

labor for certain work including demolition and debris removal Plaintiff Joseph Lloyd was employed by HMS as a laborer on this project.

On January 22, 1998, IPS superintendent, Kris Seace, directed HMS foreman, Barry Krol, to have debris removed from the roof of Building 20, which at the time was coated with ice. Plaintiff and a co-worker went onto the roof without safety harnesses because no such harnesses were available. As plaintiff threw debris from the roof into a dumpster below, he slipped on the ice, fell off the roof and sustained serious injuries.

Plaintiff brought this action against IPS and Wyeth-Ayerst. After a week of trial, the jury assessed damages at \$2,000,000.00, apportioning liability as follows: the jury found the plaintiff's negligence constituted 35% of the causal negligence, Wyeth-Ayerst's constituted 10%, and IPS's constituted 55%. Following the verdict, all parties filed timely post trial motions. IPS's motion sought judgment notwithstanding the verdict, or in the alternative, a new trial, because IPS was Mr. Lloyd's statutory employer; therefore, immune from suit under the Workers' Compensation Act, 77 Pa.C.S.A. §1, *et seq.* Wyeth-Ayerst's motion sought indemnity from IPS pursuant to the contract. Plaintiff's motion sought delay damages pursuant to Rule 238. After briefs were submitted and oral argument heard on the motions, the court granted IPS's motion finding it be plaintiff's statutory employer. Moreover, it granted Wyeth-Ayerst's motion, finding that IPS waived its immunity with regard to any indemnification liability. Finally, plaintiff's motion was granted, but only as to the portion of damages attributable to Wyeth-Ayerst's causal negligence. These will be discussed in turn.

IPS's Motion

The primary issue raised in IPS's motion is whether the court erred in failing to grant a nonsuit or directed verdict on the issue of whether IPS was plaintiff's statutory employer, and therefore liable to him only under the terms of the Workers' Compensation Act, 77 Pa.C.S.A.

§ 1, *et seq.* The Act provides:

§52. Employers' liability to employee of employee or contractor permitted to enter upon premises.

An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee.

77 Pa.C.S.A. § 52. A party who seeks immunity based on a statutory employer defense has the burden of proving five elements. First, it is an employer who is under contract with an owner. Second, the premises are under the control of this employer. Third, the subcontract was made by such employer. Fourth, part of the employer's regular business was entrusted to such subcontractor. Finally, the claimant was an employee of the same subcontractor. Peck v. Delaware County Board of Prison Inspectors, 765 A.2d 1190 (Pa. Commw. 2001), citing McDonald v. Levinson Steel Co., 302 Pa. 287, 153 A.424 (1930).

At trial, evidence was presented which established that IPS (the employer) had contracted with Wyeth-Ayerst (the owner) to complete all aspects of a major renovation of the plant. It was further shown that the labor for the project was obtained through subcontracts, including that with HMS, plaintiff's employer. The contract contemplated the performance of all aspects of the project, including the tasks assigned to HMS and, in turn, to plaintiff. Moreover, it was established that the IPS foremen were in charge of the work site and controlled the actions of the

HMS employees, which included Mr. Lloyd. Thus, upon review of the evidence presented, the court correctly determined that IPS was plaintiff's statutory employer.

Having ruled that IPS was plaintiff's statutory employer, the next question is whether IPS waived its immunity under the Workers' Compensation Act. Such waiver is permitted under the act. 77 P.S. §481(b). Plaintiff argues IPS waived its immunity by entering into an indemnity agreement with Wyeth. Exhibit WA-7, "Agreement: Design-Build Services," specifically Section 3.12, Indemnification. However, this agreement does not speak to IPS's obligations to a third party; rather, it relates solely to IPS's obligations to the owner and its willingness to indemnify the owner against third-party claims. Thus, plaintiff's reliance on the contract is misplaced.

Plaintiff also argues that IPS waived its statutory employer defense by failing to plead it with specificity as an affirmative defense. IPS's "Answer with New Matter" stated that "[IPS] asserts all of the defenses available to it under the Pennsylvania Workers' Compensation Act and avers that plaintiff's remedies are limited exclusively thereto and the present action is barred." Paragraph 55 of the Answer and New Matter of Defendant IPS. Although, it may be a better practice to raise the issue by motion at an earlier stage of the proceedings, the court finds the pleadings were sufficient and that the issue was not waived.

IPS further argues that it was error for the court to have let the question of its negligence go to the jury. The main case on which IPS relies is Fulmer v. Duquesne Light Company, 374 Pa. Super. 537, 543 A.2d 1100 (1988), where the court found that the trial court erred in allowing the jury to apportion fault between an owner and a contractor. However, that case was in a different posture. Therein plaintiff/employee had sued only the property owner, and the owner

brought in the employer as a third party defendant based on an indemnity agreement. The court found that the plaintiff was entitled to a determination of his rights exclusively against the party he sued, and that the indemnity issue was to be considered separately. In this case, plaintiff sued both the defendants directly, therefore allowing the jury to apportion negligence was proper.

The remaining issues raised in IPS's motion are evidentiary. First, IPS argues that the court erred in allowing the testimony of co-worker Daniel Bair as to his own wages and work opportunities as evidence of possible lost wages of the plaintiff. Second, IPS argues that the court erred in permitting plaintiff's expert, P. Spergel, Ed.D., to testify as to his projections of plaintiff's economic damages, both because he was not an economist and because he based his opinion partially on the testimony of Mr. Bair.

Initially we note that defendants did not object to Dr. Spergel's qualifications at trial. Even if they had, he is a rehabilitation psychologist and vocational specialist, with knowledge of both fields. He need not be an economist to render an opinion. Any perceived shortcomings in his qualifications should have been addressed on cross-examination or argument.

As to Dr. Spergel's reliance on Mr. Bair's testimony, said testimony was only one of many factors he said he considered in forming his opinion. The same holds true for the entirety of Mr. Bair's testimony. That is, evidence of a similarly skilled coworker's earnings were admissible to establish what plaintiff could have earned had he not been injured, but such evidence is not conclusive and can be adequately questioned on cross-examination. Allowing said testimony was not error.

Wyeth's motion

Having found that IPS did not waive its own immunity, a question remains as to whether under the contract IPS is liable for Wyeth-Ayerst's share. Wyeth-Ayerst's motion for post-trial relief seeks a determination of its cross-claim for indemnification by IPS for Wyeth-Ayerst's assessed ten percent share of the damages. Upon review of the contract, specifically Section 3.12, Indemnification, the court found that even though IPS had not waived its immunity as a statutory employer, discussed above, IPS had waived immunity insofar as it established indemnification of Wyeth-Ayerst. Subsection 3.12.2 provides:

In claims against any person or entity indemnified under this paragraph 3.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 3.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

Thus, the post trial motion of Wyeth-Ayerst was properly granted, and IPS is liable for Wyeth's share of the verdict: \$200,000.00.

Plaintiff's motion

The third motion filed was plaintiff's motion for delay damages pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure, in which plaintiff sought delay damages on the \$1,300,000 damages assessed by the jury against the defendants. No response was filed by either defendant to the 238 motion. In light of the modification of the verdict, these damages are

calculated on the ten percent share (\$200,000.00), for an award of \$14,073.89.¹ Hence, IPS is liable to the plaintiff for a total amount of \$214,073.89.

Conclusion

For all of the above reasons, the post-trial motions were properly decided and judgment in favor of plaintiff and against IPS in the amount of \$214, 073.89, as entered on January 22, 2002 should be affirmed.

By the Court:

Myrna Field, A.J.

¹ The Rule 238 damages were calculated as follows: one year from the date of original service was June 29, 2000. The jury verdict was announced on April 20, 2001. Applying the published rates plus 1% as provided by the rule, the court added \$8,046.49 (6/29/00 to 12/31/00 (155 days) @ 9.5%) and \$6,027.40 (1/1/01 to 4/20/01 (110days) @ 10%) for a total of \$14,073.89 in delay damages.