



protection system. That conclusion is difficult to square with our opinion in *Koch Refining Co. v. Chapa*. In *Koch*, the premises owner, Koch Refining Company, stationed a safety employee on site with authority to intervene if a subcontractor's employee engaged in a dangerous activity. There was evidence that Koch's safety employee overheard a conversation in which the independent contractor instructed its employee to engage in an unsafe pipe-lifting maneuver. Because the safety employee did nothing in response, the court of appeals held that "Koch's apparent acquiescence to the independent contractor's order to perform an unsafe operation was sufficient to compel Koch to take corrective action." *Id.* at 156-57 (quoting *Chapa v. Koch Refining Co.*, 985 S.W.2d 158, 162 (Tex. App.—Corpus Christi 1998)). We rejected that holding. We concluded that Koch's ability to intervene was not evidence that the subcontractor and its employees "were not free to do the work in their own way and is not evidence that Koch controlled the method of work or its operative details." *Koch*, 11 S.W.3d at 156. It appears, then, that LLC cannot be liable solely because it positioned an employee on the job site with inspection authority and approved KK Glass's dangerous conduct.

If, in this instance, liability cannot be based on actual control, we must determine whether there is some other basis for imposing liability. As Justice Hecht observes, LLC unquestionably retained a contractual right to enforce safety requirements. Although the Court concludes it need not reach the issue of control by contract, I believe the question of LLC's contractual right to control must be addressed. We have previously discussed circumstances under which a premises owner or general contractor has retained the right to compel compliance with safety measures. See *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469 (Tex. 1985). In *Tovar*, the premises owner retained a contractual right to suspend its independent

contractor's drilling operations "in the event of carelessness, inattention, or incompetency on the part of" that contractor. *Id.* at 470. We held that the oil company owed a duty to its independent contractor's employees when it became aware that the independent contractor was violating a specific, critical safety provision in the drilling contract. *Id.*

*Tovar* does not discuss the policy considerations that favor permitting a general contractor to require all workers on a construction site to obey fundamental safety standards without thereby subjecting itself to liability for injuries to independent contractors' employees. A general contractor's promulgation and enforcement of such basic safety measures should not be sufficient, in itself, to impose liability for injuries to subcontractors' employees. Our tort system should not penalize a general contractor for insisting on compliance with basic safety standards. A general contractor is not "required to stand idly by while another is injured or killed in order to avoid liability. Nor do we believe that the liability rules contemplate putting those who employ independent contractors in that position." *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 358 (Tex. 1998)(quoting *Welch v. McDougal*, 876 S.W.2d 218, 224 (Tex. App.–Amarillo 1994, writ denied)). Similarly, suggesting, or even requiring, that a subcontractor meet minimal safety requirements should not amount to the sort of "control" sufficient to hold a general contractor liable for injuries to subcontractors' employees.

A different question is presented when the general contractor, who has contractual responsibility for general safety measures, permits its subcontractors to deviate routinely from the most elemental safety precautions. "[A]n employer who is aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety may owe a duty to require corrective measures to be taken

or to cancel the contract.” *Hoechst-Celanese*, 967 S.W.2d at 367. I would affirm the judgment on this basis.

LLC’s liability stems from its right to compel compliance with standard safety measures coupled with its tacit approval of the subcontractor’s patently treacherous operations. LLC was fully aware that KK Glass employees, and Harrison in particular, used a bosun’s chair to perform caulking work on the exterior of a multistory building. LLC knew that the chair had no independent lifeline and that employees would have only their grasp of the rope to prevent a fatal fall. LLC employees testified that they saw Harrison using the bosun’s chair less than 30 minutes prior to his fall, with one untethered end of his lanyard looped around his neck. At no time did LLC discourage use of the bosun’s chair in this fashion. Moreover, the jury heard testimony that although LLC was careful to enforce fall-protection systems for its own employees, it remained silent while watching KK Glass employees dangle precariously from the tenth floor.

LLC is liable not merely because it adopted a general safety program or possessed a contractual right to expel subcontractors who routinely flout general safety standards, but also because LLC endorsed KK Glass’s repeated use of an obviously hazardous activity. Thus, although I cannot join the Court’s opinion with respect to actual control, I agree with the Court’s disposition and concur in the judgment.

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Wallace B. Jefferson  
Justice

OPINION DELIVERED: December 20, 2001