

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

May 10, 2018

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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"). 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").

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). 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. 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.

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."

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. *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. 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.

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.

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