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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ALAN RIVERA,	)	
	)	
Employee,	)	
	)	
v.	)	
	)	
FINAL TOUCH CONSTRUCTION SERVICES, &	)	Hearing No. 1421627
	)	
BP CONTRACTING, INC.,	)	Hearing No. 1420344
	)	
Employers.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on March 25, 2015, in the Hearing Room of the Board, in New Castle County, Delaware. The parties were given time to respond to Markel's Memorandum of Law provided to the Board during its Closing Argument. Thus, the record remained open until April 1, 2015.

PRESENT:

LOWELL L. GROUNDLAND

OTTO R. MEDINILLA, SR.

Deborah J. Massaro, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:
Brian S. Legum, Esquire, for Claimant
Joseph Andrews, Esquire for Markel Insurance
Kevin P. O'Neill, Esquire for Final Touch Construction Services
Raymond W. Cobb, Esquire for BP Contracting Inc.

NATURE AND STAGE OF THE PROCEEDINGS

On November 26, 2014 Alan Rivera, ("Claimant"), filed a Petition to Determine Compensation Due alleging that he injured his head, left ear and right wrist in a work accident on October 3, 2014, while he was working for Final Touch Construction Services, Inc., ("Final Touch Construction") and/or BP Contracting, Inc. ("BP"). In his Petition Claimant named Markel Insurance, ("Markel"), as the Carrier. On December 17, 2014 Markel filed a Motion for Insurance Dismissal.

By Order dated February 25, 2015 the Board continued this hearing on Markel's motion and clarified the issues as follows: 1) who was Claimant's employer at the time of the alleged work accident; and 2) whether Markel insured that entity at the time of the alleged work accident.

A hearing was held on Markel's petition on March 25, 2015. As noted, the record in this case remained open until April 1, 2015 so that all parties could respond to the Memorandum of Law submitted by Markel in its Closing Argument, which had not been provided to the parties despite suggestion to do so by the Board in a March 19, 2015 Order. This is the decision on the merits of Markel's petition.

SUMMARY OF THE EVIDENCE

Claimant was first called upon to testify as a fact witness by Markel.[1] Claimant does not know his home address. He lives in New Castle, Delaware on Ninth Street. He was involved in a work accident on October 3, 2014 while demolishing a concrete wall. They were almost done and he was picking up a cement block. Another gentleman started knocking on the wall and two bricks fell on Claimant.

Claimant viewed and verified a picture of the demolition area (Markel's Exhibit No. 1). The demolition was still going on at the time that the picture was taken.

Claimant believes that he was working for Final Touch, or Mr. Oscar Rolando Barrera, on the day of the work accident.[2] Mr. Barrera was not present at the work site. Claimant was instructed to knock down a wall by a person in charge at the site. He had not worked with that person in the past. He had not seen the person working with Mr. Barrera before. Claimant does not know the person's name. No one stated that the work was for BP. The area where the demolition took place was a commercial space.

When Claimant arrived at the work site, the person in charge provided Claimant with the tool, a hammer, to knock down the wall. He was not given a hard hat or safety gear. It was his understanding that the person in charge was telling him what to do that day. Claimant believed that if did not perform the work properly then he would lose his pay for that day and probably his job with Mr. Barrera. Claimant agreed to his phone number.

Upon questioning by BP Claimant testified that he met Mr. Barrera a year earlier. He agrees that he was hired in September of 2014. When he met with Mr. Barrera about the job Mr. Barrera provided instructions about the job and told Claimant to report to work the next day.

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[1] Claimant testified with the assistance of a Spanish language interpreter, Ms. Evelyn Diaz-Camacho.

[2] Throughout his testimony Claimant referred to Mr. Barrera as Rolando.

Claimant completed forms for Mr. Barrera, but not until after the work accident. When shown a W-4 Form Claimant indicated that it was not completed by him, but it was signed by him (BP's Exhibit No. 1). Claimant signed the forms after the work accident. Claimant indicated that this was not his social security number.[3] He was shown an employment eligibility verification form which, again, he did not complete, but signed. Both forms are dated September 26, 2014. Claimant did not write the dates, but signed the forms.

When he worked for Mr. Barrera Claimant was paid by him. Claimant agrees that he received a paycheck dated October 17, 2014 for the time that he worked for Mr. Barrera (Markel's Exhibit No. 23). He agrees that this reflects that he earned $10.00 per hour. He received this check while in the hospital and a cash payment for another week as well. Claimant did not remember whether he received a second check. He denied receiving a W-2 Form from Mr. Barrera (Markel's Exhibit No. 24). He agrees though that his address on the form is correct and that he still lives at this address.[4]

When he went to the work site on the date of his injury Claimant was with two people, a male and female, but he does not remember their names. Claimant understands a little bit of English, but would be unable to respond to questions without an interpreter.

Claimant was given $500.00 cash by Mr. Barrera when he was in the hospital. He was also given money for medication after his discharge from the hospital. In total, he was given about $1,000.00 in cash for medicine, etc. The money that was given to him in the hospital was for the week that he had worked, not for the time he was in the hospital. He had started working

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[3] This testimony was objected to by Claimant as irrelevant, but the Board allowed it indicating that it would give the testimony the appropriate weight. Given that Claimant's social security number, or his status, is not at issue this evidence carries no weight.

[4] This testimony was somewhat confusing as Claimant had earlier testified that he did not know his own address.

on Monday and the work accident occurred on Friday. Mr. Barrera paid Claimant cash for the week. He also received a check for that week.

Claimant believes that he was injured on October 3, 2014, but he is not sure of the exact date. He believes that he received a check for the time that he worked, including the day of the work accident, about two weeks later. While in the hospital Mr. Barrera paid Claimant $500.00 in cash for time worked and later he paid Claimant $1,000.00 in cash for medications and doctors' appointments. Claimant says that he did not get a second check from Mr. Barrera. He testified that he only received one check and the rest of the payments were in cash

Claimant did not fill out a timesheet for Mr. Barrera, but rather he would complete a form at the work sites which would be signed by a supervisor at the sites and then Claimant's co-workers would return the forms to Mr. Barrera.

Claimant was notified of his work assignments by texts from Mr. Barrera, who would inform Claimant to report to the person in charge at the various job sites. So Claimant did not know exactly what he would be doing until he arrived. Claimant does not know the exact name of Mr. Barrera's company. Mr. Barrera hired him and could fire him. Mr. Barrera paid him. Claimant would do whatever Mr. Barrera told him to do.

Upon further examination by Markel, Claimant agrees that Markel's Exhibit Nos. 2 and 3 reflect that he received two checks, but Claimant insists that he did not. He agrees that Markel's Exhibit No. 4 is a copy of the timesheet that he would ordinarily complete. He agrees that on this exhibit Final Touch Construction Services, Inc. is the header, and the work dates are from September 29, 2014 until October 3, 2014. Claimant agrees his name is the second name and it indicates that he worked eight hours on Thursday and Friday.

Claimant testified that he would find the person in charge for the place he would be cleaning when he went to the work sites. He thought he was just there to clean on the date of the work accident. He thought it was cleaning because they usually just go and take out trash from the apartments.

Upon further questioning from BP Claimant agrees that he worked for Mr. Barrera on October 2, 2014 when he was tearing down ceiling drywall and taking construction debris to a dumpster. A few years back Claimant performed work for Mr. Barrera at a location by the beach in Dover, Delaware where he was working outside moving wheelbarrows of dirt and spreading it all day. He agrees that this was not cleaning work.

Claimant reviewed a letter dated November 3, 2014 indicating that he received $1,000.00 from Mr. Barrera (BP's Exhibit No. 2). Claimant does not believe that is his signature on the letter, but agrees that he received the money.

Upon questioning by Final Touch Construction Claimant indicated that he was born October 17, 1995 and graduated high school in Honduras.

On October 3, 2014 he arrived at the work site in his own vehicle, alone, after receiving a text message the day before from Mr. Barrera. There were two other workers with him at the work site, who were already present when he arrived. Mr. Barrera was not at the work site either October 2, or October 3, 2104. Claimant had been directed to do cleaning, but it was more demolition. He has worked other places and was aware that it was construction. Claimant does not know if Mr. Barrera owns a cleaning business.

Claimant did not know exactly what he was supposed to do at work until the person at the worksite told them what to do. On this occasion that person was with Mr. Bradley Powell

(owner of BP and present for the hearing). Claimant then stated that on the day of the work accident Mr. Powell told Claimant to do demolition.

After the work accident Mr. Barrera came to see Claimant in the hospital and paid him. Claimant got his job through a friend who works for Mr. Barrera.

BP asked Claimant to clarify his payments from Mr. Barrera and Claimant indicated that when he was in the hospital he received a $500.00 cash payment and did not have to sign for that. Then he received a paycheck later and then over time he received the $1000.00 in cash. He did not get the $1,000.00 all at once, but had to report when he went to doctor or got medicine, etc. and these medical expenses all eventually added up to $1000.00. Claimant is still receiving therapy bills.

Claimant agrees that he would not know what he would be doing on each particular work day. Mr. Barrera would not tell Claimant what he would be doing. Claimant worked two days at the job site. The first day on the job site he used hammers to demolish a ceiling and performed clean-up duties. The second day when he returned he expected to do the same thing. Claimant indicated that he could leave a job site if he did not want to perform the work, but believes that he would be fired by Mr. Barrera.

Upon questioning by Final Touch Construction Claimant agrees that he felt he could leave if he did not want to perform the demolition work, but he would have been fired by Mr. Barrera, and he would not have gotten paid for that day. Thus, he felt that he had to do what Mr. Powell instructed him to do. He was there to take orders.

Upon questioning by his own attorney, Claimant clarified that the first time he performed demolition work for Final Touch Construction was the day before the work accident. He does not know an Ignacio Lopez or Eva Catalan.

Final Touch Construction asked Claimant if the earlier job that he was doing involved sweeping at another job site. Claimant indicated that he would also take out pieces of drywall at other jobs.

Upon questioning by the Board Claimant indicated that when he was hired by Mr. Barrera he was not told what he would be doing. He would just go to work and do what he was told to do at the site. Claimant obeyed whatever orders were given to him. He understands demolition means to use the tools given to him. He was never told what tools he would have to use at a job site. When asked if clean and demolish are the same word for him in Spanish, Claimant initially indicated yes and then said that he does not know.

Before or after he was injured Claimant did not discuss the work that he was doing at the work site with Mr. Barrera. In the past when working for Mr. Barrera he has been provided with the following tools: brooms, shovels, and big hammers. Before he was injured he had used a big hammer while working for Mr. Barrera. He had also used wheelbarrows, to move the dirt.

The two other people working for Mr. Barrera at the job site were also performing demolition work. They were all doing the same thing using hammers and bars performing demolition work.

Lawrence Tackenberg, Premium Auditor for Travelers Insurance Company, was called upon to testify by Markel. He has worked in this capacity for eleven years and explained that a Premium Auditor reviews records at the expiration of a policy to determine if the proper premium has been charged. He agrees that he performed an audit of BP, but when asked about a document of the DCRB, he indicated it was not his document and that it was prepared in response to a question by the insured after his audit. Therefore, he did not testify regarding the form. There is no dispute that BP is insured.

Bradley Powell, Owner of BP, was called upon to testify by Markel. Mr. Powell has been a general contractor in Delaware since 2007. When hiring a sub-contractor he obtains a Certificate of Liability Insurance, ("COI"), to verify that the sub-contractor has insurance. He obtains this when the contract is entered into and does so for his regular contractors, as well as those who are present at the job sites for only a day or two, such as Final Touch Construction.

Mr. Powell reviewed the COI for Final Touch Construction Service dated October 9, 2014 (Markel's Exhibit No. 6). He agrees that when the work accident occurred on October 3, 2014 he did not have the certificate in hand. He agrees that the COI states as follows: This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.

Upon questioning by Final Touch Construction, Mr. Powell indicated that he retained Final Touch Construction by contacting Mr. Barrera on his cell phone. He asked Mr. Barrera for three guys to do demolition work and then sent him a text indicating the specific dates. Mr. Powell had worked in the past with Final Touch Construction whose workers would work alongside BP workers to demolish drywall, metal studs, walls and ceiling tiles and haul the debris out to a dumpster. Mr. Powell has only retained Mr. Barrera's workers to perform demolition work.

Mr. Powell was not present when Claimant was injured. He believes that he was there first thing in the morning and that he just got the workers started the day before. He first learned around 11:00 a.m. that there was an injury. He headed over to the site and contacted Mr. Barrera and informed him that one of his guys was injured. He does not recall what Mr. Barrera said or

calling Mr. Barrera again after that. He does not recall any complaint from Mr. Barrera about how Mr. Powell used the workers that day.

The tools for the work were provided by BP. There were some tools onsite. Mr. Powell does not know if Mr. Barrera provided tools at this particular job site. On other jobs some of Mr. Barrera's employees would provide hammers, crowbars, and utility knives for the work.

Mr. Powell disagrees that Final Touch Construction is a cleaning service only and says that probably the communication showing this information is in text messaging which was not available for this hearing. Mr. Powell performs work for Capano and Mr. Barrera's company has performed demolition and hauling material to the dumpster for him on those jobs.

BP presented invoices dated November 12, 2014 for work performed by Mr. Barrera's company on October 2, 3 and 6, 2014 (BP's Exhibit No. 3).[5]

Mr. Powell confirmed his phone number for Markel. He agrees that the invoices submitted as BP Exhibit No. 3 are sent from Final Touch Contracting Services LLC.

Upon questioning by Claimant Mr. Powell agrees that he showed Claimant what to do at the site. He requested that the workers perform demolition work. Other than texts between Mr. Powell and Mr. Barrera there is nothing in writing to indicate this is the type of work that was to be done.

Upon questioning by his attorney Mr. Powell did not know the individuals who Mr. Barrera sent and he did not request specific workers. Mr. Powell did not communicate with Claimant personally because Mr. Powell does not speak Spanish. So he spoke to a Final Touch worker who understood English and this person translated his instructions. None of his employees speak Spanish.

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[5] These invoices list Final Touch Contracting Services, LLC which is a fourth Final Touch business that Mr. Barrera formed ten days after the work accident.

Mr. Powell contacted Mr. Barrera about two days before the work began on October 2, 2014. He believes that sometime before the work started he asked for the insurance certification from Mr. Barrera as is his usual custom, and then the certificate was sent later. When he spoke to Mr. Barrera he advised Mr. Barrera that it was demolition work. None of Mr. Barrera's workers showed up with vacuums, brooms, cleaning spray or dust mops.

As a result of the Board's denial of its directed verdict (see Findings of Fact and Conclusions of Law section below), BP called Mr. Powell to testify once more at the hearing on its behalf. Before Final Touch Construction was on the work site Mr. Powell had a conversation with Mr. Barrera about the work. Mr. Powell cannot recall specifically if he asked Mr. Barrera if he had insurance, but there was some discussion of insurance that led to the broker forwarding the COI. Mr. Powell was satisfied that there was insurance in place for Mr. Barrera's Final Touch Construction before the work began.

Upon questioning by Final Touch Construction Mr. Powell agrees that he received the COI on October 9, 2014, or later, and he knew that the work was being done at the work site on October 2 and 3, 2014. He called Mr. Barrera sometime before October 2, 2014 for the work. When he deals with sub-contractors it is his custom to obtain a COI. He was satisfied on October 2 and 3, 2014 that Final Touch Construction had insurance in place. He typically looks up the sub-contractor on the IAB website to verify that they have workers' compensation insurance and he remembers doing so in this case in order to confirm there was insurance. He had discussed this with Mr. Barrera in the past. He obtained the COI in an email from Mr. Barrera's insurance broker. He agrees that this was after the work accident. Mr. Barrera had provided workers' compensation insurance certification for all of his past work for BP.

Sharina Hayes, Underwriter for Markel Insurance, testified at the hearing on Markel's behalf. She has been a senior underwriter for Markel for seven or eight years. She works with the Delaware Compensation Rating Bureau. Markel does not provide insurance for demolition. Markel insures Final Touch Contracting Services, Sole Prop. She has no knowledge of the three other entities which Mr. Barrera owns. Final Touch Contracting Services, Sole Prop is insured for post-construction clean-up, meaning that after something is built then their insured performs post-construction clean-up. She uses the Federal Employer Identification Number ("FEIN") to confirm what class codes are approved. She explained that a single entity will not have two FEINs. In this matter Markel has accepted the risk for FEIN 14-5827429 only. She does not know of any of the other companies. She did not issue the COI for Final Touch Construction Services.

Oscar Rolando Barrera, Owner of Final Touch Construction, was called upon to testify by Markel. He agrees that he has four entities registered to him as the owner, with separate FEINs, business licenses, and corporation numbers (where applicable). The companies and FEINs are as follows: Final Touch Contracting Services Sole Prop – 14-5827429; Final Touch Contracting Inc. – 52-2135043; Final Touch Contracting Services LLC – 47-2129812 and Final Touch Construction Services Inc. – 20-1839746.

For Final Touch Construction he issued paychecks bi-weekly. At the time that Claimant was injured Claimant had worked a few days and the checks were called in for the two week period. So two checks were issued to Claimant, but Mr. Barrera knew that Claimant needed money, so only one check was given. Two checks were issued, but Mr. Barrera paid Claimant in cash after the injury. (See Markel's Exhibit No. 24). He confirmed his phone number and that there was communication, in the form of phone calls and/or texts, between Final Touch

Construction and BP on October 2, 3 and 4, 2014 pursuant to phone logs, (Markel's Exhibit No. 25). He confirmed the timesheets submitted earlier into evidence (Markel's Exhibit No. 26).

Markel denied coverage because it does not insure Final Touch Construction. Mr. Barrera explained that his accountant was supposed to dissolve a company because of his divorce. So in 2004 Mr. Barrera opened Final Touch Contracting Services. Then in 2009 he had issues with his wife and because of a pending divorce they split the business and he opened the Sole Prop, but he never did any business as that. He now says that he made a mistake because he did not use the one he opened in 1998. He thought he sold that company. He thought that he always had Final Touch Construction. Then when he called his agent after Claimant's work accident, the agent informed Mr. Barrera that he was doing business as Final Touch Construction Services, Inc. only.

Ten days after the work accident, Mr. Barrera incorporated a fourth company, Final Touch Contracting Services LLC. This is insured and Mr. Barrera is transitioning some of his business to that LLC. He assumes that he is covered under Final Touch Construction Services, Inc.

As far as the COI dated October 9, 2014 issued to BP he notes that Markel is listed for Final Touch Construction Services' workers' compensation carrier.[6] He is under the assumption that Markel insured Final Touch Construction Services.

He agrees that there are four different Final Touch entities, but to him only one has been active during the different periods. He wants to make sure he is insured. Then he testified that he is transferring *all* of his companies to the newly formed company, Final Touch Contracting

[6] Mr. Barrera notes that the COI lists the company name as Final Touch Construction Service, when it is actually Final Touch Construction Services. This is noted, but there is no dispute that it is the same company. The Board notes that at times during the hearing Mr. Barrera referred to his company as Final Touch Construction Service.

Services, LLC, and he plans to dissolve Final Touch Construction Services, Inc. He says he would not put anyone in harm's way to operate without insurance.

He does not believe that Claimant was working for him on the date of the work accident because his company is a cleaning business. Final Touch Construction Services, Inc. performs cleaning for several builders including LC Homes, Beazer, and Ryland. Mr. Barrera goes to the work sites himself. His workers sweep for the painters, and clean and prepare for the carpenters. They also perform the final cleaning of new homes for settlement. This is his main line of business.

When Mr. Barrera sent Claimant to BP's work site, he assumed that Claimant was there to clean-up after Mr. Powell's work crew. Mr. Barrera's company is not a demolition company. Claimant was given tools at the work site to do something unintended. When informed of the injury Mr. Barrera told Mr. Powell that he was not insured for that kind of work. None of his four companies have been insured for demolition work.

Upon questioning by BP Mr. Barrera agrees that he hired Claimant, paid him and could fire him if necessary. He controlled Claimant's work when he was with Claimant. When he sent Claimant to work at BP's site, then Mr. Powell directed Claimant. He assumes that Mr. Powell would use safety guidelines. Mr. Barrera agrees that he had the authority to tell Claimant to leave one job site and go to another, although this was not commonly done. He paid Claimant $10.00 an hour and billed BP $20.00 an hour for the work. He says though that he made a deal with Mr. Powell that he would charge $15.00 an hour. He thought it would be simple and he would cover expenses, but he charged $20.00 an hour on that form. He says that there was a verbal agreement for $15.00 an hour. Mr. Barrera uses a service, Paychex, Inc., to administer paychecks. Mr. Barrera calls in his employee's hours and rates.

He explained again that in 1998 he and his wife at the time opened Final Touch Contracting, Inc. and operated it until 2004, when he thought he dissolved this company. Then he opened Final Touch Construction Services, Inc. and worked from 2004 until the present. Now he is setting up LLC for all of his businesses. This transition is not fully accomplished. In 2009 he opened Final Touch Contracting Services, Sole Prop when he divorced. He says he did not do business as a sole Prop.

Mr. Barrera was subcontracted to work on more than one site for BP Contracting. For example, his workers performed work at Brookside (where the work accident occurred) and Concord Pike. He agrees that there was more than one project going on at a time.

Mr. Barrera paid Claimant for working on October 2 and October 3, 2014 (the date of the work accident) by paycheck from Final Touch Construction Services, Inc. Claimant needed money and so Mr. Barrera advanced him some cash. When Mr. Barrera bills for company services he uses the name Final Touch Construction Services and when he is paid it is in the same name. The bank account which he utilizes for his working company is in the name of Final Touch Construction Services. When he pays his employees it is from this bank account. As of October of 2014 he did not have any bank accounts in the names of his other companies, except maybe the LLC which was incorporated ten days after Claimant's work accident. So Mr. Barrera agrees that everything he does for his business is in the name Final Touch Construction Services, Inc. He agrees that is the name on the COI, but notes that the "s" is left off of the word Services. He says that the three policies that covered Final Touch Construction Services, Inc. were all obtained through the same agent.

Upon further questioning by Markel Mr. Barrera agrees that documentation shows that Markel's most recent policy, dated February 27, 2014, does not refer to Final Touch

Construction Services at all. Mr. Barrera assumed that his agent was insuring Final Touch Construction Services, but he agrees that Markel's policy is different and insures only Final Touch Contracting Services, Sole Prop. He agrees that documentation from Delaware Policy Coverage Information shows that since 2009 Markel, or its predecessors, have insured Final Touch Contracting Services, Sole Prop and not Final Touch Construction Services, Inc. He agrees that the documentation reveals that all four of his Final Touch companies have separate FEINs and business license numbers. Final Touch Contracting, Inc. and Final Touch Contracting Services, LLC (which he began ten days after the work accident) are both incorporated and so have separate and distinct corporation numbers from Final Touch Construction Services, Inc. He agrees that the documentation reveals that all four of his companies are separately insured by different carriers.

Final Touch Construction questioned Mr. Barrera who disagreed with Claimant's statement that he was not given instruction regarding the nature of his work when he was hired. Mr. Barrera says that Claimant would come by Mr. Barrera's house and pick up a broom. He says that Claimant knows what type of business Mr. Barrera runs. The only time that Claimant would not know his job duties would be when he is sent out.

Mr. Barrera operates his business from his house. He has brooms, mops and sweepers. He came to know Mr. Powell through word of mouth. They have a common client, LC Homes. He has worked with Mr. Powell three or four times in the past few years. Mr. Powell does the demolition work and Mr. Barrera's employees clean-up. Mr. Barrera does not specifically remember telling Mr. Powell what Mr. Barrera's workers do, but he thinks that he did. He does not send his workers with any tools, other than push brooms. Claimant would sometimes have a push broom in his car.

Mr. Barrera denied Claimant's comment that he worked for him a few years ago because Mr. Barrera calculates that this timing might place Claimant as too young to be working for Mr. Barrera. He does remember though that Claimant did some work for him in the past, but thinks it was more like a year ago. Mr. Barrera does not remember exactly where.

Mr. Barrera found out about Claimant's work accident from a call by Mr. Powell who told him that one of his guys was injured. Mr. Barrera initially thought it was a minor injury because no ambulance was called and a co-worker took Claimant to the ER. Mr. Barrera went to the hospital to see how Claimant was doing and learned that Claimant was hitting the wall on one side and something fell off and hit him.

Mr. Barrera does not provide construction helmets for his employees. Then Mr. Barrera testified that for safety reasons when his workers are outside at a construction site he asks his workers to wear a hard hat, but if they are inside the building his workers do not use one. Mr. Barrera was not present at the work site on the date of the work accident. He has not seen any of his employees doing demolition work. When he visited Claimant in hospital he had another communication with Mr. Powell and told him that they were not covered for that type of work. He knew that he was not covered for that. Mr. Barrera does not think Mr. Powell replied at the time.

Mr. Barrera disagrees with Mr. Powell that the workers were at the work site to do demolition work. He did not have a specific rate for Mr. Powell and so he admits that he used the word laborer on his billing. Mr. Barrera admits that the work was not as specific as at other sites. He billed Mr. Powell $20.00 an hour for this work. Mr. Barrera paid Claimant in cash because he became disabled and he assumed Claimant needed income. He gave him the money in installments of $250.00 or so weekly. He assumed that workers' compensation would

eventually pay. Claimant was released by his doctor and most of the time that he was disabled Mr. Barrera paid him.

Mr. Barrera agrees that he sent a woman, named Eva, to this work site and that he has used her before. He also sent Ignacio Lopez. Mr. Barrera keeps cleaning equipment and supplies at his own house. He does not know if the workers came by his house for equipment on the date of the accident. Normally, they stop and get brooms or vacuums, etc. If Mr. Barrera is at the job site he will direct his employees. If he contracts the job then he will tell them the specific task for that day, but when it is something with Mr. Powell, for example, Mr. Barrera does not have control on what Mr. Powell has his employees doing. Mr. Barrera assumes that Mr. Powell would have the workers clean-up. The person in charge of the job site would supervise Mr. Barrera's employees. In this case it was Mr. Powell and his foreman.

Mr. Barrera has only done three or four jobs for BP. Mr. Barrera does not remember if Mr. Powell asked about the nature of Mr. Barrera's business. In the past Mr. Barrera was contacted for same thing, renovation etc. Mr. Powell testified that in past he used Mr. Barrera's workers to do demolition work. Mr. Barrera denies this and testified that for $20.00 an hour he would not do demolition work and be liable for that type of exposure. He says this barely covers the cost. He believes that for demolition work the charge is $45.00 to $60.00 an hour. He has never invoiced BP anything over $20.00 an hour.

He always had workers' compensation insurance, even though he has several different entities. Now his insurance company is saying he does not have workers' compensation coverage in this case when his employee of a few weeks became injured. Mr. Barrera used to get audits.

As far as the COI that was generated October 9, 2014, Mr. Barrera called and had this sent to Mr. Powell after the work accident. Mr. Barrera says that Mr. Powell did not request it prior to the work accident.

Mr. Barrera admits that his insurance broker always made mistakes with the requested COIs and the name of his company. The certificate was supposed to state Final Touch Construction Services, Inc. and some customers would have to request a corrected copy several times. His broker would often write it as Final Touch Construction Service, rather than Services, just as he did with the COI in this instance.

Mr. Barrera did not know what his employees were doing with BP. He sent them out to do a task and then he bills it. He did not know until after Claimant was injured exactly what his employees were doing. He assumed that they were doing clean-up work until then. He does not send out paperwork describing his services, rather he depends on oral communication. He has mostly contracted work for homebuilders.

When questioned further by Markel Mr. Barrera agrees that some of the Final Touch entities have been audited annually and documentation shows that he did not cooperate with an audit for Final Touch Contracting Inc., in 2009 but he states that this was because he was having issues with his ex-wife. Mr. Barrera agreed that the audit documentation also indicates that Liberty Mutual, his insurance for Final Touch Contracting, Inc. was unsuccessful with their audit in 2005 because of Mr. Barrera's non-compliance. He says that company does not exist. (See Markel's Exhibit No. 14 DCRB Files for Final Touch Contracting Inc.).

Mr. Barrera agrees that the documentation shows that Markel did not issue a policy for Final Touch Construction. He states Markel requested an audit almost every year, but he missed it last year. He thought the audit was for Final Touch Construction Services. Mr. Barrera does

not understand why Markel did not issue a policy for Final Touch Construction Services, Inc. as he believed this was his only company.

Mr. Barrera agrees that his application for insurance for the Sole Prop indicates that he has no employees with that company. He states that this is wrong despite his signature on the paperwork. He agrees that this also indicates that he does not engage in any other type of business. Markel moved the following Exhibits into evidence without objection:

Exhibit 1 – Picture of Wall
Exhibit 2 – Paycheck to Alan Rivera dated October 17, 2014
Exhibit 3 – Alan Rivera Timecard
Exhibit 4 – Alan Rivera Timesheet
Exhibit 5- Alan Rivera W-2
Exhibit 6 – Certificate of Liability Insurance dated October 9, 2014
Exhibit 7 – Final Touch Contracting Services Sole Prop FEIN
Exhibit 8 – Final Touch Contracting Services Sole Prop Business License No
Exhibit 9 – Final Touch Contracting Services Sole Prop Insurance Application
Exhibit 10 -Final Touch Contracting Services Sole Prop DCRB Files
Exhibit 11 –Final Touch Contracting Inc., FEIN
Exhibit 12– Final Touch Contracting Inc., Business License No
Exhibit 13– Final Touch Contracting Inc., Corporation Number
Exhibit 14 - Final Touch Contracting Inc., DCRB Files
Exhibit 15 –Final Touch Contracting Services LLC, FEIN
Exhibit 16– Final Touch Contracting Services LLC, Business License No
Exhibit 17– Final Touch Contracting Services LLC, Corporation Number
Exhibit 18 - Final Touch Contracting Services LLC, DCRB Files
Exhibit 19– Final Touch Construction Services, Inc., FEIN
Exhibit 20 –Final Touch Construction Services, Inc., Business License No
Exhibit 21 –Final Touch Construction Services, Inc., Corporation Number
Exhibit 22 - Final Touch Construction Services, Inc., DCRB Files
Exhibit 23 –Final Touch Construction Services, Inc., Claimant's paychecks (Duplicative)
Exhibit 24 –Final Touch Construction Services, Inc., Claimant's W-2 & Payroll (Duplicative)
Exhibit 25 –Final Touch Construction Services, Inc., Telephone Log
Exhibit 26 –Final Touch Construction Services, Inc., Timesheets (Duplicative)
Exhibit 27 –Final Touch Construction Services, Inc., Markel Denial of Coverage

Upon questioning by Claimant Mr. Barrera agrees that the one paycheck was issued to Claimant from Final Touch Construction which is the same name listed on Claimant's W-2 Form. (See Markel's Exhibit Nos. 2 and 5).

Upon further questioning by BP Mr. Barrera agrees there was another project with BP in October of 2014. He says it was for whatever Mr. Powell does and doing construction clean-up is part of what Mr. Barrera's company does. Mr. Barrera's workers would clean-up drywall after demolition, but he says that this was within limits. When asked what his workers would do with a large piece of dry wall that needed to be broken in half in order to be placed in a cart for hauling, Mr. Barrera says that this duty would fall to the dry-wallers. He says that his workers do not do heavy stuff. They only do what is leftover because that is what he insures for.

When asked about the work that Claimant previously performed for him, moving dirt all day, Mr. Barrera says that Claimant was being misused at that job too.

Mr. Barrera says that he would charge a different rate for demolition and would not send a woman to do demolition work. Mr. Barrera was asked to explain why he sent the same people, for the same $20.00 charge, back to the BP work site just three days after the work accident, after he had learned that demolition was being done at the site by his workers. He did not respond directly to this question. At first, he stated that he did not understand the question. Then he said that at the time he sent the workers over on October 6, 2014 he did not know there was a workers' compensation lawsuit. He also stated that he knows accidents happen, but he did not think it was life threatening. He noted again that he would not send a woman to perform demolition and he would charge more for that type of work. He says that he could get $45.00 to $60.00 an hour if he did demolition work, but could not explain why he only charged $20.00 on this day when he knew that they were doing demolition work at the site. He agreed that he also had another project afterward for BP on Concord Pike in October of 2014 and he understood that they would be doing the same type of work as at Brookside, the work accident site. He says that his workers were going there to clean-up.

Mr. Barrera explained that the reason he paid Claimant in cash was for his lost wages. He did so because he thought that Claimant was his employee and he thought that Claimant was hurt.

Upon questioning by the Board Mr. Barrera agrees that he considers Claimant his employee. He sent Claimant to work and he assumed that someone else supervised Claimant in his cleaning work. He was under impression that he was insured by Markel for workers' compensation.

Upon questioning again by Claimant Mr. Barrera says that he did not know after the first day of work at the site, or October 2, 2014, that his workers were doing demolition work. He was not aware of this until October 3, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cross-Motions for Directed Verdicts by Markel and BP

At the end of Markel's case in chief, BP raised a Motion for Directed Verdict as to the issue of Claimant's employment arguing that the undisputed testimony by all parties is that Mr. Barrera employed Claimant. Mr. Barrera hired Claimant, could have fired him and compensated him when he was disabled. Mr. Barrera sub-contracted with BP to provide workers at the job site. BP was not Claimant's employer. Despite which Final Touch entity it is, Mr. Barrera is Claimant's employer. The documentation, paycheck, W-2 and W-4 Forms undisputedly name Final Touch Construction as Claimant's employer.

In response Markel objects and moves for its own Directed Verdict pursuant to title 19, section 2311(a)(5) of the Delaware Code, which states as follows:

> Any contracting entity shall obtain from an independent contractor or subcontractor and shall retain for 3 years from the date of the contract the following: a notice of exemption of executive officers or limited liability company members and/or a certification of insurance in force under this chapter. If the contracting entity shall fail to do so, the contracting entity shall not be deemed the employer of any independent contractor or subcontractor or their employees but shall be deemed to insure any workers' compensation claims arising under this chapter.

Markel also cites *McKirby v. A & J Builders, Inc.,* for the premise that because BP did not obtain the insurance certification before the work began it is therefore, liable. 2009 WL 713887(Del. Super.Ct). Markel argues that BP is the proper defendant because it did not have the COI "from the date of the contract" as Markel argues is required by the statute. *Id.* Specifically, Markel maintains that BP is liable because the COI, which is dated October 9, 2014, was not received until after the work accident. Mr. Powell admits that he did not have the COI when the work began. So therefore, Markel maintains that BP is the target defendant.

Markel also relies on *Cordero v. Gulfstream Development Corporation* for the premise that because the certificate was not issued until six days after the work accident this renders BP liable. 56 A.3d 1030 (Del. 2011).

Final Touch Construction agrees with Markel that the COI should have been issued the day that the work started, rather than six days later. Final Touch Construction also argues that it was Claimant's employer just for purposes of clean-up and that Mr. Barrera is only responsible if he did not follow up and lay the ground work with Mr. Powell about the proper use of his employees. Mr. Barrera believes it self-evident that his company is a clean-up company. Mr. Barrera does not have workers' compensation for demolition work. Final Touch Construction also states that BP knew it was getting demolition work performed at an under market rate.

BP's response to the COI argument is twofold. First, the argument is premature because at this stage the issue is who is Claimant's employer, not whether the employer has coverage. The only way to get to BP is if there is a finding that the sub-contractor does not have insurance and in this case there is no evidence of such. The undisputed evidence which has been acknowledged by all parties is that Claimant was employed by Mr. Barrera.

BP also maintains that there is no requirement by statute that the COI be in hand at the time of contract. BP has shown compliance. Therefore, Markel's Motion for directed verdict is without foundation. There is no dispute that Claimant was employed by Mr. Barrera/Final Touch Construction. There is no evidence in the record that this entity is uninsured. Even if it were found that Final Touch Construction was uninsured, BP has satisfied its obligation under the statute.

Claimant responds with the submission of a request for an attorney's fee. The Board did not seek responses to the affidavit due to its prematurity.

After deliberating the Board denied all Motions for Directed Verdict indicating it would give them the appropriate weight during its decision making process. As is the Board's custom, it will consider the merits of all the evidence presented, make a determination and respond to the arguments in its written decision.

Employer Issue

The first issue that the Board must address is the question of who was Claimant's Employer at the time of the work accident. For the reasons set forth below the Board finds that Mr. Barrera's entity Final Touch Construction is Claimant's Employer. Given the admission of Mr. Barrera that he believed Claimant to be his employee, and vice versa, as well as the overwhelming weight of the evidence that Claimant worked for Final Touch Construction the Board believes that Claimant was employed by this entity.

The starting point for this analysis is the statutory definition of "employee." The Act defines the term as meaning "every person in service of any corporation (private, public, municipal or quasi-public), association, firm or person, . . . under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration." DEL. CODE ANN. tit. 19, § 2301(10).[7] This wording provides two separate avenues by which a person may be found to be an employee (namely, under a "contract of hire" or "performing services for a valuable consideration"), *see Barnard v. State*, 642 A.2d 808, 814 & 817 (Del. Super. 1992), *aff'd*, 637 A.2d 829 (Del. 1994). Without dispute, Claimant performed services for a valuable consideration. The real issue under this definition is whether Claimant was in the service of

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[7] The Act also lists several classifications of people who are *not* considered employees, but Claimant does not fall within any of them. One exception is for the "spouse and minor children of a farm employer." Del. Code Ann. tit. 19, § 2301(10). Claimant is clearly not that. Another exception is for "any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of his employer." *Id.* "Casual employment" is defined as "employment for not over 2 weeks or a total salary during the employment not to exceed $100." *Id.* Although Claimant had just started working for Final Touch Construction again, his pay rate establishes that his employment cannot be described as "casual." A third exception is for "persons to whom articles or materials are furnished or repaired, or adopted for sale in the worker's own home, or on the premises not under the control or management of the employer." *Id.* The exact meaning of this provision is unclear and it may actually be a further limitation on the concept of casual employment. In any event, even considered as a separate exception, Claimant's job clearly does not fit within it. The final exception pertains to "[i]nmates in the custody of the Department of Correction or inmates on work release who participate in the Prison Industries Program or other programs sponsored for inmates by the Department of Correction." *Id.* Again, clearly this is irrelevant to Claimant's case. The Act also provides an "exception to the exception" in creating a specific classification of people who *are* considered to be employees. This class is "everyone assigned to work under §§ 901-905 of Title 31." *Id.* This refers to a person who participates in work training in connection with the receipt of public aid. Again, this is inapplicable to Claimant.

Final Touch Construction at the time of the accident or, another Final Touch entity, or as Final Touch Construction and Markel argue, whether he was working for BP because he was doing demolition work and BP is insured for that.

Certain factors, under common law, are usually considered in trying to determine whether or not an employee/employer relationship exists. These factors are as follows: 1) who hired the employee; 2) who may discharge the employee; 3) who pays the employee's wages; and 4) who has the power to control the conduct of the employee. *See Lester C. Newton Trucking Company v. Neal,* 204 A.2d 393 (Del. 1964).

In consideration of all these factors, having to do with control, the Board finds that Final Touch Construction is Claimant's Employer. To begin with the undisputed evidence, Claimant was paid by check from Final Touch Construction. He received W-2 and W-4 Forms from Final Touch Construction. Claimant's timesheet was entitled Final Touch Construction. Telephone records showing contact between Mr. Barrera and Claimant are in the name of Final Touch Construction. Claimant was told where to report to work by Mr. Barrera, the owner of Final Touch Construction. He was hired by Mr. Barrera and could be fired by Mr. Barrera. Although in this instance the tools for the work were provided by BP, Claimant testified that in the past tools for working, such as big hammers, wheelbarrows and shovels were provided by Mr. Barrera. After the work accident Mr. Barrera paid Claimant $500.00 in cash for one week of missed work and later $1,000.00 in cash for medical expenses and total disability believing that Claimant was his employee. Claimant accepted payment under the same belief. Both Mr. Barrera and Claimant testified that they believed that they were in an employee/employer relationship.

That Claimant does not know the exact name of the entity is not dispositive here where there is overwhelming evidence that Claimant worked for Final Touch Construction. All of Claimant's documentation lists Final Touch Construction as his Employer. During his testimony Mr. Barrera agreed that as of October of 2014 he did not have any bank accounts in the names of his other companies and that everything he did for his business was under the name of Final Touch Construction. There is simply no evidence to show that Claimant worked for any other Final Touch entity or even the general contractor here, BP. Therefore, the Board concludes that the weight of the evidence supports its finding that Claimant's Employer is Final Touch Construction.

Final Touch Construction raises an argument, without any factual or legal basis, that it is not Claimant's employer because of the fact that Claimant was engaged in demolition work at the time of the accident, an act for which Final Touch Construction allegedly is not insured. Final Touch Construction maintains that it is Claimant's employer for purposes of clean-up only. Final Touch Construction maintains that the only way it is responsible in this case is if Mr. Barrera did not follow up and lay the ground work with Mr. Powell about the use of his employees. Mr. Barrera felt it was self-evident that his company was a clean-up company only.

This is an argument without merit for several reasons, not the least of which is that it has no legal basis. First though, the Board will address the argument that Mr. Barrera was unaware of the fact that his employees were performing demolition work. Based on the evidence presented and its credibility determinations, the Board finds that Mr. Barrera was indeed aware that his employees were being used for demolition work at the various BP job sites. For starters, this was not the first time he had worked for BP doing demolition work. Perhaps even more critical is the fact that after Mr. Barrera alleges he first learned that his employees were doing

demolition work, which was on October 3, 2014, he then sent his employees back to the same BP job site on October 6, 2014. When asked about this he offers no meaningful response. He sent his employees to the same job site, for the same rate, after he allegedly first learned that demolition was going on at that site. This action reveals to the Board that Mr. Barrera knew that demolition work was being done there by his employees and sent them anyway.

Coupled with this is the fact that the Board finds the testimony of Mr. Powell credible that when he arranged for Mr. Barrera's employees to work at the job site he indicated that the work was demolition. He testified that he had used Mr. Barrera's employees for demolition work in the past on a few occasions. He also testified credibly that none of Mr. Barrera's employees showed up with vacuums, brooms, cleaning spray or dust mops. Mr. Powell was direct and no nonsense in his responses to questioning. Mr. Barrera, on the other hand, rambled about unrelated issues and did not directly answer many of the questions posed him. This lack of straightforwardness does not bolster his credibility with the Board. The demeanor and credibility of the witnesses and the weight to be accorded their testimony is for the Board to determine. *General Motors Corp. v. Cresto*, 265 A.2d 42, 43 (Del Super. Ct. 1970).

Another indication of Mr. Barrera's awareness that demolition work was being done is that he testified that when Mr. Powell called to inform him that an employee of his had been injured, Mr. Barrera immediately told Mr. Powell that he had no insurance for this. This is a revealing response as it indicates that Mr. Barrera seemed to know that he had an insurance issue right away. Additionally, despite his assertion that his company is only a clean-up company, Mr. Barrera did not send his employees to the BP job site with brooms, mops or any cleaning materials. Claimant even testified that in the past he had been provided by Mr. Barrera with big hammers, wheelbarrows and shovels for his work with Final Touch Construction. So the tools

provided by Mr. Barrera were not necessarily "cleaning" tools as he proclaims. Lastly, Mr. Barrera's assertion that Claimant's work for him in the past, moving dirt, was also an unauthorized use of his employee is a red flag to the Board. It appears that Mr. Barrera contracts his employees to do all sorts of work and then declares it "unauthorized."

Along this line Mr. Barrera at first testified that he does not provide construction helmets, or hard hats, for his employees, but then he testified that for safety reasons when his workers are outside at a construction site he asks them to wear a hard hat. This contradictory testimony does not even make sense. As well, in relation to the work with BP, Mr. Barrera admits that the work was not as specific as at other sites, while Mr. Powell testifies that he clearly asked for demolition work to be done. Mr. Barrera admits that he does not specifically remember telling Mr. Powell what his workers do. This is fairly weak testimony to support Mr. Barrera's assertion that it was obvious his company was only a clean-up company. Mr. Barrera's testimony that the charge of $20.00 per hour is very low for demolition work is not corroborated and as noted the Board does not find him credible that the performance of demolition work by his own workers was unknown to him. Moreover, simply because Mr. Barrera may have charged less for demolition work does not mean that it was not being done. It simply means that he was the lowest bidder. Additionally, when he invoiced the work, rather than term his employees as janitor or the like, he utilized the term laborers. The weight of the evidence supports a finding that Mr. Barrera knew, or should have known, that demolition work was being conducted by his employees at BP's work site. Overall, the Board finds Mr. Powell's testimony more credible that demolition was the very work for which Final Touch Construction was contracted to perform. The Board finds that Mr. Barrera's weak defense that he did not know what his employees were doing at the job site is not supported by the evidence.

Final Touch Construction maintains that it limits its workers' compensation insurance to only clean-up work and not demolition work and because of this Final Touch Construction is not Claimant's employer, rather BP is because it has this type of insurance. There is no legal premise for this argument that Final Touch Construction is not Claimant's Employer simply because there may be a coverage issue. The employer/employee relationship involves issues of control, not insurance coverage. As noted at the hearing and by the Board's Order dated February 25, 2015 the issues for this hearing were twofold: who is Claimant's Employer at the time of the work accident and whether Markel was the insurer of that entity. Final Touch Construction's belief that its workers' compensation coverage is limited is not at issue, but it certainly does not make Final Touch Construction any less Claimant's Employer.

Therefore, for the aforementioned reasons the Board concludes that Final Touch Construction is Claimant's Employer in this workers' compensation case.

Markel's Motion to Dismiss

Given this finding, the next issue for the Board to consider is whether Markel[8] is the insurer of Final Touch Construction. The Board finds that it is not and therefore, grants Markel's Motion for Dismissal. Markel has successfully shown through the evidence presented that Mr. Barrera owns four different entities which are as follows: Final Touch Contracting Services Sole Prop; Final Touch Contracting, Inc.; Final Touch Contracting Services LLC; and Final Touch Construction Services, Inc. (or "Final Touch Construction"). Each of these entities has a separate FEIN, business license number, DCRB file, insurers and, where applicable, corporation number. Markel has shown that it insures only Final Touch Contracting Services Sole Prop and has done so since about 2009, a fact to which Mr. Barrera agrees. Although Mr. Barrera also

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[8] BP proposes an argument that Markel is not a party here and does not have standing to seek dismissal, however, Markel is named by Claimant as the insurer on his initial petition. The Board may consider Markel's Motion to Dismiss as a party in interest under Title 19, section 2348(b) of the Delaware Code.

testified that he believes that Markel insures the entity Final Touch Construction this is not dispositive here. The evidence clearly shows otherwise.

Mr. Barrera believed one of his companies had dissolved in the past, around the time of his divorce, but admits that he opened up a new company during his divorce proceedings and then another new company ten days after the work accident. Altogether, he has opened up four separate companies over the past ten years or so. His mistaken belief that Markel is the insurer of Final Touch Construction does not mean that Markel is the carrier at risk here. Mr. Barrera's ignorance is not bliss. Here Mr. Barrera acquired four separate FEINs for each of his Final Touch entities and in doing so he had to execute and file paperwork to show the IRS that these entities exist as individual legal entities, separate and distinct from each other. The executed, undisputed documents presented at the hearing also show that at times Mr. Barrera was uncooperative with insurance audits resulting in cancellation of policies, etc. Again, Mr. Barrera cites his divorce as the reason, but whatever the reasons are, the pertinent documents show clearly that Markel insures only the entity named Final Touch Contracting Services Sole Prop, who is not the Employer in this case. Despite Mr. Barrera's assertion that he thought he only had one company and that Markel was the insurer, he admits that he had four active companies and he executed all of the appropriate documents to establish them and to insure them. He cannot now claim ignorance as a defense.

As to his mistaken belief that Markel insured Final Touch Construction based on the COI, Mr. Barrera admits that his insurance broker has forwarded COIs with the incorrect name numerous times in the past. It is clear here that the COI in this case also has the incorrect insurer listed. However, after admitting that he has opened four companies over the past ten years or so, executing all of the appropriate documents to establish and insure these entities, it is not

believable to this Board that Mr. Barrera was as unaware of the insurance issues as he claims. Importantly, his alleged lack of understanding does not mean that Markel is the insurer of Final Touch Construction.

For the above mentioned reasons, the Board grants Markel's Motion to Dismiss.

BP/Certificate of Insurance

Therefore, simply because Markel is named on the COI does not mean it is necessarily the insurer at risk. Markel has successfully shown that it is not the insurer and that it did not prepare the COI. The evidence shows that Markel does not insure Final Touch Construction, but rather Final Touch Contracting Services, Sole Prop. Markel also points to the language on the COI which states as follows: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." This language, as well as the undisputed documentation presented showing that it only insured Final Touch Contracting Services, Sole Prop supports Markel's request for dismissal from this case.

That this COI incorrectly names Markel as the insurer also does not impute liability to BP. *See Cordero v. Gulfstream Development Corporation,* 56 A.3d 1030, 1037 (Del. 2012)(finding that subsection (a)(5) is a "safe harbor" from, or exception to, the liability imposed by subsection (a)(4) which pertinently states as follows: [a]ll independent contractors...shall be covered under this chapter. Independent contractors...shall be insured by the general contractor, sub-contractor or other contracting entity for which they perform work or provide services. The Court also notes that a COI is "in force" if it is valid on its face at the time it is furnished to the contractor.). Here BP had in hand a COI that was valid on its face. From the evidence produced by Markel at the hearing it has been shown that Markel is not the insurer. This was unknown to

BP at the time of contracting. This convoluted history of Mr. Barrera opening numerous entities with separate insurances could only have been known to him and his broker. Importantly, given the language of the statute and the holding in *Cordero*, BP is not required to go beyond the face of the COI. *Id.*

Both Final Touch Construction and Markel raise a legal argument here that because BP did not have the COI in hand at the time of the work being done it is therefore liable. First, BP correctly maintains that this issue is not for consideration until it is shown that Claimant's Employer, Final Touch Construction, is uninsured. Such was not demonstrated at the hearing. Final Touch Construction is Claimant's employer and does not argue that it is uninsured for purposes of workers' compensation. It has preserved an argument for a later date that it does not cover demolition work, but this is not the same thing as being uninsured. However, even if Final Touch Construction were uninsured, given that the Board has determined that BP is not the Employer and BP has shown that it complied with the statutory requirements under § 2311(a)(5) there is no reason for BP to remain in this case. The Board hereby dismisses BP as it has fully complied with the statute.

Markel's reliance on *McKirby* to keep BP in the case is misplaced. In that case it was undisputed that the employer did not have workers' compensation insurance. Here Final Touch Construction does have insurance, but alleges that it does not cover demolition, a separate issue from that which the Board has determined here. More importantly, the general contractor in *McKirby* argued that the statutory changes implemented by § 2311(a)(5) did not go into effect until after the work accident. Such is not the posture of the current case. The statute is clearly in effect and has been since 2007. *McKirby* simply does not apply. Moreover, as BP maintains, the

Court's holding in *McKirby* did not alter or change the statute, the plain language of which does not require that a general contractor obtain the COI when the contract of work is accepted.

Markel maintains that *McKirby* imposes a duty to inquire and to obtain a COI when a contract for work is accepted. The problem with this argument is that the Court also states: "[i]t [the general contractor] signed the contract in the dark concerning worker's compensation coverage which is a major subject in construction projects. A modicum of due diligence required by the statute would have eliminated the problem." *Id.* The *McKirby* Court also discusses legislative intent behind § 2311(a)(5) and notes that, "[t]here was clear intent to offer more coverage to workers for injuries incurred at work and independently to require inquiry at the time of a contract;..." In the instant case BP did not enter into contract "in the dark" but rather inquired about workers' compensation insurance by checking into the IAB website to ensure that Final Touch Construction had insurance; likely discussed the issue with Mr. Barrera because it received the COI shortly thereafter; and partly based its belief that Final Touch Construction had workers' compensation insurance upon its prior dealings with the entity. The Board finds that BP exercised its due diligence in obtaining the COI by performing sufficient inquiry at the time of its contracting with Final Touch Construction.

BP has satisfied its obligation under § 2311(a)(5). The statute does not specifically state that the COI must be in the hand of the general contractor at the time of contracting the work, which here would have been at or around October 1, 2014. As noted, the Board believes that there was an appropriate inquiry by BP based on the credible testimony of Mr. Powell. The Board does not find Mr. Barrera credible that the COI was not requested until after the work accident. It is believable to the Board that Mr. Powell could not remember specifically asking Mr. Barrera for this COI, but he testified credibly that he does so in the normal course of

business. Again, this is evidenced by the fact that Mr. Powell received the COI a few days later. It is understandable to the Board that Mr. Powell might not remember the specific conversation. That he did not have the COI in hand on October 3, 2014 does not negate the fact that he now has a compliant COI which satisfies the statutory requirement. *See Cordero v. Gulfstream Development Corporation,* 56 A.2d 1030, 1037 (Del. 2012)(finding that workers' compensation law does not impose an implied obligation on a contractor to monitor, in good faith, its subcontractors' workers' compensation insurance coverage during the entire coverage period.). There is no specific statutory requirement for BP to have the COI in hand at the time of contracting.

Importantly, the COI indicates that Final Touch Construction was insured for the time period in which Final Touch Construction was working for BP. That Markel is the named insurer, but in actuality is not based on the evidence in this case, is not at issue for BP who has satisfied its obligation under the statute and performed its due diligence. *Id.* The evidence is clear that Final Touch Construction is Claimant's Employer and BP is not. Even if Final Touch Construction did not have workers' compensation insurance and BP had not obtained the COI, still pursuant to § 2311(a)(5) BP would not be considered as Claimant's employer, but rather would be deemed to insure any workers' compensation claims arising under this chapter. Again though, in this case BP has complied with the statute.

In conclusion, the Board finds that Claimant's Employer on October 3, 2014 is Final Touch Construction and dismisses both Markel and BP as Markel is not the insurer of this entity and BP has complied with § 2311(a)(5).

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. At the current time, the maximum based on Delaware's average weekly wage calculates to $9,983.50. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., 1996 WL 527213 at *6 (Del. Super. Ct.). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Here Claimant maintains that he is entitled to an award because an Employer has been established and counsel has spent a number of hours in legal hearings in order for this to occur. For this premise Claimant relies on *Abel Lopez Reynoso v. CEM Enterprises*, Del. IAB, Hearing No. 1385140, at 17 (November 15, 2012). However, the Board notes that compensability has not yet been determined in the instant case and there is no agreed upon injury.

The posture of *Reynoso v. CEM Enterprises,* while not binding on this Board, was entirely different than the instant case. There the parties had agreed that the claimant had sustained left upper extremity and lower extremity injuries in the work accident. *Id.* at 1. The only issue for the hearing was whether that claimant was an employee, or "casual" employee, of

CEM Enterprises at the time of the work accident. *Id.* Here, no such agreement regarding compensation has been entered into by the parties. Indeed, as Final Touch Construction has made very clear it desires to dispute its workers' compensation coverage in this case. Thus, the Board finds it premature to award any attorney's fee.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant's Employer in this case is Final Touch Construction. Markel's Motion to dismiss is granted as it has shown that it is not an insurer for Final Touch Construction. BP is dismissed as is has shown that it has fulfilled its obligations under § 2311(a)(5) and obtained a COI from Employer effective for the time that the work was being performed. Any award of attorney's fees is premature.

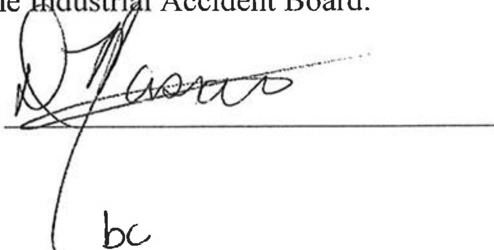
IT IS SO ORDERED THIS 24th DAY OF APRIL, 2015.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

OTTO R. MEDINILLA, SR.

I, Deborah J. Massaro, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.



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Mailed Date: 4-28-15

OWC Staff