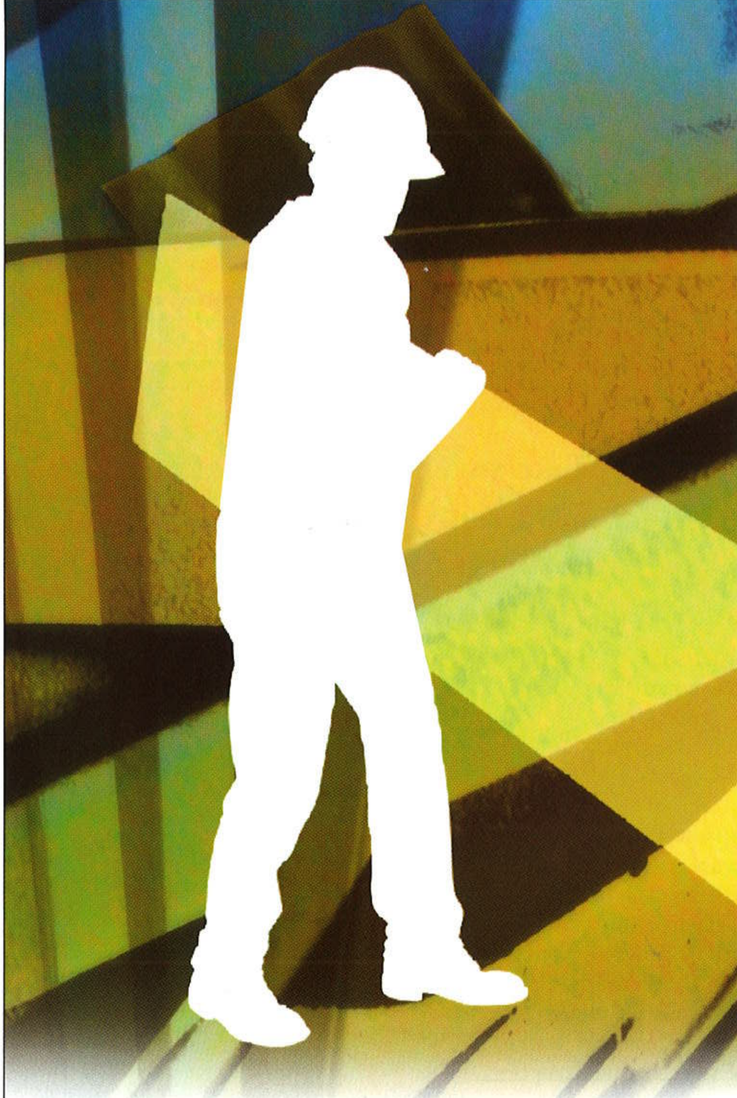

By G. Grant Dixon III*

Decisions from the Illinois Appellate Court have varied about how much control general contractors must exercise over subcontractors to make the general liable for injuries to the sub's workers. This article reviews the cases interpreting Section 414 of the Restatement (Second) of Torts and proposes an alternative analysis.

General Contractors' Liability for Injury to Subcontractors' Workers: A Confusing Construct

Since the repeal of the Structural Work Act in 1994, employees of subcontractors in Illinois have sought compensation from general contractors for construction injuries by pleading Section 414 of the Restatement (Second) of Torts. The section reads as follows:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.[1]

Based on this language, subcontractors' workers have sued general contractors and other employers for workplace injuries on the theory that the general contractor "retains control" over the work. However, Comment (c) to section 414 says, among other things, that the "employer must have maintained some degree of control" over how the work was done. (See sidebar on page 250 for full text.) According to Comment (c), "[i]t is not enough that he

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* The author would like to thank Nathan T. Ewing for his help with this article.

1. Restatement (Second) of Torts, § 414 (1965). (Hereinafter "Restatement (Second) § 414.")

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has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations."

Decisions from the Illinois Appellate Court have failed to clearly establish what measure of control general contractors and other employers must exercise over subcontractors to make the general liable for injuries to the sub's workers.

This article will review leading Illinois supreme and appellate court decisions interpreting section 414 and propose a two-part test for applying the doctrine in future cases.

The Illinois Supreme Court: *Larson v Commonwealth Edison Co*

Section 414 of the Second Restatement of Torts was first adopted in Illinois by our supreme court in *Larson v Commonwealth Edison Co.*[2] In that case, defendant Commonwealth Edison was in the process of remodeling one of its electric generating plants. It entered into contracts with numerous contractors, each of which was to perform specific work. Under the terms of those contracts, all work was to be performed "under the general supervision and to the satisfaction of owner's" construction department.[3] The plaintiff was injured when a scaffolding built by his employer, a subcontractor, broke, causing him to fall.

He sued, contending that the owner was "in charge of" the work for the purposes of the Structural Work Act.[4] After losing at trial, he appealed, arguing that the trial court erred in its instructions to the jury.

The supreme court's analysis of control ("in charge of," in Structural Work Act terms) examined the common law. The court stated that "[e]ven at common law retention of the *right to control the work* is sufficient to subject one to duty and tort responsibility...."[5] The high court used this common law principal to demonstrate that the Structural Work Act – a law intended to broaden contractor responsibility – could not be more limited than the common law. Thus, because the right to control is in itself sufficient to establish liability under section 414, Com Ed's supervision in *Larson* was more than enough to establish liability.

Our supreme court has not mentioned Restatement (Second) Section 414 since. Many Illinois appellate court cases, however, have. The courts are divided on the issue of how much control the general contractor must exercise over the workplace to be held responsible for injuries to a subcontractor's workers.

Appellate cases finding sufficient control

The following cases are among those in which courts found that the employer exercised sufficient control over the subcontractor to subject itself to liability.

Moss v Rowe Construction Co. In *Moss*,[6] the plaintiff was guiding a large load being lifted by a crane when the crane's boom struck and killed him. At the time of his death, he was being supervised by his employer, a subcontractor to the general contractor. The general contractor had no representatives on site at the time of the injury.

The fourth district appellate court examined the contract between the general contractor and the plaintiff's employer. The contract at issue in *Moss* revealed that the general contractor agreed to assume the duty of control over worker safety. The subcontracts mandated that the subcontractor abide by those terms as well.

The testimony in the case did not significantly contradict that language. Depositions of several witnesses indicated that the general contractor had the authority to direct workers, stop the work, and select equipment, though the record revealed that the general contractor never exercised that control. Because the general contractor had the right of control under the terms of the contract, the trial court's summary disposition in the general contractor's favor was reversed.

McConnell v Freeman United Coal Co. In *McConnell*,[7] the fifth district appellate court considered whether a landowner could be liable for an equipment operator's injuries while he was working on the landowner's job site. The plaintiff alleged that the landowner owed him a duty for the contractor's conduct on the job site under Restatement (Second) Section 414. The defendant alleged that because they were on the job site only to be sure specifications were adhered to, it had no control and was therefore not liable.

In reversing the lower court's granting of summary judgment, the court held that it was "not clear what effect defendant's employees' communications with [plaintiff's] supervisors carried....Defendant's entitlement to summary judgment was not clear and free from doubt, and its motion should have been denied."[8]

Cases stand at opposite ends of the spectrum, leaving plaintiffs in the fourth appellate district with a remedy and those in the first appellate district without.

Fancher v Central Illinois Public Service Co. In *Fancher*,[9] the surviving spouse of a worker killed when ash from a cleaning project fell on him sued the owner, asserting liability under Restatement (Second) Section 414. The defendant contended that because the plaintiff was an employee of an independent contractor, the defendant owed no duty of care.

Reversing a dismissal at the trial court level, the fifth district appellate court noted that the defendant had given instructions on what and how the work was to be done. It held the defendant had retained sufficient control – by the simple giving of instructions – to be liable for plaintiff's injuries.

Bokodi v Foster Wheeler Robbins, Inc. In *Bokodi*,[10] the plaintiff was injured while working on a job site using a manual lift. In the contracts for the job, the general contractor retained authority to stop the work of any subcontractor at any time if it observed safety hazards that posed an immediate threat to life or limb. The general contractor was also responsible for scheduling the work and had a safety program and safety person

2. 33 Ill 2d 316, 211 NE2d 247 (1965).
3. Id at 319, 211 NE2d at 249.
4. Id at 324, 211 NE2d at 252.
5. Id at 325, 211 NE2d at 252 (emphasis added, citations omitted).
6. 344 Ill App 3d 772, 801 NE2d 612 (4th D 2003).
7. 198 Ill App 3d 322, 555 NE2d 993 (5th D 1990).
8. Id at 328, 555 NE2d at 997 (citation omitted).
9. 279 Ill App 3d 530, 664 NE2d 692 (5th D 1996).
10. 312 Ill App 3d 1051, 728 NE2d 726 (1st D 2000).