STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF WORKERS' COMPENSATION,	)	
Petitioner,	)	
vs.	)	Case No. 05-2966
BICON, INC.,	)	
Respondents.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 23, 2006, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Colin M. Roopnarine, Esquire
Department of Financial Services
Division of Workers' Compensation
200 East Gaines Street
Tallahassee, Florida 32399-4229

For Respondent: Harry Winderman, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent materially understated payroll and thus should be deemed to have failed to

secure payment of workers' compensation, which is a sanctionable offense.

PRELIMINARY STATEMENT

On May 4, 2005, Petitioner Department of Financial Services issued and served on Respondent Bicon, Inc., a Stop Work Order, which directed Respondent to cease all business operations in Florida based on the charge that Respondent had materially understated payroll and thus would be deemed to have failed to secure payment of workers' compensation. On July 5, 2005, Petitioner issued and served on Respondent an Amended Order of Penalty Assessment, which levied a fine against Petitioner——for failing to secure payment of workers' compensation——in the amount of $300,809.63.

In a Petition dated July 13, 2005, Respondent denied Petitioner's allegations and requested a hearing. On August 18, 2005, Petitioner forwarded the matter to the Division of Administrative Hearings.

The final hearing took place as scheduled on January 23, 2006, with both parties present. Each party waived the right to examine and cross-examine witnesses at hearing. In lieu of a formal evidentiary proceeding, the parties stipulated to the admission of Petitioner's Exhibits 1 through 13. One of Petitioner's exhibits is the Affidavit of John Turner. Another

is the deposition of Roxanne Moisuk. These exhibits comprise the only testimony in evidence.

In addition to Petitioner's exhibits, the parties agreed to the admission of Respondent's Exhibit 1, which was to be a composite of Respondent's responses to Petitioner's discovery requests. Counsel for Respondent was instructed, at hearing, to file Respondent's Exhibit 1, and he agreed to do so without delay. The exhibit was never filed, however, despite several post-hearing telephonic reminders.

The final hearing transcript was filed on February 16, 2006. Thereafter, Petitioner timely filed a Proposed Recommended Order, which was considered. Respondent filed its proposed Findings of Fact and Conclusions of Law after the deadline for doing so had run. The undersigned nevertheless considered Respondent's submission; it had no effect on the outcome.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2005 Florida Statutes.[1]

FINDINGS OF FACT

1. Petitioner Department of Financial Services ("Department") is the state agency responsible for enforcing the statutory requirement that employers secure the payment of workers' compensation for the benefit of their employees.

2. Respondent Bicon, Inc. ("Bicon") is a corporation domiciled in Florida and engaged in the business of hauling construction debris, which is considered a non-construction activity for the purposes of workers' compensation coverage requirements.

3. Bicon's workers' compensation carrier from October 1, 2003 to May 4, 2005 (the "Focal Period") was Bridgefield Employers Insurance Company ("Bridgefield"). Bridgefield's Policy Number 830-29266 (the "Policy") initially covered Bicon for the period from May 11, 2002 to May 11, 2003. Bridgefield renewed the Policy twice, each time for a one-year period.

4. The premium for the Policy was based on Bicon's payroll. Before the beginning of each policy period, Bicon provided Bridgefield an estimate of its payroll for the upcoming period.[2] Bridgefield then established an estimated premium for the period, which Bicon was expected to pay in installments. After the policy period had ended, Bridgefield audited Bicon's records to determine actual exposures. Once the audit had been completed, the estimated premium was adjusted as necessary, upward or downward, to reflect actual exposures for the policy period.

5. The audit covering the first renewal period (May 11, 2003 to May 11, 2004) caused Bridgefield to conclude that there existed a premium shortfall of $274,281.66, for which sum

Bridgefield billed Bicon on May 2, 2005.[3] Given that the estimated premium for the period had been $22,634.44,[4] this was a significant upward adjustment. The premium increase was attributed to exposure arising from Bicon's use of an alleged uninsured subcontractor, which exposure Bridgefield's auditor valued at $816,231.00.

6. Bridgefield's Audit Summary Sheet contains the following instructions pertaining to uninsured subcontractors:

> If no evidence of coverage is submitted to the insured for a subcontractor and only labor is provided, the auditor must include either payroll of the subcontractor's employees or the Total Contract Price. If the labor and material portions of the contract are not broken down in the Insured's records, the auditor must include the Total Contract Cost prorated according to manual rules.

No persuasive or convincing evidence was offered establishing whether the auditor calculated the subcontractor exposure for the first renewal period based on the subcontractor's payroll or, alternatively, on the contract price.

7. Bicon paid $53,091.40 against the audit adjustment, leaving a balance of $221,190.26, which remained outstanding as of the final hearing. Bicon has disputed the findings of Bridgefield's audit, but the record does not disclose the nature and grounds of its objections.

8. The estimated premium for the second renewal period (May 11, 2004 to May 11, 2005)——which had been calculated in March 2004, apparently before the findings from the audit of the first renewal period were available——was $20,097.48.[5] The retrospective audit convinced Bridgefield that the estimated premium had fallen short by the amount of $186,653.88, for which Bridgefield billed Bicon on September 13, 2005. This shortfall was attributed to Bicon's use of five alleged uninsured subcontractors, which the insurer claimed gave rise to an exposure appraised at $718,462.00. No persuasive or convincing evidence was offered to establish whether the auditor calculated this exposure based on the subcontractors' respective payrolls or, alternatively, on the contract prices.

9. Bicon disputed these audit findings, and as of the final hearing had not paid any part of the audit adjustment. The record does not disclose the nature and grounds of Bicon's objections to this audit.

10. The Department's case against Bicon is premised on the liability for workers' compensation that attaches to a contractor who engages a subcontractor to perform any part of the contractor's contractual obligations to a third party. In such a situation, if the subcontractor is uninsured, then the contractor is obligated to provide workers' compensation to all of the subcontractor's employees.

11. The Department alleges that, during the Focal Period, Bicon sublet work to the following uninsured subcontractors: Precision Equipment Fabricators & Repair, Inc.; S&S National Waste, Inc.; Mickelson Enterprises, Inc.; and Wheeler Employee Leasing, Inc. The Department alleges further that, in its dealings with Bridgefield, Bicon materially understated the amounts of its uninsured subcontractors' payrolls——a practice that, the Department contends, is deemed by statute to constitute a failure to secure the payment of workers' compensation.

12. Despite these allegations, 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. Rather, in this regard, the Department's investigator testified (via affidavit) as follows:

> [T]he vast majority of the work being performed [by Bicon's alleged subcontractors] was the hauling of debris by truck drivers, which is a non-construction activity. However, the duties performed by the employees of Precision Equipment Fabricators & Repair Inc., were construction in nature, specifically, the installing/erecting of debris chutes at construction sites.

Aff. of J. Turner at 3. Notably absent from the investigator's account is any testimony that the alleged subcontractors were performing Bicon's contract work.

13. There is, however, some circumstantial evidence that Bicon sublet part of its contract work to other entities. In its application for workers' compensation insurance, for example, Bicon described its business operations as follows: "haul[ing] clean recyclable construction materials (sand, gravel, concrete, wood) from construction sites to waste management locations." The Department accepts this description, for in its Proposed Recommended Order, the Department requested a finding that "Respondent is . . . engaged in the business of hauling construction debris, which is a non-construction activity." The undersigned so found above.

14. It is reasonable to infer, from the basic undisputed facts about Bicon's business, that Bicon provided hauling services to third parties (its clients or customers) to whom it was contractually bound. The inference is sufficiently strong that the undersigned is convinced, and finds, that such was the case.

15. The evidence shows that Bicon considered various entities, including S&S National Waste, Inc. ("S&S"); Mickelson Enterprises, Inc. ("Mickelson"); and Wheeler Employee Leasing, Inc. ("Wheeler"), to be its "subcontractors." Indeed, at the

Department's request, Bicon produced one of its subcontracts, which is in evidence, wherein Mickelson was designated the "subcontractor." The undersigned is convinced, and finds, that Bicon did, in fact, enter into subcontracts, express or implied, with S&S, Mickelson, and Wheeler.

16. It is undisputed, moreover, that these three companies——S&S, Mickelson, and Wheeler——performed the work of hauling construction debris, which happens to be Bicon's core business. Therefore, it is reasonable to infer, and the undersigned finds, that, to some extent, S&S, Mickelson, and Wheeler provided hauling services to Bicon's customers.

17. None of the aforementioned subcontractors had workers' compensation insurance in place during the Focal Period.

18. The evidence is insufficient to prove that Precision Equipment Fabricators & Repair, Inc. ("Precision") was a subcontractor of Bicon that performed Bicon's contract work. On the contrary, Mr. Turner's testimony, which was not contradicted, shows that Precision was engaged in a different business from Bicon's——one involving construction activities (i.e. installing debris chutes) as opposed to the non-construction work of hauling. There is no persuasive or convincing evidence in the record establishing that Bicon was contractually obligated to anyone to perform such construction services.

19. There is no persuasive or convincing direct evidence that Bicon ever understated the payroll of S&S, Mickelson, or Wheeler in communicating with Bridgefield. There is, indeed, no evidence in the record of any statement made by or on behalf of Bicon, to Bridgefield, concerning either the subcontractors' payrolls or the amounts that Bicon had paid, expected to pay, or owed its subcontractors pursuant to the subcontracts that it had made with them.[6]

20. The Department's theory, which is implicit (though unstated) in its litigating position, is that Bicon must have understated the subcontractors' payrolls because: (a) during the audits following the first and second renewal periods, Bridgefield picked up additional exposure, which it attributed to uninsured subcontractors; and (b) no other explanation accounts for the large discrepancies between the estimated premiums and the audited premiums.[7] The flaw in this theory is that the incriminating fact which the Department urges be inferred (material understatement of payroll) is plainly not the only possible cause of the known effect (audit findings relating to uninsured subcontractors). Without being creative, the following possibilities, all of which are reasonable and consistent with the proved facts of this case, spring readily to mind:

1. Estimating its anticipated exposures, Bicon told Bridgefield that it estimated its payments to uninsured subcontractors would be $X, and

a. in fact, Bicon had estimated that it would pay uninsured subcontractors $Y——a materially greater sum than $X. Or:

b. in fact, Bicon truly had estimated that its payments to uninsured subcontractors would total $X, but its estimate turned out to be low, and the actual aggregate of such payments was $Y, a materially greater sum.

2. Bicon said nothing to Bridgefield about its payments to uninsured subcontractors until the audits because:

a. prior to the audits, Bridgefield had never asked Bicon to disclose such information. Or:

b. prior to the audits, Bridgefield had asked Bicon an ambiguous question about its estimated payroll exposures, which Bicon reasonably had understood as not inquiring about payments to uninsured subcontractors. Or:

c. although, prior to the audits, Bridgefield had asked Bicon a clear and unambiguous question

calling for Bicon to disclose such information, Bicon had remained silent on the issue.

3. Bicon told Bridgefield about its payments to uninsured subcontractors, but Bridgefield, which knew that the actual amount of such exposure would be included at audit in determining the final premium, declined to use the information in calculating the estimated premium.

21. The Department failed to prove, by any standard, that something like 1.a. occurred in fact. Further, the Department failed to exclude numerous hypotheses of innocence——such as 2.a., 2.b., and 3.——which are reasonable and consistent with the evidence. Accordingly, the undersigned declines to infer, from the proved facts, that, in its communications with Bridgefield, (the existence of which must be inferred, for there is no direct evidence of such communications), Bicon materially understated either the amounts of its subcontractors' payrolls or the amounts Bicon paid or owed to its subcontractors for the work they performed for Bicon's customers pursuant to subcontracts.

22. Consequently, it is determined, as a matter of ultimate fact, that Bicon is not guilty of materially understating payroll——and hence failing to secure payment of workers' compensation——as charged under Section 440.107(2), Florida Statutes.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

24. The Department argues that its evidential burden is to prove the allegations against Bicon by a preponderance of the evidence "because [Bicon] does not have a license or property interest at stake so as to raise the standard of proof to clear and convincing" evidence. Pet. Prop. Rec. Order at 9. This contention is clearly contrary to settled law. In Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996), the Florida Supreme Court held that clear and convincing evidence is required to justify the imposition of administrative fines because they "are penal in nature and implicate significant property rights." Here, the Department is seeking to impose an administrative penalty in excess of $300,000.00. Therefore, it must prove the charges against Bicon by clear and convincing evidence. Id.; see also, e.g., Latham v. Florida Comm'n on Ethics, 694 So. 2d 83, 86 (Fla. 1st DCA 1997)(Personal wealth is "entitled to the prophylactic benefit of the clear and convincing burden of proof.").

25. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of

Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

26. The obligation to provide workers' compensation is set forth in Section 440.10, Florida Statutes, which provides in pertinent part as follows:

> (1)(a) Every employer coming within the provisions of this chapter shall be liable for, and shall secure, the payment to his or her employees, or any physician, surgeon, or pharmacist providing services under the provisions of s. 440.13, of the compensation payable under ss. 440.13, 440.15, and 440.16. Any contractor or subcontractor who engages in any public or private construction in the state shall secure and maintain compensation for his or her employees under this chapter as provided in s. 440.38.
> (b) In case a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors, all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment, and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.
> (c) A contractor shall require a subcontractor to provide evidence of workers' compensation insurance. A subcontractor who is a corporation and has an officer who elects to be exempt as permitted under this chapter shall provide a copy of his or her certificate of exemption to the contractor.

Note the distinction between "employers," whose liability for compensation arises under subparagraph (a); and "contractors," whose liability for compensation arises under subparagraph (b). Any person or corporation meeting the statutory definition of "employer"[8] must secure compensation for his or its "employees."[9] In contrast, when a person or corporation becomes a

"contractor,"[10] he or it must secure compensation for the employees of its uninsured subcontractor(s).

27. The judicial term of art for a "contractor" under Section 440.10 is "statutory employer." See Motchkavitz v. L.C. Boggs Indus., 407 So. 2d 910, 912 (Fla. 1981)("Section 440.10 establishes the concept of 'statutory employer' for contractors who sublet part of their work to others."). Notwithstanding this terminology, the employees of an uninsured subcontractor are neither true employees——i.e. employees in the commonly understood sense——of the statutory employer, nor even, necessarily, its "employees," as that term is defined in Section 440.02(15), Florida Statutes. See Gator Freightways, Inc. v. Roberts, 550 So. 2d 1117, 1118 (Fla. 1989)(driver employed by company that leased trucking equipment to common carrier was not the carrier's "employee"; rather, the carrier was the driver's "statutory employer"). The subcontractor's employees remain, as a matter of fact, the employees of the subcontractor.

28. In charging Bicon with the offense of failing to secure the payment of workers' compensation, the Department has relied on Section 440.107(2), which provides in relevant part as follows:

> For the purposes of this section, "securing the payment of workers' compensation" means obtaining coverage that meets the requirements of this chapter and the Florida Insurance Code. However, if at any time an

> employer materially understates or conceals payroll, materially misrepresents or conceals employee duties so as to avoid proper classification for premium calculations, or materially misrepresents or conceals information pertinent to the computation and application of an experience rating modification factor, such employer shall be deemed to have failed to secure payment of workers' compensation and shall be subject to the sanctions set forth in this section.

(Emphasis added.) Being penal in nature, this statute must be strictly construed; any ambiguities are to be resolved in favor of the party charged with an offense. Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977). A narrow interpretation guards against imposing sanctions for conduct not reasonably proscribed. Id.

29. Summarizing the material accusations in this case in light of the statutory framework reviewed above, Bicon, which allegedly was a statutory employer responsible for providing compensation under Section 440.10(1)(b), Florida Statutes, is alleged to have materially understated the payrolls of its subcontractors' employees.[11] If this alleged practice were cognizable under Section 440.107(2), and if the factual allegations were true, then it would be necessary to deem Bicon guilty of failing to secure payment of workers' compensation, for which failure a "stop work" order and an administrative

penalty would be available and appropriate sanctions. See § 440.107(7)(d), Fla. Stat.

30. The first question, then, is whether Bicon was a statutory employer. To conclude that Bicon was a statutory employer requires that certain facts be established. Specifically, "for a company to be a contractor under [Section 440.10, Florida Statutes], its primary obligation in performing a job or providing a service must arise out of a contract." Gator Freightways, 550 So. 2d at 1119. This is because

> the clear implication in this part of the [Workers' Compensation Law] is that there must be a contractual obligation on the part of the contractor, a portion of which he *sublets* to another. To "sublet" means to "underlet", Webster's New International Dictionary; in the context in which it is here used, the effect of subletting is to pass on to another an obligation under a contract for which the person so "subletting" is primarily obligated.

Jones v. Florida Power Corp., 72 So. 2d 285, 289 (Fla. 1954)(italics in original); see also, e.g., Duran v. Hotelerama Assocs., Ltd., 892 So. 2d 505 (Fla. 3d DCA 2004)(hotel owner, which was not contractually obligated to give its guests tickets to club located in hotel, was not the statutory employer of club's employee); Cuero v. The Ryland Group, Inc., 849 So. 2d 326 (Fla. 2d DCA 2003)(owner/developer that owed no contractual duty to any third party to build project was not statutory employer of subcontractor's employee); Lizarraga v. American

Airlines, Inc., 2000 U.S. Dist. LEXIS 14843 (S.D.Fla. Sept. 19, 2000)(airline was statutory employer of airport security guard who worked for subcontractor that discharged airline's implied contractual duty to provide safe passage of its customers' cargo).

31. As found, Bicon was engaged in the business of hauling construction debris for third parties. In their respective capacities as Bicon's subcontractors, S&S, Mickelson, and Wheeler sometimes performed hauling operations for Bicon's customers. Therefore, to the extent that the employees of S&S, Mickelson, and Wheeler performed such services on Bicon's behalf, Bicon was their statutory employer. Accordingly, it is concluded that Bicon was liable for compensation to the employees of S&S, Mickelson, and Wheeler, pursuant to Section 440.10(1)(b), Florida Statutes.

32. It is concluded that Bicon was not liable, however, for compensation to the employees of Precision, for Precision was not shown to have been performing any of Bicon's contract work.

33. The next question is whether Bicon, as a statutory employer, was an "employer" for purposes of Section 440.107(2), Florida Statutes. The answer is not self-evident, for if the legislature had intended to make contractors qua contractors subject to penalty under Section 440.107, then it arguably would

have said so explicitly——and it did not, which suggests, perhaps, that statutory employers, as such, are not subject to being deemed, pursuant to Section 440.107(2), to have failed to secure payment of workers' compensation. The undersigned has determined, however, that such argument, though not without merit, is ultimately unpersuasive because another important provision of the Workers' Compensation Law——Section 440.11, Florida Statutes, which confers immunity from additional liability on employers responsible for workers' compensation—— likewise fails specifically to mention contractors, yet has been held consistently to include them. See, e.g., Motchkavitz v. L.C. Boggs Industries, Inc., 407 So. 2d 910, 913 (Fla. 1981)("[T]he liability to secure coverage for [the] employees [of a subcontractor] . . . immunizes a contractor from suit by such employees."); Lingold v. Transamerica Ins. Co., 416 So. 2d 1271, 1272 (Fla. 5th DCA 1982)(as statutory employer, general contractor is immune from suit by subcontractor's employee seeking damages for negligence). Thus, the undersigned concludes that the term "employer" as used in Section 440.107(2) reasonably can be understood to include a statutory employer such as Bicon.

34. A more difficult question is whether, as a matter of law, a statutory employer can be punished either for (a) understating a subcontractor's payroll, or for (b) understating

the amount paid or owed to a subcontractor pursuant to a subcontract. Uncertainty in these matters stems from the fact that the term "payroll" is not defined in the Workers' Compensation Law.

35. To resolve this uncertainty, the undersigned turns to a rule of interpretation that the Florida Supreme Court has called

> "one of the most fundamental tenets of statutory construction[, namely,] that [courts] give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature. When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary."

The Reform Party of Florida v. Black, 885 So. 2d 303, 312 (Fla. 2004), quoting Nehme v. Smithkline Beecham Clinical Labs., Inc., 863 So. 2d 201, 204 (Fla. 2003).

36. The following definition of "payroll" is typical of that found in dictionaries:

> 1. A list of employees receiving wages or salaries, with the amounts due to each. 2. The total sum of money to be paid out to employees at a given time

The American Heritage® Dictionary of the English Language (4th ed. 2000). The foregoing definition is consistent with and reflects, the undersigned believes, the common, ordinary usage of this word.

37. Mindful of the dictionary definition, the undersigned does not believe that ordinary people commonly use the term "payroll" to describe the contract price of a subcontract. Indeed, one reason that subcontractors are engaged is to avoid putting additional employees on the contractor's payroll. While it is possible, the undersigned supposes, that "payroll" is used as a term of art in the context of workers' compensation to refer to payments to subcontractors, no evidence of such specialized usage was offered.[12] To the contrary, the evidence shows that Bridgefield, for one, distinguished between "payroll of the subcontractor's employees," on the one hand, and "Total Contract Price"——that is, payments made or owed by the contractor to the subcontractor——on the other. It is concluded, therefore, that the plain and ordinary meaning of the word "payroll" does not comprehend payments to subcontractors pursuant to a subcontract.

38. From this conclusion it follows that, where the only purported "payroll" at issue consists of payments made, or due and owing, to a subcontractor pursuant to a subcontract, a statutory employer cannot be found guilty under Section 440.107(2), Florida Statutes, of materially understating payroll.[13] Accordingly, it is concluded that to the extent the charge against Bicon is based on the allegation that Bicon

materially understated the prices of its subcontracts, such charge fails as a matter of law.

39. The question remains whether a statutory employer can be punished for materially understating a subcontractor's payroll, using the term "payroll" in its usual and customary sense to mean the wages and other compensation paid by the subcontractor to its employees.[14] On this issue, there is no probative evidence in the record. Lacking evidence, the undersigned reasons that in most circumstances, a contractor does not have access to its subcontractor's payroll. This is based on the reasonable assumption that few subcontractors would agree to share payroll information with a contractor, not only because such data are sensitive and proprietary, but also because such information would give the contractor a clearer picture of the subcontractor's actual costs and thus tend to strengthen the contractor's bargaining position.

40. Since it would be unusual, as far as the undersigned is aware, for one employer to give its payroll information to another company simply because the two have entered, or are about to enter, into an subcontract,[15] the undersigned concludes that the term "payroll" as used in Section 440.107(2), Florida Statutes, cannot reasonably be construed to include the payroll of another person or entity besides the employer against whom the charge of failing to secure the payment of workers'

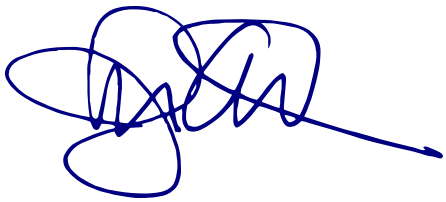
compensation is brought. Consequently, the undersigned concludes that a statutory employer cannot be found guilty, under this statute, of materially understating a subcontractor's payroll. To the extent that the charge against Bicon is based on the contention that Bicon understated its subcontractors' payrolls, therefore, the charge fails as a matter of law.

41. Even if, however, the term "payroll" could be construed liberally to include either a subcontractor's payroll or a contractor's payments to subcontractors, the charge against Bicon would fail anyway, as a matter of fact, because no persuasive or convincing evidence was offered establishing that Bicon at any time materially had understated, in its communications with Bridgefield, either the amounts it had paid to subcontractors or its subcontractors' payrolls. For this additional, independent, and alternative reason, Bicon cannot be punished for the offense of which it stands accused.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order rescinding the Stop Work Order and exonerating Bicon of the charge of failing to secure the payment of workers' compensation by materially understating payroll.

DONE AND ENTERED this 16th day of March, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2006.

ENDNOTES

[1]/ The Workers' Compensation Law, Chapter 440, Florida Statutes, is regularly amended and was, in fact, revised periodically during (or effective at the outset of) the time frame relevant to this case. Having studied the legislative history, however, the undersigned has concluded that the pertinent provisions of the current (i.e. 2005) code are either the same as, or not materially different from, any earlier versions that might otherwise be applicable. Therefore, rather than burden this Recommended Order with potentially confusing and ultimately unnecessary references to historical statutes whose application would not affect the outcome, the undersigned has elected to apply Chapter 440 in its present form.

[2]/ Bicon had an insurance agent who probably transmitted this information. There is no evidence, however, as to the identity(ies) of the individual(s) who actually conveyed the payroll estimates to Bridgefield, nor is there any evidence as to the contents of any relevant statements for the initial policy period (or any subsequent periods).

[3]/ The audit for the initial policy period, incidentally, had revealed that the estimated premium of $19,138.46 was too high, resulting in a downward adjustment, to $17,875.17.

[4]/ No persuasive or convincing evidence was offered showing the information upon which this estimated premium had been based or where such information had come from.

[5]/ No persuasive or convincing evidence was offered showing the information upon which this estimated premium had been based or where such information had come from.

[6]/ According to the Department, Bicon's counsel stipulated to the ultimate issue when, at a pre-hearing deposition, he made the following comment:

> There's an issue, we under-recorded payroll. We understand that. They've come in and reclassified people that were subcontractors as employees, so I stipulate to all of that.

Statement of H. Winderman, Esq., during Depo. of R. Moisuk taken Jan. 19, 2006, at 11. The Department urges that the foregoing "stipulation" be understood as an admission that Bicon "understated its payroll to Bridgefield." Another reasonable interpretation of the remark, however, is that counsel was merely restating the principal issue in dispute and stipulating to Bridgefield's position, namely that Bicon's subcontractors' employees were covered under the Policy, requiring large premium increases for the first and second renewal periods. The statement of Bicon's counsel is too ambiguous, at any rate, to be taken as far as the Department presses it.

[7]/ The Department also argues, as mentioned, that Bicon's counsel stipulated that Bicon had understated its payroll to Bridgefield——but the undersigned rejects this argument as unpersuasive.

[8]/ The term "employer" is defined in the Workers' Compensation Law, see § 440.02(16), Fla. Stat. (definition of "employer"), but "contractor," interestingly, is not.

[9]/ "Employee" is a statutorily defined term. See § 440.02(15), Fla. Stat. (definition of "employee").

[10]/ A contracting party does not automatically become liable for the payment of compensation to another's employees every time it enters into a contract with another employer. See Cuero v. The Ryland Group, Inc., 849 So. 2d 326, 328 (Fla. 2d DCA 2003)("[O]ne does not become a contractor under section 440.10 merely by entering into a contract with a subcontractor."). To be a "contractor" requires the entry into a particular kind of contract, as will be discussed.

[11]/ Alternatively, it could be said that Bicon allegedly understated the amounts it paid (or owed) to the subcontractors, i.e. the respective contract prices of the subcontracts. The Department, however, has used the term "payroll" indiscriminately, failing to distinguish between the payrolls of subcontractors and the amounts paid to subcontractors.

[12]/ Such evidence would have been admissible. Cf. Red Carpet Corp. v. Calvert Fire Ins. Co., 393 So. 2d 1160, 1160-61 (Fla. 1st DCA 1981)(trial court erred in excluding expert testimony regarding insurance adjusting, policy provisions, and trade custom in insurance industry); Aetna Ins. Co. v. Loxahatchee Marina, Inc., 236 So. 2d 12, 14 (Fla. 4th DCA 1970)("Obscure connotations of an insurance policy can be greatly illuminated by knowledge of custom and usage in the industry as well as the expert's knowledge of terms which take on a different hue in the specialized field than in the field of general knowledge.").

[13]/ This does not mean, of course, that a statutory employer can with impunity make material misrepresentations to its insurer regarding payments to subcontractors. Such wrongdoing likely would give the insurer a cause or causes of action for damages or other relief available in a civil lawsuit.

[14]/ As should be obvious but is perhaps worth stating, the contract price of a subcontract is one thing, the subcontractor's payroll is quite another. Any subcontractor who desires to make a profit will charge an amount in excess of the subcontractor's total cost of performance, which cost typically would include, but not be limited to, a portion of its payroll expense.

[15]/ The Department did not try to prove, and it has not argued, that statutory employers actually have, or reasonably should have, access to their subcontractors' payrolls. If in fact subcontractors do disclose their payrolls to contractors as a

result of the Workers' Compensation Law, then the Department should have presented some evidence of this practice.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.