Dallas/Fort Worth
CONSTRUCTION™

NEWS
The Industry's Newspaper
www.constructionnews.net (972) 517-4703 ★ Home Ofc: P.O. Box 791290 San Antonio, TX 78279 (210) 308-5800 ★ JUNE 2009 ★ Vol. 7 ★ No. 6

# Owner controlled insurance policies

**Timothy B. Soefje**, Senior Associate
***Campbell & Chadwick P.C.***
Dallas, TX

The construction industry won yet another important victory in the Texas Supreme Court in the evolving law of Owner Controlled Insurance Policies (OCIP). In an opinion handed down in April, the Texas Supreme Court held in *HCBeck, Ltd. v. Rice*, that it is irrelevant whether a general contractor merely "provided" or directly "purchased" the OCIP because the Texas Workers' Compensation Act remains the exclusive remedy for an injured subcontractors' employee where the owner or general contractor has an OCIP in place subject to a written contract.

Owner Controlled Insurance Policies quickly are becoming the norm on small and large construction projects, but the full scope of protection afforded by an OCIP remains undecided by the Texas courts.

The OCIP usually will be purchased by the owner or general contractor and is paid as a credit against each subcontractor's contract price. Typically the OCIP provides workers compensation coverage for the benefit of the owner, construction manager, contractor, and eligible subcontractors of all tiers who have on-site employees. The contract between the owner and general contractor, or between the general contractor and subcontractors, generally will require all eligible subcontractors to participate in the OCIP.

There are numerous advantages to an owner or general contractor obtaining an OCIP. Most important among them, however, is the Texas Worker's Compensation Act becomes the exclusive remedy, and injured subcontractors' employees' lawsuits for negligence are barred, where an owner or general contractor provides an OCIP pursuant to a written contract with a subcontractor. By and large the trial courts have sided against the construction industry in OCIP cases, limiting the application of the exclusive remedy provision. As reflected in the *Rice* case, however, the Texas Supreme Court appears ready to step in to enforce the Act in favor of owners and general contractors.

The Texas Supreme Court first considered this issue of "provided" versus "purchased" in December 2008. In *Hunt Construction Group, Inc. v. Konecny,* the Texas Supreme Court reversed a six-figure jury verdict, holding the exclusive remedy provision applied where the OCIP automatically covered all eligible subcontractors. The Court concluded that the Texas Workers Compensation Act protects an owner or general contractor when either *"supplies or makes available"* workers' compensation insurance coverage to subcontractors and its employees.

In *Rice*, the Texas Supreme Court was presented with a slightly different situation. In *Rice* the subcontractor was only required to enroll in the site owner's OCIP and was not automatically covered by the OCIP. The case arose on a project where the site owner, FMR Texas, Ltd. contracted with HCBeck to construct an office campus on FMR's property. FMR's contract included an OCIP that FMR required HCBeck to incorporate into all of its subcontracts. HCBeck and all of its subcontractors were required to enroll in the OCIP. As the subcontractor enrolled, FMR would issue an individual policy in the subcontractor's name. If the subcontractor did not enroll, the subcontractor would be in breach of the contract and subject to termination from the project. The agreement permitted FMR to cancel the OCIP, but in the event FMR chose to cancel the OCIP, the contract required HCBeck to secure, at FMR's cost, other insurance covering all subcontractors' employees at the same levels as provided by the OCIP.

Subject to the contract, HCBeck entered into a subcontract with a company called Haley-Greer, who properly enrolled in the OCIP. It was Haley-Greer's employee that was injured on the job and recovered workers' compensation benefits. The employee then sued HCBeck for negligence. The employee argued that because FMR purchased the OCIP and cost HCBeck nothing, HCBeck had not "provided" insurance, and therefore was not qualified under the Act as a statutory employer entitled to the exclusive remedy defense.

The Texas Supreme Court rejected this argument, holding that regardless of who "purchased" the OCIP, HCBeck "provided" workers compensation insurance to its subcontractors pursuant to the project contract with FMR. Additionally, the court noted that even in the event that FMR exercised its option to terminate the OCIP, the written agreement required that "[HCBeck] shall secure such insurance at the owner's [FMR] cost . . ." The OCIP handbook also required HCBeck, as the general contractor, to provide on-site insurance in the event that FMR canceled the OCIP.

The Texas Supreme Court noted that TEX.LABOR CODE §406.123(a) does not require a general contractor to actually obtain the insurance, or even pay for it directly. The Act only requires that there be a written agreement to provide workers' compensation insurance coverage.

The Texas Supreme Court did not address, however, whether it would have held the same way if HCBeck's contract with FMR had not placed on HCBeck, as general contractor, these specific requirements to obtain workers' compensation insurance even if FMR canceled the OCIP.

Plaintiffs' attacks on OCIPs will continue, but *Rice* and *Konecny* indicate strongly that the Texas Supreme Court remains steadfast to construe the Texas Worker's Compensation Act broadly to apply the Act's exclusive remedy provision to bar negligence lawsuits by injured workers where an owner or general contractor provides an OCIP to all on-site subcontractors and subcontractor employees.

---

*Timothy B. Soefje is a senior associate with the Dallas, TX, law firm of Campbell & Chadwick P.C. He specializes in construction litigation and professional liability defense, including engineers, architects, real estate appraisers, attorneys and accountants.*