IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ANDREW MCKIRBY,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 07A-08-005-RFS
	)	
	)	
	)	
A & J BUILDERS, INC., R.A. BUNTING & COMPANY, INC., ALLEN DAVIDSON, JAMIE DAVIDSON,	)	
	)	
	)	
	)	
Appellee.	)	

MEMORANDUM OPINION

Upon Appellant's Appeal of the Industrial Accident Board. Reversed.

Submitted: March 11, 2009
Decided: March 18, 2009

Andrea G. Green, Esquire, and Nicole M. Evans, Esquire, Doroshow, Pasquale, Krawitz & Bhaya, Millsboro, DE, Attorneys for Appellant.

William D. Rimmer, Esquire, and John J. Ellis, Esquire, Heckler & Frabizzio, Wilmington, DE, Attorneys for Appellee.

Andrew McKirby ("Appellant") has appealed a decision of the Industrial Accident Board ("Board") to grant R.A. Bunting & Company, Inc.'s ("Appellee" or "Bunting") Motion to Dismiss. For the reasons set forth herein, the Board's decision is reversed.

STATEMENT OF FACTS

Appellant was employed as a carpenter by A & J Builders, Inc. ("Employer" or "A & J"). On or about January 9, 2008, Appellant was working on a home being constructed at Lot 42 Jericho Court, The Preserve, in North Bethany, DE. Bunting was the general contractor for this project. A & J submitted a proposal for house framing and associated work for $67,900.00 which was accepted by Bunting, (hereafter, "the contract") on October 15, 2007. Appellant alleges that in the course of his work, his foot slipped while he was on the third floor, causing him to fall two stories to the first floor. Appellant alleges that he has sustained multiple injuries from this fall and was treated for injuries to his left hand, wrist, and index finger at Beebe Medical Center in Lewes, Delaware.

Appellant alleges that Employer did not have workers' compensation insurance. Appellee had workers' compensation and employer's liability coverage from The Hartford Mutual Insurance Company. This policy period began on May 14, 2007, and expired on May 14, 2008.

Appellant filed a Petition to Determine Compensation Due against Employer and Appellee with the Board on or about February 4, 2008. Appellant sought total disability benefits, medical expenses, transportation expenses, medical witness fees, and attorney's fees. A legal hearing was held on June 11, 2008, to hear arguments on Appellee's Motion to Dismiss on the issues raised in this appeal. A Dismissal Order was granted on or about July 15, 2008. Appellant appealed that order to this Court on July 30, 2008.

STANDARD OF REVIEW

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law, and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law. *Histed v. E. I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. 2003) at *1. Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla but less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988). In conducting its review, this Court is not to engage in the practice of judging witness credibility or weighing the evidence proffered; those functions are reserved exclusively for the Board. *Id.* at 1106.

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 WL 1806163 (Del. Super. 2007) at *1. Absent error of law, the standard of review for a

Board's decision is abuse of discretion. *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211 (Del. Supr. 2007) at *2. The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis* at *1.

DISCUSSION

The facts of this case are not in dispute for purposes of this motion; the record was supplemented on March 5 and 11, 2009, to provide the date of the contract between A & J and Bunting; consequently, this appeal presents only a question of law. To understand the legal questions involved, the statutory changes which occurred in 2007 are important. Section 2311 of the Delaware Code deals with workers' compensation. 19 *Del. C.* 2311. On January 17, 2007, the General Assembly amended this section. Two additions are particularly relevant to this appeal. Subsection (a)(4) read as follows:

> All independent contractors governed by this subsection shall be covered under this chapter. Independent contractors shall have an option to purchase coverage to satisfy this requirement, or alternatively shall be insured by the general contractor, subcontractor or other contracting entity for which they perform work or provide services. Actual remuneration of the independent contractor will be used to determine premium subject to the executive officer minimum and maximum payrolls approved by the Department of Insurance. Executive officers, partners, sole proprietors and members of a limited liability company, when working in an independent contractor role, shall be subject to the same requirements as outlined above and may not rely upon §2308 of this title. 19 *Del. C.* §2311(a)(4) (Jan. 2007) (amended May 2007).

Subsection (a)(5) read as follows:

> Any contracting entity shall obtain, and retain for three (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. 19 *Del. C.* §2311(a)(5) (Jan. 2007) (amended May 2007).

These amendments created a new statutory framework for workers' compensation. The General Assembly put the onus on the general contractors to make sure that their subcontractors had coverage for workers' compensation liability. If they did not, the general contractors would now be held liable. This statute is the basis for Appellee's inclusion in this case.

On May 23, 2007, the General Assembly again amended the statute. This change took place nine days after the beginning of Appellee's policy period. Subsection (a)(4) was changed to read as follows:

> All independent contractors governed by this subsection shall be covered under this chapter. Independent contractors shall have an option to purchase coverage to satisfy this requirement, or alternatively shall be insured by the general contractor, subcontractor or other contracting entity for which they perform work or provide services. Actual remuneration of the independent contractor will be used to determine premium subject to the executive officer minimum and maximum payrolls approved by the Department of Insurance. Executive officers who are stockholders of a corporation and individuals who are members of a limited liability company may elect to be exempted from the above and this chapter, pursuant to and by complying with §2308(a) of this title. However, for purposes of this subsection the exemption provided in §2308(a) of this title for executive officers who are stockholders of a corporation shall be limited to no more than 4 executive officers. Partners and sole proprietors, when working in an independent contractor role, shall be subject to the requirements of this subsection and may not rely upon §2308(b) and (c) of this title. This subsection applies to insurance policies issued or renewed on or after July 17, 2007. 19 *Del. C.* §2311(a)(4).

Subsection (a)(5) was changed to read as follows:

> Any contracting entity shall obtain from an entity described in the preceding subsection, and shall retain for three (3) years from the date of the contract the following: a notice of exemption of executive officers and/or a certification of insurance in force under this chapter and/or a certification that no insurance has been obtained by the entity. If the contracting entity shall fail to do so, the contracting entity shall not be deemed the employer of any subcontractor or independent contractor or their employees but shall be deemed to insure any workers' compensation claims arising under this chapter. 19 *Del. C.* §2311(a)(5).

Appellee has argued that the statute did not go into effect until July 17, and that it cannot be held liable as a result. It has been uncontested that if this statute was in effect, then Appellee could potentially be found liable to Appellant.

Since the effective date of the statute is a question of law, this Court will review it de novo. *McDonald's* at *1. The Board found that the General Assembly intended to create a phase-in period to allow contractors to obtain coverage under the new law before it would take effect. The dispute between the parties has been whether the statute in question went into effect on January 17, 2007 or on July 17, 2007. This dispute misses an important point.

The original amendment to the Workers' Compensation Act went into effect on January 17, 2007. That statute imposed liability on Appellee. The July 17 date did not become part of the statute until it was amended on May 23, 2007. Appellee's insurance policy began on May 14, 2007. At the time the policy began, the earlier version of the statute was in effect. The change to subsection (a)(4) merely related to coverage of executive officers; none of Appellee's executive officers are involved in this action. 19 *Del. C.* §2311(a)(4).

Moreover, the change to subsection (a)(5) clarified the lack of an employer-employee relationship with the contracting entity. This was necessary to preserve tort liability claims by injured workers against third parties in the position of A & J. Without clarification, an argument could be made that traditionally permitted tort suits would be barred by the exclusivity provisions of the worker's compensation law. Also, it made a change to the scope of documents the contracting entity was required to obtain depending upon the nature of the parties. 19 *Del. C.* §2311(a)(5). The requirement of a party like A & J to seek a certification of coverage continued. As these changes do not affect Appellee's standing in this action, it would have been properly brought under either version of the statute.

Appellee has argued that - in January - the General Assembly could not have enacted a dependent subsection [i.e., (a)(5)] seven months before its companion subsection was to come into effect. Of course, the companion subsection [i.e., (a)(4)] was enacted at the same time, but without the sentence creating July 17, 2007, as the effective date. In any event, both subsections established independent obligations. One focused on the purchase of insurance, and the other required a duty to inquire and to obtain a certification when a contract for work was accepted.

Appellee has argued that it would be unfair to the insurance carrier to create liabilities that were not considered when the original policy was signed. In fact, this liability was in place on May 14, 2007; the later amendment to the statute would not have been considered at that time. The insurance carrier had four months of notice that this liability had been enacted and is bound to know its consequences on the risk Appellee might incur. Ignorance of the law is no excuse.

"A statute is ambiguous if it 'is reasonably susceptible of different conclusions or interpretations.'" *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998). That appears to be the case here with the July date. "If the statute is ambiguous, a court must seek to resolve the ambiguity by ascertaining the legislative intent." *Id.* Courts have found that ambiguity can "arise from the fact that giving literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature." *Coastal Barge Corp. v. Coastal Zone Indus. Control Board*, 492 A.2d 1242, 1246 (Del. 1985). This concept is particularly relevant to the case at hand.

In order to reach the legislative intent that has been argued by Appellee and accepted by the Board, one must presume that the General Assembly intended to require independent contractors to obtain worker's compensation insurance or subject their contracting entity to liability and then decided over four months later to eliminate this new liability for a period of almost two months. After this period, it would renew. This interpretation makes little rational sense. Why would the General Assembly want to start, stop, and then restart a remedy? Appellee has also failed to offer any argument as to why the General Assembly would have intended to eliminate the liability as it existed during the period of over four months that it was already in place. 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; it defies logic to presume that the General Assembly then changed its mind a few months later and invalidated the liability that had been created.

If the General Assembly did intend to eliminate liability that had gone into effect during the period after the statute was first amended, it could have done so explicitly in the later amendment.

The fact that it did not is evidence of legislative intent to leave that liability in place. Appellee cannot escape its liability under section 2311 by relying on this amendment; it acquired insurance that failed to satisfy the statutory requirements in place. In addition, Bunting failed to inquire and to obtain a certification of insurance from A & J before entering into the contract. The accident occurred long after all of the statutory changes were made. Appellee simply failed to protect itself. It signed the contract in the dark concerning worker's compensation coverage which is a major subject in construction projects. A modicum of due diligence required by the statute would have eliminated the problem.

CONCLUSION

Considering the foregoing, the decision of the Board is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.