STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KATHLEEN GORMAN	)	
	)	
VS.	)	W.C.C. 01-01030
	)	
NEW DURHAM STEEL	)	
KATHLEEN GORMAN	)	
	)	
VS.	)	W.C.C. 01-01029
	)	
MARATHON CONSTRUCTION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated at the trial level for hearing and decision and remain consolidated at the appellate level. The two (2) cases are original petitions filed by the employee against the company who employed her, New Durham Steel (hereinafter "New Durham"), and against the general contractor, Marathon Construction (hereinafter "Marathon"). The trial judge concluded that Marathon had complied with R.I.G.L. § 28-29-6.1 and therefore could not be held liable for the employee's injuries. New Durham was found liable for a period of partial incapacity from December 27, 2000 to August 13, 2001. After considering

the arguments of the parties on appeal, we deny the appeals and affirm the decision and decrees of the trial judge.

W.C.C. No. 01-01030 is an original petition in which the employee alleges that she sustained injuries to her right knee and right shin on December 26, 2000 while employed by New Durham, which resulted in total incapacity beginning December 27, 2000. At the pretrial conference, the petition was denied and the employee claimed a trial in a timely manner.

W.C.C. No. 01-01029 is an original petition containing the same allegations and filed against Marathon. Marathon was the general contractor for the construction of a Home Depot in North Kingstown, Rhode Island. Marathon entered into a contract with Jay Steel to do the steel and iron work on the project. Jay Steel, which was primarily a steel and iron supplier, in turn, contracted with New Durham to actually do the work on the job site. At the pretrial conference, the trial judge ordered Marathon to pay the employee weekly benefits from December 27, 2000 and continuing due to an injury to her right knee. The trial judge found that Marathon had failed to obtain written documentation that New Durham had insurance in place and was therefore deemed to be the employee's employer pursuant to the provisions of R.I.G.L. § 28-29-6.1. Marathon filed a timely claim for a trial.

The parties entered a stipulation of facts as follows:

"1. The Employee, Kathleen Gorman, was an employee of New Durham Steel.

"2. The Employee's date of birth is August 9, 1963. The employee has zero dependents.

"3. On December 26, 2000, the Employee injured her right knee while in the employ of New Durham Steel.

"4. At the time of her injury the Employee's average weekly wage was $982.00.

"5. As a result of the December 26, 2000 injury, the employee was partially incapacitated from work from December 27, 2000 to August 13, 2001.

> "6. On August 14, 2001 the Employee returned to work for a different employer, earning wages equal to or in excess of her pre-injury wage with New Durham Steel.
>
> "7. The Employee has undergone medical treatment for her right knee, which treatment was reasonable and necessary in order to care, cure or rehabilitate the Employee from the effects of her work injury." (Jt. Exh. 1.)

While the trial was pending, Travelers Indemnity Company (hereinafter "Travelers") filed a motion to intervene in the proceedings. Travelers had written an insurance policy for New Durham while the company was working at the Home Depot site, but there were some questions as to coverage for this incident. As a result, Travelers' interest in the matter was distinct from its insured, which had separate counsel. It should be noted that counsel for Travelers did not sign off on the stipulation of facts submitted by the other parties, although counsel repeatedly recognized in memoranda to the court and statements before the court that there appeared to be no dispute that the employee sustained a work-related injury and had a period of disability.

The only witness to testify was Kevin Turner, the controller for Marathon. He stated that it was Marathon's policy to require any subcontractors to present a certificate of insurance before they could set foot on the job site. Production of the actual insurance policy was not required and Mr. Turner did not conduct any further investigation as to specific terms of the policy or verification with any other source that a policy was valid and in effect.

Several documents were introduced into evidence. A certificate of insurance dated October 17, 2000 was presented to the court. The certificate states that New Durham is the insured; that Travelers wrote the policy for workers' compensation insurance; that the policy ran from May 4, 2000 to May 4, 2001; and that Jay Steel was the certificate holder. It also notes that

the job location was the Home Depot site and Marathon is an additional insured. Mr. Turner testified that he had this document in his work file for the project.

Another certificate of insurance was introduced into evidence dated November 3, 2000. The insured on this certificate was Jay Steel and it designated the Home Depot work site. A copy of a fax sent from Jay Steel to Marathon dated February 25, 2001 was presented to the court. The fax stated that a certificate of insurance for New Durham was enclosed, which was the October 17, 2000 certificate.

The trial judge examined the documentation and found that the certificates of insurance provided to Marathon satisfied the requirement that a general contractor obtain "written documentation" that a subcontractor has workers' compensation insurance. She concluded that Marathon's reliance on those certificates was reasonable and Marathon had satisfied its obligations under R.I.G.L. § 28-29-6.1. Therefore, she denied the petition against Marathon, and granted the employee's petition against New Durham.

Travelers, the intervenor, filed a claim of appeal from the decrees in both cases. The employee filed a claim of appeal in W.C.C. No. 01-01029, the petition against Marathon.

Our role in reviewing the decision of a trial judge is very limited. Rhode Island General Laws § 28-35-28(b) provides that the findings of fact made by a trial judge are final unless the appellate panel concludes that they are clearly erroneous. A *de novo* review of the evidence may only be conducted after a specific finding is made by the appellate panel that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996); Blecha v. Wells Fargo Guard-Company Serv., 610 A.2d 98 (R.I. 1992).

Travelers filed four (4) reasons of appeal. In the first reason, it argues that the trial judge overlooked the statutory language that the general contractor must verify that the subcontractor

carries workers' compensation insurance "with no indebtedness." R.I.G.L. § 28-29-6.1. Travelers contends that there is no evidence in the record to establish that New Durham had insurance "with no indebtedness."

Travelers is apparently arguing that it was the responsibility of Marathon to confirm that New Durham had paid in full for its workers' compensation insurance coverage for the length of the job at the Home Depot site. The phrase "with no indebtedness" is not defined in any Rhode Island statute or court decision. A search through insurance law treatises failed to turn up any reference to the phrase. We believe that the Legislature did not intend that the general contractor or construction manager verify on a daily basis that the subcontractor's insurance policy remains in effect. We also do not believe that the statute mandates that a subcontractor must pay for its insurance policy in full for the term of its contract with the general contractor or construction manager.

Construction contracts can potentially run for a year or several years, depending upon the size of the project. A subcontractor may not even know the exact time period during which it may be on the job site because the start and completion date of its portion of the project may be dependent upon other work being completed first. To interpret the statute to require that the subcontractor must produce proof that a policy is paid in full for such an ill-defined period of time would be unreasonable.

Furthermore, the certificate of insurance, which is obviously a universal form utilized by the insurance industry, states as follows:

> "Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will endeavor to mail 10 days written notice to the certificate holder named to the left, but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives." (Er's Exh. B)

Thus, the understood practice was that the company holding the certificate as proof that a subcontractor has insurance would be notified in the event that the policy was cancelled for any reason. We believe that Marathon's reliance upon these accepted practices and procedures of the insurance industry is reasonable.

In its second and third reasons of appeal, Travelers argues that reliance upon the certificates of insurance introduced in this matter, and reliance on certificates of insurance in general, to establish the existence of an insurance policy, is unreasonable. Travelers suggests that Marathon should have sought out additional confirmation from other sources that a policy was in existence for New Durham, rather than simply rely upon the certificate of insurance. We disagree.

A "certificate of insurance" is defined in Black's Law Dictionary as a "document evidencing fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms." The certificates of insurance introduced into evidence in this matter clearly state in part:

> "This is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated, ..."

The certificate of insurance admitted as Employer's B states that New Durham Steel is the insured; Travelers is providing the workers' compensation insurance; the certificate holder is Jay Steel; Marathon Construction is an additional insured; and the location of the operation is the Home Depot site in Rhode Island. By its own terms, the certificate of insurance is proof that an insurance policy has been issued. With this document in hand, we see no reason to impose a requirement upon the general contractor to take additional steps to verify that an insurance policy exists.

We would also point out that in its appeal, Travelers repeatedly referred to a policy that may have been issued by Liberty Mutual Insurance Company. The certificate of insurance referring to Liberty names Jay Steel as the insured party, not New Durham, and is irrelevant to the present petitions.

In its fourth reason of appeal, Travelers asserts that the trial judge was clearly wrong when she admitted the certificate of insurance as an exhibit over the objection of counsel for Travelers. The company contends that the document cannot be admitted under the business records exception because the "source of information or the method or circumstances of preparation indicate lack of trustworthiness." R.I. R. Evid. 803(6). However, counsel was unable to explain why the document should be excluded as unreliable. The document was produced by Mr. Turner, the controller of Marathon, who testified that he received all of the financial and other documents concerning the Home Depot project in North Kingstown as part of his duties overseeing the project. He indicated that New Durham, through Jay Steel, was required to submit the certificate of insurance in order to work on the job site.

The promulgation of Rule 803(6) came about due to concerns with "relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type." Rule 803(6) Advisory Committee's Note. The general principle underlying this exception to the hearsay rule is that records made in the course of a regularly conducted activity are generally considered reliable and trustworthy.

In IBEW, Local 99 v. United Pacific Ins., 573 A.2d 270 (R.I. 1990), the Rhode Island Supreme Court cited with approval the language of the Second Circuit Court of Appeals in Saks

International, Inc. v. M/V Export Champion, 817 F.2d 1011 (2d Cir. 1987), addressing the admission of records under Rule 803(6) of the Federal Rules of Evidence (which is identical to our Rule 803(6)):

> "The principal precondition to admission of documents as business records pursuant to Fed.R.Evid. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable. * * * Documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties * * * and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them * * * . Further, there is no requirement that the person whose first-hand knowledge was the basis of the entry be identified, so long as it was the business entity's regular practice to get information from such a person." Id. at 1013.

Based upon these comments, it is clear that the fact that the document was not prepared by Marathon, but rather by a non-party, is irrelevant. The certificate of insurance is a form commonly used in the insurance industry to certify to companies or individuals who are not party to the insurance contract that an insurance policy has been issued for the named insured. The document is prepared by the insurance agent who arranged the insurance. We are unable to find any evidence or inference in the record that the certificate of insurance is an untrustworthy or unreliable document. We find the discussion by our Supreme Court to be very instructive on this issue and therefore conclude that the trial judge did not commit error in overruling Travelers' objection to the admission of the certificates of insurance under the business records exception to the hearsay rule.

The employee filed a claim of appeal in W.C.C. No. 01-01029 raising two (2) issues which we have addressed in our discussion of the reasons of appeal filed by Travelers. Based upon our denial of the reasons filed by Travelers, and our decision to affirm the trial judge's

decision granting the employee's petition in W.C.C. No. 01-01030, we hereby deny the employee's appeal in W.C.C. No. 01-01029.

The reasons of appeal filed by the intervenor, Travelers Indemnity Company, in both W.C.C. Nos. 01-01029 and 01-01030 are hereby denied and dismissed and the decision and decrees of the trial judge are affirmed. Travelers shall pay a counsel fee in the sum of One Thousand Seven Hundred Fifty and 00/100 ($1,750.00) Dollars to Albert J. Lepore, Esq., attorney for the employee, for the successful defense of the intervenor's appeal in W.C.C. No. 01-01030.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Sowa and Ricci, JJ. concur.

ENTER:

_____
Olsson, J.

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Sowa, J.

_____
Ricci, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KATHLEEN GORMAN)
)
VS.) W.C.C. 01-01029
)
MARATHON CONSTRUCTION)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeals of the intervenor, Travelers Indemnity Company, and the petitioner/employee, and upon consideration thereof, the appeals are denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on July 7, 2003 be, and they hereby are, are affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Sowa, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Albert J. Lepore, Jr., Esq., Peter S. Haydon, Esq., George E. Furtado, Esq., and Maurice Luckern, President, New Durham Steel, 254 Ridge Road, New Durham, NH 03855, on

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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.		WORKERS' COMPENSATION COURT APPELLATE DIVISION
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VS.	)	W.C.C. 01-01030
	)	
NEW DURHAM STEEL	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the intervenor, Travelers Indemnity Company, and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

1. That the findings of fact and the orders contained in a decree of this Court entered on July 7, 2003 be, and they hereby are affirmed.

2. That the intervenor, Travelers Indemnity Company, shall pay a counsel fee in the sum of One Thousand Seven Hundred Fifty and 00/100 ($1,750.00) Dollars to Albert J. Lepore, Jr., Esq., attorney for the employee, for the successful defense of the intervenor's claim of appeal.

Entered as the final decree of this Court this day of

BY ORDER:

_____

John A. Sabatini, Administrator

ENTER:

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Olsson, J.

_____
Sowa, J.

_____
Ricci, J.

I hereby certify that copies were mailed to Albert J. Lepore, Jr., Esq., Peter S. Haydon,, Esq., George E. Furtado, Esq., and Maurice Luckern, President, New Durham Steel, 254 Ridge Road, New Durham, NH 03855, on

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