FLORIDA
DEPARTMENT OF
FINANCIAL SERVICES

TOM GALLAGHER
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED 2006 JUN 16 A 11:27 DIVISION OF ADMINISTRATIVE HEARINGS

FILED

JUN 14 2006

Docketed by:

IN THE MATTER OF:

BICON, INC.

_____________________________/

Case No. 82590-05-WC

05-2966

FINAL ORDER

This cause came on for consideration of and final agency action on a Recommended Order rendered on March 16, 2006, after a hearing conducted pursuant to Sections 120.57(1) and 120.569, Florida Statutes, by Administrative Law Judge John G. Van Laningham. Petitioner, Department of Financial Services, Division of Workers' Compensation, filed timely exceptions on March 31, 2006. The Respondent, Bicon, Inc., did not file exceptions, but did file a response to the Petitioner's exceptions. The transcript of proceedings, the exhibits introduced into evidence, the Proposed Recommended Orders, the Recommended Order, the Petitioner's exceptions, and Respondent's response have all been considered in the rendering of this Final Order.

Ruling on Petitioner's Motion to Declare Response to Exceptions Untimely

On April 18, 2006, the Petitioner filed a Motion to declare the Respondent's response to the Petitioner's Exceptions untimely. The Petitioner argued that since the Petitioner's Exceptions were timely filed on March 31, 2006, pursuant to Rule 28-106.217(2), Florida Administrative Code, the response to the Exceptions should have been filed on April 10, 2006.

Instead, the Respondent's response was mailed on April 11, 2006 and not received by the Petitioner until April 14, 2006, or four days after the deadline for filing. The Petitioner requests that the Respondent's response be dismissed as untimely filed.

Petitioner is correct that the Respondent's response to the Exceptions were not filed in accordance with the provisions of Rule 28-106.217(2), Florida Administrative Code. However, all objections raised in the Respondent's untimely response were specifically considered in the Department's review of the Petitioner's Exceptions, although the Department was under no obligation to do so. Accordingly, Petitioner's Motion has been rendered moot.

Rulings on Petitioner's Exceptions

The Petitioner asserts in its First Exceptions to Finding of Fact #12 of the Recommended Order that the phrase "...the Department did not elicit any direct evidence that Bicon's alleged subcontractors were performing jobs or providing services that Bicon was contractually obligated to carry out for third parties", is irrelevant and should be rejected. The Petitioner contends that the Respondent was charged with materially understating its payroll and that whether the Respondent actually performed any work on behalf of third parties is not relevant to the issue.

It appears in Finding of Fact #12, that the Administrative Law Judge (ALJ) made the statement in the first sentence of the Finding of Fact as introductory to an explanation of the testimony of the Department's investigator. The ALJ is attempting to determine which entity is performing which work, as is evidenced from the paragraphs following Finding of Fact #12. That analysis is arguably relevant to the case. Accordingly, the Petitioner's First Exception is REJECTED. However, any legal inferences from this analysis drawn by the ALJ in his attendant Conclusions of Law are not accepted and will be addressed below.

The Petitioner asserts in its Second Exception to Finding of Fact #18 and Conclusion of Law #32 that the ALJ made the assumption that Precision Equipment Fabricators and Repair, Inc ("Precision"), as a subcontractor of Respondent, had to be in the same industry as the Respondent. The Petitioner contends that the issue is not whether Precision performed work on behalf of the Respondent, but whether the Respondent failed to report Precision as a subcontractor/employee to its insurance company. The Petitioner argues that the ALJ had no supporting evidence to interpret the statute in such a manner. However, it appears that the ALJ in Finding of Fact #18 is explaining the relationship of the alleged sub-contractors to the Respondent . The ALJ relies upon the testimony received from the Department's investigator, John Turner, in finding that there was not convincing evidence to establish that Precision was performing any of the Respondent's contract work. Therefore, there is arguably competent, substantial evidence to support the ALJ's finding. The appropriate weight to be given to the evidence is the exclusive province of the ALJ, and cannot be disturbed by the agency unless the findings are not supported by competent substantial evidence. Brogan v. Carter, 671 So.2d 822 (Fla. 1st DCA 1996); Prysi v. Department of Health, 823 So.2d 823 (Fla. 1st DCA 2002). The Department is not empowered to reweigh the evidence supporting that finding. Consequently, if Precision is not proven to be performing the Respondent's contract work, it would not appear that the Petitioner has convincingly proven that Precision falls within the ambit of Section 440.10, Florida Statutes. As a result, the ALJ's attendant Conclusion of Law #32 cannot be rejected given the specific facts of this case. As there is competent substantial evidence in the record to support Finding of Fact #18 and Conclusion of Law #32, the Petitioner's Second Exception is REJECTED.

The Petitioner asserts in its Third Exception to Finding of Fact #19 of the Recommended Order that the ALJ did not render this finding based on any evidence in the record and that it was erroneously based upon the ALJ's commentary in the endnote to this finding. The Petitioner argues that the ALJ inappropriately interpreted Respondent's counsel's comments at a pre-hearing deposition. However, in Finding of Fact #19, the ALJ appears to be addressing the lack of evidence presented to prove that the Respondent materially understated the payroll of its subcontractors, which is the gravamen of the Division's Stop Work Order . The ALJ's endnote #6 is an evaluation of the record to determine whether Bicon's counsel actually stipulated to the ultimate issue in this case. After reviewing Bicon's counsel's comments, the ALJ reasonably concluded that the statement of Bicon's counsel was too ambiguous to constitute an admission that the Respondent underreported its payroll. As there was a reasonable basis for the ALJ to conclude that Respondent's counsel made no admission that the Respondent underreported its payroll, Petitioner's Third Exception is REJECTED.

The Petitioner asserts in its Fourth Exception to Finding of Fact #20 of the Recommended Order that the ALJ went beyond his jurisdiction by making inferences and raising factual possibilities exonerating the Respondent when such "possibilities" were not raised by the Respondent at the hearing. Section 120.57(1)(l), Florida Statutes provides, in pertinent part, that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." Competent substantial evidence has been defined as:

> The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or

> weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element of the offense charged.

See, Dunn v. State, 454 So.2d 641, 649 (Fla. 5th DCA 1984).

In Finding of Fact #20, the ALJ theorized on possible explanations for the understatement of payroll by the Respondent, even though these theories had not been raised by the Respondent and had no evidentiary support in the record. Consequently, in presenting these theories in his Recommended Order that the Division had no opportunity to address, the ALJ placed himself in a position of advocating on behalf of the Respondent and departed from his requisite position of neutrality. See, Department of Highway Safety and Motor Vehicles v. Griffin, 909 So.2d 538 (Fla. 4th DCA 2005). See also, Department of Highway Safety and Motor Vehicles v. Pitts, 815 So.2d 738 (Fla. 1st DCA 2002) holding that "... the hearing officer must nonetheless remain neutral and detached and [she] departs from that position of neutrality when [she] elicits evidence that the [Department] itself never submitted for consideration". In the instant case, neither party introduced any evidence at hearing regarding these theories.

While it is axiomatic that the ALJ may interpret and weigh evidence that has been properly admitted into evidence, in this instance the ALJ has gone beyond his role as a neutral party by theorizing on the reasons for the Respondent's actions. None of these "possibilities" were proven or even discussed at or prior to the hearing in this case. Based upon a review of the entire record in this case, Finding of Fact #20 was not based upon competent, substantial evidence and must be rejected. Accordingly, Petitioner's Fourth Exception is ACCEPTED.

The Petitioner asserts in its Fifth Exception to Finding of Fact #21 that the ALJ inappropriately required the Department to exclude "numerous hypotheses of innocence." The Petitioner's exception is well-founded By imposing such a requirement, the ALJ again improperly placed himself in a position of advocating on behalf of the Respondent, because such a requirement is not based upon any competent substantial evidence in the record. Thus, for the same reasons set forth relative to the Fourth Exception above, the Petitioner's Exception to Finding of Fact #21 is ACCEPTED to the extent indicated herein. Additionally, in Petitioner's Exception to Finding of Fact #22, the Petitioner contends that the use of the term "guilty" is inappropriate because this is not a criminal proceeding. The Petitioner further contends that there is nothing in Section 440.107(2), Florida Statutes that implies there is an element of intent in materially understanding payroll. Although it may be true that the ALJ could have phrased this conclusory finding more artfully, it appears to merely be a summary of the findings of fact in this case (or a conclusion of law mischaracterized as a finding of fact), and not an implication of criminal conduct by the Respondent. However, to the extent, if any, that the ALJ imposes a requirement that the Division prove a Respondent's *intent* to materially understate its payroll in order to prove a violation of Section 440.107(2), Florida Statutes, the Petitioner's exception is ACCEPTED. Accordingly, the Petitioner's Fifth Exception to Finding of Fact #22 is ACCEPTED to the extent modified herein.

The Petitioner asserts in its Sixth Exception to Conclusions of Law #26 and #27 that the ALJ is impermissibly attempting to create a fictional distinction between "employers" and "contractors", when such a distinction was never raised by either party as an issue, and no evidence was presented by either party on this issue.

In this exception, the Petitioner argues that these Conclusions of Law would operate to undermine the plain meaning of Chapter 440, Florida Statutes. The Petitioner further argues that the agency should be afforded great deference in the interpretation of the statute it administers, with appropriate case citations for that proposition.

The ALJ's statutory discussions in these two conclusions of law appear to be based upon his erroneous distinction between the terms "employer" and "contractor" in Sections 440.10(1),(a) and (b), Florida Statutes. This analysis attempts to create a distinction between the legal obligations of contractors versus employers, based upon the ALJ's construction that an *employer's* liability to provide workers compensation coverage is only imposed within subsection (a), while a *contractor's* liability to provide workers compensation coverage is only imposed within subsection (b). Essentially, the ALJ argues that because each term appears in a separate subsection of the statute, that separation operates to impose insular and different obligations on employers and contractors. The ALJ then concludes that statutory employers cannot, as a matter of law, be found guilty of understating payroll. (See, Conclusions of Law # 38 and #40, and Endnote 13 of the Recommended Order).

However, the distinction the ALJ attempts to draw between those terms as used in Sections 440.10(1)(a) and (b), Florida Statutes ignores the simple fact that subsection (a) explicitly refers to both an "employer" and a "contractor or subcontractor" who engages in any public or private construction in the state. This dual reference destroys the ALJ's distinction between "employers" and "contractors" that he utilizes in concluding that the statute is unenforceable against statutory employers.

The ALJ's analysis also ignores the provision in Section 440.10(1)(b), Florida Statutes that essentially deems the subcontractors' employees to be the employees of the contractor,

stating that all those employees "shall be deemed to be employed in one and the same business or establishment". That wording refutes the ALJ's argument that a subcontractor's employees are never the contractor's employees. More importantly, it also strongly implies that there is but one "payroll' for that "one and the same business" for which the contractor is liable to report, thus persuasively undercutting the ALJ's argument that a contractor cannot be found to have understated a subcontractor's payroll.

Adopting the ALJ's analysis in these Conclusions of Law would have the undesired and absurd effect of making the reporting provisions of this statute unenforceable against statutory employers that are also contractors. That was clearly not the intention of the Florida Legislature. It is axiomatic that an agency is afforded wide discretion in the interpretation of a statute which it is given the power and duty to administer. See, Republic Media, Inc. v. Department of Transportation, 714 So.2d 1203, 1205 (Fla. 5th DCA 1998). The Department's interpretation of Section 440.10(1)(a), (b) and (c), Florida Statutes is as or more reasonable than the ALJ's and accordingly, the Petitioner's Sixth Exception is ACCEPTED.

The Petitioner asserts in its Seventh Exception to Conclusions of Law #34 - #40 that the ALJ inappropriately went outside the record to determine the definition of the term "payroll". The Petitioner points out that the SCOPES Manual and the Basic Manual, adopted by the Petitioner in "Rule 69L-6, Fla. Admin. Code "[sic]" provides a detailed definition of "payroll". This duly-adopted definition of "payroll" does not draw the ALJ's erroneous distinction between "payroll of the subcontractor's employees" and the "total contract price". (See Conclusions of Law #37- #38, #40). Moreover, the meaning of the term "payroll" was never raised as an issue, before or during the hearing. As the ALJ's definition of the term "payroll" conflicts with the

Petitioner's duly-adopted definition, which is more reasonable than the ALJ's definition, the Petitioner's Seventh Exception is ACCEPTED.

Notwithstanding the acceptance of Petitioner's Exceptions above, under the particular facts of this case, it has not been established by clear and convincing evidence in the record that the Respondent specifically and materially understated its payroll to Bridgefield. For that reason, the ALJ's recommendation to rescind the Petitioner's Stop Work Order is ACCEPTED.

ACCORDINGLY, IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law made by the Administrative Law Judge are adopted as modified herein as the Department's Findings of Fact and Conclusions of Law.

IT IS HEREBY FURTHER ORDERED that the Recommendation made by the Administrative Law Judge is adopted by the Department, and the Division of Workers' Compensation shall rescind the Stop Work Order issued to Respondent, Bicon, Inc., on May 4, 2005.

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Fla. R. App.P. 9.110. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same and the appropriate filing fee with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE AND ORDERED this 14 day of June, 2006.

RICK MAHLER
Chief of Staff

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