

**BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE**

JULIO GARCIA TRUJILLO,)	
)	
Employee,)	
)	
v.)	Hearing Nos. 1419959, 1419958 &
)	1412159 (respectively)
)	
ATLANTIC BUILDING ASSOCIATES,)	
SANTOS CONSTRUCTION, LLC, and)	
WVM CONSTRUCTION,)	
)	
)	
Employers.)	

DECISION FOLLOWING REVERSAL AND REMAND

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on May 1, 2018, in a Hearing Room of the Board, in Dover, Delaware.

PRESENT:

WILLIAM F. HARE

PATRICIA Y. MAULL

Kimberly A. Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Tara E. Bustard, Attorney for the Employee

Andrew J. Carmine, Attorney for Atlantic Building Associates/Carrier

NATURE AND STAGE OF THE PROCEEDINGS

On June 7, 2017, the Superior Court reversed and remanded the Industrial Accident Board's ("Board") decision from April 13, 2016 following a hearing on Petitions to Determine Compensation Due ("DCD") filed by Julio Garcia Trujillo ("Claimant") against Atlantic Building Associates ("Atlantic"), Gaston Santos Bautista d/b/a Santos Construction, LLC¹ ("Santos") and WVM Construction² ("WVM").³ After Claimant filed his DCD Petitions, the Office of Workers' Compensation determined that neither Santos nor WVM was insured for Delaware workers' compensation claims as of the date of Claimant's April 9, 2014 injury.

At the time of the March 28, 2016 hearing, Claimant conceded that Atlantic was not his employer; however, he still sought compensation from Atlantic pursuant to 19 *Del. C.* § 2311(a)(5) on the basis that Atlantic failed to obtain a certification of insurance from its subcontractor (WVM) evidencing Delaware workers' compensation insurance. In reliance on the *Cordero* decision, Atlantic argued that it was not liable for Claimant's work injuries because it had obtained a certificate of insurance ("COI") from WVM that was "valid on its face at the time it [was] furnished."⁴ At the hearing, both parties acknowledged that WVM's workers' compensation insurance policy only applied to workers and work accidents in the State of New Jersey.

¹ In the April 13, 2016 decision, the Board found that Claimant was an employee of Santos at the time he was injured. Despite proper notice, no one appeared at the March 28, 2016 hearing on behalf of Santos.

² The Board made no rulings in regard to WVM, as that DCD Petition was not properly noticed for the March 28, 2016 hearing date, and no one appeared on behalf of WVM. The Board, likewise, makes no rulings regarding WVM following remand.

³ The Superior Court subsequently denied Claimant's Motion for Reargument, which requested that the Court simply reverse the Board's decision without remand. *Julio Garcia Trujillo v. Atlantic Building Associates, et al.*, 2017 WL 3738407, No. N16A-05-003 (Del. Super. Ct., August 29, 2017) (ORDER).

⁴ *Cordero v. Gulfstream Development Corp.*, 56 A.3d 1030, 1037 (Del. 2012).

Following a hearing on the merits, in the April 13, 2016 decision, the Board concluded that Atlantic was not liable for Claimant's work-related injuries. The Board found that the COI obtained by Atlantic on behalf of WVM was valid on its face, despite the fact that the COI itself did not evidence that WVM's insurance applied to employees working in Delaware. The Board felt that the COI purported to show valid workers' compensation coverage, and absent any obvious "red flags" contained therein, it felt that Atlantic had a good faith basis to believe that WVM had Delaware coverage. Thus, the Board declined to deem Atlantic liable to ensure Claimant's work injuries under title 19 of the Delaware Code, section 2311(a)(5).

On appeal, the Superior Court reversed and remanded the case back to the Board for further proceedings. The Court noted that in order to satisfy section 2311(a)(5), Atlantic was required to obtain a certification that its subcontractor WVM had insurance "in force under this chapter;" meaning, not merely showing that there is insurance with effective dates covering the work period, but insurance that satisfies either section 2371(d)(1), (2) or (3) of title 19 of the Delaware Code.⁵ The Court held that the Board applied an incorrect legal standard to the case; the Board had erred in concluding that Atlantic had acted in good faith and satisfied any due diligence requirement in conjunction with section 2311(a)(5) by receiving a COI that *purported* to show Delaware workers' compensation insurance coverage with no "red flags" apparent. The Court noted that the Board had taken *Cordero* out of context, and pointed out that "[i]f the

⁵ *Id.* The Court noted that pursuant to § 2371(d), the insurance required of out-of-state employers for employees doing substantial work in the State "shall" consist of:

- (1) An actual Delaware workers' compensation policy covering activities of the employer for any employee engaged in the employer's business in the territory of the State; or
- (2) A written rider on an out-of-state policy of insurance covering the work activities of the employees as fully and completely as an actual Delaware workers' compensation policy would; or
- (3) A declaration of self-insurance that would be valid and acceptable if made by a Delaware employer in the territory of the State providing such coverage, filings and surety as is required of Delaware employers to be self-insured for claims for Delaware workers' compensation.

existence of Delaware workers' compensation insurance is not evidenced on the face of the COI, the COI cannot be valid on its face as to this critical fact."⁶ Thus, the Court held that because the COI that WVM provided Atlantic did not, on its face, specify Delaware coverage, Atlantic was then required to verify that WVM's workers' compensation insurance was actually in force in Delaware. The Court has remanded the case back to the Board to determine whether Atlantic performed this necessary verification.

At a May 1, 2018 remand hearing, additional evidence and further legal argument was presented.⁷ The evidence already presented by the parties at the prior hearing remains part of the record at the hearing on remand.⁸

SUMMARY OF THE EVIDENCE

Linda Garufi, secretary and treasurer of Atlantic, was called as a witness by Claimant. Atlantic is a Maryland, as opposed to a Delaware, corporation. Mrs. Garufi was working at Atlantic's office in Maryland in March 2014. At that time, she was the only person responsible for collecting COIs from subcontractors.

In the March 2014 timeframe, Atlantic hired WVM to complete work for the Miller & Smith Advisory Group.⁹ Mrs. Garufi agreed that a contract was signed in this regard between Atlantic and Valdemir Pereira (the owner of WVM) on March 10, 2014.

Mrs. Garufi is familiar with Delaware workers' compensation insurance as it applies to subcontracting. She was aware in March 2014 that she was required to obtain COIs evidencing

⁶ *Julio Garcia Trujillo v. Atlantic Building Associates, et al.*, 2017 WL 2591409 at *4, *5, No. N16A-05-003 (Del. Super. Ct., June 7, 2017). *See also Cordero, id.*

⁷ *See State v. Steen*, 719 A.2d 930 (Del. 1998). The parties stipulated to the admission of a packet of exhibits alphabetically from A to R that was marked into evidence as "Joint Exhibit #1."

⁸ 19 *Del. C.* § 2348 (f).

⁹ Mrs. Garufi was directed to the "Exhibit B" tab within the parties Joint Exhibit #1.

workers' compensation insurance from subcontractors. Mrs. Garufi explained that not one COI that she has ever received indicates which specific state(s) that the policy covers. She added that even if she asked an insurer to do so, she does not think they would put this information on the COI.

Because the COI provided on behalf of WVM did not mention that it covered Delaware, Mrs. Garufi felt that it was her responsibility to confirm that there was Delaware workers' compensation insurance. Thus, she received a Delaware business license from WVM, which to her, proved that WVM had Delaware workers' compensation insurance. Mrs. Garufi explained that, to her knowledge, in order to receive a Delaware business license, businesses must first prove that they have Delaware workers' compensation insurance. She believes that she satisfied the workers' compensation statute by receiving WVM's business license in addition to the COI.¹⁰ Mrs. Garufi was not able to pinpoint the exact date that she received the Delaware business license from WVM; she knew that it came in before the work started, however, because she always makes sure there is a COI and a valid business license before work starts.

Mrs. Garufi would not agree that she did not receive anything regarding WVM's insurance coverage other than the COI and a copy of WVM's Delaware business license. She had also received WVM's incorporation paperwork and a copy of WVM's EIN number that was assigned to WVM by the Internal Revenue Service. Having received all of this information, especially the EIN number, Mrs. Garufi felt quite certain that WVM was a valid, reputable company.

Mrs. Garufi admitted that she had testified "I think that's probably about it" during the March 28, 2016 hearing in reference to having received the signed contract from WVM, the COI

¹⁰ Mrs. Garufi confirmed that Exhibit G reflects the COI that she received from AVS Insurance Agency on behalf of WVM.

and the Delaware business license from WVM; this was in the context of verifying WVM's Delaware workers' compensation insurance.¹¹ Mrs. Garufi reiterated that she believes that the State of Delaware needs to confirm that a company has workers' compensation insurance before it provides a company with a Delaware business license. In relation to the April 2014 work accident, she agreed that WVM's most recent Delaware business license was issued on January 15, 2014.¹² Mrs. Garufi admitted that she had not seen WVM's Delaware business license application, and clarified that she does not believe she could request to see it.¹³ She was unsure whether the Workers' Compensation Act mentions receipt of a Delaware business license in terms of proving workers' compensation coverage. Mrs. Garufi testified that she is aware that she needs to receive a COI because she was instructed to do so. During Atlantic's end-of-year audit, Atlantic must show that all of the subcontractors that were hired had workers' compensation insurance, so Atlantic must provide all of the COIs.

Mrs. Garufi agreed that about two months after WVM was issued a Delaware business license, WVM and Atlantic entered into the March 10, 2014 contract.

Mrs. Garufi was questioned about Atlantic's process to ensure that a subcontractor's insurance coverage exists; specifically, she was asked what she did to verify that the Delaware workers' compensation insurance that she presumed WVM had in January 2014 when the Delaware business license was issued was still in effect as of March 2014. She testified that there is no way for her to call the State of Delaware to see if the workers' compensation

¹¹ Transcript of Board's March 28, 2016 hearing, page 16, line 19.

¹² This was evidenced by Exhibit N. The license itself lists WVM as being located in Somers Point, NJ.

¹³ Mrs. Garufi was directed to Exhibit J, which is WVM's Delaware business license application. She agreed that the form indicates that WVM is located in New Jersey and that the company had applied for a license as a "Non-Resident Contractor." The application also indicates that WVM had indicated "no" to the question asking, "Will you have employees that work in Delaware, or withhold DE state income tax from DE residents that do not work in DE?" Mrs. Garufi testified that she had not seen this application before.

insurance is still valid; the State will not give her that information. She believes that she has no legal right to get that information.

Mrs. Garufi was questioned about her potentially calling the insurance company displayed on the COI itself to confirm that WVM's coverage extended to Delaware in the March 2014 timeframe. She reiterated that she is unsure why an insurance company would send her a COI if the insurance policy itself is not valid. Mrs. Garufi confirmed that AVS Insurance Agency ("AVS") had provided Atlantic with the COI on WVM's behalf.

Mrs. Garufi testified that Atlantic would not have specifically requested that WVM have a policy extending to Delaware just to work on one job. She clarified that the majority of the time, insurance policies cover the company to work in multiple states. She repeated that she had relied on the Delaware business license as evidence that WVM had workers' compensation insurance valid in Delaware. She agreed that nothing stopped her from verifying this with the insurance company, although she did not believe it necessary. She thought she had already satisfied the requirement by getting the COI and Delaware business license. Mrs. Garufi agreed that she had not called Liberty Mutual to confirm that WVM had Delaware workers' compensation coverage. She testified that she does not see the point in calling around when the State of Delaware has already told her that there is coverage based on the issuance of the Delaware business license.

Mrs. Garufi agreed that she also did not check the Delaware Department of Labor ("DOL") website to see whether WVM carried Delaware workers' compensation coverage. She clarified that she has done so in the past, and unless it is a Delaware insurance policy, it will not show up. She has called the DOL before and asked why she could not find her brother's coverage, and she was told that it was because he has a Maryland policy, and even though it

extends to Delaware, it would not show up on the website. Mrs. Garufi admitted that Atlantic never requested a copy of a written rider evidencing Delaware workers' compensation coverage.

Atlantic next questioned Mrs. Garufi. She testified that she has been with Atlantic since 2005. Atlantic subcontracts about 40 times per year.

Mrs. Garufi agreed that none of the COIs she received between May 30, 2013 and October 25, 2017 indicate to which specific state(s) the coverage extends. She agreed that often companies located in the Mid-Atlantic region have "all states" policies that extend coverage to other states. She reiterated that she cannot check on the DOL's website for a policy that was provided outside of Delaware, even if the coverage extends to Delaware. It is not easy to verify coverage in these cases. She often cannot just request that Liberty Mutual send her a certificate; she has to have the insured company request that a certificate be sent to her.

Mrs. Garufi first contacted Liberty Mutual after Claimant's work accident. She called to give them notice that Claimant was hurt. She could not remember at what point she was informed that there was no coverage for Claimant.

Claimant's counsel questioned Mrs. Garufi again. She admitted that she had also never asked WVM directly to provide her the policy showing Delaware coverage. She explained that this is not normal practice; she just asks for a COI and Delaware business license.

Atlantic next questioned Mrs. Garufi. She confirmed that part of the contract contains language that the subcontractor will remain insured through the duration of the project in question.

The Board questioned Mrs. Garufi. She testified that she is not aware that even if there is a valid Delaware business license there is a possibility that there might not be valid workers'

compensation insurance. If people do not pay their policy premiums or get dropped, however, certain insurance companies will let her know.

Rebecca Colabaugh, an adjuster from Liberty Mutual, was called as a witness on behalf of Claimant.¹⁴ She has been employed by Liberty Mutual as a senior claims specialist for almost four years. Mrs. Colabaugh handles newer accidents and manages workers' compensation claims. She is involved in communicating with all of the parties.

Ms. Colabaugh testified that WVM had a contract for workers' compensation insurance coverage with Liberty Mutual that was effective in April of 2014. The policy coverage was applicable to the state of New Jersey only, however. Ms. Colabaugh is unaware of WVM ever having a Liberty Mutual policy for coverage extending into Delaware.

Ms. Colabaugh testified that on April 11, 2014, Linda Garufi contacted Liberty Mutual. Mrs. Garufi had apparently reported this claim to Liberty Mutual's screening unit. Before this, to Ms. Colabaugh's knowledge, no one had called in to verify that WVM's insurance policy extended to the state of Delaware. Ms. Colabaugh had not spoken to Mrs. Garufi during the initial call; once she received the file, however, she called her directly a few times.

Mrs. Garufi advised Ms. Colabaugh that she had reported the claim to Liberty Mutual under the presumption that WVM was the owner of the policy. She also told of what she knew of the accident, essentially that Claimant had fallen to the ground while framing a house. Ms. Colabaugh requested a copy of the contract between WVM and Atlantic. Other than that, Mrs. Garufi had indicated that she had a COI showing coverage in New Jersey for WVM. Mrs. Garufi did not provide a copy of the COI and Ms. Colabaugh has never seen it. She is unsure

¹⁴ Relevant portions of Rebecca Colabaugh's deposition, which was presented at the original hearing, was highlighted for the Board at the Remand hearing. The deposition was marked as Claimant's Exhibit #1 at the time of the Remand hearing.

how Mrs. Garufi went about obtaining the COI from AVS Insurance Agency, which was dated March 3, 2014, but she knows that it can be gotten.

Ms. Colabaugh conducted an internal investigation in regard to the incident involving WVM Construction and Claimant. This entailed reviewing information to determine if the New Jersey policy would apply to this Delaware accident.

The only information Ms. Colabaugh had in regard to who employed Claimant at the time of his accident was that Claimant was in contact with someone named Gaston Santos during his employment. She had received information, possibly from the general contractor (Atlantic) that Claimant was hired by Gaston Santos, who was employed in some capacity by WVM Construction. Ms. Colabaugh had never personally spoken with Mr. Santos. She did inquire with Mr. Pereira, the owner of WVM, by email. On April 30, 2014, he advised that he knew Gaston Santos, but that he was a "former employee." Mr. Pereira also indicated that it had been more than forty-five days since Mr. Santos worked for WVM. Ms. Colabaugh had no further contact with Mr. Pereira, as he failed to further respond to emails or phone calls.

On April 15, 2014, Ms. Colabaugh also spoke with a representative from Westco Insurance ("Westco") in regard to this matter. The representative from Westco indicated that they had received a claim filed by Atlantic, but that they advised Atlantic that there would be no coverage for Claimant through Atlantic either. Claimant was never an employee of Atlantic's, so the claim would be denied.

That same day, April 15, 2014, Ms. Colabaugh contacted AVS. At that time, she questioned whether or not AVS was aware of any Delaware policy for WVM and was told that AVS also was not.

Based on the results of her investigation, Ms. Colabaugh concluded that WVM's New Jersey policy with Liberty Mutual would not extend to Delaware. Liberty Mutual thus denied workers' compensation coverage to WVM in terms of Claimant's Delaware accident.

On cross examination, Ms. Colabaugh agreed that a determination of whether there is specific insurance coverage requires looking at the actual policy. Further, Ms. Colabaugh agreed that Liberty Mutual insures businesses and employers all over the United States.

Ms. Colabaugh does not generally deal with COIs. She can obtain them from time to time, but she is never the one to create them. They are released primarily by the agents and brokers. Ms. Colabaugh admitted that she had never seen the COI that Mrs. Garufi referenced in regard to WVM.

Ms. Colabaugh testified that she had not sent letters to Atlantic to let Atlantic know that there was no coverage extending to Delaware, because Atlantic is not a client of Liberty Mutual. However, she clarified that if Atlantic had needed this information, Liberty Mutual would have definitely provided it.

When Ms. Colabaugh spoke with a representative from AVS Insurance, there was no indication that the representative from AVS knew of Claimant's work accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On remand from the Superior Court, the Board has been directed to correct an error in the application of the law. While a COI on behalf of WVM was provided to Atlantic pursuant to Section 2311(a)(5), on its face, the COI was ambiguous as to whether the coverage extended to employees working in Delaware. As the Court noted, because the COI was ambiguous as to Delaware coverage, Atlantic was therefore required to verify that WVM had workers' compensation insurance in force in Delaware. Thus, the Court has directed the Board on remand to make a factual determination as to whether Atlantic verified that WVM had workers' compensation insurance that extended to Delaware.

Pursuant to this remand, Claimant maintains that Atlantic should be found liable to insure Claimant's April 9, 2014 injuries under Section 2311(a)(5), in its failure to verify Delaware workers' compensation coverage. Atlantic, on the other hand, argues that Atlantic received a COI that purported on its face to show valid insurance coverage as well as a copy of WVM's Delaware business license, which was further evidence of Delaware insurance coverage; on this basis, Atlantic maintains that it satisfied its statutory duty.

Following the explicit direction from the Court, and an extensive review of the evidence presented both at the original hearing and the hearing on remand, the Board finds that following receipt of a COI that was ambiguous in terms of effective insurance coverage, Atlantic failed to verify that WVM's workers' compensation insurance was actually in force in Delaware. Therefore, the Board ultimately concludes that Atlantic is liable to insure Claimant's April 9, 2014 injuries under Section 2311(a)(5).

The Board first notes that upon reflection on the Superior Court's direction, the Board's original determination was incorrect. The Board initially employed a due diligence standard in finding that Atlantic satisfied the statute by receiving a COI that purported to show valid workers' compensation insurance with no obvious "red flags," in conjunction with a copy of WVM's Delaware business license. However, the Board recognizes that this analysis left out the consideration of the very critical language "in force under this chapter;" in other words, absent plain language on the COI indicative of Delaware coverage, Atlantic was specifically required to verify that there was workers' compensation coverage effective *in Delaware*. This is specifically where the Board now finds that Atlantic failed.

By statute, if Atlantic wanted to avoid having to insure work accidents involving WVM's employees, they had to receive a COI evidencing Delaware workers' compensation coverage or

had to otherwise verify that there was Delaware workers' compensation coverage. Section 2311(a)(5) states:

Any contracting entity shall obtain from an independent contractor or subcontractor and shall retain for 3 years from the date of contract the following: a notice of exemption of executive officers or limited liability company members and/or *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. (Emphasis added).

The *Cordero* Court made clear that general contractors must verify that their subcontractors have Delaware workers' compensation coverage in effect at the time of contract.¹⁵ Here, Atlantic received a COI, but there was no evidence of Delaware workers' compensation coverage contained on the four corners of the document itself. Therefore, as the Court noted, Atlantic needed to take an additional step(s) to confirm that WVM was insured for Delaware work accidents. Atlantic argues that it took an additional step; specifically, Atlantic maintains that the receipt of WVM's Delaware business license that was issued on January 15, 2014 evidenced WVM's Delaware workers' compensation coverage.¹⁶ However, the Board was not convinced that this was sufficient to satisfy Section 2311(a)(5). While perhaps receipt of WVM's Delaware business license might have been coupled with Delaware workers' compensation insurance on the date of issuance of the license, it does not necessarily mean that the coverage was still in place in March 2014. It is true that coverage can lapse, and the insured can be dropped for

¹⁵ As the Court noted in *Cordero*, there is an inherent requirement to verify that Delaware workers' compensation coverage is in place during the effective period of time the work will take place; however, there is no obligation for a general contractor to continuously monitor or re-verify that there is ongoing insurance coverage unless there is reason to suspect that there is an issue.

¹⁶ Mrs. Garufi also testified that she believed that WVM was a "reputable company" for certain reasons, such as their providing an EIN number.

various reasons, such as unpaid premiums. Policies can also later be cancelled by either the insurer or the insured.

The facts of this case actually serve to prove that one cannot necessarily presume that Delaware workers' compensation coverage is in place simply because a Delaware business license has been issued, even if recently. Here, there is no evidence that WVM *ever* had workers' compensation coverage extending to Delaware. In fact, Ms. Colabaugh testified that there was no such Delaware coverage issued to WVM by Liberty Mutual or by AVS. Thus, it is clear that, for whatever reason, there are circumstances where a Delaware business license is not coupled with actual effective Delaware workers' compensation insurance. This is perhaps because such an insurance policy was never held, as here, or because Delaware workers' compensation insurance has later lapsed. For these reasons, if liability is to be avoided under Section 2311(a)(5), it is obviously very important that general contractors take additional steps to explicitly verify that Delaware workers' compensation coverage is in place at the outset of a contract, instead of simply relying on the issuance of a Delaware business license.¹⁷

While not ultimately convincing to the Board, Mrs. Garufi provided other reasons that she believed it unnecessary to go further in verifying WVM's Delaware workers' compensation coverage beyond receipt of the COI and the Delaware business license. She testified that all of the COIs she has ever seen have not mentioned which states are specifically covered; she added that many companies doing business in this area tend to have "all states" policies as work might be performed in different states within the area. She alluded to the presumption that WVM also had an "all states" policy. To the Board, there are several very obvious problems with these

¹⁷ Delaware is a small state that is close in proximity to various other states. The instant case is a perfect example of why general contractors should be diligent with insurance verification efforts at the outset of subcontracting work; here, Atlantic is a Maryland company that is subcontracting a New Jersey company to perform work on a project in Delaware. It is clear that this contracting work often crosses state lines.

presumptions. First, it is now clear that WVM did not have an “all states” policy, so this presumption was inaccurate. Additionally, just because most of these COIs do not contain information regarding which states are covered, this does not mean that a general contractor is free to just presume that their subcontractor’s insurance coverage is an “all states” policy that will apply to the state in which the work will be performed. The insurance company is simply providing proof of insurance, and there is no reason to presume that the insurance company, whom is likely not privy to the actual contract, is going to be aware of where a specific project is located.¹⁸ As Section 2311(a)(5) directs, it is up to the general contractor to ensure that its subcontractors have acquired the proper insurance coverage before work begins, not the insurance carrier.

The Board also notes that Mrs. Garufi further testified that she presumed that Delaware coverage was in place because Mr. Pereira signed a contract with Atlantic that specifically indicated that WVM had to maintain Delaware workers’ compensation coverage at all times that work was being performed. This is again a faulty presumption, based on the facts at hand. Despite the language of the contract that Mr. Pereira signed, WVM apparently never had Delaware workers’ compensation coverage. Certainly, there is no question that, at times, parties

¹⁸ Mrs. Garufi also testified that she presumed that Liberty Mutual would not have sent the certificate if it did not apply to the state where the work was to be performed. She indicated that it made no sense that Liberty Mutual or AVS failed to question why it was sending a COI regarding work that would take place in a state for which the policy did not extend. Again, the fact that the insurance policy did not actually extend to Delaware proves this presumption to be faulty. As the Board has already noted, the workers’ compensation carrier will not be party to the actual contract, so it is unreasonable to presume that the carrier will have the information about where a specific project is being completed when proof of insurance is asked to be provided. Instead, when a COI is requested to be sent by the insurance carrier to a certain party, it is more likely the case that the carrier simply sends the COI as directed. Here, the project itself was located in Delaware, while Atlantic was a Maryland company and WVM was a New Jersey company. There is no reason to presume that Liberty Mutual (or AVS) would realize, and then somehow step in to guarantee that the insured is covered in Delaware before sending the COI. Instead, it is incumbent upon the subcontractor to make sure that such insurance is in place covering the work in question; and, under Section 2311(a)(5), it is also the general contractor’s duty to ensure that this is the case if liability is to be avoided. That Atlantic essentially pointed a finger at Liberty Mutual (or AVS) for not being aware that the project itself was located in Delaware, and for not likewise making sure that WVM was insured in Delaware misplaces responsibility, in the Board’s estimation.

are guilty of breaching the terms of contracts, so the fact that a contract contains this language should not have been relied upon as explicit evidence of Delaware workers' compensation coverage.

The Board finally notes that, despite all of the reasons that Atlantic testified that it believed it was reasonable to presume that WVM had Delaware workers' compensation coverage, it was always an option for a representative from Atlantic to have called Liberty Mutual and/or AVS for explicit verification that WVM's workers' compensation policy extended to Delaware. Mrs. Garufi testified that insurance companies would not automatically provide this information if asked, and that the insured party itself would have had to call the insurance company to authorize the information being released to Atlantic. Mrs. Garufi also testified at length at the original hearing that performing this type of verification is just not practicable because of the voluminous number of subcontractors Atlantic is dealing with. The Board was not convinced, even if true, that this excuses Atlantic from having to verify WVM's Delaware workers' compensation coverage under Section 2311(a)(5). Mrs. Garufi ultimately testified that Atlantic has between 25 and 40 subcontractors over a one-year time period. The Board doubts that this verification process takes so long, or is so difficult, that Atlantic would rather risk liability than take this extra step to verify coverage. In fact, Ms. Colabaugh testified that if Atlantic had requested this information, it would have been provided, and the Board does not doubt this. Mrs. Garufi admitted that she had not called either Liberty Mutual or AVS prior to Claimant's work accident, so there is no indication that any attempt was actually made. The Board further found it notable that Mrs. Garufi testified that, following this case, she has changed her practice and now does call each insurance company directly to verify that Atlantic's

subcontractors have the proper workers' compensation coverage in place. Thus, it is very clear that this could have been done with WVM as well.

In sum, for the aforementioned reasons, the Board simply was not convinced that Atlantic verified that WVM had workers' compensation insurance that was effective in Delaware after receiving a COI that was absent on its face as to Delaware coverage. Thus, while not Claimant's employer, Atlantic is deemed liable to insure Claimant's April 9, 2014 work-related injuries under section 2311(a)(5).

Attorney's Fee and Medical Witness Fee

A claimant who is awarded compensation¹⁹ is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320.

The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). An award of less than the maximum fee is permissible and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded.²⁰ Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant's counsel submitted an affidavit stating that she spent approximately 21 hours preparing for the two hearings. Claimant's counsel was admitted to the Delaware Bar in 2006

¹⁹ The Board found pursuant to the April 13, 2016 decision that Claimant proved that he suffered compensable injuries in relation to the April 9, 2014 work accident, and that a closed period of total disability as well as his outstanding medical expenses in that regard were compensable.

²⁰ See *Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).

and is experienced in the area of workers' compensation. Her first contact with Claimant was in July 2014. There is no evidence that counsel has represented Claimant in anything other than a workers' compensation context. The case was of above-average complexity. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, however. There is no evidence that counsel was precluded from accepting other employment because of working on this case. Claimant has entered into a contingent fee agreement with Counsel, and a copy of the fee agreement was provided to the Board. There is no suggestion that Atlantic is incapable of paying an attorney's fee.

Taking into consideration the factors set forth above and the statutory limits on awards, the Board finds that an attorney's fee in the amount of \$6,500.00 is reasonable and appropriate in this case.

A medical witness fee for testimony on behalf of Claimant is also awarded to Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.²¹

²¹ Dr. Schwartz's expert testimony was presented at the original March 28, 2016 hearing.

STATEMENT OF THE DETERMINATION

Based on the foregoing, following the hearing on remand, the Board concludes that because Atlantic failed to verify Delaware workers' compensation insurance, pursuant to title 19 of the Delaware Code, section 2311(a)(5), Atlantic (a non-employer) is deemed to insure Claimant's April 9, 2014 injuries.²²

IT IS SO ORDERED THIS 2nd DAY OF AUGUST, 2018.

INDUSTRIAL ACCIDENT BOARD

William F. Hare / *W.F. Hare*
WILLIAM F. HARE

Patricia Y. Maul / *P.Y. Maul*
PATRICIA Y. MAUL

I, Kimberly A. Wilson, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Kimberly A. Wilson

Mailed Date: 8-7-18

JB
OWC Staff

²² The Board's findings regarding Claimant's compensation in relation to the April 9, 2014 work accident was delineated in the March 28, 2016 decision.

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