4-25-1983

Buzard v. Super Walls, Inc.

COLORADO SUPREME COURT

No. 83-SA-46

BUDDY L. BUZARD and JACQUELYNE R. BUZARD, Plaintiffs-Appellants, vs. SUPER WALLS, INC., a Colorado corporation, Defendant-Appellee.	(Trial Court No. 81-CV-7809) Appeal from the District Court of the City and County of Denver The Honorable Harold D. Reed District Judge

BRIEF OF THE APPELLEE

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COLORADO SUPREME COURT

No. 83-SA-46

BUDDY L. BUZARD and JACQUELYNE R. BUZARD,	)	
Plaintiffs-Appellants,	)	
vs.	)	BRIEF OF THE APPELLEE
SUPER WALLS, INC., a Colorado corporation,	)	
Defendant-Appellee.	)	

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The Trial Court properly held that Defendant is immune from suit by Plaintiffs, pursuant to the Colorado Workmen's Compensation Act, C.R.S. 1973 §8-48-101, et seq., and properly granted summary judgment in favor of Defendant.

B. The Colorado Workmen's Compensation Act, C.R.S. 1973 §8-48-101, et seq., is constitutional.

C. Defendant is entitled to an award of attorneys' fees incurred on appeal, pursuant to Rule 38, Colorado Appellate Rules, and C.R.S. 1973 §13-17-101, et seq.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs filed their Complaint, claiming personal injuries of Buddy L. Buzard, including a fractured pelvis, fractured vertibrae, fractured feet and ankles, as a result of a fall at a construction site in Boulder, Colorado. Plaintiff Buddy L. Buzard claimed to be an independent contractor and construction worker at the construction site, and claimed that Defendant Super Walls Inc., acting through its employees, negligently performed the installation of roof trusses, which negligence caused the collapse of the roof trusses, resulting in Plaintiff's fall and injuries. Plaintiff Buddy L. Buzard claimed

damages in excess of $300,000.00. Plaintiff Jacquelyne R. Buzard, the wife of Plaintiff Buddy L. Buzard, claiming damages for loss of consortium, expenses, loss of services and loss of time and income, sought damages in excess of $50,000.00.

Defendant filed its Answer and Jury Demand (pp. 4-7), generally denying Plaintiffs' claims, and asserting affirmative defenses including the defense that Plaintiffs' claims were barred by the statutes of Colorado, including but not limited to C.R.S. 1973 §8-48-101, et seq.

B. Course of Proceedings.

Plaintiffs commenced this action by filing of their Complaint (pp. 1-3) on September 4, 1981. Defendant filed its Answer and Jury Demand (pp. 4-7) on October 8, 1981. After extensive discovery, by way of Requests for Admissions, Requests for Production and Interrogatories, particularly related to the status and relationship of the parties and intervening contractors, Defendant filed its Motion for Summary Judgment (pp. 9-10), Memorandum Brief in Support of Motion for Summary Judgment (pp. 11-18), and Affidavit in Support of Motion for Summary Judgment (pp. 19-21) with the Court on April 1, 1982. After Plaintiffs filed their Opposition Brief and Affidavits (pp. 25-38), Defendant filed its Reply Brief in Support of Motion for Summary Judgment (pp. 39-43) on or about May 19, 1982.

This Court set the matter for hearing on September 22, 1982, which hearing was held on that date, the reporter's Transcript thereof forming a part of the record on appeal. At the hearing, the Court made an oral determination and findings (pp. 30-32 of the Reporter's Transcript). The Court requested counsel for the Defendant to draw up appropriate Orders, to be submitted for review and approval. Counsel for Defendant submitted proposed Findings of Fact, Conclusions of Law and Entry of Judgment on October 4, 1982. By letter (not a part of the record) dated October 8, 1982, counsel for Plaintiffs objected to certain portions of the proposed Findings of Fact, Conclusions of Law and Entry of Judgment. After a conference between counsel and the Court on October 27, 1982, the proposed

Findings of Fact, Conclusions of Law and Entry of Judgment was revised and submitted to Court and counsel on October 27, 1982. The revised Findings of Fact, Conclusions of Law and Entry of Judgment (pp. 44-47), not being objected to by Plaintiffs' counsel, were signed by the Court on November 16, 1982 (p. 47). Summary Judgment was entered as of that date.

Plaintiffs filed their Notice of Appeal on November 18, 1982 (p. 48), and their Designation of Record on Appeal (pp. 53-54) on December 8, 1982. The Notice and Designation were served on Defendant's counsel. Plaintiffs filed their Security for Costs Bond (p. 51) on November 30, 1982, without serving a copy on Defendant's counsel. As a result, although raised as an issue by Defendant in its Preliminary Statement herein, it appears that Plaintiffs complied with the Colorado Appellate Rules regarding the filing of a Bond for Costs. A dispute, as yet unresolved, exists as to which party to this appeal is responsible for the costs of the Reporter's Transcript, part of the record herein. After Plaintiffs' refusal to pay for the cost of the Reporter's Transcript, Defendant ordered and paid for that transcription, filing an appropriate Motion with the Trial Court.

C. Statement of the Facts

As reflected in the Court's Findings of Fact, Conclusions of Law and Entry of Judgment, counsel stipulated and the Court found that there were no disputed issues of material fact, "the only dispute being whether Buddy L. Buzard was a common law independent contractor or employee of Bruce Hawkins, d/b/a Hawkins Construction Company." (p. 44; p. 15-16 of the Reporter's Transcript) Without finding whether Buddy L. Buzard was a common law employee or a common law independent contractor, the Court assumed for purposes of determination of the Defendant's Motion for Summary Judgment that Buddy L. Buzard's argument that he was a common law independent contractor of Bruce Hawkins, d/b/a Hawkins Construction Company, under common law definitions of independent contractor and employee, was valid.

The following facts were admitted by the parties and are

not in dispute: (1) Buddy L. Buzard was injured in the course and scope of his work in the construction of a racquetball structure on property owned by Rally Sport Boulder Inc. (p. 20, p. 44); (2) Super Walls Inc. was a general contractor on the project (p. 19, p. 44); (3) Super Walls Inc. contracted to construct the structure of the project, including foundations, walls, floors, ceilings, roofs, stairs and weather protection (p. 19, p. 44); (4) Super Walls Inc. contracted with Bruce Hawkins, d/b/a Hawkins Construction Company, to install and complete the roof framing and plywood decking (p.19, p. 25, p.44); (5) The roof framing and plywood decking to be completed by Bruce Hawkins, d/b/a Hawkins Construction Company, constituted a portion of the work to be performed by Super Walls Inc. for the owner of the premises (p. 19, pp. 44-45); (6) The construction of racquetball courts, systems and structures, including roof framing and plywood decking, constituted a portion of the business of Super Walls Inc. (p. 20, p. 45); (7) Super Walls Inc. is in the business of contracting out work to be done on racquetball court projects (pp. 19-20, p. 45); (8) Buddy L. Buzard contracted with Bruce Hawkins, d/b/a Hawkins Construction Company, to perform a portion of the work required to be done by Bruce Hawkins, d/b/a Hawkins Construction Company, under its contract with Super Walls Inc. (p. 20, p. 25, p. 45); (9) At the time Buddy L. Buzard was injured, he was on the project and performing work required to be performed under his contract with Bruce Hawkins, d/b/a Hawkins Construction Company (p. 20, p. 45); (10) At the time Buddy L. Buzard was injured, he was on the project and performing work which was required to be done by Bruce Hawkins, d/b/a Hawkins Construction Company, under its contract with Super Walls Inc. (p. 20, p. 45); (11) At the time Buddy L. Buzard was injured, he was on the project and performing work which was required to be done by Super Walls Inc. under its contract with the owner of the premises (p. 20, p. 45); (12) Buddy L. Buzard has received workmen's compensation benefits for his claimed injuries (p. 20, p. 45).

In addition, there was no genuine issue as to the following facts: (1) At the time of Buddy L. Buzard's injury, Super Walls Inc.,

Bruce Hawkins, d/b/a Hawkins Construction Company, and Buddy L. Buzard were covered by workmen's compensation insurance (p. 20, p. 26, p. 45); (2) Super Walls Inc. required Bruce Hawkins, d/b/a Hawkins Construction Company, to obtain and deliver a certificate of workmen's compensation insurance, for its statutory employees, prior to commencing work on the project (p. 20, p. 45); (3) Hawkeye Security Insurance Company acknowledged its insurance coverage and liability to Bruce Hawkins, d/b/a Hawkins Construction Company, and Buddy L. Buzard, and admitted liability to Buddy L. Buzard for workmen's compensation benefits (p. 20, p. 45).

The facts germane to the issues on appeal are not in dispute, and are not disputed by Plaintiffs in the Reporter's Transcript (pp. 15-17), nor in their Opening Brief. In fact, the only factual dispute, as shown by Plaintiffs' Statement of Facts, is whether Buddy L. Buzard was a common law subcontractor, independent contractor, or employee of Hawkins Construction Company. As determined by the Trial Court (p. 44; pp. 30-31 of the Reporter's Transcript), those factual issues do not bear on the issues on appeal, the terms "employee" and "employer" being defined in the Colorado Workmen's Compensation Act, C.R.S. 1973 §8-48-101, et seq. Plaintiffs' argument at the trial level, as reflected in their Statement of Facts in their Opening Brief, relies on applying common law definitions of "employee" and "independent contractor" to the relevant sections of the workmen's compensation statute. Except for Plaintiffs' use of the words "subcontractor" and "employee" in a common law sense when discussing the provisions of the workmen's compensation statute, Defendant incorporates the Statement of Facts contained in Plaintiffs' Opening Brief.

ARGUMENT

SUMMARY OF ARGUMENT

Defendant respectfully submits that the trial court properly granted summary judgment in favor of Defendant based on the lack of a genuine issue as to any material fact, and that Defendant was not liable to either Plaintiff for Plaintiffs' alleged injuries, as a

matter of law. Defendant further submits that, as found by the Appellate Courts of the State of Colorado in previous decisions, the Colorado workmen's compensation statute is constitutional. In addition, Defendant submits that Plaintiffs' arguments on appeal, as a result of the prior decisions of the Colorado Appellate Courts, are groundless, and that Defendant is entitled to an award of attorneys' fees and costs incurred in the appeal, as well as reimbursement for the costs of preparation of the Reporter's Transcript of the hearing on the Motion for Summary Judgment.

1. A. THE TRIAL COURT PROPERLY HELD THAT DEFENDANT IS IMMUNE FROM SUIT BY PLAINTIFFS, PURSUANT TO THE COLORADO WORKMEN'S COMPENSATION ACT, C.R.S. 1973 §8-48-101, ET SEQ., AND PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT.

The Workmen's Compensation Act of Colorado, C.R.S. 1973 §8-48-101, et seq., statutorily sets forth the duties, obligations and benefits relating to workmen's compensation coverage in Colorado. C.R.S. 1973 §8-48-101, as amended, sets forth the provisions concerning liability of, and recovery from, those contracting out work, deeming those contractors-out as "employers" under the Act:

> 8-48-101 Lessor or contractor-out deemed employer - liability - recovery. (1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 54 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles and such lessee,

sublessee, contractor, or subcontractor, as well as any employee thereof, shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said lessee, sublessee, contractor, or subcontractor.

(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under section 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof, or against its employees, servants, or agents . . .

C.R.S. 1973 §8-48-102, as amended, contains the statutory provisions regarding the liability of entities for insurance relating to the repair or improvements to real property:

8-48-102. Repairs to real property - liability for insurance. (1) Every person, company, or corporation owning any real property or improvements thereon and contracting out any work done on and to said property to any contractor, subcontractor, or person who hires or uses employees in the doing of such work shall be deemed to be an employer under the terms of articles 40 to 54 of this title. Every such contractor, subcontractor, and person, as well as their employees, shall be deemed to be employees, and such employer shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said contractor and subcontractor

and their employees or employees' dependents and, before commencing said work, shall insure and keep insured his liability as provided in said articles. Such employer shall be entitled to recover the cost of such insurance from said contractor, subcontractor, or person and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said contractor, subcontractor, or person.

(2) If said contractor, subcontractor, or person doing or undertaking to do any work for an owner of property, as provided in subsection (1) of this section, is himself an employer in the doing of such work and, before commencing such work, insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said contractor, subcontractor, or person nor his employees or insurers shall have any right of contribution or action of any kind, including actions under section 8-52-108, against the person, company, or corporation owning real property and improvements thereon which contracts out work done on said property, or against its employees, servants, or agents . . .

C.R.S. 1973 §8-42-102, as amended, limits the liability of statutory employers who comply with the statutes:

8-42-102. Liability of employer complying. An employer who has complied with the provisions of articles 40 to 54 of this title, including the provisions relating to insurance, shall not be subject to the provisions of section 8-42-101; nor shall such employer or the insurance carrier, if any, insuring the employer's liability under said articles be subject to any other liability for the death of or personal injury to any employee, except as provided in said articles; and all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account

of such death of or personal injury to any such employee and accruing to any person are abolished except as provided in said articles.

As argued by Plaintiffs, the determination of the summary judgment at the trial level, and the determination of this appeal, is a question of law, and not based on any question of material fact.

It is undisputed in the present case that Rally Sport-Boulder, Inc. was the owner of a project, on which construction Defendant Super Walls Inc. was a general contractor. It is further undisputed that Super Walls Inc. subcontracted out part of its work to Bruce Hawkins, d/b/a Hawkins Construction Company. Taking the evidence in the light most favorable to the Plaintiff, there is no dispute that Plaintiff Buddy L. Buzard was a common law sub-subcontractor of Bruce Hawkins, d/b/a Hawkins Construction Company, on the project.

The Workmen's Compensation Act of Colorado, in particular the provisions set forth above, specifically cover such a situation as existed herein, where work is contracted out by an owner and a general contractor. Section 8-48-101 provides that any entity, such as Super Walls Inc., engaged in the business of constructing a building by contracting out part of the work, in this case to Bruce Hawkins, is a statutory employer of Hawkins. In addition, the same section provides that Bruce Hawkins, in subcontracting out part of his work to the Plaintiff, Buddy L. Buzard, becomes a statutory employer of Buzard. Finally, the same section provides that the general contractor, in this case, Super Walls Inc., is the statutory employer of the employees and subcontractors of its subcontractors. In a similar case, the Supreme Court of Colorado in Edwards vs. Price, 191 Colo. 46, 550 P.2d 856 (1976) stated:

> "As a statutory employer, SCC was liable for workmen's compensation benefits to the decedent's survivors if Jelco, Inc., had failed to obtain workmen's compensation coverage. However, the survivors received their workmen's compensation benefits from Jelco, Inc., and as noted above, the statute provides that under those circumstances the

survivors cannot maintain a negligence action against SCC or any of its principals. The trial court properly entered judgment in favor of the Defendants . .

"In return for this ultimate statutory liability, the general contractor is relieved of any liability for 'contribution or action of any kind, including actions under §8-52-108'. Section 8-48-101(2), C.R.S. 1973. The subcontractors are not subjected to this ultimate liability for injuries to employees of the general contractor or other subcontractors. Thus, the subcontractors are not immunized from common-law actions by employees of the general contractor or other subcontractors."

The purpose of §8-48-101, in defining constructive, or statutory, employees, is to "prevent evasion of the insurance contract by leasing." Rogers vs. Solem, 103 Colo. 52, 83 P.2d 154 (1938). In the present fact situation, it does not matter whether Buddy L. Buzard is a common law "subcontractor" of Bruce Hawkins, "employee" of Bruce Hawkins, or "independent contractor" under Bruce Hawkins. It is "the purpose of the statute to prevent the avoidance of the insurance contract by calling the relation one of principal and independent contractor when such relation does not exist. The statute is intended to cover every business conducted by one through the activities of another under any kind of a contract." Faith Realty and Development Co. vs. Industrial Commission, 170 Colo. 215, 460 P.2d 228 (1969). As stated in San Isabel Electric Association, Inc. vs. Bramer, 183 Colo. 15, 510 P.2d 438 (1973), "the statutory intent behind C.R.S. 1963, 81-9-1 (now C.R.S. 1973 §8-48-101) is to prevent employers from evading compensation coverage by contracting-out work instead of directly hiring the workmen."

The Workmen's Compensation Act is "not limited to specific technical relationships. It covers every business conducted by one through the activities of another under any kind of contract." Rhodes vs. Industrial Commission, 99 Colo. 271, 61 P.2d 1035 (1936). The intention of the workmen's compensation law is to "create special categories of employees and employers to provide protection for

employees and to compel employers to maintain insurance coverage . . . There is no reason that compensation coverage need be linked to common law definitions of employment in order to be constitutional. The statute is valid." Lancaster vs. C.F. & I. Corporation, 190 Colo. 463, 548 P.2d 914 (1976).

An entity under the Workmen's Compensation Act is deemed to be a statutory "employer" where that entity "contracts out work which is part of its regular business and would ordinarily be accomplished with its own employees." San Isabel Electric Association, Inc. vs. Bramer, supra, and Posey vs. Intermountain Rural Electric Association, 41 Colo. App. 7, 583 P.2d 303 (1978). The cases holding that the workmen's compensation statute covers any situation where the subcontracted work is part of the regular business operation of the Defendant are legion. See: Pioneer Construction Company vs. Davis, 152 Colo. 121, 381 P.2d 22 (1963). As set forth herein, in the Statement of the Facts, it is undisputed that Defendant Super Walls Inc. is generally engaged in the type of construction being performed by Plaintiff Buddy L. Buzard at the time of his injury. It is further undisputed that Defendant subcontracted out a portion of the work which it would normally do with its own employees. In contracting out any part of its business, Defendant is deemed by the statute to be the statutory or constructive employer of those performing that work. The Plaintiff, Buddy L. Buzard, is just such a statutory employee. "The person thus protected from third party liability is the person on whom statutory liability is imposed; i.e., the principal contractor." Krueger vs. Merriman Electric, 29 Colo. App. 492, 488 P.2d 228 (1971). The Act distributes work related losses so that the burdens fall upon those who necessitate and control the work. O'Quinn vs. Walt Disney Productions Inc., 177 Colo. 190, 493 P.2d 344 (1972). As stated in Frohlick Crane Service, Inc. vs. Mack, 182 Colo. 34, 510 P.2d 891 (1973), reh. den. (1973):

> "The primary purpose of the Workmen's Compensation Act is to afford workmen compensation for job-related injuries, regardless of fault . . . In return, the employer who is responsible under the Workmen's Compensation Act is granted

immunity from common-law claims . . . The employer is immunized from claims for tortious injuries only because he assumes the burden of compensating a workman for all job-related injuries."

Super Walls Inc., acknowledging its obligations under the Workmen's Compensation Act, not only obtained insurance for such compensation through the State Compensation Fund, but also specifically required Bruce Hawkins, d/b/a Hawkins Construction Company, to provide proof of such compensation insurance. (pp. 20)

The Workmen's Compensation Act places certain burdens on those contracting-out portions of their work. In assuming the obligations under the Act, by providing insurance and benefits to statutory employees, regardless of fault, Super Walls Inc. satisfied the statutory requirements. In exchange for the coverage provided to statutory employees, Super Walls Inc. falls within the statutory privilege and immunity from suit for alleged negligence. The Supreme Court, in O'Quinn vs. Walt Disney Productions Inc., supra, has succinctly summed up the law applicable to the instant action, in stating:

"As noted above, the instant legislation confers an immunity on a general contractor or a real property owner in exchange for a duty which inheres to the benefit of a workman. Thus, while on the one hand a workman will be required to forego a negligence action against a general contractor or real property owner, he will on the other hand be assured that regardless of fault, the more solvent general contractor or real property owner stands behind and secures the Workmen's Compensation liability of the workman's immediate employer." (emphasis added)

Buddy L. Buzard, the Plaintiff in this action, has received workmen's compensation benefits through insurance naming as insured Bruce Hawkins, d/b/a Hawkins Construction Company. (pp. 20, 26, 45) In addition, Buddy L. Buzard had available insurance through the State Fund naming Super Walls Inc. as the insured. (p. 20) Coverage and immunity under the Act are not limited to common law "employer"

and "employee" definitions. Continental Oil vs. Sirhall, 122 Colo. 332, 222 P.2d 612 (1950). The Act defines "employees" as all "employees, servants, agents, lessees, sublessees, contractors or subcontractors". Buddy L. Buzard, assuming the facts as he asserts them, was a subcontractor of Bruce Hawkins, who was in turn a subcontractor of Defendant, Super Walls Inc. C.R.S. 1973 §8-48-101 deems all subcontractors of Super Walls inc. to be employees of Super Walls Inc., provided that Super Walls Inc. has complied with the Workmen's Compensation Act. There is no dispute that Super Walls Inc. so complied with the Act. As a result thereof, Defendant is granted statutory immunity from the claims of the Plaintiffs in the instant action.

> "It is the general contractor to whom the employees of all subcontractors may look for workmen's compensation if their immediate employer is uninsured or financially irresponsible." Edwards vs. Price, supra. (emphasis added)

The Workmen's Compensation Act effectively requires all of those upstream from the injured individual to provide workmen's compensation benefits for those downstream. As the general contractor, Defendant, Super Walls Inc., provided those benefits to not only its direct common law employees, but to all those deemed to be employees under the statute, including the Plaintiff. In exchange for the benefits provided by the Act, an injured individual downstream is precluded from suing any upstream individuals or entities, who have complied with the Act.

In Plaintiffs' argument, there are continuous citations to cases and statutes referring to "employee" and "employer", it then being argued that those cases are not dispositive of the instant action for the reason that Buddy L. Buzard was not a common law "employee" of Super Walls. What Plaintiffs continually overlook is that the Workmen's Compensation Act, in particular §8-48-101 and §8-48-102, defines the terms "employee" and "employer", under the statute, far differently than the corresponding common law definitions of those terms. The facts of the instant action are clear that Buddy L. Buzard was a statutory employee of Super

Walls Inc., regardless of whether or not he was a common law employee of Super Walls Inc. Buddy L. Buzard was injured while performing work that had been contracted out by Super Walls Inc. to Bruce Hawkins, and by Hawkins to Buddy L. Buzard. Therefore, whether or not he was a common law employee, he was a statutory employee. Quite simply, Plaintiffs' citations of authority do not support their position.

Plaintiffs cite Chartier vs. Winslow Crane Service Company, 142 Colo. 294, 350 P.2d 1044 (1960), in support of their position. In that case, the Court merely held that individuals in separate chains of statutory employment could sue a negligent individual in a separate statutory employment chain. Again, in the instant action, it being undisputed that Plaintiff was performing work contracted out by Super Walls to Hawkins, and by Hawkins to Buddy L. Buzard, there is no question that Buddy L. Buzard was in the same statutory employment chain as Super Walls Inc., and that Buddy L. Buzard is attempting to sue a statutory employer upstream from himself. None of the cases cited by Plaintiffs permits such a suit, such suits being expressly precluded by the Colorado Workmen's Compensation Act.

Plaintiffs further argue that the Workmen's Compensation Act and the immunities afforded to a statutory employer thereunder, apply only when the statutory "employer" and its "subcontractor" have direct contractual dealings. Plaintiffs argue that it is only where such direct dealings occur that the contractor is deemed to be a statutory "employer" of the subcontractor's employees. Defendant submits that it, as a general contractor, attained the status of a statutory "employer" as it related not only to a common law subcontractor's "employees", but also to common law sub-subcontractor's employees, sub-sub-subcontractor's employees, etc. Plaintiffs argue that the reference to "subcontractor" in C.R.S. 1973 §8-48-101 is intended only to apply to the first level of subcontractors, rather than, as expressly provided by the Colorado Workmen's Compensation Act, all those, at all levels, performing work contracted out. Initially, Defendant

submits that the clear intention of the Workmen's Compensation Act is to provide coverage by, and prevent liability of, a general contractor such as Super Walls (a statutory "employer") for injuries to those in the chain of statutory employment under that general contractor, performing work of the general contractor that has been contracted out. In addition, as argued by Defendant at the hearing on its Motion for Summary Judgment, the provisions of C.R.S. 1973 §8-48-101, as applied to the instant factual situation, define Buddy Buzard, as a "subcontractor" of Bruce Hawkins, as Bruce Hawkins' statutory "employee". In addition, the statute provides that Bruce Hawkins (as a subcontractor of Super Walls) and his "employees" (meaning his statutory employees), including Buddy L. Buzard, are the statutory "employees" of Super Walls Inc. By following this logical application of the statutory terms "employer" and "employee" at each level in the chain of work contracted out, it is evident that not only would it have been cumbersome and interminable to have referred to not only "subcontractors", but also to "sub-subcontractors", "sub-sub-subcontractors", etc., but that such reference was totally unnecessary under the definitions and language used, all lower levels of "subcontractors" being defined as "employees" of the "subcontractor" immediately above him, and so forth at each level up the chain.

"When there is a hierarchy of subcontracts and sub-sub-contracts, immunity has generally been extended up the hierarchy, through the intermediate contractor to the contractor twice removed." 2 A Larson, The Law of Workmen's Compensation, §72-31(e), and cases cited therein. See also: Stolte vs. Eighth Judicial District Court, 510 P.2d 870 (Nev. 1973). Such immunity is extended to those contractors who require their subcontractors to provide workmen's compensation insurance. It is undisputed that this Defendant not only obtained its own insurance through the State Compensation Fund, but also specifically required its subcontractor, Bruce Hawkins, d/b/a Hawkins Construction Company, to provide proof that it too carried such insurance. (p. 20) Plaintiffs admit that premiums were paid by Hawkins out of the contract payments due to Buddy L.

Buzard in order to protect Hawkins from any liability for workmen's compensation benefits pursuant to the "contracting-out" statute. (p. 23) This Defendant was subject to the ultimate liability for injuries to not only its common law employees, but also the statutory employees of subcontractors and the employees of sub-subcontractors. See Edwards vs. Price, 191 Colo. 46, 550 P.2d 856 (1976). Such a result is completely consistent with the policy of the Workmen's Compensation Act, in that the burden is intended to fall upon the shoulders of the entity which necessitates and controls the work giving rise to an alleged injury. See O'Quinn vs. Walt Disney Productions, Inc., 177 Colo. 190, 493 P.2d 344 (1972).

The primary purpose of the Workmen's Compensation Act is to afford workmen compensation for job-related injuries, regardless of fault. Thomas vs. Farnsworth Chambers Co., 286 F.2d 270 (10th Cir. 1960).

> "An equally basic purpose of the act is to make the remedies provided under the act exclusive and to insulate the employer, liable under the act, from any other liability whatsoever". Thomas, supra.

Although cited by Plaintiffs, the Thomas case, because it interprets materially different statutory wording, is not authority for the position of Plaintiffs. The statutory changes since the Thomas decision specifically immunize Defendant Super Walls from these Plaintiffs' claims. The employer is immunized for claims for tortious injuries only because he assumes the burden of compensating a workman for all job-related injuries. Frohlick Crane Service Inc. vs. Mack, 182 Colo. 34, 510 P.2d 891 (1973), reh. den. (1973). The object of the contracting-out section is to avoid and to prevent the remote employer from avoiding liability by resorting to the device of having work accomplished by irresponsible, independent contractors. San Isabel Electric Association vs. Bramer, 182 Colo. 15, 510 P.2d 438 (1973). To avoid such avoidance, the Act makes the general contractor liable to injured employees of subcontractors, unless the subcontractor carries liability insurance. The general contractor

is exposed to statutory liability to a job-related injury of a statutory employee of a sub-subcontractor. Defendant, Super Walls Inc., protected its employees, statutory and otherwise, throughout the entire chain of employment, by obtaining insurance for such compensation through the State Compensation Fund, and also by specifically requiring Bruce Hawkins, d/b/a Hawkins Construction Company, to provide proof of such compensation insurance. If the Defendant had not satisfied its obligation under the Act, and had not required Hawkins to acquire compensation insurance, the Defendant itself would have been liable for compensation under the Act. However, having obtained and received insurance, it is granted corresponding immunity.

Taking Plaintiffs' theory to its logical conclusion would lead to the absurd result that a contractor which had contracted-out part of its work and complied with the provisions and policies of the Act, by requiring its subcontractors to provide compensation insurance, would be exposed to common law tort actions. Those same common law tort actions would be precluded if the contractor had not so complied and had not required its subcontractor to provide compensation insurance. Thus, a complying contractor would be penalized by its good faith efforts to ensure that the employees in the employment chain are provided for in case of injury. By adopting the Plaintiffs' theory, the Court would encourage tactics which would, in effect, be exactly the opposite of what the Act seeks to avoid. A contractor in the position of this Defendant, would be in a better position if it did not insist upon the subcontractor obtaining compensation insurance. Obviously, the Plaintiffs' construction of the statute does not accord with the objectives and purposes of the Act, or with reason, and it is a construction which should be rejected. The Court should not be requested to construe C.R.S. 1973 §8-48-101 in such a manner as to result in absurd and impractical consequences or in such a manner as to frustrate the obvious intent of the legislature. Frohlick Crane Service, Inc., supra.

Plaintiff further attempts to avoid the basic principles

of the Workmen's Compensation Act by describing the relationship between Hawkins and the Plaintiff, Buddy L. Buzard, as that of an independent contractor. Such a characterization has nothing to do with whether or not a person is a statutory employee under the Workmen's Compensation Act. The test to determine whether the statutory employer-employee relationship exists pursuant to C.R.S. 1973 §8-48-101, as amended, is whether or not the work contracted is part of the regular business of the contractor and would ordinarily be accomplished with one of the contractor's own employees. San Isabel Electric Association, Inc. vs. Bramer, supra; Posey vs. Intermountain Rural Electric Association, 41 Colo. App. 7, 583 P.2d 303 (1978). It is undisputed that the Defendant, Super Walls Inc., is generally engaged in the type of construction that was being performed at the time of the Plaintiff's alleged injury. Further, the Plaintiffs admit that Buddy L. Buzard contracted to perform certain portions of the construction work which was contracted to Bruce Hawkins, d/b/a Hawkins Construction Company, by the Defendant, Super Walls Inc. In contracting-out part of its operations, the Defendant is deemed, by the statute, to be the statutory or constructive employer of those performing that work.

Where workmen's compensation insurance for those downstream has been required and is in force, as is the situation in the instant action, every contractor, being a statutory employer, upstream from the claimant, is immune from suit. Plaintiffs' argument, if successful, would result in contractual relationships specifically designed to avoid workmen's compensation liability. General con tractors would, in order to avoid workmen's compensation liability, contract work out to an entity which was specifically precluded from actually performing the work. That entity would, by contract, be required to further subcontract out the work, thus avoiding any direct relationship. Under Plaintiffs' argument, such a procedure would avoid any direct contractual relationships and avoid liability for workmen's compensation benefits.

B. THE COLORADO WORKMEN'S COMPENSATION ACT, C.R.S. 1973 §8-48-101, ET SEQ., IS CONSTITUTIONAL.

Plaintiffs argue that even assuming summary judgment was correct on the basis of the statute granting immunity to Super Walls Inc., the statute is unconstitutional as applied in this case. The constitutionality of the immunity provisions of the Colorado Workmen's Compensation Act has been previously upheld in Edwards vs. Price, 191 Colo. 46, 550 P.2d 856 (1976) and Lancaster vs. C. F. & I. Corporation, 190 Colo. 463, 548 P.2d 914 (1976). C.R.S. 1973 §8-48-102(1) requires statutory employers to maintain insurance for its statutory employees. C.R.S. 1973 §8-48-101(2) and C.R.S. 1973 §8-42-101 grant a corresponding immunity to those statutory employers who, either directly or indirectly, assure workmen's compensation insurance for their statutory employees. Defendant incorporates the arguments and authority contained herein on Issue 1, that argument and authority being also relevant to this Issue 2, without restating such argument and authority in its entirety.

Plaintiffs' argument of unconstitutionality assumes that Super Walls Inc., in the instant action, had no statutory liability for workmen's compensation benefits to Buddy L. Buzard. Plaintiffs' constitutionality argument, therefore, is based on exactly the same arguments as outlined and rebutted above. Plaintiffs' argument, to be successful, must either (1) apply common law definitions of "employer" and "employee" to C.R.S. 1973 §8-48-101(1), or (2) severely limit the definition of the word "subcontractor", in order to avoid the statutory requirement that a general contractor such as Super Walls either provide, or require those to whom it subcontracts work out to provide, workmen's compensation insurance. The clear provisions of the statute require an entity in the position of Super Walls Inc. to either provide workmen's compensation insurance for all of its statutory employees, which would include Buddy L. Buzard, or to require its common law subcontractor (Bruce Hawkins) to either provide directly, or require all of its statutory employees (including Buddy L. Buzard) to provide, workmen's compensation

insurance for themselves. In fact, it is undisputed in this case that Super Walls Inc. had its own workmen's compensation insurance, which would have covered Buddy L. Buzard (p. 20), as well as requiring Hawkins, or those to whom he contracted out, to provide their own insurance (p. 20). In this case, Buddy L. Buzard received workmen's compensation benefits from an insuror obtained either through himself or Bruce Hawkins.

Plaintiffs also argue that there is something "blatantly unfair and inherently incongruous" in allowing an individual to sue those downstream, but to disallow a suit against an upstream contractor. As stated in Edwards vs. Price, supra, there is a rational basis for granting immunity in exchange for liability for workmen's compensation benefits. As stated above, those upstream have statutory liability for workmen's compensation benefits, and are, in exchange, granted immunity. However, those downstream have no liability for workmen's compensation benefits for those upstream from themselves, and therefore have no corresponding immunity. Edwards vs. Price, supra. The Workmen's Compensation Act, being designed to assure the availability of workmen's compensation benefits, without proof of fault, is constitutional, rational and serves a valid purpose.

C. DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES INCURRED ON APPEAL, PURSUANT TO RULE 38, COLORADO APPELLATE RULES, AND C.R.S. 1973 §13-17-101, ET SEQ.

Defendant submits to the Court that Plaintiffs' arguments are groundless, under the previous decisions of this and the Colorado Court of Appeals, and are totally unsupported by the statute in question. As such, Defendant is entitled to an award of attorneys' fees and costs, pursuant to Colorado Appellate Rule 38, and C.R.S. 1973 §13-17-101, et seq., incurred in this appeal. See: United Bank of Denver N.A. vs. Pierson, (Colo. App. 1982), (p. 102, January Colorado Lawyer); Rogers vs. Charnes, 656 P.2d 1322 (1982); Smith vs. Colo. Department of Revenue, (Colo. App. 1982) (p. 113, January Colorado Lawyer); Schlosky vs. Mobile Premix Concrete, Inc., 656 P.2d 1321 (Colo. App. 1982); In Re Estate of Perins, 526 P.2d 313

(Colo. App. 1974). Defendant is entitled not only to its attorneys' fees and costs incurred on appeal, but also to reimbursement of the sum of $80.50 paid to Jo Ellen Jackson, for the Reporter's Transcript which forms a part of this record. The Reporter's Transcript, and Defendant's argument and authority contained in its Memorandum Brief in Support of Motion for Summary Judgment (pp. 11-18) and Reply Brief in Support of Motion for Summary Judgment (pp. 39-43), portions of which are incorporated verbatim in this Brief, are incorporated herein by reference.

CONCLUSION

Defendant requests this Court to affirm the trial court's granting of summary judgment, and to award Defendant its costs in obtaining the Reporter's Transcript of the hearing on the Motion for Summary Judgment, as well as its costs and attorneys' fees incurred in pursuing this appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE APPELLEE was deposited in the United States mail, postage prepaid, addressed to the following this 25th day of April, 1983:

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Karen A. DeWall