

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
ORLANDO DISTRICT OFFICE

Julio Machuca,  
Employee/Claimant,

OJCC Case No. 15-022856NPP

vs.

Accident date: 9/17/2015

Francisco Fuente/JA Drywall Inc uninsured  
subcontractors to Brierhill Homes, Blanton  
Drywall, Inc., Fuentes Construction  
Services, Inc./Association Insurance  
Company, Auto Owners, and Broadspire,  
Employer/Carrier/Servicing Agent.

Judge: Neal P. Pitts

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ORDER ON E/C'S MOTION FOR SUMMARY FINAL ORDER

This matter came on for a hearing on the 8<sup>th</sup> day of February, 2016 pursuant to the E/C's (Brierhill Homes, Inc. hereinafter "Brierhill") Motion For Summary Final Order, filed with DOAH on December 9, 2015, in which Brierhill, as the general contractor, is seeking a summary final order of dismissal from this action on the grounds that Blanton Drywall is the insured subcontractor who is legally responsible for providing workers' compensation benefits to the claimant or this accident.

**The following documents were admitted into evidence:**

**Judge's Exhibits:**

1. Petition For Benefits, filed by the claimant with DOAH on March 9, 2015;

2. Petition For Benefits, filed by the claimant with DOAH on March 16, 2015;
3. Petition For Benefits, filed by the claimant with DOAH on April 20, 2015; and
4. Order Granting Motion To Admit Medical Records Pursuant to §440.29(4), Florida Statutes, together with the attached DWC 25 forms completed and signed by Dr. Friedman.

**Claimant's Exhibit:**

1. Claimant's Motion For Advance, filed by the claimant with DOAH on April 27, 2015.

**Employer's Exhibit:**

1. None.

**SUMMARY OF EVIDENCE:**

1. The claimant testified that on September 17, 2015 he and his friend, Elida Moran, (described essentially as his common law wife) were working on a residential construction project called "Waterstone" located in Windermere, Florida. This is a private gated enclave on Lake Butler consisting of private residences. The work that the claimant was performing finish drywall work when he was injured.
2. The claimant testified that he and Ms. Moran had been hired by a Francisco Fuentes of Fuentes Construction

Services to perform the finished drywall work. The claimant has been hired by and worked for Francisco Fuentes in the past.

3. On the date of the accident, the claimant was working on scaffolding when he fell about 16 feet landing on the floor and hitting his shoulder and head and losing consciousness. He has no more memory of the details of the fall.
4. Ms. Moran did not observe the claimant's fall but she was working in the same area where the fall occurred. She went to him after the fall and observed him unresponsive on the floor. She observed that he was confused, his eyes were open, and the head and nose were swollen.
5. The claimant was taken by ambulance to the hospital. He was out of work for a month following the accident. He has since attempted to return to work but has experienced difficulty performing finish dry wall work.
6. The general contractor on the construction project is Brierhill Homes, Inc. ("Brierhill," one of the approved builders. Brierhill is insured is insured for workers' compensation.

7. Brierhill subcontracted the entire scope of the drywall work to Blanton Drywall (Blanton). There are three specialties in drywall: hanging, finishing, and spraying. These are done by different skill sets and different contractors.
8. Blanton is insured for workers' compensation by Auto Owners Insurance Company. Brierhill is listed as an additional insured on the certificate of insurance.
9. Blanton's contractual responsibilities were to purchase all of the materials for the drywall job and to contract for the labor. Blanton subcontracted the labor portion of the drywall work to JA Drywall Incorporated (Juan Alicea), which is uninsured. JA Drywall in turn subcontracted the finishing labor work to Fuentes Construction (Francisco Fuentes), which is insured through Frank Crum, as a PPO.
10. According to the testimony of Fred Blanton, he observed the claimant working at the job site prior to the accident. Based upon his observation of the claimant, he engaged in a discussion with Juan Alicea of JA Drywall Incorporated about the claimant during which Mr. Alicea told Mr. Blanton that the claimant was covered for workers' compensation insurance. Mr.

Blanton was under the impression this coverage was provided by Fuentes Construction. This assumption was erroneous as the claimant was not insured for worker's compensation purposes by either JA Drywall or Fuentes Construction.

11. According to the testimony of Juan Alicea, he is the owner of JA Drywall Incorporated, who subcontracted with Blanton Drywall to provide hang, spray, and finish drywall work at this project. Juan Alicea in turn contracted out the finishing work to Fuentes Construction.

12. Before subcontracting with Fuentes Construction, Mr. Alicea had a telephone conversation with Francisco Fuentes during which Mr. Fuentes told him that he had workers' compensation insurance and that "he had everything." "All of the paperwork." Mr. Alicea did not ask for verification of the paperwork from Mr. Fuentes, intending to do so at the end when he delivered the check.

13. Following this telephone conversation, Mr. Alicea then met Francisco Fuentes at the job site on September 14, 2015 and at that time they agreed upon a price of \$7.50 a board for the finishing work. Mr.

Alicea estimated that there were about 570 boards involved in the project; making the contract worth about \$4,275.00.

14. The claimant and his wife showed up at the project on the morning of September 14, 2015. Realizing that there were only two of them, and observing the size of the project which included putting on the "corner beads," the claimant refused to do it and left the project. Mr. Alicea got back in touch with Francisco Fuentes who agreed to send 4 people to do the project. Following this phone call, and after talking to Mr. Fuentes, the claimant and his wife returned that morning and began working. No additional employees were sent prior to the claimant's accident.

15. According to an affidavit executed by Kathryn Butkus, Fuentes Construction has a policy of insurance with FrankCrum, as the PPO, for employees which Fuentes Construction leases from FrankCrum. According to this affidavit, at no time material hereto did Fuentes Construction lease Julio Machuca from FrankCrum as an employee, nor is there any job application submitted by Julio Machuca to FrankCrum or by Fuentes Construction. At no time was Julio Machuca an employee

of FrankCrum, and at no time did FrankCrum lease Julio Machuca to Fuentes Construction. The only employees leased by Fuentes Construction from FrankCrum are Jose F. Fuentes and Eriberto Fuentes.

16. In his deposition, Mr. Fuentes denies that he hired the claimant for this job. According to this testimony, he has no idea how the claimant got on this job site.

In making my findings of fact, I have carefully considered and weighed all of the evidence presented to me. Based upon the evidence, I make the following findings of fact:

1. I have jurisdiction over the subject matter and the parties.
2. I find that the claimant was involved in an accident on September 17, 2015 while in the course of scope of his employment working on the "Waterstone" project. I find that the accident occurred at Lot 27, 6109 Orta Court, Windermere, Florida. I find that the claimant was taken by ambulance from the construction site to the hospital.
3. I find that Brierhill Homes was the general contractor for this project. I find that Brierhill Homes subcontracted the entire drywall portion of the project to Blanton Drywall. I find that Blanton Drywall in turn

subcontracted the labor portion of the drywall work to JA Drywall Incorporated (Juan Alicea), which is uninsured, and that JA Drywall in turn subcontracted the finishing labor work to Fuentes Construction (Francisco Fuentes), which is insured through FrankCrum, as a PPO. I find that the claimant was performing finished drywall work when he was injured.

4. I find that Blanton Drywall was insured for workers' compensation coverage with Auto Owners Insurance Company, policy no. 01178272598314, with the effective dates of March 1, 2015 through March 1, 2016. The Certificate of Insurance confirming this coverage is attached to the affidavit of Dave Rauh, the owner of Brierhill Homes.
5. I find for purposes of this motion that on the date of this accident, the claimant was performing finished drywall work. Therefore, I find that he was working within the scope of the drywall portion of the construction contract between the general contractor and its drywall subcontractor, Blanton Drywall.
6. For purposes of §440.15(c)2., I find that the claimant is entitled to workers' compensation coverage for this accident from one of the entities contractually performing the drywall work: Blanton Drywall; JA Drywall;



and/or Fuentes Construction, depending upon the insured status of these entities. Should none of these entities have workers' compensation coverage, I conclude that the claimant would be entitled to workers' compensation coverage from Brierhill Homes and its insurer.

7. Because this is a motion for summary final order, in which I cannot resolve disputed issues of fact, for purposes of this order I make no findings whether the claimant was or was not an employee of Fuentes Construction when he was injured. However, assuming that I were to find that the claimant was an employee of Fuentes Construction when he was injured, I find that he would not be insured for workers' compensation benefits because Fuentes Construction did not lease the claimant from its PPO, FrankCrum. Thus, when the claimant was injured, he was not covered for workers' compensation benefits under Fuentes Construction's PPO policy for this accident. Thus, I consider the Fuentes Construction was an uninsured employer for purposes of this claimant.

8. Based upon the above contractual arrangements, I further find that the contractor JA Drywall, who subcontracted with Fuentes Construction, for the finishing labor work was uninsured for purposes of workers' compensation

coverage on the date of this accident. Thus, I find that the claimant would not be insured for purposes of workers' compensation coverage for this accident through JA Drywall.

9. Based upon the contractual arrangements, I find that the subcontractor above JA Drywall is Blanton Drywall, which had subcontracted with JA Drywall for all of the drywall work, including the finishing work, and which was insured for purposes of workers' compensation coverage on the date of this accident. Thus, I find that the claimant would be insured for purposes of workers' compensation coverage for this accident through Blanton Drywall and its insurer, Auto Owners Insurance Company.

10. Pursuant to the provisions of §440.10(1), every construction site in Florida is to be insured for workers' compensation benefits. Pursuant to the provisions of §440.15(c)2., the term "employee" includes "all persons who are paid by a construction contractor as a subcontractor, unless the subcontractor has elected an exemption as permitted by this chapter, or has otherwise secured the payment of compensation coverage as a subcontractor, consistent with s440.10, for work performed by or as a subcontractor." In *Contractor's*

*Management Services, Inc. v. Dixon*, 734 So.2d 435 (Fla. 1<sup>st</sup> DCA 1999), the appellate court stated that if an officer's exemption is ineffective or otherwise invalid, he is considered to be a statutory employee of subcontractor for purposes of the Act, and if the subcontractor has failed to obtain coverage for him, he is entitled to recover workers' compensation benefits under the contractor's policy. Citing to *Swartout v. Lewis & Assoc. Dev. Corp.*, 548 So.2d 804 (Fla. 1<sup>st</sup> DCA 1989).

11. In the case sub judice, the issue is whether Blanton Drywall can be considered to be the "contractor," for purposes of §440.15(c)2., or whether that term only applies to the "general contractor," Brierhill Homes, rather than to other subcontractors downstream who in turn have subtracted its contractual responsibilities to another subcontractor downstream. Brierhill argues that Blanton Drywall is the considered to be the "contractor," for purposes of §440.15(c)2., and because it is insured for purposes of workers' compensation coverage for this accident, it [Brierhill] is entitled to be dismissed from this action because it [Brierhill] cannot be held legally responsible under this statutory provision since there is

an insured contractor between itself and the claimant from which the claimant may obtain coverage. The claimant argues that the general contractor remains liable vis a vis the claimant and as such Brierhill should be required to file an indemnity/contribution action against Blanton Drywall should it wish to shift its responsibility to Blanton Drywall.

12. It should be noted that the term "contractor" is not defined in the statute. It is further noted that the statute does not use the term "general" contractor in its statutory scheme set forth in §440.15(c)2. The statute expressly provides that it is the intent of the Legislature that the Workers' Compensation Law be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers' return to gainful reemployment at a reasonable cost to the employer.

13. Based upon that statutory intent, and under the rules of statutory construction, under the undisputed facts of this case, I find that Blanton Drywall is the statutory employer, and therefore, conclude that for purposes of §440.15(c)2, Blanton Drywall, and its insurer, Auto Owners Insurance Company, are considered to be the

"contractor" from whom the claimant is entitled to recover benefits for injuries sustained in this accident. Since it has been determined through discovery that Blanton Drywall is insured, and further is considered to be the "contractor" for the drywall portion of the contract, the claimant's action should be against this E/C. It does not result in quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the workers' return to gainful reemployment at a reasonable cost to construe the statute to require the employer, Brierhill, remain in the case and to pursue an indemnity/contribution action against Blanton Drywall. This action would double the cost of litigation as there are two defense counsel involved when in reality coverage exists with one employer, Blanton Drywall. Rather, I conclude that the quick and efficient delivery of disability and medical benefits to the claimant would be to limit the action against the statutory employer.

14. It should be noted that this conclusion is based upon the findings that Blanton Drywall is insured for workers' compensation coverage on the date of this accident. Should for any reason it turns out that Blanton Drywall

is not insured for workers' compensation coverage on the date of this accident, or that the claimant is not insured under its policy, then the claimant has the right to pursue his claim against Brierhill and its insurer as the general contractor.

CONSIDERED, ORDERED, and ADJUDGED as follows:

1. E/C's Motion For Summary Final Order, filed with DOAH on December 9, 2015, is hereby granted, subject to the following.
2. Brierhill Homes, Inc. is hereby dismissed, without prejudice, from this action based upon the finding that Blanton Drywall is insured for workers' compensation coverage on the date of this accident and that the claimant would be an insured under its contract for workers' compensation purposes on the date of this accident. Should it later be established during this action that Blanton Drywall is not insured for workers' compensation coverage on the date of this accident, or that the claimant is not insured under its policy, then the claimant has the right to refile his claim against Brierhill, and its insurer, as the general contractor

pursuant to the provisions of §440.15(c)2.

3. Jurisdiction is hereby reserved to determine whether Brierhill is a prevailing party for purposes of the taxation of costs.

DONE AND ORDERED in Orlando, Orange County, Florida, on the 24<sup>th</sup> day of February, 2016.



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