates was the general contractor. Beer PreCast Concrete claims it was also a subcontractor, whose job it was to supply and erect all precast concrete panels. Beer says it engaged Erection Specialists as its own subcontractor, to perform the erecting work on the site. AGRA Industries is a Canadian corporation which owns 100% of the Beer stock; AGRA claims it has never done any business in the state of Virginia, let alone on the Main Street Centre site. Beer is a separate corporate entity, a subsidiary of AGRA.

McReynolds has been awarded a workers comp. claim against his employer Otis Elevator. (See Exh. D, Beer's Reply Brief for its Workers Comp. Bar Plea.)

This action was removed to federal court in early October of this year. The Scheduling Order was just entered December 3, and the motion to compel was filed previously on November 17.

II. AGRA's Motion to Quash Service of Process

AGRA seeks to quash the process served on it through the Sec'y of Va., and to be dismissed from the action, for want of personal jurisdiction over it. AGRA's motion should be GRANTED, since its claims seem undisputed, the law supports its argument, and the plaintiff has filed no response challenging its motion.

AGRA is a Canadian corporation which has not transacted or done any business within Virginia. Neither did AGRA have anything to do with the Main Street Centre project. AGRA's only

possible connection to the accident is that it wholly owns the stock of Beer. The two are separate corporate entities which operate as such.

AGRA is correct in stating that its mere ownership of the subsidiary corp., Beer, which has transacted business in Virginia is not sufficient contact with Virginia to constitute doing business in the state, or to justify personal jurisdiction over AGRA. A foreign corp. must have transacted business in Virginia before a court can exercise personal jurisdiction over it. Va. Code, § 8.01-328.1. And the burden of proof is on the plaintiff to prove jurisdiction through proper service of process on the foreign corporation. Consolidated Engineering Co. v. Southern Steel Co., 88 F.R.D. 233, 235 (E.D.Va. 1980). Since there is no jurisdiction, AGRA claims the service was improper and must be quashed, and AGRA dismissed.

Finally, the courts are clear that "the doing of business of a subsidiary corporation in a state does not, without more, confer jurisdiction over the nonresident parent corporation." Goldrick v. D. M. Picton Co., 56 F.R.D. 639, 642 (E.D.Va. 1971); Consolidated Eng'g, 88 F.R.D. at 235; citing Harris v. Deere and Co., 223 F.2d 161 (4th Cir. 1955). And the plaintiff has not responded to challenge these claims or the law. Therefore, the service on AGRA should be quashed, and it should be dismissed from the case.

The only question is whether it should be dismissed with or without prejudice to McReynold's claims. AGRA wants to be dismissed with prejudice, but in Goldrick the court dismissed the

action against the foreign parent corp. without prejudice. See 56 F.R.D. at 642 (E.D.Va. 1971)(Kellam,J.) Rule 12, Fed.R.Civ.P. does not seem to indicate either way. However, the final sentence of Rule 41(b) strongly suggests that a dismissal for want of jurisdiction should be without prejudice to the pltf's claims. The rule implies that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits; and this only makes sense, because such a dismissal does not address the substance of the claim.

III. Plaintiff's Motion to Compel

The Plaintiff filed his first set of interrogatories and requests for production of documents, along with his Motion for Judgment. These discovery requests essentially seek all information relating to the identity and description of the steel pipe which allegedly injured McReynolds. They ask about all facets of the manufacture, use, packaging, etc. of the pipe, and also seek information about insurance coverage and defenses. Beer has responded in some way to all questions but those about the pipe.

Beer responded by saying it knows of no steel pipe or tubes used in the precast concrete construction, or of anything like a steel pipe that could have injured McReynolds. When it got a more specific description of the pipe (dimensions, etc.) from McReynolds, it undertook a "good faith" investigation into the identity of the alleged piece of steel. It found that "no such piece of steel was called for in any of the plans or drawings, was supplied or erected on the project, or was in any way related to Beer's work on the project." Apparently, when it told pltf's

counsel this, pltf. then said the description pltf's counsel gave on Oct. 28 was incorrect. Pltf's counsel said he would give a new description of the pipe; Beer says it has never received this new description.

Beer thus argues the motion to compel should be denied because Beer is not in a position to answer these requests further. Beer also seeks its costs and fees in defending the motion. McReynolds, on the other hand, says he needs further information from Beer before he can determine whether he should voluntarily dismiss this action. The plaintiff also contends such information is necessary for deciding the workers' comp. plea asserted by Beer.

If what Beer says is true, then the motion to compel should be denied. Unfortunately, Beer has introduced no evidence to back its claim that it knows of no pipe, and McReynolds has no specific evidence to show that Beer does have knowledge. From these pleadings, it is impossible to tell who is correct and how you should decide the motion. Perhaps an evidentiary hearing is called for.

Alternatively, this requested information does <u>not</u> seem relevant to the issues underlying the workers comp. plea. The question of the pipes' identity, etc., has nothing to do with whether Beer complied with the Workers Comp. Act, so as to be entitled to its protection from suit. Thus, this motion to compel is not essential or critical to the substantive issues now at hand; you could reasonably defer ruling on it until later.

IV. Beer's Workers Compensation Plea

Beer has reinstated its workers comp. plea, filed in the state court action, now as a motion to dismiss or for summary judgment pursuant to Rules 12(b)(6) and 56. This motion is complicated by the factual issues, which may have to be sorted out before you can rule on the motion.

Beer argues (and McReynolds seems to admit) that both parties were statutory employees of the owner of the project--at least at first glance. The plaintiff was an employee of a subcontractor (Otis Elevator), and therefore a statutory employee of the owner and general contractor. Beer was a subcontractor, whose work was an integral part of the construction of the building; therefore, Beer and its employees were statutory employees of the owner and general. (And both were engaged in a part of "the trade, business or occupation of the owner" as fellow statutory employees.)

Therefore, Beer argues, pltf's exclusive remedy for injuries is pursuant to the Workers Comp. Act of Va., a remedy which pltf. has already been awarded by the Ind'l Comm'n. Va. Code, §65.1-40 and -41. Section 65.1-41 provides that a common law action may be brought only against an "other party;" however, an other party is one who is a stranger to the employment and to the work involved in the owner's trade, business or occupation. Smith v. Horn, 232 Va. 302, 351 S.E.2d 14, 16 (1986). Beer was not a stranger or "other party," because its work in supplying and erecting concrete panels was an integral part of the overall pro-

ject. Therefore, Beer is immune from suit for personal injuries by a fellow statutory employee, like McReynolds.

A. McReynold's Contentions

1. Beer Did not Have Insurance. Pltf contends that Beer failed to comply with Va. Code §65.1-103 and -105, which require all employers to insure payment of compensation under the act in order to receive the protection of §65.1-40, which precludes a suit by employees. Section 65.1-105 requires every employer subject to the Act to file with the Ind'l Comm'n evidence of compliance; the pltf. claims that Beer has failed to do this, and that therefore Beer loses the protection of the Worker's Comp. statute. (If Beer has in fact failed to comply, then the pltf. is right; the penalty for violating these provisions is that the employer will be subject to suit by other employees, and is precluded from raising defense based on contributory negligence, assumption of risk, or fellow employee negligence. Va. Code, §65.1-106.)

These penalty provisions allowing employee suits are to be liberally construed in favor of the employee. Va. Used Car Auto Parts v. Robertson, 212 Va. 100, 181 S.E.2d 612 (1971); Delp v. Berry, 213 Va. 786, 789, 195 S.E.2d 877 (1973).

Beer contends, however, that it was covered by insurance and by the proper filing made by Beer's own subcontractor, Erection Specialties, Inc. Erection provided the workers comp. insurance for all workers on the site performing labor under Beer's subcontract. Beer and Erection complied with the Act by filing evidence of the insurance coverage, under §§65.1-103, -105. (See

Exhs. C and D to Beer's brief in support.) Beer claims that the coverage provided by Erection covered both Beer and Erection, and therefore both were in compliance with the Act.

Beer further contends, alternatively, that even if it did fail to comply in this respect, §65.1-106 would not prevent Beer from raising the Act as a defense to this suit. The penalty bar of §65.1-106 only applies where the injured party's employer was the one who failed to comply through lack of insurance. Va. Used Auto Parts v. Robertson, 181 S.E.2d 612, (Va. 1971).

Finally, Beer alternatively contends that Pltf's full recovery from his own employer's insurer bars recovery in this action--even if Beer technically violated the statute. The pltf. received an award for his injuries from the Ind'l Comm'n. (See Exh. D to Beer's brief.) This plaintiff is entitled to only one full recovery and he cannot collect more than one time. Delp v. Berry, 213 Va. 786, 195 S.E.2d 877 (1973).

2. Beer's Subcontract is Invalid Because Beer Was Not A Licensed Contractor. Second, pltf. contends that the Workers comp. bar does not apply to protect Beer, because Beer's subcontract was void; it was void, because Beer did not have a contractor's license. (Beer implicitly admits that it did not have a valid contractor's license.) Because its subcontract was void, Beer cannot be a statutory employee under the owner--and is hence not entitled to the workers comp. bar.

Section 54-113 of the Va. Code does require a contractor to hold a license in order to perform any construction, etc., in the state. This is a penal statute, claims McReynolds; any contract

entered into in violation of §54-113 is void under the procedural posture of this case. See Bowen Electric Co. v. Foley, 194 Va. 92, 72 S.E.2d 388 (1952). Section 54-142 sets forth the penalties for violation of §54-113; all contracts which violate the Act are void and unenforceable unless such contract comes within the narrow exception of §54-142(D). That subsection does not apply here, because it allows a contractor to recover on his contract in a suit brought by him, where he had no actual knowledge of §54-142 and he has substantially performed his contract. Therefore, Beer cannot assert the contract as the basis of a defense.

Beer, in contrast, claims that the pltf. misunderstands and misstates the law on this point. While Bowen held such contracts are totally void, Bowen is no longer good law in Virginia; the statute has since been amended, and the Supreme Court has stated (even prior to the amendment) that it never intended to hold that the contract was void for all purposes. In Cohen v. Mayflower Corp., 196 Va. 1153, 86 S.E.2d 860 (1955), the court held that such a "contract was void only in the sense that it was illegal and unenforceable by a contractor in an action on the contract against an innocent party." First Charter v. Middle Atlantic, 237 S.E.2d 145, 149 (Va. 1977). In no other way is such a contract deemed to be void or unenforceable under state law.

Further, as the Court noted in First Charter, the statute bars the contractor's recovery (if he sues on the contract) only when the contractor had actual knowledge of the key §54-142. The person with whom Beer contracted had a duty to give Beer

notice of the section prior to the time of entering the contract; because Beer did not have actual knowledge of §54-142 prior to contracting, the use and enforcement of its contract are not prohibited. Beer claims it substantially performed its contract and did not have actual knowledge of the statute; therefore, its contract should not be held totally void.

The case of First Charter does generally seem to support Beer's argument here; the other contracting party is required to give Beer actual notice of §54-142, and Beer is prohibited from suing on its contract only if it had actual knowledge of the statute. (However, the pltf. has a good point that this one exception to invalidity does not apply to Beer, because Beer is not seeking to recover on the contract for services it rendered, but rather to use its contract as the basis for a workers comp. defense. This issue may take more time and facts to sort out.)

Finally, Beer argues that if the legislature intended to deprive an unlicensed contractor of all its defenses under the Workers Comp. Act, it could have done so expressly in either Title 54 or 65.1; it has chosen not to do so, and thus must not intend such a result to occur.

That sums the arguments, Judge. This case may need more facts and may need to be taken under advisement.

And because Code §§ 54-113, 54-142 are in derogation of common law rights (they impose restrictions on a common trade or occupation), they are to be strictly and narrowly construed — even though they have remedial features. Sellers v. Bles, 198 Va. 49, 92 S.E.2d 486, 489 (1956). (raised by Δ Beer in oral argument).