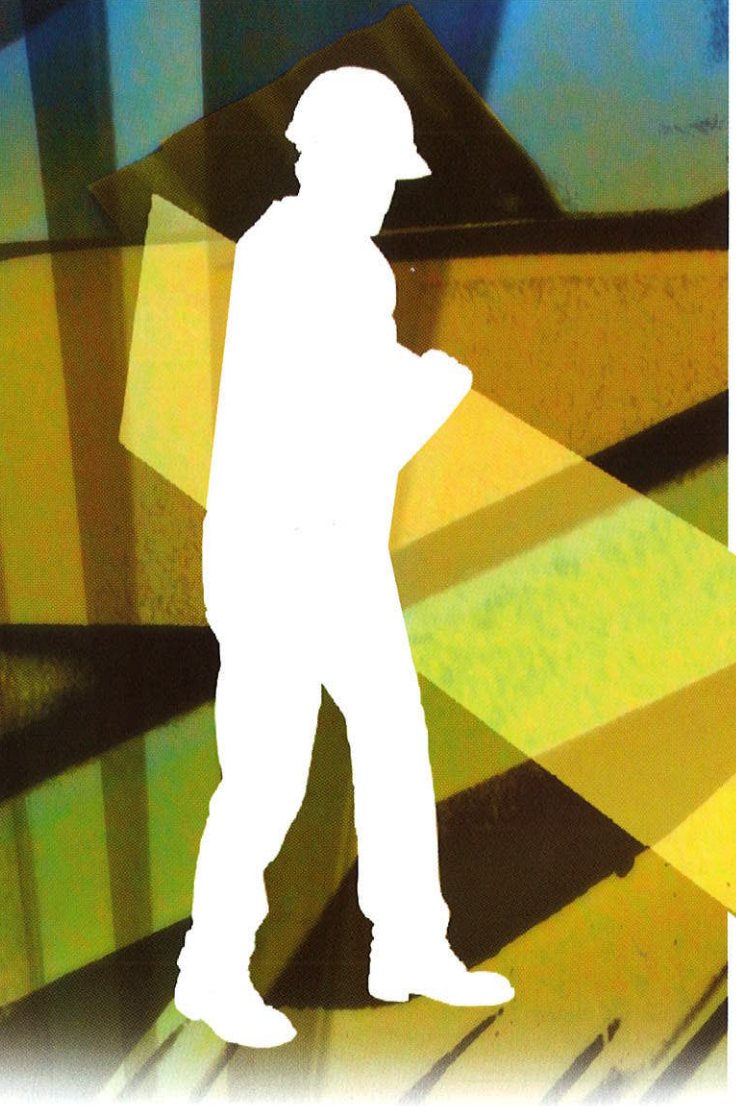

By G. Grant Dixon III*

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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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).

for the job. On these facts, the first district appellate court reversed the grant of summary judgment.[11]

Brooks v Midwest Grain Products of Illinois, Inc. More recently, in *Brooks*,[12] an ironworker fell and was injured while working on a suspended scaffolding. He sued the owner of the property, contending that because the defendant retained control over the job site under Restatement (Second) Section 414, it should be liable. The trial court granted summary judgment to the defendant.

On review, the appellate court considered the question of control. It acknowledged that the defendant required a permit before subcontractor work could commence. The defendant also had a representative on site "to answer a question as to how the work was to be performed."[13] The third district appellate court went on to hold that the defendant had retained sufficient control to deny summary judgment, based almost solely on the presence of a single representative on site. The court also emphasized that because of the representative's presence it was reasonable to infer that the plaintiff was not able to perform his work until he received confirmation from the representative.

Moorehead v Mustang Construction Co. Finally, in *Moorehead*,[14] the plaintiff, a subcontractor employee, was injured when he fell from a ladder onto a concrete floor. The general contractor was granted summary judgment at the trial court, arguing that the plaintiff's employer, not the general contractor, was responsible for the safety of its workers.

After noting the above-mentioned precepts, the third district appellate court reversed the summary disposition. The court emphasized that the general contractor was required by contract to "be fully and solely responsible for the jobsite safety."[15] The additional safety responsibility of the employer does not replace that duty, the court found.

Appellate cases finding insufficient control

Other cases, however, have determined there was not sufficient evidence of control to create general contractor liability.

Fris v Personal Products Co. In *Fris*,[16] the court found no control in spite of contractual language nearly identical to that in the supreme court's *Larson* case.

Restatement (Second) of Torts, Section 414

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.

Comment:

a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he 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. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

11. Id at 1064, 728 NE2d at 736. A case cited with favor by the *Bokodi* court was *Pasko v Commonwealth Edison Co*, 14 Ill App 3d 481, 302 NE2d 642 (1st D 1973). In *Pasko*, Commonwealth Edison hired the plaintiff's employer to install a series of electrical poles. The plaintiff was injured when a hole dug for one of the poles caved in on top of him. The first district appellate court began its review by looking at the contract between the owner, Commonwealth Edison, and the subcontractor-employer of plaintiff. That contract required the subcontractor to work "in a proper, safe and secure manner with the utmost care...." Id at 483-84, 302 NE2d at 645. It also granted the owner the right to stop work "whenever the Work interferes or threatens to interfere with the operation of the Owner's equipment until such interference is eliminated." Id at 484, 302 NE2d at 645. Commonwealth Edison contended it merely inspected the site and was not responsible for providing a safe workplace.

In affirming the liability finding by the jury, the court noted that the jury could have found that if Commonwealth Edison failed to supervise the jobsite safety it was responsible or that Commonwealth Edison failed to inspect the jobsite appropriately after work was under way. Thus, the jury verdict was affirmed.

Several other cases have held a duty under Restatement (Second) § 414 terms even though the Structural Work Act had not yet been repealed. See *Haberer v Village of Sauget*, 158 Ill App 3d 313, 511 NE2d 805 (5th D 1987); *Tsourmas v Dimeff*, 161 Ill App 3d 897, 515 NE2d 743 (1st D 1987); *Weber v Northern Illinois Gas Co*, 10 Ill App 3d 625, 295 NE2d 41 (1st D 1973).

12. 311 Ill App 3d 871, 726 NE2d 153 (3d D 2000).

13. Id at 873, 726 NE2d at 154.

14. 354 Ill App 3d 456, 821 NE2d 358 (3d D 2004).

15. Id at 457, 821 NE2d at 359.

16. 255 Ill App 3d 916, 627 NE2d 1265 (3d D 1994).

The plaintiff in *Fris* injured himself while trying to pick up a pallet at a jobsite. The defendant retained the right to inspect the work and order changes to the specifications and plans. It also ordered that safety rules and regulations be followed and that the work be done in a safe manner. However, the subcontractor was free to perform its work activities as it saw fit.

The plaintiff prevailed at trial, but the third district appellate court reversed. The reviewing court cited Comment (c) to Section 414 of the Restatement (Second) and held that, though the defendant had a right of control, "this general authority cannot be viewed as creating such a right of supervision as to have prevented [the independent contractor] from doing routine work in its own way."[17]

Rangel v Brookhaven Constructors, Inc. In *Rangel*,[18] the first district appellate court stated that the mere reservation of right of supervision over Mr. Rangel's employer, a subcontractor to the defendant, was a general right and thus did not create, directly or indirectly, a right of direction over the plaintiff's work.

Shaughnessy, Moss, and Martens. The first and fourth appellate districts recently engaged in a rare public point-counterpoint over the proper interpretation of Restatement (Second) Section 414.

The first case in the trilogy was *Shaughnessy v Skender Construction Co*[19] from the first district. There, the plaintiff was injured while working as an employee of a sub-contractor's sub-contractor. The general contractor and subcontractor, neither of which contracted with the plaintiff's employer, moved for summary judgment contending neither retained control over the plaintiff's work and, therefore, were not responsible under Restatement (Second) Section 414. The first district found there was not enough control over the plaintiff's activities for liability to be imposed on the general and sub-contractor, in spite of contract language giving the general contractor broad on-the-job safety responsibilities.

The fourth district questioned the *Shaughnessy* decision in *Moss*.[20] The *Moss* court acknowledged *Shaughnessy* but said it could not ignore the contractual terms without making contractual obligations for safety a "meaningless nullity."[21]

The final case in the trilogy was the first district's *Martens v MCL Construction Corp.*[22] There, MCL served as the manager for the construction of several condominiums. The plaintiff worked for a subcontractor to a steel contractor hired by MCL. He was injured when he fell from a steel beam during the construction.

The contract gave MCL control "over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters."[23] MCL was responsible for safety and obliged to designate a safety person on site to prevent accidents, and it required all contractors to follow all safety rules and regulations. The MCL president, however, testified that MCL did not supervise anyone other than their own employees and did not perform any construction work but, rather, hired contractors who were in charge of how they performed their own work. The trial court found for MCL.

The first district affirmed. The court acknowledged the difficulty of determining who is in control. It also noted that the general contractor is liable for his failure to exercise supervisory control if he does so without reasonable care. In this case, the court focused on the opportunity of MCL to control the activities of the subcontractors. The court found that although MCL required safety procedures to be followed by all contractors on the job site, that requirement did not constitute sufficient control over job-site safety to impose liability.

The court also took the opportunity to explain its decision in *Shaughnessy* and distinguish *Moss*. The court noted that nothing in the *Shaughnessy* record indicated that the defendant failed to fulfill its contractual obligation to maintain a safety program. And, the court explained, the subcontractor's foreman had instructed the plaintiff, not the defendants' supervisory staff. Thus, the court found *Shaughnessy* and *Martens* were properly decided.[24]

A proposed two-part test

Cases like *Moss* and *Martens* 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. The issue is ripe for resolution by the Illinois Supreme Court.

Any approach to Restatement (Second) Section 414 cases must consider the contract, worksite activities, documents, contracts, testimony, and related information.[25] All must be scrutinized in light of long-established contract and construction law. The following two-part review procedure considers these factors.

The first step in any analysis under the Restatement must be examination of the contract, which is the "basis of the bargain" among the parties.

First, examine the contract. The first step in any analysis under the Restatement must be examination of the contract, which is the "basis of the bargain" among the parties. The contract almost always spells out the duties and responsibilities of the parties and dictates who has responsibility for what jobs. And nearly every modern construction contract specifies which party has responsibility for job-site safety.

Construction contracts have been given short shrift by some courts. Even when the contract gives a defendant explicit responsibility for jobsite safety, some courts have found no duty for safety on the job.[26] Note, however, that the

(Continued on page 261)

17. Id at 924, 627 NE2d at 1270.
18. 307 Ill App 3d 835, 719 NE2d 174 (1st D 1999).
19. 342 Ill App 3d 730, 794 NE2d 937 (1st D 2003).
20. *Moss* at 777, 801 NE2d at 615.
21. Id.
22. 347 Ill App 3d 303, 807 NE2d 480 (1st D 2004).
23. Id at 307, 807 NE2d at 483.
24. Another case with a similar holding is *Ross v Dae Julie, Inc*, 341 Ill App 3d 1065, 793 NE2d 68 (1st D 2003). Most recently, the first district decided *Clifford v Wharton Business Group LLC*, 353 Ill App 3d 34, 817 NE2d 1207 (1st D 2004). In dicta, the court did not find enough evidence of control to merit a finding of duty. However, the issue was waived for the purposes of appeal.
25. In nearly every recent case, the question of a contractor's duty is tested by summary judgment. See, e.g., *Raffen v International Contractors, Inc*, 349 Ill App 3d 229, 811 NE2d 229 (2d D 2004). Cases from other jurisdictions comport with this analysis.
26. It seems incongruent to this author to suggest that although the contract requires a contractor to be responsible for on-the-job safety, when someone is hurt because of safety rule violations, that liability should not inure to the contracting party in charge of safety.

Provide privacy and security. For obvious reasons, judges and lawyers must be careful about how they distribute jurors' addresses, phone numbers, and other personal data. Jurors are also made uncomfortable by invasive questioning during voir dire and public disclosure of private matters. Lawyers should only do such probing if necessary, and the court must closely monitor the voir dire examination and protect the juror where appropriate. At a minimum, questioning on private matters should occur outside the presence of other jurors and the public.

In appropriate cases, the court can even prohibit public disclosure of jurors' names (705 ILCS 315/1). Court security personnel should help jurors in and out of court and to their vehicles if the circumstances warrant.

Help jurors comprehend, remember, and process information. Imagine being told you've been selected to make a critical decision that will affect another person's reputation, property, and liberty. In the next breath, you're told to be totally passive until the moment of decision. You may not ask questions of witnesses, attorneys, or third parties; you may not use information other than that presented in court (whether it is presented well or not); you will not be told specifically what's at issue until after all the evidence is in and just before you must decide. Oh, and you must reach a unanimous decision with 11 other people but none of you can discuss the case or process testimony until just before the decision.

That is not the way people typically make decisions about important matters. Some jurisdictions permit jurors to ask questions under carefully prescribed rules and discuss and process the evidence during the case.

These changes can have negative effects, of course, particularly in criminal trials. Change of this sort must be approached with caution. But many things can be done without rule changes.

Lawyers and judges can work to see that testimony and jury instructions are in language jurors can understand. Avoid legalese whenever possible and give lay definitions of technical terms.

Illinois now allows jurors to take notes to help remember the evidence. Attorneys should present their evidence and exhibits in interesting ways to aid juror comprehension and encourage close attention. Cases can be streamlined and simplified to the greatest extent possible to keep the jurors' tasks clear and jury instructions and verdict forms comprehensible.

Jury service has been described as the last mandatory civic duty. The American public values the right to jury trial and people want to do a good job when called. We must do our part to help them succeed. ■

GENERAL CONTRACTORS' | *Continued from page 251*

contract is typically between the owner and the general contractor, not the general contractor and the subcontractor. Thus, while the contracts are evidence of control, construction lawsuits brought under the Restatement (Second) are negligence, not contract, cases.

Second, if the contract doesn't settle the issue, examine other evidence. Most construction contracts spell out relevant duties. If they do not, however, courts are obligated to look beyond the terms of the contracts. Other evidence might include worksite activities, documents, and testimony. Likewise, in certain circumstances the duty may be non-delegable.[27]

Ultimately, this additional evidence will lead the court in one of two directions: 1) ratify the conclusion that there was no responsibility, or 2) show the defendant assumed the duty of worker and/or job safety.[28]

Common law and Restatement Comment (c). This two-part analysis is in complete congruity with both Illinois common law and Restatement (Second) Section 414. Common law has always proscribed liability and responsibility for safety. Likewise, as *Larson* teaches, Section 414 does not limit the application of liability at common law, it expands it. As our supreme court wrote in *Larson*, "[e]ven at common law retention of the right to control the work is sufficient to subject one to duty and tort responsibility...."[29]

This approach is consistent with the Restatement (Second) text and commentary itself. Section 414 states that if a contractor "retains the control of *any* part of the work" it is liable for the failure to exercise that control in a reasonable way. So, for example, if a contractor (through his contract) is in charge of worker safety, that *is* retention of control.

Some would argue this approach is inconsistent with the comments to Restatement (Second) Section 414. Courts who find lack of control often cite Comment (c) and its statement that "the employer must have retained at least some degree of control over the manner in which the work is done." (For the full text of Comment (c), see sidebar.) It also says that "[t]here must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

The counter-argument: the contractor's contractual responsibility to assure that safety rules are followed gives it at least some measure of control over the manner in which the work is done. Workers are obligated to follow those safety rules, and when they fail to do so, the general contractor has responsibility under the terms of its contract to address that.

The counter-argument is even more persuasive, however. Inevitably, cases finding lack of control under Comment (c) hold that there is not enough control to subject the general contractor to liability. Yet the commentary only says "some" control is needed – it does not specify the amount. How can a worker be entirely free to do the work in his own way if the general contractor retains any control? In short, he cannot. ■

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27. For a case discussing the non-delegable nature of duties even in Restatement (Second) § 414 terms, see *Park v Burlington Northern Santa Fe Railway Co*, 108 Cal App 4th 595, 133 Cal Rptr 2d 757 (4th D 2003).

28. As the commentators to the Illinois Pattern Jury Instruction (Civil), 55.00 series note, a number of factors could be considered to be sufficient to mandate responsibility for worker injuries. These include, but are not limited to the right to stop work for safety reasons; authority to implement safety rules/procedures; safety consultant consistently present on job site; supervision and control of the work; retention of the right to supervise and control the work; supervision and coordination of subcontractors; responsibility for taking safety precautions at the job site; authority to issue change orders; holding meetings in which safety issues are discussed; ownership of the equipment used at the job site; and, authority to order unsafe equipment removed.

29. *Larson* at 324, 211 NE2d at 252 (citations omitted).