SUBJECT: Defining general contractor and subcontractor for workers compensation

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 9 ayes — Deshotel, Elkins, Christian, England, Gattis, Giddings, Orr, Quintanilla, S. Turner

0 nays

2 absent — Keffer, S. Miller

WITNESSES: For — Steve Bresnen, Nelson Roach, Texas Trial Lawyers Association; Jose Herrera; David Senko; Alan Tysinger; (*Registered, but did not testify*: Currie Hallford, Dallas L. Willis, TPLC-CWA; Hortencia Herrera; Rick Levy, Texas AFL-CIO; Craig McDonald, Texans for Public Justice)

Against — Mike Hull, Richard Trabulsi, Texans for Lawsuit Reform; Shannon Ratliff, Texas Civil Justice League; (*Registered, but did not testify*: Luke Bellsnyder, Texas Association of Manufacturers; Michael Chatron, AGC Texas Building Branch; Jayme Cox, Shell Oil; Cathy DeWitt, Texas Association of Business; Jon Fisher, Associated Builders and Contractors of Texas; Steve Hazlewood, Dow Chemical Company; Ron Hinkle. American Insurance Association; Julie Klumpyan, Valero Energy Corporation; Mike Meroney, Huntsman Corporation; David Mintz, Texas Apartment Association; Will Newton, The National Federation of Independent Business - Texas; Hector Rivero, Texas Chemical Council; Ben Sebree, Texas Oil and Gas Association; Donna Warndof, TIPRO-Texas Independent Producers and Royalty Owners Association)

BACKGROUND: Workers' compensation is a no-fault, state-supervised system established under the Workers' Compensation Act (Labor Code, Title 5, subtitle A) to pay the medical expenses of employees who are injured on the job and to compensate them for lost earnings. Texas does not require employers to carry workers' compensation insurance. However, employers who carry workers' compensation insurance get protection from unlimited legal liability for employees' on-the-job injuries, and workers receive timely compensation without having to sue their employers.

Labor Code, sec. 406.121 (1) defines a "general contractor" as a person who undertakes to procure the performance of work or a service, either separately or through the use of subcontractors. The term includes a principal contractor, original contractor, prime contractor, or an analogous term, but excludes a motor carrier that provides transportation service through an owner operator. Labor Code, sec. 406.121 (5) defines a subcontractor as a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform.

On August 31, 2007, the Texas Supreme Court ruled in *Entergy Gulf States v. Summers*, (Tex. 2007) that Labor Code, secs. 406.121 (1) and (5) definition of general contactor and subcontractor did not forbid a premises owner from also being a general contractor entitled to the exclusive-remedy defense provided by the Workers' Compensation Act. The Supreme Court held a rehearing on the case in October 2008 and reaffirmed the decision on April 3, 2009.

DIGEST:

HB 1657 would amend Labor Code, secs. 406.121 (1) and (5) to provide that general contractor would be a person who undertook to procure the performance of work or services for the benefit of another, either separately or through the use of subcontractors.

A subcontractor would be a person who contracted with a general contractor to perform all or any part of the work or services that the general contractor had contracted with another party to perform.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009.

SUPPORTERS SAY:

HB 1657 would authoritatively establish that a premises owner could not be considered a contractor for the purposes of workers compensation and would reassert that the Legislature, not the Texas Supreme Court, should make this determination. If, as the Texas Supreme Court claims, premises owners already have a well established right in law to be considered statutory employers, those wanting to put that policy into statute would not have made numerous failed attempts pass bills to define premises owners as such.

HB 1657 would help restore the explicit bargain between workers and employers in which workers forego their right to sue for damages in exchange for limited payment of their medical bills and replacement of lost wages. The *Entergy* decision effectively negated this bargain and granted immunity to the premise owners without the responsibility to protect injured workers. Premises owners should not have a blanket workers' compensation exemption as general contractors. As a matter of practice, premises owners do not have an ongoing relationship with employees of contractors on construction and repair projects on their property, nor do they actively supervise the work. Owners of oil refineries or chemical plants concentrate on the processes for making their products, not on incidental construction or repair projects.

Premises owners already enjoy significant protections from liability suits from independent contractors through Civil Practices and Remedies Code, ch. 95. Essentially, any injured employee of an independent contractor has to prove that a premises owner had control over the manner in which the work was performed and had actual knowledge of the unsafe conditions and failed to adequately warn of the danger. The tort reform group's own study on the low number of workers who prevail in such cases proves how high a barrier exists on such claims. That report also notes that only 2 percent of Texas businesses would be liable for such actions, but cannot quantify the amount of possible damages. Still, allowing the *Entergy* standard to stand would make the possibility of recovery from a negligent premises owner even more unlikely.

HB 1657 would provide incentives for premises owners to maintain a safe workplace and to prevent accidents from happening in the first place. Allowing premises owners to claim what effectively could be a limited or meaningless level of protection for workers could lead to their skimping on safety programs or measures to save money on insurance premiums. The bill would restore the possibility of a premises owner being sued for a catastrophic event, such as the BP Refinery explosion in Texas City in 2005 that killed 15 contract workers and injured hundreds of others, and would encourage them to improve safety. In the BP plant case, BP as the premises owner had total control of the work site and extensive knowledge of the defects and safety issues, yet ignored warnings from its own employees and consultants.

The bill would provide clarity to the courts that Texas law applies to these types of cases. Entergy Gulf States does business in both Texas and

Louisiana, and their contracts include provisions asserting that premises owners have protections as general contractors — something allowed in Louisiana's statutes based on the Napoleonic code. The Texas Supreme Court should not have applied the Louisiana standard, and HB 1657 simply would restore what had been longstanding Texas law.

OPPONENTS SAY:

The Legislature should take the opportunity presented by the *Entergy* decision to reevaluate the public policy implications involved in recognizing third-party immunity in the workers' compensation system. However, legislators should reject HB 1657 and should expand the statutory employer doctrine to bar all third-party lawsuits for on-the-job injuries if the injured worker was covered by workers' compensation insurance.

Permitting premise owners to be considered as general contractors in providing workers compensation is good for workers, business, and consumers. Premises owners could provide both protections for workers and safety programs through owner-controlled insurance programs (OCIP), in which the owner of a construction project designates an insurance broker to secure insurance policies for the entire project, covering each general contractor and subcontractor. The Comptroller's 2003 Good Government recommendation 39 noted that OCIPS could result in savings of between 0.5 and 4 percent of construction costs for state projects alone.

HB 1657 would be contrary to what has become actual employment practices in Texas. When Texas originally enacted workers' compensation in 1913, workplace relationships were usually direct between employers and employees. During the past century, job sites have grown more complex, with multiple tiers of contractors and subcontractors. Texas law accommodates this reality by conferring immunity against tort lawsuits to a general contractor and to statutory employees of a general contractor when the general contractor has agreed in writing with his subcontractors to provide workers' compensation insurance. The *Entergy* decision only clarified this existing status of premises owners as "statutory employers."

No employers — whether they participate in workers' compensation or opt out as nonsubscribers as allowed by Texas law — would deliberately put any their own employees or those of a contractor or subcontractor at risk. They provide safety programs both to contain the high costs of insurance coverage and to meet their own moral obligations.

HB 1657 could raise the cost of doing business in Texas and discourage economic development in the state. A study by the Stradian Group commissioned by Texans for Lawsuit Reform shows that the associated costs of third-party litigation in workers' compensation cases exceed $300 million annually. Those expenses would not be paid just by the chemical plant, but would be passed along in turn by the tire store and the beauty shop that sell the products to consumers. Few workers benefit from third-party litigation in workers' compensation cases. The Stradian Group report found that 187,000 compensable injuries occurred in Texas between 2000 and 2003, but only 397 plaintiffs, or fewer than 100 a year, collected more benefits than provided by workers' compensation insurance.

OTHER OPPONENTS SAY:

The Legislature should address the lack of sufficient compensation for those workers with catastrophic injuries, a significant contributor to third-party litigation in workers compensation cases. If these severely injured workers would receive fair and adequate compensation, they would have less incentive to sue premise owners.

NOTES:

A similar bill, SB 2063 by Duncan, has been referred to the Senate State Affairs Committee.