

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

JULIO GARCIA TRUJILLO, )  
an individual, )  
 )  
Employee-Below, )  
Appellant, )  
 )  
v. )  
 )  
ATLANTIC BUILDING ASSOCIATES, )  
a foreign corporation, and GASTON )  
SANTOS BAUTISTA, d/b/a SANTOS )  
CONSTRUCTION, LLC, a domestic )  
corporation, )  
 )  
Employers-Below, )  
Appellees. )

C.A. No. N16A-05-003 JRJ

**OPINION**

Date Submitted: March 10, 2017

Date Decided: June 7, 2017

*On Appeal from the Industrial Accident Board: REVERSED and REMANDED.*

Tara E. Bustard, Esquire, Arthur M. Krawitz, Esquire, Doroshow, Pasquale Krawitz & Bhaya, 1208 Kirkwood Highway, Wilmington, DE. Attorneys for Employee-Below, Appellant Julio Garcia Trujillo.

Andrew J. Carmine, Esquire, Elzufon Austin & Mondell, 300 Delaware Avenue, Suite 1700, P.O. Box 1630, Wilmington, DE. Attorney for Employer-Below, Appellee Atlantic Building Associates.

**Jurden, P.J.**

## I. INTRODUCTION

This is an appeal from an April 13, 2016 Decision of the Industrial Accident Board (the “Board”).<sup>1</sup> Employee-Below, Appellant Julio Garcia Trujillo was injured on April 9, 2014, while performing construction work for Gaston Santos Bautista d/b/a Santos Construction (“Santos”).<sup>2</sup> Trujillo brought Petitions to Determine Compensation Due against Santos, WVM Construction (“WVM”) (the subcontractor that hired Santos),<sup>3</sup> and Employer-Below, Appellee Atlantic Building Associates (“Atlantic”) (the contractor who hired WVM).<sup>4</sup> After Trujillo filed his Petitions to Determine Compensation Due, the Office of Workers’ Compensation determined that neither Santos nor WVM was insured for Delaware workers’ compensation claims as of the date of Trujillo’s injury.<sup>5</sup>

Trujillo seeks compensation from Atlantic pursuant to 19 *Del. C.* § 2311(a)(5) on the basis that Atlantic failed to obtain “a certification of

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<sup>1</sup> Notice of Appeal from Industrial Accident Board Decision Dated April 13, 2016, Exhibit A Industrial Accident Board Decision Dated April 13, 2016 (“Board Decision”) (Trans. ID. 58976848).

<sup>2</sup> In its April 13, 2016 Decision, the Board found that Trujillo was an employee of Santos at the time he was injured. Board Decision at 23–24.

<sup>3</sup> It appears that Santos either worked directly for or was subcontracted to perform framing work by WVM. *Id.* at 2. However, the exact nature of the relationship between Santos and WVM is unclear. Although Trujillo brought a Petition to Determine Compensation Due against WVM, that Petition was not scheduled for the March 28, 2016 hearing, and the Board made no findings as to WVM due to lack of proper notice. *Id.* at 2 n.1.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> Employer-Below, Appellee Atlantic Building Associates’ Answering Brief (“Atlantic. Resp.”) (Trans. ID. 60216671), Appendix at A-230 February 20, 2015 Email from Delaware Department of Labor Office of Workers’ Compensation Workers’ Compensation Specialist to Counsel for Trujillo.

insurance in force under [Chapter 23 of Title 19]" of the Delaware Code from its subcontractor WVM. Relying on *Cordero v. Gulfstream Development Corp.*,<sup>6</sup> Atlantic argues that it is not liable for Trujillo's workers' compensation claim because it obtained a certificate of insurance ("COI") from WVM that was "valid on its face at the time it [was] furnished," regardless of the fact WVM's workers' compensation insurance policy applied only to workers and work accidents in the State of New Jersey.<sup>7</sup>

The Board found that the Atlantic is not liable for Trujillo's workers' compensation claim because the COI obtained by Atlantic was valid on its face, despite the fact that the COI did not evidence that WVM's insurance applied to its employees working in Delaware.<sup>8</sup> For the reasons explained below, the Court finds that the Board applied an incorrect legal standard to the case.

## II. BACKGROUND

### A. Factual Background

Trujillo testified before the Board that Santos hired him to perform construction work and that he was working for Santos on April 9, 2014, when he was injured.<sup>9</sup> The parties jointly stipulated that the construction site was in Millville, Delaware, and that while working on the second floor of a house,

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<sup>6</sup> 56 A.3d 1030 (Del. 2012).

<sup>7</sup> Atlantic Resp. at 12 (quoting *Cordero*, 56 A.3d at 1037).

<sup>8</sup> Board Decision at 17-23.

<sup>9</sup> *Id.* at 10.

Trujillo stepped on a piece of plywood that collapsed beneath him.<sup>10</sup> Trujillo fell from the second floor to the ground floor.<sup>11</sup> An ambulance transported Trujillo to the emergency room where he was diagnosed with an L2 compression fracture.<sup>12</sup>

Linda Garufi, a representative of Atlantic, also testified before the Board.<sup>13</sup> Atlantic is a Maryland corporation that performs commercial and residential construction work, including work in Delaware.<sup>14</sup> Garufi testified that Atlantic subcontracted WVM to perform framing work at the Millville construction site.<sup>15</sup> AVS Insurance Agency, WVM's insurance broker, provided Atlantic with a COI indicating that WVM had workers' compensation insurance.<sup>16</sup> The COI showed a policy number, the amount of insurance coverage, and effective dates of November 25, 2013, through November 25, 2014.<sup>17</sup> The COI indicates that the policy limits are "per statute," but it does not state which statute. Garufi did not ask WVM, a New Jersey corporation, for anything in writing to verify that it had Delaware workers' compensation insurance.<sup>18</sup>

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<sup>10</sup> Employee-Below, Appellant's Opening Brief ("Trujillo Op. Br.") (Trans. ID. 60120371), Appendix at A-232 Joint Stipulation of Facts.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Board Decision at 3.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 3. The contract between Atlantic and WVM requires WVM to have workers' compensation insurance. *Id.* at 6 n.5. The COI furnished to Atlantic is Exhibit G of the parties Joint Exhibit Package.

<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 7.

Garufi admitted that the COI furnished to Atlantic does not indicate whether the policy covers workers' compensation claims for workers or work accidents in Delaware.<sup>19</sup> On this point, Garufi explained that no COI form she has seen indicates what states the coverage extends to.<sup>20</sup> Garufi did not attempt to verify whether WVM's workers' compensation insurance extended to Delaware through the Delaware Department of Labor's website.<sup>21</sup> However, Garufi did check the Division of Revenue's website to see whether WVM had a Delaware business license for 2014.<sup>22</sup> Garufi testified that she believed she had essentially verified that WVM had workers' compensation coverage in Delaware by checking WVM's Delaware business license because a non-resident subcontractor must provide proof of workers' compensation insurance as well as a bond in order to work within Delaware.<sup>23</sup>

Garufi testified that she learned of Trujillo's injury when a medical bill was sent to Atlantic's office.<sup>24</sup> After receiving the medical bill, Garufi contacted

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<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* See Workers' Compensation Search Form, Delaware Department of Labor Division of Industrial Affairs, <http://dia.delawareworks.com/workers-comp/workers-comp-search.php>.

<sup>22</sup> Board Decision at 4.

<sup>23</sup> *Id.* See 30 *Del. C.* § 2502(b) ("The Division of Revenue shall not issue any license to any person [desiring to engage in business in this State as a contractor] until and unless such person: . . . (3) Has filed a certificate of insurance showing that such person has insured liability in the amount and manner, and when due, and as required, under the workers' compensation laws of this State, or a certificate on a form prescribed by the Department of Labor of this State that such person has been declared to be a qualified self-insurer by the Department of Labor of this State pursuant to the workers' compensation laws of this State.).

<sup>24</sup> Board Decision at 7.

WVM's insurance provider, Liberty Mutual, because she feared that the accident had not been reported.<sup>25</sup>

Rebecca Colabaugh, an adjuster for Liberty Mutual, testified by deposition that WVM had a workers' compensation insurance policy applicable to the State of New Jersey that was effect in April 2014.<sup>26</sup> After speaking with Garufi regarding the accident,<sup>27</sup> Colabaugh conducted an internal investigation to determine whether the New Jersey policy would apply to Trujillo's Delaware accident.<sup>28</sup> Based on the results of her investigation, Colabaugh concluded that WVM's policy would not extend to Trujillo's injury, and Liberty Mutual denied coverage to WVM.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 13.

<sup>27</sup> The Board heard some conflicting testimony regarding Garufi's communication with Colabaugh. In particular, Colabaugh testified that Garufi indicated to her that she had a COI showing workers' compensation coverage in New Jersey for WVM. *Id.* Garufi denied telling Colabaugh that WVM only provided Atlantic with a "New Jersey Certificate of Liability Insurance." *Id.* at 9.

<sup>28</sup> *Id.* at 13.

<sup>29</sup> *Id.* at 14. In a letter sent from Colabaugh to WVM regarding Trujillo's claim, Colabaugh was unable to offer a coverage determination based on the limited information known at the time, but highlighted the New Jersey Limited Other States Insurance Endorsement as a relevant policy provision and reserved as a possible basis for denial as follows: "To the extent that Mr. Garcia Trujill [sic] was hired in the State of Delaware to work solely in Delaware, you have not met all criteria for the Limited Other States Endorsement to apply on your NJ policy." Joint Exhibit Package, Exhibit J.

## **B. The Board's April 13, 2016 Decision**

The Board began its analysis by noting that Atlantic was not Trujillo's employer.<sup>30</sup> While this fact would normally preclude Atlantic's liability for Trujillo's workers' compensation claims, 19 *Del. C.* § 2311(a)(5) requires contracting entities to obtain from their subcontractors "a notice of exemption of executive officers or limited liability company members and/or a certification of insurance in force under this chapter." If a contracting entity fails to obtain either a notice of exemption or a certificate of insurance, "the contracting entity . . . shall be deemed to insure any workers' compensation claims arising under this chapter." The Board recognized that, by enacting § 2311, "the 'General Assembly put the onus on the general contractors to make sure that their subcontractors had coverage for workers' compensation liability.'"<sup>31</sup> Despite this onus on general contractors, the general contractor will not necessarily be liable in every case where a subcontractor does not, in fact, have coverage for workers' compensation liability. On this point, the Board identified the Delaware Supreme Court's decision in *Cordero* as particularly relevant.<sup>32</sup>

In *Cordero*, Rodriguez Contracting Company ("Rodriguez") provided Delaware Siding Company ("Delaware Siding") with a COI for workers'

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<sup>30</sup> Board Decision at 17.

<sup>31</sup> *Id.* at 17–18 (quoting *McKirby v. A & J Builders, Inc.*, 2009 WL 713887, at \*2 (Del. Super. Mar. 18, 2009)).

<sup>32</sup> *Id.* at 18.

compensation insurance in connection with a subcontract for siding and roofing work, but then allowed the coverage to lapse.<sup>33</sup> At the time Rodriguez's employee was injured, Rodriguez did not have a workers' compensation insurance policy in effect, but Delaware Siding did not know or have reason to believe that Rodriguez did not have workers' compensation insurance coverage.<sup>34</sup> In support of its holding that both Delaware Siding and the general contractor, Gulfstream Development Corporation, had fulfilled their obligations under § 2311(a)(5), the Delaware Supreme Court explained that § 2311(a)(5) is a "safe harbor" from § 2311(a)(4)'s universal coverage mandate.<sup>35</sup> The Supreme Court held that once a contractor satisfies § 2311(a)(5), it will not be liable to insure workers' compensation claims from its subcontractor's employees, even if the subcontractor allows its coverage to lapse, except in cases "where the contractor knows or has reason to believe the certification is false."<sup>36</sup> For example, "where the contractor knows that its subcontractor has a history or practice of allowing its insurance coverage to lapse before the coverage period expires."<sup>37</sup>

The Board found *Cordero* instructive and highlighted the following language: "A certification of insurance is 'in force' if it is valid on its face at the

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<sup>33</sup> 56 A.3d at 1033.

<sup>34</sup> *Id.* at 1033, 1038.

<sup>35</sup> *Id.* at 1037.

<sup>36</sup> *Id.* at 1037–38.

<sup>37</sup> *Id.*



time it is furnished to the contractor.”<sup>38</sup> In light of that language, the Board found the COI provided by AVS Insurance Agency to Atlantic valid on its face.<sup>39</sup> Further, the Board found that Atlantic acted in good faith and satisfied any due diligence requirement of the statute.<sup>40</sup> The Board supported this finding by noting that there were no “red flags” in the case that should have put Atlantic on notice that WVM did not have insurance coverage “in force.”<sup>41</sup> Consequently, the Board found that Atlantic is not liable to insure Trujillo’s injuries.<sup>42</sup>

### III. PARTIES’ CONTENTIONS

Trujillo contends that the plain language of 19 *Del. C.* § 2311(a)(5) requires the workers’ compensation insurance referenced on a “certification of insurance in force under this chapter” to be *Delaware* workers’ compensation insurance.<sup>43</sup> Because Atlantic never obtained a COI from WVM for workers’ compensation insurance “in force” in Delaware, Trujillo concludes Atlantic must insure Trujillo’s workers’ compensation claims pursuant to § 2311(a)(5).<sup>44</sup>

Atlantic contends that the Board did not err in determining that Atlantic complied with § 2311(a)(5).<sup>45</sup>

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<sup>38</sup> *Id.* at 1037.

<sup>39</sup> Board Decision at 18.

<sup>40</sup> *Id.* at 21.

<sup>41</sup> *Id.* at 21–22.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> Trujillo Op. Br. at 9–12.

<sup>44</sup> *Id.*

<sup>45</sup> Atlantic Resp. at 12–14.

#### IV. STANDARD OF REVIEW

The Court reviews decisions of the Industrial Accident Board only to determine whether the decision is free from legal error and whether the Board's findings are supported by substantial evidence.<sup>46</sup> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>47</sup> Legal errors are reviewed *de novo*.<sup>48</sup> Absent error of law, the Board's decision is reviewed for abuse of discretion.<sup>49</sup> An abuse of discretion occurs when the Board's decision "exceeded the bounds of reason in view of the circumstances, [or] so ignored recognized rules of law or practice so as to produce injustice."<sup>50</sup>

#### V. DISCUSSION

As noted by the Board, *Cordero* is not squarely on point with this case. *Cordero* involved a subcontractor allowing its workers' compensation insurance to lapse after furnishing the contractor with a COI that was valid on its face as to the effective dates of the policy. Stated differently, *a fact evidenced on the face of the COI* turned out to be false. It was in this context that the Supreme Court stated "[a] certification is 'in force' if it is valid on its face at the time it is furnished to

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<sup>46</sup> *Roos Foods v. Guardado*, 152 A.3d 114, 118 (Del. 2016) (quoting *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at \*2 (Del. Super. Mar. 24, 2008)).

<sup>47</sup> *Id.* (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

<sup>48</sup> *Id.* (citing *Pers.-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

<sup>49</sup> *Id.* (citing *Pers. Gaines*, 981 A.2d at 1161).

<sup>50</sup> *Id.* (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

the contractor.”<sup>51</sup> Thus, when a contractor does not know or have reason to believe that a policy is not or will not be effective on the dates stated on a COI, the contractor fulfills its obligation to obtain a certification of insurance “in force” when the COI states effective dates for the workers’ compensation insurance that cover the work period. As the Court explained, “[w]e can safely presume that the General Assembly intended that a certification ‘in force’ at the time it is furnished would remain ‘in force’ during its entire coverage period.”<sup>52</sup> That said, § 2311(a)(5) requires not only a “certification of insurance in force” but a “certification of insurance in force *under this chapter*.” The significance of the “under this chapter” language was not addressed in *Cordero*.

Pursuant to 19 *Del. C.* § 2371, “[e]very employer to whom this chapter applies shall insure the payment of compensation to [] employees . . . .”<sup>53</sup> An employer with its primary place of business in another state is required to “carry Delaware workers’ compensation coverage *in full* for any employees doing substantial work in the State as if they were an employer in Delaware.”<sup>54</sup> By statute “[s]ubstantial work shall include” “[a] construction or contracting business for which a Delaware employer would be required to be licensed under Chapter 25 of

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<sup>51</sup> *Cordero*, 56 A.3d at 1037.

<sup>52</sup> *Id.*

<sup>53</sup> 19 *Del. C.* § 2371(a).

<sup>54</sup> *Id.* § 2371(b) (emphasis added).

Title 30.”<sup>55</sup> Chapter 25 of Title 30 requires “[a]ny person desiring to engage in business in this State as a contractor” to obtain a license from the Department of Revenue.<sup>56</sup> Thus, § 2371 requires all contractors performing construction work in Delaware to have “Delaware workers’ compensation coverage in full” in connection with such work.

Moreover, 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 the 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.

In order to satisfy § 2311(a)(5), Atlantic was required to obtain a certification that its subcontractor, WVM, had insurance “in force under this chapter.” Plainly, insurance “in force” under Chapter 23 of Title 19 is not merely insurance with effective dates covering the work period, but insurance that satisfies either §§ 2371(d)(1), (2), or (3). With regard to employers who do not self-insure,

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<sup>55</sup> *Id.* § 2371(c).

<sup>56</sup> 30 *Del. C.* § 2502(a).

§ 2371(d)(1) explicitly provides that a “Delaware workers’ compensation policy” must cover “the activities of the employer for any employee engaged in the employer’s business *in the territory of the State.*”<sup>57</sup> Written riders for out-of-state policies of insurance must also meet this territory requirement in order to “cover[] the work activities of the employees as fully and completely as an actual Delaware workers’ compensation policy would.”

The Board erred by taking the *Cordero* holding that “[a] certification of insurance is ‘in force’ if it is valid on its face at the time it is furnished to the contractor” out of context and disregarding the plain language of § 2311(a)(5) that the certification be for insurance “in force [under Chapter 23 of Title 19].” *Cordero*’s facial validity holding involved a fact that was evidenced on the face of the COI obtained—the effective dates of the policy. This case involves a fact that was not evidenced on the face of the COI obtained—whether the workers’ compensation insurance applies to employees working in Delaware.<sup>58</sup> By elevating isolated language from *Cordero* over the language of the statute, the Board applied an incorrect legal standard.

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<sup>57</sup> Emphasis added.

<sup>58</sup> Joint Exhibit Package, Exhibit G.

Section 2311(a)(5) requires a contractor to obtain a “certification of insurance in force under [Chapter 23 of Title 19],”<sup>59</sup> i.e. a certification of Delaware workers’ compensation insurance, whether that insurance is an actual Delaware workers’ compensation policy or a written rider to an out-of-state insurance policy.<sup>60</sup> If the 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. As the Superior Court stated in its decision in *Cordero v. Gulfstream Development Corp.*, “implicit in 19 Del. C. § 2311(a)(e) [sic] is a good faith obligation to verify insurance coverage, and the lack of due diligence by the

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<sup>59</sup> Chapter 23 of Title 19 does not lay out any requirements for a § 2311(a)(5) “certification” other than that it be for “insurance in force under this chapter.” However, Black’s Law Dictionary defines a certificate of insurance as “[a] document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers.” Certificate, *Black’s Law Dictionary* (10th ed. 2014). Further, the Delaware Certificates of Insurance Act defines a certificate of insurance, for purposes of Chapter 45, Title 18, as “a document or instrument, regardless of how titled or described, that is prepared or issued by an insurer or insurance producer as evidence of property or casualty insurance coverage.” 18 *Del. C.* § 4502. The Certificates of Insurance Act prohibits the use of an “unfair, misleading, or deceptive” COI form issued “in connection with property, operations, or risks located in this State,” but it does not mandate the use of any particular form for a COI. *Id.* §§ 4503, 4506. While the Certificates of Insurance Act does not mandate a particular form or content for certificates of insurance, other provisions of the Delaware Code do, but only in specific circumstances not applicable here. *See, e.g., Id.* § 1916 (requiring a broker’s certificate for surplus lines coverage for a home to “show the name and license number of the individual surplus lines broker, the description and location of the subject of the insurance, coverage, conditions and term of the insurance, the premium and rate charged, taxes collected from the insured, and the name and address of the insured and insurer”); *Id.* § 3519 (setting forth requirements for certificates of group health insurance policies); *Id.* § 3706 (setting forth requirements for certificates of consumer credit insurance).


<sup>60</sup> In cases of self-insurance, where an employer has furnished to the Department of Labor “satisfactory proof of the employer’s financial ability to pay directly [workers’] compensation” under 19 *Del. C.* § 2372, the employer will have “a certificate” issued by the Department of Labor pursuant to 19 *Del. C.* § 2375.

general contractor under the right facts may require liability to be imposed.”<sup>61</sup> The question is, therefore, whether Atlantic exercised sufficient due diligence to verify that the insurance coverage evidenced by the COI was “in force under [Chapter 23 of Title 19]” to satisfy its obligation under § 2311(a)(5).

## VI. CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **REVERSED and REMANDED** for further proceedings consistent with this opinion.

**IT IS SO ORDERED.**



Jan R. Jurden, President Judge

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<sup>61</sup> 2011 WL 6157487, at \*5 (Del. Super. Nov. 30, 2011), *aff'd*, 56 A.3d 1030 (Del. 2012).