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Supreme Court of Texas.
HCBeck, LTD., Petitioner,
v.
Charles Rice, Respondent.
No. 06-0418.

October 18, 2007

Appearances:

David R. Weiner, Dallas, Texas, for petitioner.
Paul Boudloche, Fort Worth, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-0418, HCBeck Limited versus Charles Rice.

COURT MARSHALL: [inaudible] please the Court. Mr. Weiner will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF DAVID R. WEINER ON BEHALF OF THE PETITIONER

MR. WEINER: Mr. Chief Justice and may it please the Court. I'm David Weiner, counsel for HCBeck Limited-- here with me today is co-counsel for Beck, Mr. Peter Martin. Also, in attendance is Ms. Lynn Hughes who is the co-author of the brief for the insurance [inaudible]. I believe that this case can be described in a nutshell. The construction contract between the owner and HCBeck required that all of the subcontractors enroll in the Owner Controlled Insurance Program, which all refer to as the OCIP. The written agreement between Beck, the general contractor, and Haley-Greer, the subcontractor, incorporated all of the provisions of the construction contract and it's spelled out in particular that the insurance coverage was going to be furnished under the OCIP, and, and in addition, directed Haley-Greer as to what it needed to do to obtain the coverage under the OCIP. Haley-Greer did indeed enroll in the OCIP. It was issued an individual worker's compensation policy. That policy was paid for-- the premiums for that policy were paid for by the owner. Mr. Rice was injured on the job and

he obtained benefits under the worker's compensation policy. Under these facts, HCBeck should be considered the statutory employer or the deemed employer of Haley-Greer and its subcontractors and entitled to immunity under Section 406.123 of the labor code because it had a written agreement with the subcontractor in which it provided worker's compensation coverage to the subcontractor and its employees.

JUSTICE JOHNSON: Does that mean that if we look at an oilfield contract where this-- the contractors are required to provide worker's compensation and give a certificate to the operator, that that operator has provided worker's compensation because they've contractually required it and required proof of that [inaudible]? And if not, how does that differ from your situation?

MR. WEINER: Well, I understand that there are, that there are, that there are differences with respect to those oilfield situations -

JUSTICE JOHNSON: Then let's talk about any, any, any-- let's talk about the maintenance in a building. If you have a maintenance-- a large company that's contracted several buildings to maintain and then they do subcontracts and they require that, that subcontractor to be in a particular building contractually to provide worker's compensation for their employees and to provide a certificate to the general contractor that that has been provided.

MR. WEINER: Well, it would not, it would not be, it would not be provided under the scenario that you're describing, because -

JUSTICE JOHNSON: How does that differ from yours is what I'm wondering. You have a contractual requirement, so how does that differ from yours?

MR. WEINER: It differs because in the case before the Court today, the owner purchased the policy and paid the premium, whereas, as I understand the scenario that you're, you're describing, Justice Johnson, it would be the subcontractor who was simply required to purchase and have worker's compensation insurance for the job. In fact, the argument that Mr. Rice has made throughout these appellant proceedings is that, that taking the position that simply requiring the subcontractor to have worker's compensation insurance is sufficient to trigger the statute and the immunity under the statute, and that is not our position because the way that this mechanism was designed here, Haley-Greer, the subcontractor, did not pay the premium, it was the owner who, who, who obtained and furnished the policy. It was the owner who, as I say, paid the premium for the policy, and Haley-Greer didn't have the responsibility for, for going out and obtaining its own worker's compensation insurance and paying for the premium. Part of the mechanism here in the OCIP, was that the subcontractor, as part of the enrollment process, and in fact, the very heart of the enrollment process was to submit the information to the insurance representative of the owner with respect to the, the, the cost of its worker's compensation insurance that it would then be required to deduct from its contract price. That's exactly what happened here. So that-- they had the cost savings that was reflected in reducing its contract price with the general contractor and with the owner.

JUSTICE JOHNSON: But your position in all of this was simply a contractual requirement that the sub provide worker's comp.

MR. WEINER: Again, it's not that the sub provide the worker's comp

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JUSTICE JOHNSON: Your position was a contractual requirement.

MR. WEINER: It was a contractual requirement that the sub enroll in the Owner Controlled Insurance Program, which included the general liability insurance as well as the worker's compensation insurance, and

that's what Haley-Greer did. It enrolled in that program, and it had its worker's compensation policy purchased for it by the owner of the project, of FMR. Now the reason that we contend that the general contractor, that's Beck, is entitled to immunity under the statute, is that it was part of its subcontract with Haley-Greer, its written agreement with Haley-Greer that Haley-Greer enroll in that Owner Controlled Insurance Program. The, the courts that have, have addressed the question of the meaning of "provide," and, really, the, the, the central question in this case is whether the-- what Beck did in this case constituted providing within the meaning of the statute have held that it doesn't matter how the insurance was provided to the subcontractor. All that really matters is that there was a worker's compensation policy that was enforced, when there was.

JUSTICE BRISTER: You can see "provide" does not mean [inaudible] the sub to pay for it?

MR. WEINER: Correct, and, and in fact, that's probably the crucial, the crucial point, is that there's, there's some kind of arrangement or some kind of mechanism under which the subcontractor is relieved of having to pay for it.

JUSTICE BRISTER: Was-- the brief seemed to suggest that your client did not reduce their price to reflect-- that they want having to pay for worker's comp either.

MR. WEINER: Well, I think the court of appeals said in its opinion that "They-- that Beck did not reduce its contract price, but the, but the state of record is that it does not reflect one way or the other." However, I think that -

JUSTICE BRISTER: When Beck entered the contract, they knew they weren't going to have to pay for the insurance.

MR. WEINER: That they weren't, they weren't going to have to pay for their insurance and they weren't going to have to pay for the subcontractors' insurance because with respect to the, the owner -

JUSTICE BRISTER: I want you to infer from that, that their price was reduced.

MR. WEINER: Yes. In fact, if you, if you look and, and you can see that the-- there's a certificate in the record of the coverage for Beck as well as certificates for the coverage for the subcontractor, Haley-Greer. In order to get to that point, they had to have enrolled in the process in the Owner Controlled Insurance Program, the record simply just doffer the OCIP, that it could have terminated the OCIP at, at any time, and the answer to that, we have submitted, is that the Court of Appeals should not have been concerned with what might have happened under the OCIP, but only what actually did happen. And what actually did happen was that it furnished the Owner-- the OCIP that Haley-Greer and all the subcontractors enrolled in the OCIP that there was a policy, that Mr. Rice here obtained benefits under policy. So what might have happened is simply irrelevant to the state of the-- to the facts in, in this case. The interesting thing in a sense is, if the court were to ever to consider what might have happened had the OCIP not been in place on this job, is that the Court of Appeals clearly misread the OCIP as far as the alternative insurance provision. The Court of Appeals said that "Under the OCIP, if the owner decided not to furnish the OCIP or if it decided at some point to terminate it, that Haley-Greer would have been required to provide or to, to pay for its own worker's compensation insurance," but that's clearly not what the alternative insurance provision in the OCIP says. What it says is that "If something like that were to happen, then the general contractor, Beck, would be required to purchase the worker's compensation insurance

and that it would be at the owner's expense." So again, even though the court need not reach that alternative ground because the focus really should be on what actually did happen in this case, that if the court were, for some reason to, to address that in any way, the only conclusion that really could be drawn here, is that Haley-Greer, the subcontractor, was never going to be required to bear the expense of the worker's compensation coverage. The OCIP itself, even in saying that the OCIP might not be applicable, guaranteed that that coverage was going to be purchased at somebody else-- somebody other than the subcontractor's expense. The second ground that the -

JUSTICE HECHT: What-- before you get off that, what--why do-- why is this an owner-provided program as opposed to a general contract program?

MR. WEINER: Well, it was-- that-- there, there are, there are those two kinds of wrap-up programs, the OCIP, the Owner Controlled Insurance Program, and the CCIP, the Contractor Controlled Insurance Program. It, it appears that in the-- in one of the cases that has addressed these, these kinds of arrangements, as to ET case from the court of appeals, there was a Contractor Controlled Insurance Program that, in its structure is essentially the same. Now whether it originates with the owner or it happens to originate with the general contractor, really should make no difference in the result as far as the immunity that's extended to the general contractor.

JUSTICE HECHT: Does the owner get any immunity as-- from having an OCIP as opposed to a CCIP?

MR. WEINER: Well, there, there's no question that the, that the owner wouldn't have the immunity. In fact, that's essentially what was decided recently by the court in the Entergy Gulf State's case, the owner can, can in, in effect stand in the shoes of the general contractor, and that's a completely logical and sensible result because it's the, the owner who is procuring the, the work on the site, and that's certainly what happens in, in a project like, like this, it's the owner who initiates everything and procures the work on the site, working through the general contractor, of course. The, the second ground that-- or second line of reasoning that the court of appeals engaged in here was to say that, well, all you did-- all that Beck really did here was to require the, the subcontractor, Haley-Greer, to apply for this coverage, and we don't think that requiring them to, to apply for the coverage is sufficient to establish that they provided the coverage, and -

JUSTICE O'NEILL: Well, if the alternative insurance provision was as the court of appeals read it, I understand you agree that they misinterpreted the provision, but if, in fact, the, the contracts required the sub to go out and get its own and pay for its own insurance if the owner controlled program didn't approve the sub, then, then you wouldn't have any, any quibble with the CA opinion, right?

MR. WEINER: Well, again in, in a different circumstance, I, I, I understand that the, the argument would have to be different -

JUSTICE O'NEILL: But in that instance, did the-- in that instance, the contractor wouldn't have provided anything?

MR. WEINER: Well, he wouldn't have provided because the bottom line is that if the subcontractor had to pay for its own worker's compensation insurance, it really, in all likelihood, could not be said that "The general contractor provided it." What matters is, more than anything -

JUSTICE O'NEILL: On the cases, the cases of said payment is not so much the indicia, but I mean if, if Beck had required the subcontractor

to go out and get its own insurance, regardless of who paid for it, would that be a different-- would that change your mind?

MR. WEINER: Yes. Because-- and, and then what, what-- Mr. Rice has said is that, "that's what our-- and our position is that requiring the subcontractor to go out and get worker's compensation policy entitles the general contractor to immunity, and that's not what, what our position is." Our position is that, that Beck provided the, the insurance in this case because it had the written agreement because it specified and it required that the subcontractor obtain that insurance through the OCIP, and what is crucial, is that under that OCIP, the, the premium was paid for by someone other than the subcontractor who was going to get the coverage.

JUSTICE O'NEILL: I guess what I'm saying though is, presume, presume that the OCIP requires payment by the owner, and the sub doesn't-- applies and is not approved, and presume the OCIP then said that "The sub has got to go get its own insurance but the owner will pay for it." In that event, Beck would have done nothing to provide insurance, right? It didn't have to go out and secure an, an alternate person, nor did it pay a premium.

MR. WEINER: Well, I, I don't think that, that really is any different than a, a scenario under, under which Beck might have directly purchased the comp insurance for the subcontractor and said, "Subcontractor Haley-Greer, you have to, you have to enroll in this program." But they-- they submit their enrollment papers, and the insurance representative determines, as, as your scenario suggests, that for some reason, they're not going to cover them. So they've got to go out and secure that insurance from somebody else, but it remains the, the responsibility of Beck to pay for the premium. I think that that would be sufficient to establish providing -

JUSTICE O' NEIL: No, I'm saying the owner paid for the premium and the sub had to go out and get -

MR. WEINER: Well, again, it, it's the same thing but it, but it relates to the second argument of the, the second ground that the Court of Appeals invoked here for saying that, that Beck had not provided, and that is that all there was, was a requirement of an application. But it wasn't just an application. It was an enrollment procedure, and that's not, not going to be any different in-- the mechanism that was, that was in place here, is not any d

JUSTICE O'NEILL: It, it it would be?

MR. WEINER: Yes.

JUSTICE O'NEILL: Just-- even though you wouldn't have done anything?

MR. WEINER: Well, but I think they would have done something, which is that they would have, they would have required them to participate in the program if they could establish their eligibility which, as a practical matter, is what does happen. They do establish their eligibility.

CHIEF JUSTICE JEFFERSON: Other questions? Thank you, Counsel. The court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Boudloche will present argument for the respondent.

ORAL ARGUMENT OF PAUL BOUDLOCHE ON BEHALF OF THE RESPONDENT

MR. BOUDLOCHE: May it please the Court. Counsel, this is a contractual interpretation case. I'm not here challenging the statute, and I'm not here challenging the holdings of Williams versus [inaudible]. Simply stated, I'm not here to destroy the Texas economy as seems to be suggested by the amicus briefs. I do believe that if there is a properly constructed OCIP program that the general contractor has immunity under 406.123. My position is that this is not a properly constructed OCIP program, and that a general contractor, and in particular, HCBeck, cannot cloak themselves with immunity by simply calling a contract an OCIP program, and say that this statute should apply.

JUSTICE O'NEILL: Well, it seems to me, so much of the argument boils down to the interpretation of the alternate insurance policy.

MR. BOUDLOCHE: Yes Ma'am.

JUSTICE O'NEILL: And if your interpretation of that clause is wrong, if under that alternate insurance cause, in fact, HCBeck had to go out and get insurance if the sub wasn't approved, that the owner would then pay for, does your argument fall?

MR. BOUDLOCHE: I, I would agree with Counsel on that, but I believe that if there's a proper interpretation of that statute or, or I mean, of that provision, you would see that it is Haley-Greer, Mr. Rice's employer, actually would have to go out and purchase that policy.

JUSTICE HECHT: So you're distinguished-- the distinction in your case is the one clause that said, "If the owner cancels the worker's comp, you, the sub, have to go get it?"

MR. BOUDLOCHE: Yes, Sir, because the statute says that "There has to be a written agreement."

JUSTICE: Right.

MR. BOUDLOCHE: And if that agreement means, you know, that they are to provide the workers' compensation -

JUSTICE BRISTER: Does this have to be a written agreement to provide insurance?

MR. BOUDLOCHE: Correct, and under this -

JUSTICE BRISTER: But they did-- and insurance was provided.

MR. BOUDLOCHE: Insurance was provided. Now here my argument is, is that this is-- because of the optional nature of this program, you know, what the general contractor wants in this is to say, you know, we're, were kind of tippy-toeing into this. We can provide it, but if for any reason, we can cut out any subcontractor or any lower-tier subcontractor, you know, indiscriminately. And the basic premise of a written contract is that there's legal obligations.

JUSTICE BRISTER: But does that, does the worker's comp statute or the program put any limit on that, like a notice period or can you just, you know, drop them at two in the afternoon and so for the rest of the day they're bare, or how does it -

MR. BOUDLOCHE: The, the statute has no notice probation or no specific limitations. My argument here your Honor, is that There's an overall construction contract for period of time. Now what there saying is inside this construction contract is that we're having this also program and for period of time we're going to provide oweship to all the subcontractors. That if it any point anyone of subcontractors are, are risk expectations are come too high that we want to drop him out of the program, we can do so that next subcontractor their point has no rights, no remedies against the general contractor to say, "Wait a minute you are to provide this."

JUSTICE BRISTER: I'm trying, I'm trying to figure out why would--

an owner would do that. Said we've got somebody working on the site who's doing-- real dangerous things, so therefore, we're going to get rid of our insurance, so that when one of your guys dies, he'll sue for a bunch. Why would they-- why would they ever do that?

MR. BOUDLOCHE: Not-- well, okay, you know, first your Honor, this-- what they're going to do is, they're looking at the economies of scale, and this is what was argued in the amica briefs, the general contractor is going to take in the various subcontractors, and premiums are based upon the risks that [inaudible]-- come about by the subcontractor -

JUSTICE BRISTER: But again, a [inaudible] subcontractor, you're going to fire him, you're not going to just decide to leave him on the job, and we'll take care of any injuries ourselves. You're not going to get rid of your insurance. You're going to get rid of the sub, aren't you?

MR. BOUDLOCHE: Not necessarily. In certain, you know, construction occupations are very high, high risk, and there's going to be, you know, some, you know, incidences that may occur -

JUSTICE BRISTER: Which is why you want worker's comp insurance.

MR. BOUDLOCHE: Which is why you want worker's compensation insurance -

JUSTICE BRISTER: Actually, [inaudible] the fact that it's optional, I can't imagine the scenario where they would cancel it.

MR. BOUDLOCHE: Well, there could be any number of -

JUSTICE BRISTER: When, when would it be in their economic interest to drop the worker's comp coverage?

MR. BOUDLOCHE: When, when the premiums-- when they can shift that premium off of themselves after the general contractor to the subcontractor, and say, "subcontractor, we want to, you know, still carry comp, but you're going to pay the ...

JUSTICE BRISTER: [inaudible] if you get rid of the, the premium is always less than the lawsuit though.

MR. BOUDLOCHE: Well, -

JUSTICE BRISTER: People wouldn't get it -

JUSTICE O'NEILL: Here, it doesn't matter because the owner is going to pay the premium anyway.

MR. BOUDLOCHE: No, your Honor, I disagree with Counsel on that. The, the-- this case is, is that the premium is being paid by the owner, but is being financed by Haley-Greer because they have to cut their price for the job to be able to participate into the program. In fact, even on the same page that we have, the alternate insurance agreement they were talking about, just above that shows the final insurance cost calculations. The final calculations of what the subcontractor has to take off of his bid price to finance the premium that the owner is paying. So -

JUSTICE BRISTER: That's not, that's not illegal or anything?

MR. BOUDLOCHE: No your Honor.

JUSTICE BRISTER: That's the way it always works?

MR. BOUDLOCHE: I [inaudible] imagine, so under an OCIP program, yes. But I mean it, the-- but it still means that Haley-Greer is, is funding the, the premium.

CHIEF JUSTICE JEFFERSON: There, there-- and this may be a simplistic way to read this statute, but what's the purpose of it? If you--it seems to me that the purpose is-- the object is to make sure that the employees on the site are covered by worker's compensation insurance. And if that is done, what-- does the legislator really care whether it's than by the owner through this all separate done by the

general contractor through a direct contract between within the subcontractor [inaudible].

MR. BOUDLOCHE: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: And here, the employee received worker's comp insurance that wasn't the purpose of the legislation satisfied?

MR. BOUDLOCHE: No, your Honor.

CHIEF JUSTICE JEFFERSON: Tell me why not, so I can understand.

MR. BOUDLOCHE: Okay. Let me, let me-- okay. Here we-- in, I guess, you know, I'm sure of my age, because that's-- I came back doing [inaudible] worker's compensation, and I remember when the statute was originally passed in the, in the '80s, compensation provides for the employer a exception if he buys compensation so that an injured employee, without regard to fault, receives compensation benefits, indemnity benefits, and medical benefits. It only applies to the employer, in this case, Haley-Greer. Now, traditionally, if any third party out here that is not the employer, they're all subject to the worker's compensation-- to common law liabilities. If the employer, under worker's compensation, chooses to go without buying worker's compensation, his penalty is that he loses his common law defenses.

CHIEF JUSTICE JEFFERSON: Yes, but by--- under the statute, by providing, by providing insurance to the employee, the general contractor becomes, basically, the statutory employer.

MR. BOUDLOCHE: Okay. What he's -

CHIEF JUSTICE JEFFERSON: He's not, he's not literally, but the legislation is saying, we're going to give this general contractor immunity as if they were the employer because the employees are being protected by coverage.

MR. BOUDLOCHE: It's their-- creating a fiction that the general contractor is the employer. They're creating this fiction so that it encourages a general contractor to provide worker's compensation for some subcontractors who may not be otherwise able to get worker's compensation.

CHIEF JUSTICE JEFFERSON: [inaudible] that bring it back to my question. Why isn't that purpose satisfied here? The worker's compensation is being provided to the employee.

MR. BOUDLOCHE: Because there is a big difference between a general contractor receiving the immunity under this statute, and a real employer receiving immunity. Remember what I said, the real employer, if he doesn't go-- have worker's compensation, his penalty is that he loses his common law defenses. Here the general contractor, if he chooses not to have an OCIP program, he has no penalty. He still has his common law defenses. If this case gets remanded for some reason, and I go back-- is remanded as ordered by the Court of Appeals, I'm going to go back there and fight the defense of an independent contractor. They don't lose that defense simply because they haven't provided worker's compensation?

CHIEF JUSTICE JEFFERSON: Why not?

MR. BOUDLOCHE: So there is a distinct difference -

JUSTICE: Why wouldn't, why wouldn't they lose that immunity if they didn't provide?

MR. BOUDLOCHE: Because they're not an employer. They only become a fictitious employer under this statute if they buy the compensation. As provide the compensation under a written agreement, and that is why the statute is so specific and that it says, "You have to have a written agreement as opposed to something oral, and you have to provide worker's compensation, not just require worker's compensation." You have to go out and provide it, and what I'm saying is that provide

means if they have to provide an underwriting outlet, they have to make sure that there is that subcontractor who may not be able to get compensation elsewhere, can get compensation, that they have to, you know, actually make that provision. And the reason for that is, is if they don't do, you know, don't have those extra requirements in there, then they go back and they just have their common law defenses.

JUSTICE O'NEILL: But you don't, you don't want to subcontractor to be hanging out there?

MR. BOUDLOCHE: No Ma'am.

JUSTICE O'NEILL: And if they're not hanging there, then they're covered. I mean, then, then the general contractor is immune and the owner's immune, right? I mean, that's why I keep coming back to the alternate insurance clause, because really the question is, does this hang out the subcontractor or not in the event the owner doesn't provide the insurance?

MR. BOUDLOCHE: It, it does not do so because what they are doing is turning around and saying, and HCBeck passes through to the subcontractor, that the subcontractor and lower-tier subcontractors will be required to provide alternate insurance.

JUSTICE O'NEILL: Well, and that's, that's the question I have. The very next sentence defines what alternate insurance is. And it says, "Alternate insurance is the coverage acquired by the contract documents if OCIP does not enforce, or doesn't apply." So the coverage required by the contract documents, if you don't qualify for the OCIP program, is that HCBeck go out and get the insurance?

MR. BOUDLOCHE: I, I disagree with the Court's interpretation, and I think that this is a very fundamental issue in disagreement between the parties, and this is where it's contractual interpretation. If you follow that line of logic, then what is the purpose of the sentence above? The sentence above says that "subcontractor and lower-tier subcontractors will be required to provide alternate insurance." My interpretation is that that next sentence defines, as you say, what alternate insurance is. It is the coverage. The main contract, says that "You have to have coverage in certain limits of million dollars, you know, worker's compensation, employer's B coverage of a million dollars, general liability coverage of a million dollars, over 300 million dollars, whatever it is." What it is referring to-- is the limits, the coverage limits that are required. It doesn't say that HCBeck is going to go out and buy and pay for those policies. It's saying that the-- and that-- otherwise, you completely eliminate a whole sentence. By your interpretation or by the petitioner's interpretation of the case, saying that HCBeck is going to go out and provide it-- the policies if -

JUSTICE O'NEILL: Well, that's what the OCIP provides. The OCIP says, "The construction manager shall secure the insurance."

MR. BOUDLOCHE: Yes, and in -

JUSTICE O'NEILL: And then, and then the, the subcontract says, "Alternate insurance is the coverage required by the OCIP." And so as I can see -

MR. BOUDLOCHE: I'm not-- no, Ma'am. The, the main contract documents-- and I realize, you know, it's a real thick book and the whole record is up here. But in there, it has an OCIP program in the contract documents, and then it has a provision, I believe it begins at 11.011 or something of this nature. What it says, "Is that for any reason FMR cancels the OCIP program, then the general contractor is to go out and get the following coverages in the following limits." You know, [inaudible] on, you know, telling them what they'd have to do

would be--what would you have in a contract if you did not have an OCIP program. And then what I'm contending is that HCBeck then comes along with their subcontract and the alternate insurance provision that we have here and says, subcontractor, if they do cancel this, you know, you have to go out and get, you know, these various policies and these limits because you know, the limits are required and is specified in the main contract, you know? Otherwise, you completely eliminate that above sentence, you know, which is that the subcontractor and the lower-tier subcontractors will be required to provide the alternate insurance.

JUSTICE: Do you agree with Court of Appeals that it was not necessary, that HCBeck actually paid for the coverage?

MR. BOUDLOCHE: That, that is the holding of Williams versus [inaudible].

JUSTICE HECHT: You started out by saying you agreed with that?

JUSTICE: Provide-- how do you provide unless somebody pays?

MR. BOUDLOCHE: The-- my, my argument with regards to how its provided is that to get insurance you have to have somebody that's willing to underwrite it. You know, HCBeck and FMR, they're not going to, you know, they're not going to pay to-- undertake the risk. What they're going to do is find somebody to undertake the risk. What I'm saying is that you provide it when you provide a, you know, an underwriting outlet. Now the limit of what is provide is, of course, going to be a subject of -

JUSTICE JOHNSON: Well, what if you have an underwriting outlet and nobody pays the premium? Does it provide it?

MR. BOUDLOCHE: No. But some, I mean-- but that's subject to, you know the contractual provisions. When a -

JUSTICE JOHNSON: Well, well I, I'm [inaudible]. These employees are not going to be covered unless someone pays the comp premium.

MR. BOUDLOCHE: Sure. And, and, and the -

JUSTICE JOHNSON: Outright payment from providing this, I mean -

MR. BOUDLOCHE: What I'm saying is that the, the contract could say that the subcontractors' paying-- is to pay the premium, that we will provide you an-- a policy, but we want you to pay the premium, or you know, it can say, you cut down your price and your, your job cost so that we'll, you know, essentially [inaudible] through us, and we'll be sure that the premium is, is paid, or they can -

JUSTICE JOHNSON: [inaudible] promising to pay the premium. Sometimes people don't do what they promise.

MR. BOUDLOCHE: Correct.

JUSTICE JOHNSON: So how do you, how do you get the employees covered unless somebody actually pays? You're saying that they don't have to pay to provide comp for those employees?

MR. BOUDLOCHE: No, your Honor, because what I'm-- the-- under a rigor contract, construction contract, what you're going to have is, you're going to have the general contractor telling the subcontractor that you must have worker's compensation, and the subcontractor then goes out and finds an underwriter, an insurance company that's going to write it, and then what he's going to do, is that he's going to, you know, that subcontractor's going to pay the premium.

JUSTICE JOHNSON: Okay, so it's provided when it's paid for. That's what I thought Justice Hecht was asking about. The Court of Appeals doesn't-- I thought you said that "You're not-- your position is not that it has to be paid for in order to be provided."

MR. BOUDLOCHE: No, no, your Honor, I'm sorry. The, the Williams versus [inaudible] case, they-- the employee raised the argument that

the premium was being paid for by the-- his direct employer, not the general contractor. And in Williams versus [inaudible] they said, "it doesn't matter who pays the premium, you know, what is-- the real issue is whether or not compensation was provided by the general contractor, and that is what I was responding to Justice Hecht about"

JUSTICE HECHT: And you agree with that?

JUSTICE HECHT: At least for purposes of -

MR. BOUDLOCHE: For purposes of today, yes, your Honor. That, that's, that's not the issue that I, I'm raising at this point.

JUSTICE: But your argument that it's not provided if it can be cancelled, if it's optional, doesn't that add something to the statute? It just says, "You have to have a written agreement, which was provided." It doesn't say it's a non-cancelable written agreement, and here we had written agreement and it was provided. So which, which part of provide says and "It has to be something that you can't cancel it."

MR. BOUDLOCHE: It's not, it's not in the provide part. It's in the written agreement part. Because a written agreement is a contract, and a contract has enforceable obligations.

JUSTICE BRISTER: Well, but if you hire a guy to mow your lawn, you can do that in writing. But that doesn't mean that you can't cancel it tomorrow.

MR. BOUDLOCHE: Then-- that is correct, your Honor.

JUSTICE BRISTER: So how come this kind of written agreement-- how do we know this kind of written agreement has to be one you can't cancel?

MR. BOUDLOCHE: What I'm saying is that you're just part of an overall construction contract. An overall construction contract goes from, you know, beginning to end, and what I'm saying is that during the period of that whole contract, if you're having an OCIP program, then you have to agree to, you know, provide it during that whole program. Now if the whole contract, the whole construction contract, you know, craters, and they cancel the whole program-- the whole contract, then, then you cancel it at that point.

JUSTICE BRISTER: Then wouldn't the statute have said, "You have to have a written agreement agreeing to provide for the whole program?"

MR. BOUDLOCHE: My interpretation of the statute is that essentially what they're saying otherwise -

JUSTICE BRISTER: [inaudible] statute, statute said.

MR. BOUDLOCHE: Otherwise it becomes illusory, Judge. They, you know, they can, they could bounce it out, you know, the -

JUSTICE BRISTER: Well, [inaudible] it performs an illusory contract is still a contract, right? Illusory contract's just a perspective, once everybody performs -

MR. BOUDLOCHE: And, and, and since what you're trying to do is provide compensation benefits to, or prospectively to the employees of subcontractors, if at any point during the overall construction project, you know, the owner, for whatever reason, expense or otherwise, says, you know, "I'm not going to afford you anymore," then, it then shifts it back to the subcontractor, and what is the penalty for the general contractor if he does that? Nothing. He has his otherwise common law defenses. Now if the subcontractor, the real employer does that, he then loses his common law defenses -

JUSTICE GREEN: Okay, let me, very quickly note [inaudible], if, if in fact the owner says, well I want the subcontractor to pay these comp costs now, pay the premium, does the, does the sub get to add that back in to its-- under the agreement into the contract?

MR. BOUDLOCHE: I would-- I'm, I'm hesitant to answer that, Judge,

as-- because I haven't gone back and analyzed that part of it. They-- to be in the program, they did have to reduce their, their price.

JUSTICE GREEN: So it makes sense that if you have to pay for it, then you should be able to-- whether the agreement covers that or not, you don't know.

MR. BOUDLOCHE: It, it makes sense, but I, I can't-- I don't want to represent something to the Court.

JUSTICE O'NEILL: And just a quick question -

MR. BOUDLOCHE: Yes Ma'am.

JUSTICE O'NEILL: Does Entergy versus Summers have any application here?

MR. BOUDLOCHE: No Ma'am. And may -

JUSTICE O'NEILL: I mean does that -

MR. BOUDLOCHE: It, it, it has no effect to the issues that I am bringing before this Court. I realize it -

JUSTICE O'NEILL: You're saying no because it hadn't been preserved? Hadn't been -

MR. BOUDLOCHE: Well, what I'm saying is that HCBeck throughout, and even today, is saying that they are the general contractor, and that FMR was the owner. Unlike in Entergy in which Entergy [inaudible] then says, "Hey, we're the general contractor."

JUSTICE O'NEILL: That's what I'm saying. It's a preservation point really, because they haven't argued that they are one and the same here.

MR. BOUDLOCHE: Yes, your Honor. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF DAVID R. WEINER ON BEHALF OF PETITIONER

MR. WEINER: What I understand from both of the-- what Mr. Rice has said, and as adopted by the court of appeals is-- and on both of the, the, the grounds on which the Court of Appeals decided the case, that, not only did there have to be a written agreement between the general contractor and the subcontractor under which the general provided the worker's compensation insurance to the subcontractor, but as Mr. Rice inserted at, at any number of points in the briefing here, under which the, the general contractor obligated itself to provide the insurance. It's a crucial addition to the language of the statute that is not in the statute. The Court of Appeals seem to be persuaded by it, because what it seems to indicated is that there had to be an unconditional and guaranteed provision of this worker's compensation insurance to the subcontractor. That is not what the statute says.

JUSTICE O'NEILL: Well, but you would think the statute contemplates that for an employer to get this benefit of being a deemed employer, they have to have done something real. They have to have given something for that in terms of providing worker's comp insurance. And if the alternate insurance clause allows Beck to do nothing if, if OCIP doesn't approve them for the program, then that doesn't really serve the purpose of the statute.

MR. WEINER: I disagree, your Honor, that the-- first of all, that the alternative insurance is crucial to the, the, the court's decision in this case. But in, but in fact, of course, and even in the way that, that, that Mr. Rice is construing that alternative insurance provision, of course, we say that's not the proper construction of the alternative

insurance provision, and it's page 641 of the, of the clerk's record, Paragraph 11.2 of the OCIP itself, which lays out what will happen in the event that the OCIP is, is excluded from the construction contract, and it says, quite clearly, quite explicitly, that the construction manager, and that would be-- it has to go out in purchase -

JUSTICE O'NEILL: I agree. I mean, I understand you all disagree over the construction of the clause. If, if your opposing counsel's construction were the proper one, if the alternate insurance clause in the subcontract says, "In the event of a OCIP termination subcontractor, and lower-tier subcontractors will be required to provide alternate insurance, and if that did require the sub to go out and get alternate insurance, not HCBeck, then what is Beck providing here?" It's no providing a premium. It's not providing insurance.

MR. WEINER: I think that, that would be the state of facts that would be presented upon the filing of the lawsuit, and it could very well be that Beck would not be entitled in that, in that circumstance to the statutory immunity because it had, as a factual matter, not provided it. But the factual matter in this case, in the state of the record, is that it was provided. Every contract, every contract can be cancelled. This is no different than any other contract with respect to the provision of worker's compensation insurance. So there's, again, the alternative insurance provision is, is not really what ought to be focused on because it's just what if circumstance, but what really counts, what really should matter, of course, is what, what did happen.

JUSTICE O'NEILL: So what I think I hear you saying is, that if you did look at the contracts and you didn't look at what actually happened, if you look at the obligations under the contracts, and if the alternate insurance provision is interpreted as opposing counsel says, "It should be, then you'd concede in that situation that there would be no provision by HCBeck." That's what I think I heard you say.

MR. WEINER: Because I think that, that, that Rice would be coming to court and saying that we're entitled to-- that they're entitled to sue HCBeck, because-- and they're not entitled to statutory minority, because they want out and obtain the policy and they paid the premium. Now that's that the-- to look back at that point whereas to look back that to govern the case is what was enforced at the time.

JUSTICE O'NEILL: I understand. Now let me ask you a quick-- do you agree that Entergy versus Summers doesn't apply here?

MR. WEINER: Actually, as the Associated General Contractors' amicus brief points out that Entergy, in conjunction with the Court of Appeals decision and ET, could actually provide a second look [inaudible] -

JUSTICE O'NEILL: I, I understand that, but no argument has been made here that the -

MR. WEINER: No, no. Because we, we, we've-- there, there's a different configuration [inaudible]-

JUSTICE O'NEILL: Let me finish my question. There's no argument here that the owner acted as its own general contractor?

MR. WEINER: No, there is not.

JUSTICE O'NEILL: Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted, and the Court will take another brief recess.

COURT MARSHALL: All rise.

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