

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

REUBEN CORDERO,)
)
Employee-Below, Appellant,)
)
v.) C.A. No. 11A-03-003 WCC
)
GULFSTREAM DEVELOPMENT)
CORPORATION, and)
DELAWARE SIDING COMPANY,)
)
Employers-Below, Appellees.)

Submitted: August 15, 2011
Decided: November 30, 2011

OPINION

Appeal from Industrial Accident Board. AFFIRMED.

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John J. Ellis, Esquire; Heckler & Frabizzio, P.A., 800 Delaware Avenue, Suite 200, P.O. Box 128, Wilmington, DE 19899-0128. Counsel for Appellee Gulfstream Development Corporation.

Robert J. Richter, Esquire; Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., 300 Delaware Avenue, Suite 1700, P.O. Box 1630, Wilmington, DE 19899-1630. Counsel for Appellee Delaware Siding Company.

CARPENTER, J.

This appeal by employee-appellant Reuben Cordero of the Industrial Accident Board's dismissal of his petitions against Gulfstream Development Corporation and Delaware Siding Company requires the Court to determine whether Delaware's workers' compensation statute imposes a continuing obligation on contracting entities to insure that their subcontractors' liability insurance remains in effect throughout the term of the contract. After reviewing 19 *Del. C.* §2311(a)(5), the Court concludes that a contractor has satisfied its obligations under the statute when it has obtained from its subcontractor proof of insurance coverage and retained such proof for three years as long as the insurance certificate reflects coverage throughout the period of time the subcontractor will be working on the project. Once this is obtained, the contractor has no affirmative obligation to follow up with its subcontractor to verify that the coverage has not been canceled or to monitor the subcontractors' insurance coverage. Finding the Industrial Accident Board's decision to be supported by substantial evidence and free from legal error, the Court will AFFIRM the Industrial Accident Board's dismissal of the petitions.

FACTS¹

This appeal arises from an incident that occurred on July 31, 2008.² On that date, Reuben Cordero ("Cordero") was working on a residential construction

¹ This recitation of the facts is adapted from the Stipulation of Facts presented to the Industrial Accident Board before the hearing on January 20, 2011.

² Stipulation of Facts, Appendix to Appellant's Opening Brief at A-1.

project in Dagsboro, Delaware as an employee of Rodriguez Contracting Company (“Rodriguez Contracting”). Cordero suffered serious brain injuries after the ladder he was climbing fell to the ground.³ Cordero has not been able to work since the accident.⁴

Gulfstream Development Corporation (“Gulfstream”) was the general contractor on the construction project where Cordero was injured.⁵ Gulfstream had subcontracted siding and roofing work to Delaware Siding Company (“Delaware Siding”), which in turn subcontracted the roofing work to Rodriguez Contracting, Cordero’s employer.⁶ Cordero was not employed by Gulfstream or Delaware Siding at any time relevant to this appeal.

Prior to Cordero’s injury, Rodriguez Contracting had given Delaware Siding a Certificate of Liability Insurance dated February 26, 2008 indicating that it held an insurance policy from Liberty Mutual that was in force from January 4, 2008 through January 4, 2009.⁷ This policy was canceled on March 13, 2008.⁸ Rodriguez Contracting purchased a new insurance policy from Liberty Mutual on May 9, 2008, which was also due to expire on January 4, 2009.⁹ This policy was

³ Appellant’s Opening Brief 2.

⁴ *Id.*

⁵ Stipulation of Facts ¶ 5.

⁶ *Id.*

⁷ Stipulation of Facts ¶ 8.

⁸ Stipulation of Facts ¶ 9. During the hearing before the Board, counsel for the plaintiff represented that the cancellation was due to non-payment of premiums.

⁹ Stipulation of Facts ¶ 10.

canceled on July 10, 2008.¹⁰ The record appears to suggest that Delaware Siding had no notice of either policy cancellation.

Gulfstream, the general contractor on the project, obtained a Certificate of Liability Insurance dated September 19, 2007 from Delaware Siding. The certificate indicated that Delaware Siding had an insurance policy that was effective from September 1, 2007 until September 1, 2008. Since Rodriguez Contracting was an uninsured employer at the time of the plaintiff's accident, Cordero is seeking coverage under the policy maintained by Delaware Siding or Gulfstream.

PROCEDURAL HISTORY

Cordero filed a Petition to Determine Compensation due against Gulfstream on August 23, 2010. He filed an identical petition against Delaware Siding on September 1, 2010. Cordero alleged that he was entitled to compensation from the general contractor and subcontractor under 19 Del. C. §2311(a)(5), which holds contracting entities responsible for worker's compensation benefits where the contractor did not obtain proof of insurance from the subcontractor. Gulfstream and Delaware Siding subsequently moved to dismiss the petitions, asserting that they had complied with 19 *Del. C.* §2311(a)(5). The Industrial Accident Board

¹⁰ Stipulation of Facts ¶ 6.

(“IAB”) held a hearing on this legal question on January 20, 2011 and granted both motions to dismiss on February 10, 2011.¹¹

The IAB dismissed the petition against Gulfstream on the ground that it satisfied its obligations with respect to its subcontractor Delaware Siding under 19 *Del. C.* §2311(a)(5) and there was no argument that Delaware Siding became uninsured in the course of the project. The IAB also dismissed the petition against Delaware Siding, finding that 19 *Del. C.* §2311(a)(5) does not impose “an affirmative ongoing duty [on the contractor] to assure that the Certification of Insurance provided by the subcontracting entity with the appropriate effective dates continues to be valid.”¹² The IAB further concluded that “Delaware Siding was entitled to rely, in good faith, on the Certificate of Insurance it had been provided.”¹³

STANDARD OF REVIEW

This Court reviews decisions of the IAB only to insure that they are supported by substantial evidence and free from legal error.¹⁴ “Substantial evidence” is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁵ On appeal, the court does not “weigh the

¹¹ The parties agreed to a stipulation of facts and therefore no evidence was orally presented to the Board.

¹² Order at 4.

¹³ *Id.*

¹⁴ *Opportunity Center v. Jamison*, 940 A.2d 946, *2 (Del. 2007).

¹⁵ *Willis v. Plastic Materials Co.*, 2003 WL 164292, *1 (Del. Super. Jan. 13, 2003).

evidence, determine questions of credibility, or make its own factual findings.”¹⁶

Legal questions are reviewed de novo.¹⁷ Absent an error of law, decisions of the Board are reviewed for abuse of discretion.¹⁸

DISCUSSION

All parties concede that Gulfstream and Delaware Siding both received a Certificate of Liability Insurance with appropriate dates from their respective subcontractors. Accordingly, the sole question before the Court is whether 19 *Del. C.* §2311(a)(5) imposes a continuing obligation on contractors to insure that their subcontractors carry valid liability insurance even after obtaining proof of insurance coverage with appropriate dates at the time of the contract. 19 *Del. C.* §1123(a)(5) provides:

Any contracting entity shall obtain from [...] [a] subcontractor and shall retain for 3 years from the date of the contract [...] a certification of insurance in force under this chapter. If the contracting entity shall fail to do so, the contracting entity shall not be deemed the employer of any independent contractor or subcontractor or their employees but shall be deemed to insure any workers’ compensation claims arising under this chapter.

Gulfstream and Delaware Siding argue that they satisfied their statutory obligation by obtaining proof of valid liability insurance from their respective subcontractors and retaining copies in their records for over three years and therefore they cannot

¹⁶ *Id.*

¹⁷ *Baughan v. Wal-Mart Stores, Inc.*, 2008 WL 193576, *2 (Del. Supr. 2008).

¹⁸ *Willis*, 2003 WL 164292 at *1.

be held liable for Cordero's worker's compensation claim. Cordero contends, in essence, that the contractors should be held liable for failing to insure that his employer's insurance policy remained in force for the duration of the project.

In support of his argument, Cordero looks to this Court's opinion in *McKirby v. A&J Builders, Inc.*,¹⁹ which held that a general contractor who had failed to obtain proof of workers' compensation insurance from its subcontractor was responsible for paying workers' compensation benefits to its subcontractor's injured employee. The *McKirby* Court emphasized that the legislative intent behind 19 *Del. C.* §2311(a)(e) was to provide additional protection to employees: "There was clear intent to offer more coverage to workers for injuries incurred at work and independently to require inquiry at the time of a contract..."²⁰

Furthermore, the Court noted that the "General Assembly put the onus on the general contractors to make sure that their subcontractors had coverage for workers' compensation liability."²¹ Cordero argues that the legislative intent to expand coverage to include the employees of potentially uninsured subcontractors requires the application of the statute to cases where the subcontractor's insurance has lapsed since the date of the contract.

¹⁹ 2009 WL 713887 (Del. Super. Mar. 18, 2009).

²⁰ *Id.* at *4.

²¹ *Id.* at *2.

Unfortunately, the language of the statute does not support imposing liability on contractors who comply with the initial inquiry mandated by the statute so long as that certificate of insurance covers the time frame of the subcontractors' work on the project. Once this obligation is met there is no statutorily mandated requirement to actively monitor subcontractors to insure that they have not canceled their insurance coverage. The statute requires contracting entities to obtain "a certification of insurance in force under this chapter" and to retain such proof of insurance for three years from the date of the contract.²² The statute does not impose any obligation on general contractors to follow up with their subcontractors to verify that the insurance remains in force. Indeed, if there was a continuing obligation, that requirement could easily have been incorporated into the statute with guidance as to the procedure a contractor should follow to verify that its subcontractors have maintained appropriate coverage and how often a contractor needs to conduct follow-up investigations. Even though the plaintiff has suggested numerous avenues for contractors to obtain this information, none of them are mandated by the statute. While the Court is sympathetic to Cordero's argument that the statute was drafted to protect individuals in his position, it unfortunately does not allow him to collect workers' compensation benefits from

²² 19 *Del. C.* §1123(a)(5).

Delaware Siding or Gulfstream. If additional responsibilities are to be placed on general contractors, that issue is one that calls for a legislative solution.

Cordero's reliance on the Oregon Court of Appeals decision in *E.W. Eldridge, Inc. v. Becker*²³ is also misplaced. The Oregon court affirmed the decision of its workers' compensation board requiring the prime contractor to pay workers' compensation benefits to an employee of its subcontractor, which was uninsured at the time of the employee's injury. However, Oregon's statute differs significantly from Delaware's worker's compensation statute. Oregon law provides that "all persons engaged in the performance of the contract are deemed subject workers of the person letting the contract unless the person to whom the contract is let has qualified either (a) [a]s a direct responsibility employer [...]; or (b) [a]s a contributing employer..."²⁴ The Oregon court explained that the statute makes prime contractors "responsible for persons deemed 'subject workers' under the provisions of the Workers' Compensation Laws."²⁵ The court ultimately held that the statute should be "applied in light of the circumstances at the time a worker is injured, rather than the time the contract is let."²⁶

²³ 700 P.2d 301 (Or. App. 1985).

²⁴ *Id.* at 302-03.

²⁵ *Id.*

²⁶ *Id.* at 303.

While the Oregon court’s approach is appealing, particularly given the difficult factual circumstances presented by this case, this Court cannot overlook the significant differences between Oregon’s statute and our own. Oregon’s statute specifically makes the subcontractor’s employees “subject workers” of the prime contractor for the purposes of workers’ compensation. The Oregon court relied on the legislative history of the Oregon statute, which clearly stated that a prime contractor “shall be liable to the Industrial Accident Fund for the payment of all contributions which may be due such fund on account of the performance of the contract or any subcontract thereunder.”²⁷ The legislative history of Delaware’s statute, however, is quite different. Until 2007, 19 *Del. C.* §2311 prohibited employees of a subcontractor from pursuing workers’ compensation claims against the prime contractor and their sole workers’ compensation remedy was against their individual employer.²⁸ In January 2007, §2311 was amended to read:

Any contracting entity shall obtain, and retain for 3 years from the date of the contract, certification of insurance in force from any entity described in the preceding subsection. If the contracting entity should fail to do so, the contracting entity shall be deemed the employer for purposes of any workers’ compensation claim arising from the transaction.

²⁷ *Id.* at 304.

²⁸ *Liberty Mut. Ins. Co. v. JBR Contractors, Inc.*, 2010 WL 5306782, *3 (Del. Super. Dec. 2, 2010). 19 *Del. C.* §2311(a)(2006) previously read, “No contractor or subcontractor shall receive compensation under this chapter, but shall be deemed to be an employer and all rights of compensation of the employees of any such contractor or subcontractor shall be against their employer and not against any other employer.”

This amendment expanded coverage to workers when the contractor failed to insure that their subcontractor had coverage at the time they contracted for the subcontractor's services. The statute was amended again in May 2007 to its current version. This Court explained in *McKirby* that the most recent amendment was intended to clarify "the lack of an employer-employee relationship with the contracting entity" so as "to preserve tort liability claims by injured workers against third parties."²⁹ Oregon's statute, by contrast, lends itself to the interpretation that the prime contractor would be considered the subcontractor's employer for worker's compensation purposes. The language and legislative history of Delaware's and Oregon's respective workers' compensation statutes reveal that the statutes are dissimilar and should not be applied in the same way.

It is important to note that the Court has made this decision because the Certificates of Insurance Gulfstream and Delaware Siding obtained, if they had remained in effect, would have covered the time frame Rodriguez Contracting would have been on the work site. The Court does believe there is an obligation by the contractor to insure that subcontractors are insured while they are on site. Contractors cannot ignore a certificate submitted by a subcontractor that clearly will lapse during the time frame the subcontractor will be performing work under

²⁹ *McKirby*, 2009 WL 713887, at *3.

the contract. As an example, if Delaware Siding had obtained a certificate of insurance from Rodriguez Contracting that was only valid for four additional months and Delaware Siding continued to use Rodriguez Contracting on the site past that time, Delaware Siding would not be free to ignore the lapsed policy and allow Rodriguez Contracting to continue to work. If it did, Delaware Siding opens itself to workers' compensation claims. In other words, a general contractor cannot turn a blind eye to its subcontractor's lack of insurance and expect the Court to protect it from its malfeasance. A similar liability result could be imposed if the general contractor continues to use a subcontractor that it knows from past practices and experience consistently cancels its policy a few months after executing a project contract. Under such circumstances, the Court could potentially find the lack of monitoring as a basis to hold the general contractor liable. In other words, implicit in 19 *Del. C.* §2311(a)(e) is a good faith obligation to verify insurance coverage, and the lack of due diligence by the general contractor under the right facts may require liability to be imposed. Simply put, the Court believes the obligation the statute imposes is greater than simply getting a piece of paper during the initial contracting with the subcontractor.³⁰

³⁰ While the plaintiff introduced before the Board a document that reflected Rodriguez Contracting's history of canceled insurance policies, there was no evidence that Delaware Siding was aware of this history or had experienced similar prior issues with this subcontractor.

With this caution, The Court finds no legal error in the Board's decision and there is substantial evidence to support its finding that Gulfstream and Delaware Siding satisfied their obligations under 19 *Del. C.* §2311(a)(e). Therefore, they cannot be held liable for Cordero's workers' compensation benefits.

CONCLUSION

Accordingly, the Court affirms the decision of the Board dismissing the petitions for compensation against Gulfstream and Delaware Siding.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.