ORAL ARGUMENT – 02/18/04
02-1187
GARZA V. EXEL LOGISTICS, INC.

HARRIS: Today this court must decide whether a temporary help firm and its client company can shield themselves from liability under the worker's comp. statutes, under a theory that they are joint for dual employers. This is not and should not be the law in Texas. Alternatively there are fact issues that permeate the proceeding concerning the existence of an employer/employee relationship and that summary judgment should be reversed.

I would like to address three primary issues. First, I would like to address that the dual employer relationship does not exist outside the context of the Staff Leasing Services Act, and outside a situation governed by a specific contract.

OWEN: You seem to say in your brief that by contract the parties can establish a dual _____ relationship even if they don't comply with the Staff Leasing Services Act.

HARRIS: I think that it's very important to emphasize a distinction between the Staff Leasing Services Act and temporary help agencies, which is what is at issue here. The Staff Leasing Services Act deals with a completely different industry. The staff leasing services is very highly regulated and they are also for all practical purposes called professional employer organizations.

Most states have legislation specifically differentiating between staff leasing services and temporary help firms. And I think the distinction is so important, because in a staff leasing situation a lot of these companies basically come in and they take over the operational supervision of the client company. It's primarily a white collar business. In other words they come in and they actually act as a co-employer along with the client company. They come in and they take care of all of the administrative responsibilities. They pay wages. They pay benefits. They take care of the insurance issues. They take care of personal management.

OWEN: What's to keep someone who doesn't meet all those requirements, and say We're just a temporary provided, and say we don't have to meet the Staff Leasing Services Act. We are going to call ourselves a temporary service provider. Where do you draw the line?

HARRIS: In the co-employer relationship the parties contract and they specifically agree to this co-employment relationship.

OWEN: Why can't you do that outside the Staff Leasing Services Act? Why can't these professional companies come in by contract and agree to whatever they want to without complying with the Staff Leasing Services Act?

HARRIS: Again it's a different industry. The temporary employee companies that you

are talking about they want the right of control to remain with the actual license holder and the actual leasing company. Because there are a lot of ramifications if they share control. For example, there are tax implications. And in the staff leasing industry, the tax issues are specifically addressed.

O'NEILL But didn't Interim act as a staff leasing entity? That's what I'm having a hard time seeing is what is the difference in the way they actually performed here?

HARRIS: In the temporary employee industry, which we are talking about here, employees are just leased for a very short period of time.

O'NEILL: But it seems to me like Interim acted more as a staff leasing agent than it did temporary employee service.

HARRIS: You're right to the extent that they did have employees on site, but again it's just a different industry. They are treated differently and they don't have the protections that you have with respect to the staff leasing industry. So it's not fair to extrapolate - again the staff leasing industry is highly regulated.

O'NEILL: What did Interim do that made it not a staff leasing entity?

HARRIS: Their employees were only there for a very short period of time. There was no co-employer arrangement within the terms of that contract. I think that the CA grossly misstated or mischaracterized what the agreement was.

O'NEILL: But you would agree that Interim did have a lot of characteristics of a staff leasing agent?

HARRIS: I would agree that they agreed within the contract to supervise, to recruit, and to hire employees. And yes. You are correct to that extent. But there's no co-employer arrangements. So they shouldn't be able to have the benefits of the Staff Leasing Services Act without all the burdens.

OWEN: Why should anybody by contract be able to agree to ___ a comp policy when the statute doesn't seem to permit that? The statute says you can do it in certain circumstances - a general contractor and they list a few exceptions. And then there's the Staff Leasing Services Act. It doesn't seem to contemplate that private parties can by contract agree that one policy covers both parties.

HARRIS: I think that you are absolutely correct. I think that the legislature has seen fit to recognize certain circumstances. For example, the Staff Leasing Services Act, there's a specific provision for subcontractors and general contractors and letter carriers, but the legislature has recognized that there could be a share control for worker's comp. purposes. But they haven't recognized it in the temporary leasing issue.

OWEN: But you seem to say in your briefs that they could. Doesn't that create a split workforce?

HARRIS: I guess we didn't make it very clear in our briefs. We're not saying that you can contract to provide worker's comp. insurance for another.

HECHT: You said exactly that. You said Garza does not disagree with the general premise that a party can contract to provide worker's comp. for another.

HARRIS: Well that doesn't necessarily mean though that for the purposes of the worker's comp. statute that they are covered.

HECHT: You said, several courts have interpreted this provision, 401.011, finding when an employer has compensation to allow the payment of worker's comp. premiums through an arrangement with a third party.

HARRIS: At the very least, I think that there should be some sort of minimum protections for an injured worker. In other words, even though parties may contract for this arrangement, I don't think that the other employer specifically named in the policy, there aren't alternative employer endorsements that specifically cover that injured worker as to that particular employer. I don't think that the worker's comp. statute specifically addresses that.

HECHT: Did Exel have "compensation" coverage within the meaning of the worker's comp. act and covered Garza?

HARRIS: It's our position that even though parties like occurred in this case, Interim obtained worker's comp. insurance. There's no evidence that that insurance was intended to apply to Exel. There's no indication outside of this contract that what they did was other than insure their own workforce. In other words pass along overhead costs along to Exel. And additionally there's no evidence in this record...

HECHT: Why would Exel pay for it if they weren't going to get the benefit?

HARRIS: It's simply the cost of doing business. I don't think it's any different than, for example, I employee a contractor to come do work on my house. I'm probably going to require them to have worker's comp. insurance and liability insurance, but I'm not insured as an employer through their worker's comp. coverage. It just doesn't work that way. I don't think that the legislature through the worker's comp. statutes has contemplated indirect subscribers. The language of the statute specifically says that a worker has compensation coverage if the employer is either obtained an approved insurance policy or secured the payment of compensation through self insurance.

OWEN: What are the limits of what you can contract for? Let's say, I'm a large company with a lot of employers. I'm a nonsubscriber. But I do get some of my employees from

a temporary leasing service. Can I get them to name me as an additional insured on their policy? Will that make me a subscriber as to those employees, or how does this all work?

HARRIS: That's a good point. I think that what's missing from the equation that you just mentioned is the requisite notice and consent by the employee. For example, the worker's comp. statute requires employers to specifically notify employees that they are covered by worker's comp. insurance coverage at the time they are hired. Not only do they have to provide that notice in writing, but it also has to be conspicuously placed throughout the workplace. And in addition to that, I think the notice given has to specifically name the employer. And here, Mr. Garza was not provided notice that Exel, for example, considered him to be an employer for purposes of worker's comp. coverage as to that particular company.

OWEN: There are some CA opinions that seem to say that if you have a rider on your policy that specifically names a client company as an additional named insured that's good enough. Are those cases right or not?

HARRIS: I think a lot of the cases that you mentioned were decided under the old statute, when all you had to do was merely pay a fee in order to be deemed a subscriber. There are 4 cases which you are talking about since the new statute came into effect. Much of those are no writ cases. I have to disagree with the holdings of those 4. I don't think that that's enough under the current worker's comp. scheme that requires you to give notice. In effect these temporary workers are giving up valuable common law rights to sue premises owners when they are injured, and they don't even know about it. The analysis of these courts...

HECHT: You saying they are giving up rights, but all they can do is walk off the job. They can't object to worker's comp. can they? I'm not going to work for you unless you're a nonsubscriber.

HARRIS: That's a good point. But I think at the same time they are going under the premises of a client company. They have no idea that the client company is considering them to be their employee. And frankly it's just simply illegal, superficial fiction. They don't really consider them to be employees. It's just for these worker's comp. purposes to avoid liability.

HECHT: If Exel had bought its own policy, then under Wingfoot you wouldn't be able to sue either Interim or Exel. Is that true?

HARRIS: I don't think that that's necessarily the case. Because again there's no indication that Mr. Garza would be an employee as to Exel. Here is the elements of the employer relationship are missing. There's no consent here to the relationship.

OWEN: Are there any statutory provisions that explicitly address split workforces?

HARRIS: Not that I've been able to find.

PHILLIPS: It makes no difference to you whether Exel has worker's comp or not?

HARRIS: No. For example. I don't think it's any different for me as a lawyer, say I go to the work site of a client company to do a site inspection. I may be injured on the property. That company may have worker's comp. insurance, but I'm not their employee. Not only do you have to have worker's comp. insurance but you have to have the employer/employee relationship.

PHILLIPS: So the trick here is just to structure your contract correctly so that somebody has dual employment and they can be precluded from bringing a common law suit.

HARRIS: I think at a very minimum you would want to make sure that you are an additional insurer on the policy. If you're the client company then you want to have a contract with indemnity provisions. But I think a lot of these temporary agency cases, they are not going to put in a contract that they had joint control because that's not what's happening out there. And if they did that I think you open up a whole pandora's box as far as tax implications. Again the Staff Leasing Services Act, I mean that's been recognized by the federal government and there are specific tax provisions that apply to them. Under the IRS code the common law right of control test determines whether you have to pay taxes or not.

HECHT: So in your view it doesn't make any difference whether Exel had coverage, whether it put up the notice, whether it was listed as an insured. No matter what, you still say Garza was not an employee and he's entitled to sue?

HARRIS: Yes.

OWEN: What about the Borrowed Servant Doctrine? Does that implicate all the tax consequences that you're are talking about?

HARRIS: That's a good point. I'm not really sure of the ramifications of that. I think it depends on whether you're asserting like a third party liability claim or whether it's asserted in the two party liability context.

It's our position in our brief that if these employers are allowed to circumvent the Borrowed Servant Doctrine by arguing that they are dual employers, that would basically eradicated the Borrowed Servant Doctrine because why would any employer - I mean every employer would be out there asserting that they have some limited control over these employees, so as to take advantage of the worker's comp...

OWEN: Isn't it to your benefit for them to argue that Garza was a borrowed servant and for you to argue that they are a nonsubscribers? If he's not a borrowed servant then you don't have a cause of action do you?

HARRIS: No. I think if they were negligent as far as providing an unsafe place to work,

I think that there is still a cause of action.

OWEN: Do they owe a duty to a nonemployee to provide a safe place to work? Are you left with a premises claim or what?

HARRIS: We may be left with a premises claim.

OWEN: It seems to me that what you are saying is that he was a borrowed servant, but they don't get the benefit of the bar. I thought that was your position.

HARRIS: We're not arguing that they are a borrowed servant. We're saying that there was no employer/employee relationship between Exel and Mr. Garza.

WAINWRIGHT: You mentioned you had three legal points to make. First, was the dual employee staff leasing act relationship. What were the other two?

HARRIS: We addressed the issue of whether you could contract to provide worker's comp. insurance for another. The second issue was whether the common law right to control test is the appropriate test to be applied under these circumstances.

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RESPONDENT

ALLEN: I start with the observation that temporary employment agencies play a very important role in today's business world. It can be in the context of manual labor, like we have here in Garza, like the court confronted in the Alvarado v. Wingfoot case. It could be in the context of professionals. Very common are clerical. But there's a common thread through all of these temporary employment situations in that all of these situations are where the temporary agency are providing workers to employers, client companies, who in the words of J. Owen in Wingfoot act in furtherance of these employer, these client companies businesses. They act in furtherance of these businesses.

The question that we have before the court today is how do you reconcile this important sector with comp laws when an employee gets hurt? Remember Garza, just like Alvarado was in the Wingfoot case, was acting in furtherance of the business interest for whom they worked. These aren't shoppers who fall down or slip and fall in a store. They are not clients visiting a plant. They are working in furtherance. Garza was being paid by Exel, through Interim, to provide manual labor in furtherance of Exel's business.

What Exel and Interim are asking the court here is not at all profound. It's not at all radical. We're not saying for example that Garza can't sue the manufacturer of the conveyor belt.

OWEN: What you're saying though is you want the benefit of the temporary agency's policy. So that means you're paying your premium based on their accident rating, not on yours.

ALLEN: That's true. These are classified employees.

OWEN: And you've got a split workforce. You decide to be a nonsubscriber as to your own employees, yet you want to take advantage of the lower rating to get coverage and the bar for these temporary employees.

ALLEN: No. I don't think that's right. And I think that's the reason why the Staff Leasing Services Act came in in 1995, because back in the early 1990's staff leasing services were being used as a front for insurance fraud where you would have truck drivers coming in and being classified as secretaries and things like that. There are plenty of cases in the early 1990's like that and that's what the Staff Leasing Services Act responded to.

OWEN: I don't understand why this is different.

ALLEN: First of all temporary agencies never came under attack like staff leasing services agencies did.

OWEN: Let's say Exel gets these employees five days a week, month after month. How is that different? You're treating them as your own employees and you're not providing worker's comp coverage to them based on your own work accident history.

ALLEN: The way it works is that the comp rates are determined by the type of work that these workers are doing. And sure, a worker like Garza is going to be classified different than a temporary secretary.

OWEN: But your own experience rating is not going to be used in setting Interim's comp premium.

ALLEN: It's the classification of the employee, as in this case manual labor...

PHILLIPS: But there's an experience rating that the employer has over and beyond classification of the generic job duty. And that's J. Owen's question. Whose employer experience rating is going to be used when the rate is set for Interim?

ALLEN: I will point out that we're outside of the record here. There's nothing in the record that specifically addresses that. But the way it works is that the comp carrier goes with Interim, or Wingfoot, or whoever the temporary agency might be and they classify the workers as hard manual labor, soft clerical, and basically all points in-between. And they determine a worker's comp rate based on that. It's not a situation where like you had in the early 1990's, where Acme trucking over in Louisiana was having a staff of 1,000 truck drivers where the comp was being paid

out at clerical rates.

O'NEILL: But if Exel were carrying the policy itself and there were no temporary agency involved, Exel would pay a higher rate if it had a bad experience rating. So by getting employees from temporary agency, it is theoretically possible for it to get a better rate on worker's comp.

ALLEN: Theoretically only, because that's certainly not - there's nothing in the record that would indicate that's the situation here. And the reason why Exel is using Interim as a temporary employment agency to provide them with manual labor is not to beat the comp system. It's just that they had a need for temporary employees at the time.

O'NEILL: But it could be used to beat the comp system?

ALLEN: In a theoretical sense.

O'NEILL: What about Interim is different from a staff leasing services company. Everyone seems to talk about these are two completely different things, but practically day to day, tell me why they are so different from a staff leasing company?

ALLEN: For example, staff leasing services have to go through - it's not just the comp benefit that's involved with the Staff Leasing Services Act. The Staff Leasing Services Act has a checklist of...

O'NEILL: I'm not talking about the act itself. I'm talking about the entities that are covered by the act. What is so different about Interim that keeps it out of the staff leasing act?

ALLEN: Because they are providing temporary employees where staff leasing companies are intended to provide permanent employees. You do not go and use the Staff Leasing Services Act as a mechanism to be provided with temporary employees.

O'NEILL: Is that a contractual matter? In other words, if Mr. Garza had been going everyday for 6 months, whereas a leasing company just had an agreement that they would be there for 6 months is it form over substance?

ALLEN: No. Because they are two completely different things.

O'NEILL: I hear you say that but I don't understand how.

ALLEN: It's the difference between temporary and permanent. I guess what you are getting at is why wouldn't an otherwise staff leasing services company operate as a temporary employer. And as mentioned there is tax benefits. It really is different.

OWEN: I can't see the statutory authority for what you want to do. You say you are

the employer, and that you are entitled to rely on the statutory bar. Yet you're a nonsubscriber as to your own employees.

ALLEN: That's certainly not true. That's not in the record and it's not true. In point and fact Exel had its own comp insurance for its own employees.

OWEN: So why didn't you assert that bar?

ALLEN: At this point time - well we did assert the bar of comp on behalf of both Exel and Interim. Remember Interim has been sued in this case - there's an admission that Interim is the employer here. But that's the way that this progressed. It was a suit against Exel. We pled the bar. We moved for summary judgment based on the Interim comp policies.

OWEN: Do you represent Exel or Exel's comp carrier?

ALLEN: I represent Exel and I represent Interim. I don't represent the comp carrier.

OWEN: It's not in the record that you are a subscriber though. Is that correct?

ALLEN: No. It's not in the record. But it's not in the record that we're not a subscriber either.

OWEN: I'm going to have to assume for the purposes of the legal issue that you are not a subscriber. And you want to take advantage of someone else's policy in which you're not a named insured. You may have paid the premium as part of the cost of business, but you didn't specifically write a check to the comp carrier and you're not named. Where is the statutory authority for that?

ALLEN: There is no statutory authority. The authority comes from this court in Alvarado. The authority comes from...

OWEN: We were very careful to point out in Alvarado that they each had two policies and therefore under the statutory definitions of employer, they were employers, because they were subscribers. And since they were each subscribers they were each entitled to the bar. And here you want one policy to cover a subscriber and a nonsubscriber.

ALLEN: We were dual employers for purposes of Mr. Garza.

OWEN: But the act is very specific about who can procure insurance for another. It says general contractors, and motor carriers. There are a few exceptions. It doesn't say that a temporary leasing agency can procure insurance for client companies.

ALLEN: I understand that Alvarado is key here. I understand that the court basically

had to decide Alvarado with one arm tied behind its back in light of the fact that the worker in that case didn't appeal the borrowed servants finding on behalf of _____. But I would point out to the court that it's not radical to apply Alvarado principles here, but it would be radical not to apply them here.

OWEN: I don't understand that. Particularly if you are a subscriber why don't you just tender your comp coverage to this man? If he's your employee why isn't he covered under your comp policy?

ALLEN: Because in this particular instance he's an employee of both Interim and Exel...

OWEN: And so why wouldn't he be covered by your comp carrier and, then, therefore, you're entitled to statutory bar through your comp carrier. Why is that radical?

ALLEN: That's not radical, but it's not radical that - can an employee have more than one employer for purposes of comp? The answer is yes. Neither the definition of employer/employee nor the exclusive remedy forecloses more than one employer. The labor code's overall scheme of comp.

OWEN: If you're an employer, you are an employer. And you're either a subscriber or you're not. If you are a subscriber then you get the bar. If you're not you don't.

ALLEN: And the bar that Exel is able to enjoy in this type of situation is the bar that just like J. Schneider said in the CA's opinion that Exel purchased worker's comp insurance for Garza albeit through Interim. And that's just the bottom line.

If you read the Alvarado opinion, you don't come away with it with any focus that the court's decision was based on the fact that both companies, both Wingfoot and Web were subscribers or were providing comp coverage.

OWEN: We went to some pains to point out we were relying on the definition of employer in the act, which said you are a subscriber, and that's the way you got to the bar.

ALLEN: But my point is, as CJ Schneider said, that Garza was provided with worker's comp coverage through Interim, paid by Exel.

OWEN: What about the situations where you are a nonsubscriber and have a bad work experience, and you go to a temporary company to get your manual labor, and they don't have the experience factor yet that you do. Aren't you circumventing the comp scheme?

ALLEN: In that situation, the comp carrier might very well have a right of recourse against the temporary agency in that type of situation.

OWEN: The comp carrier never agreed to insure you. You're not a named additional insured.

ALLEN: Right. It's not just a situation where Interim goes out and by subterfuge or otherwise gets worker's comp coverage for temporary employees that it's assigning in high risk or high prone to injury situations. It's not that at all. This is a situation where the comp carriers are all over this. And they know exactly what they are getting in to.

OWEN: If you wanted to be an additional named insured under Interim's policy, would Interim have had to pay a higher premium?

ALLEN: No. Because the comp carrier knows that Interim is assigning employees to, in this case to Exel. Just like in Wingfoot...

OWEN: So possibly you could put 30 different employers, add them on as additional named insureds and there would not be any higher comp premiums?

ALLEN: No. See the reason why you don't need to be an additional named insured on the comp policy because of the dual employer doctrine. In other words they are acting in furtherance of the company's business. This isn't a situation where we're saying we're representing...

WAINWRIGHT: Mr. Allen. We don't know the answer to that question yet. That's what we're going to decide. If you can tell us, why didn't Exel assert its worker's comp bar in this case, at least in the alternative?

ALLEN: That's just the way it went up on summary judgment. We did assert the bar. If you look in Exel's first amended original answer, there is a pleading that affirmative defense of the worker's comp. The way that it went up on summary judgment is that Exel was relying on the interim comp policy. Remember Garza was getting comp benefits. If you go and you look at the Enoch concurrence in Alvarado, you look at the cases that everybody seems to agree has some credibility. Is the person being covered by comp? Is the person being paid comp? End of story.

OWEN: If we follow that line of logic, where do we draw the line when a pseudo staff leasing company comes along and says I don't have to comply? We're dual employers. We have a contract.

ALLEN: If you're dual employers, under the case law, and there's many ways you can get to it. You can get to it through the right to control test that seems to be at issue and at focus in the Alvarado case. You can get it through the restatement. I think it's just a matter of applying the common law. Dell says that the Staff Leasing Services Act trumps the common law with respect to the right to control test. Well we're not under the staff leasing...

OWEN: That's my point. Let's say I'm a company. I don't want to have to maintain

the net worth requirements. I want to be able to assign this, that and the other. All the things that the staff leasing act, the protections it has, I don't want to buy into that. So I just enter into a contract with you and say we're going to do what we want to do under the contract, and we're going to be dual employers, and my policy is going to cover you. Why doesn't that constitute an end run around the Staff Leasing Services Act?

ALLEN: Is the employee getting the benefits of comp? Is the employee getting compensated?

OWEN: Yes, but without all the protections that the staff leasing act puts in there.

ALLEN: Then at that point in time it may very well become an issue between the comp carrier and the temporary agency.

OWEN: Why isn't that in total derogation of what the legislature was trying to get at?

ALLEN: Well your hypo might very well be. But that's not the issue of Garza in this particular situation. Garza was getting comp benefits. He was hurt. He was rushed and got immediate medical care. He got his wages pursuant to the comp act. He was acting in furtherance of the business...

OWEN: Under my example he is too. Except the only difference is that the employee leasing company has decided it doesn't want to provide and meet the standard required in the Staff Leasing Services Act. How do we draw lines?

ALLEN: The line isn't drawn in Garza. What you're talking about is a dispute between the comp carrier and its insured. In this case the temporary agency. Garza is getting the benefits. The whole public policy of the comp system is so that injured employees can without...

OWEN: The staff leasing act is very specific about whose rating is going to apply and how to calculate that net worth requirement. You've got to get a license. There are protections put in there for the employee too. And so I'm having trouble seeing where we draw the line if we accept your analysis on who's covered by the Staff Leasing Services Act and who isn't. Who has to comply and who doesn't.

ALLEN: Once again, you're talking about a situation that isn't Garza v. Exel and Interim. You're talking about a situation where - let's just say Shady Temporary Agency Inc. assigns Garza to a bad workplace environment and he gets horribly hurt, and Garza gets rushed to the hospital and through comp gets all of his medical bills paid and gets his wages pursuant to the comp act, and this, that and the other. Well Garza is protected by comp. That's the person who we need to focus on.

OWEN: So why shouldn't Garza be able to sue the client who didn't comply, which

he was in a contract that didn't comply with the Staff Leasing Services Act? Why should that client who runs a horrible workplace get the benefit of the bar if they haven't complied with the Staff Leasing Services Act?

ALLEN: Because for one thing the temp agency in that situation is not a staff leasing services company. The second thing is, the line of questioning that you're presenting to me would seem to indicate that your worried about what's going on on the comp side of things. Where the focus here really needs to be what's happening to Garza? Is Garza getting comp benefits?

OWEN: He's also getting his common law rights cut off against the person who allegedly injured him.

ALLEN: And that's the quid pro quo under the comp system.

PHILLIPS: Under your logic taken to the next extreme there's no reason why subcontractors should ever be able to sue the landowner or the contractor for negligence that they caused while he/she was at a workplace if the subcontractor has comp insurance. So our whole body of law that we've been struggling with for the last 20 years is just irrelevant.

ALLEN: No. In fact, I think the situation that you're talking about is specifically addressed through the statute. And of course we've all read the Texas Lawyer article about the Eady case over in Houston. In that type of situation it's right there.

Now I would make the distinction between a sub and a general. This is not a sub and a general situation. This is a dual employment situation.

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REBUTTAL

ALLEN: I would like to address J. O'Neill's questions about the difference between staff leasing companies and temporary agencies. In a typical PEO situation, which is the staff leasing situation, the company comes in and basically they take over the administration. So it's really a white collar type of job. In other words they are co-managing the company along with the client company and they are there for a long, long period of time. So that's why they are required by contract to specifically agree to become employers. And in a temporary help situation, the employee just comes there for a very short period of time. They are only there to sort of supplement the client's workforce for a very finite period of time.

O'NEILL: I understand the generic difference, the definitional difference, but I don't know how it applies in the workforce realistically. There are people who go to temporary employment agency and they are there for 3 years, they are sent out to the same company everyday for a long period of time. And how practically that means they are still a different sort of entity is difficult for me to understand.

ALLEN: I think as a matter of practice in most of these temporary help situations, the right of control is retained by the leasing company. So I think that that's a big difference. Obviously it's going to vary from situation to situation but generally in ch. 92, the temporary common worker statute which is sort of close to the temporary leasing situation, specifically says that the employer is the license holder.

HECHT: If you are Interim and Exel and you wanted Garza to be covered by comp no matter what, what would you do different?

ALLEN: I think at a minimum I would make certain contractual provisions to cover that.

HECHT: What would it be?

ALLEN: I guess I would sort of make an arrangement where you are co or joint employers and you have a shared right of control. But at the same time, I don't know that that necessarily is what the worker's comp statute contemplated because you don't have the specific notice and consent by the employee.

HECHT: It seems to me that your answer is they can't do it.

ALLEN: I don't think that they can. I think at a minimum you have to have that, but I don't think that you can really contract. There's a lot of opportunity if you do that for collusive behavior. In other words there is no incentive for the client company to provide a safe place for the temporary workers and they can treat them differently. That means they have all the advantages of being able to assert the shield of the workers comp bar, but they don't have any of the burdens of being an employer - just paying taxes, providing benefits, providing health care and all the other attributes of an employer.

O'NEILL: So there would be a big disincentive then for employers to use temporary employee agencies?

ALLEN: No.

O'NEILL: From what I understand you are saying it doesn't matter whether they are a subscriber or not a subscriber. There's not going to be comp coverage for a temporary worker.

ALLEN: I don't think that that's the case at all. There are still a lot of incentive for companies to use temporary workers because they pay them lower wages, they don't have to pay them benefits.

O'NEILL: But if a company wants to protect itself from common law liability, subscribing to the worker's comp system and by hiring a temporary agency that itself pays comp for

and you don't allow them the bar under any scenario, it seems to me that no employer would want to use temporary workers.

ALLEN: That's why they have liability insurance and a lot of these cases, I think that they have indemnity provisions with the temporary agency. That's just part of doing business. I don't think that it's appropriate to thrust this employer/employee relationship upon workers such as Mr. Garza.