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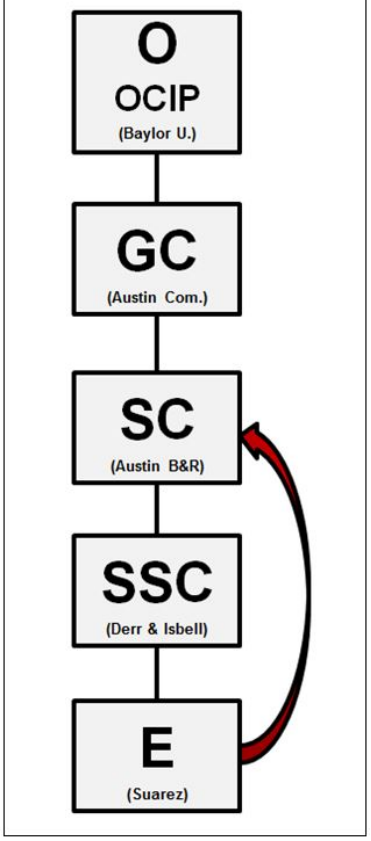
Construction Law Practice Tip: Plaintiffs' Attorneys Again Fail to Defeat CIP-Based Exclusivity Defense

By Pierre Grosdidier

In *Austin Bridge & Road, LP v. Suarez*, the First Court of Appeals once again confirmed the validity of Texas Labor Code § 406.123's exclusive remedy defense for a subcontractor enrolled in an owner-controlled consolidated insurance program ("OCIP").[1] The case reflects the appellate courts' well-established deference to the Legislature's "decided bias" in favor of finding insurance coverage in cases involving the Workers' Compensation Act (Tex. Lab. Code Chap. 401 *et seq.*, the "Act").

Parties' relationships in *Austin B&R v. Suarez*.



In *Suarez*, Baylor University, the owner, imposed an OCIP on its general contractor ("GC") Austin Commercial, LP and its subcontractors and sub-subcontractors (see the accompanying chart for the parties' relationship).[2] The prime contract also contained a provision that allowed Baylor to discontinue the OCIP, in which case the contract imposed on the GC or any of its subcontractors or sub-subcontractors the obligation to maintain the OCIP coverage at Baylor's expense.[3] Suarez, an employee of sub-subcontractor Derr & Isbell Construction, LLC ("DIC"), drowned during a bridge construction accident. All parties in the contractual chain were enrolled in the OCIP, which included coverage for workers' compensation. Suarez's family (the "Suarezes") applied for and received death benefits through the OCIP.[4]

The Suarezes sued Austin Bridge & Road, LP, the subcontractor that hired DIC, among others, for negligence and gross negligence. The trial judge denied Austin Bridge's motion for summary judgment, which was based on the Act's exclusive remedy provision under §§ 406.123 and 408.001. The Suarezes prevailed at trial with a judgment in excess of $17 million, but the court of appeals reversed and rendered a take-nothing judgment. It held that Austin Bridge had "conclusively established its exclusive-remedy defense."[5]

In its analysis, the court of appeals first noted the "substantial similar[ities]" between this case and *HCBeck, Ltd. v. Rice*, the Texas Supreme Court's landmark decision regarding OCIPs and the exclusive remedy defense.[6] *HCBeck* held that a GC enjoys the exclusivity defense pursuant to § 406.123 when it and its subcontractors enroll in an OCIP and the GC commits to provide backup coverage should the owner cancel the OCIP.[7] In both *HCBeck* and this case, the owner and the GC contracted to provide insurance coverage to all employees via an OCIP and made arrangements for back-up coverage should the owner decide to discontinue its participation in the program. The court of appeals concluded that, as in *HCBeck*, the prime contract "constitute[d] a written agreement . . . to provide workers' compensation coverage" to all project workers, and that Austin Commercial provided this coverage because both its upstream and downstream contracts included workers' compensation coverage.[8]

In opposing Austin Bridge's exclusivity defense, the Suarezes first argued that the two successive subcontracts (between the GC and Austin Bridge, and between the latter and DIC) did not satisfy the "written agreement" requirement of Texas Labor Code § 406.123(a)." But the court held that both subcontracts expressly incorporated the prime contract and required enrollment in the OCIP. Writings showed, therefore, that both Austin Bridge and DIC were aware of the OCIP and its enrollment requirement.[9]

To support their argument that no written contract existed, the Suarezes argued, *inter alia*, that the subcontracts could not have incorporated the prime contract because the latter *post-dated* the subcontracts. In fact, the court noted, only the Austin Bridge-DIC subcontract pre-dated the prime contract and only so by a day. Construing contracts "from a utilitarian standpoint," the court concluded that the parties signed the subcontracts at a time when the prime contract was sufficiently definite in scope that the parties knew and agreed to its terms.[10]

The Suarezes also argued that the subcontracts did not provide workers' compensation coverage because "they merely required enrollment in the OCIP."[11] The Suarezes supported their argument by citing to *Valadez v. MEMC Pasadena, Inc.*, a 2011 decision by the First Court of Appeals that held that a GC does not provide workers' compensation coverage so as to benefit from the exclusivity defense by contractually requiring a subcontractor to obtain such coverage.[12] The court of appeals easily distinguished *Valadez* because in that case the subcontract required coverage but did not impose participation in an OCIP. In other words, the owner merely required the contractor to secure coverage on its own for its employees. In this case (*Suarez*), the subcontractors were also required to participate in the OCIP. The case law held that this distinction was enough to deem that Austin Bridge "'provide[d]" workers' compensation insurance to Derr & Isbell and its employees." The provision of this coverage qualified Austin Bridge for the exclusivity defense.[13] The court restated the Texas Supreme Court's view that such a broad interpretation of the term "provide" served the legislature's "decided bias" for workers' compensation coverage.

Citing its 2004 *Etie v. Walsh & Albert Co., Ltd.* decision, the court also reiterated its holding that the exclusivity defense applied to all tiers of subcontractors when the GC purchased a contractor-controlled insurance program ("CCIP") for all workers at the construction site.[14] By extension, the defense also applied to all tiers of subcontractors covered by Baylor's OCIP. The court found support for this extension of its *Etie* holding to OCIPs in the Texas Supreme Court's *TIC Energy & Chem., Inc. v. Martin* decision, which held that

> because a contractor can " 'provide[ ]' workers' compensation, even when it has not purchased the insurance directly, ... multiple tiers of subcontractors [thereby] qualify as statutory employers entitled to the exclusive-remedy defense.[15]

The Supreme Court justified this holding by reasoning that it extended workers' protection at a project site both horizontally and vertically.

The court concluded that the prime contracts and the subcontracts "constituted a written agreement to provide workers' compensation insurance coverage pursuant" to the Act's § 406.123(a). Austin Bridge was, for the Act's purpose, a deemed co-employer or co-employee of DIC and its employee Suarez, and it was entitled to the Act's exclusive remedy defense because the parties honored the terms of the contracts. That is, the parties enrolled in the OCIP and Suarez's family applied for and received death benefits under the policy.[16]

Interestingly, the court of appeals did not cite to *Hunt Constr. Group, Inc. v. Konecny*, a case it decided in 2008 that involved parties in substantially the same posture as in *Suarez*.[17] In *Konecny*, a sub-subcontractor employee sued the subcontractor that hired his employer, among others and as in the above chart. An OCIP covered all parties and Konecny, the injured plaintiff, recovered workers' compensation benefits.[18] The court held that the defendants, including the subcontractor, were "deemed employees" under the Act.[19]

[1] No. 01-16-00682-CV, 2018 WL 2049356, --- S.W.3d ---, at *1 (Tex. App.—Houston [1st Dist.] May 3, 2018, no. pet. h.) (not released for publication). For background information regarding the exclusivity defense and CIPs, *see* Pierre Grosdidier, *Limitations of Exclusivity Defense in Workers' Comp Cases*, Law360, March 21, 2018.
[2] In the chart, O = owner; GC = general contractor; SC = subcontractor; SSC = sub-subcontractor; E = employee. The red arrow shows who sued whom among the parties to the appeal.
[3] *Id*. at *2.
[4] *Id*. at **2, 4–5.
[5] *Id*. at **1, 17. The court also concluded that no evidence supported the jury's $2 million punitive damage award.
[6] *Id*. at *12 (citing *HCBeck*, 284 S.W.3d 349 (Tex. 2009)).
[7] *Id.* at **8–9 (citing *HCBeck*, 284 S.W.3d at 352–54, 360).
[8] *Id.* at *12.
[9] *Id*.
[10] *Id*. at *13 and n.2.
[11] *Id*. at *14.
[12] *Id*. (citing *Valadez*, No. 01-09-00778-CV, 2011 WL 743099, at *4 (Tex. App.—Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.) (not an OCIP case)).
[13] *Id*. at *14–15 (citing cases).
[14] *Id*. at *16 (citing *Etie*, 135 S.W.3d 764, 768 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)).
[15] *Id*. (citing *TIC Energy*, 498 S.W.3d 68, 74 (Tex. 2016) (quoting *HCBeck*, 284 S.W.3d at 359)).
[16] *Id*. at *17.
[17] 290 S.W.3d 238 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Appellant's Brief cites to *Konecny*.
[18] *Id*. at 240–41.
[19] *Id*. at 247.