NATE HOLYOKE BUILDERS, INC.,
AND NATE HOLYOKE, INDIVIDUALLY
(Appellants)
v.

WCB ABUSE INVESTIGATION UNIT
(Appellee)

Argued: November 20, 2013
Decided: April 24, 2014

PANEL MEMBERS: Hearing Officers Knopf, Stovall, and Goodnough

Majority: Hearing Officers Knopf and Goodnough
Dissent: Hearing Officer Stovall

BY: Hearing Officer Knopf

[¶1] Nate Holyoke Builders, Inc., and Nate Holyoke, individually (collectively referred to as Holyoke), appeal from a Workers' Compensation Board hearing officer decision (*Dunn, HO*) granting an Abuse Investigation Unit (AIU) complaint alleging violations of 39-A M.R.S.A. §§ 401 and 403 (Supp. 2012),[1] and seeking penalties pursuant to 39-A M.R.S.A. § 324(3) (Supp. 2013). The hearing officer determined that in 2010 and 2011, Holyoke had misclassified nine employees as independent contractors and had failed to secure the payment of workers' compensation for those employees. Accordingly, the hearing officer imposed a penalty in the amount of $30,000 pursuant to section 324(3), even

[1] Title 39-A M.R.S.A. § 401(1) has since been amended. P.L. 2011, ch. 643, § 11 (codified at 39-A M.R.S.A. § 401(1) (Supp. 2013) (effective Dec. 31, 2012)).

though the misclassified employees had been predetermined by the board to be independent contractors pursuant to 39-A M.R.S.A. §§ 105(1), (1-A), and 105-A (Supp. 2012).[2]

[¶2] Holyoke raises several issues on appeal:

> (1) Whether the hearing officer erred when determining that Holyoke was in violation of sections 401 and 403 for failing to secure the payment of workers' compensation with respect to employees it had misclassified as independent contractors or construction subcontractors, when Holyoke's workers' compensation policies would have provided coverage for any worker later determined to be an employee.
>
> (2) Whether the hearing officer erred when determining that nine workers who performed services for Holyoke were employees rather than independent construction subcontractors.
>
> (3) Whether the board has authority to impose a penalty on Holyoke for not securing the payment of workers' compensation for those workers who have been predetermined by the board to be independent contractors or construction subcontractors, but are later determined to be employees.[3]

[¶3] We affirm the hearing officer's decision that Holyoke was required to secure the payment of compensation for all of its employees, including those who

[2] Title 39-A M.R.S.A. § 105-A(1)(B) (Supp. 2012), defining "construction subcontractor," has since been rewritten to define "construction subcontractor" consistently with 39-A M.R.S.A. § 102(13-A) (Supp. 2013). P.L. 2011, ch. 643, ¶ 9 (effective Dec. 31, 2012) (codified at 39-A M.R.S.A. § 105-A (Supp. 2013)).

[3] Holyoke also argues that it reasonably relied on the board's predetermination decisions when obtaining insurance coverage during the relevant policy period; thus, the board is equitably estopped from pursuing penalties against it. However, when evaluating and ultimately rejecting this argument, the hearing officer made a factual finding that Holyoke did not rely on the board's predetermination decisions when obtaining insurance coverage. Because that factual finding is not subject to appellate review, 39-A M.R.S.A. § 322 (Supp. 2013), we conclude that the estoppel argument lacks merit, and we do not discuss it further.

were predetermined to be independent contractors or construction subcontractors but later determined to be employees pursuant to the Act. We also conclude that the hearing officer did not err when determining those individuals were, in fact, employees pursuant to the Act. However, 39-A M.R.S.A. § 105-A(3) (Supp. 2013), which circumscribes the board's authority to impose penalties for misclassification in cases involving construction subcontractors, is ambiguous with respect to the extent of the board's authority. Because we must construe that provision strictly, we vacate that portion of the decision that imposes a penalty for failing to secure the payment of workers' compensation.

I. PROCEDURAL BACKGROUND

[¶4] On September 26, 2011, the AIU sent a notice of prehearing conference under 39-A M.R.S.A. § 324(3) to Holyoke informing it that the AIU had reason to believe Holyoke "may have violated the Maine Workers' Compensation Act of 1992 or Board rules by failing to obtain or maintain approved workers' compensation insurance coverage for its employees as required by 39-A M.R.S.A. Sections 324 (3), 401 and 403." Prehearing conferences were held on October 24, 2011, and January 31, 2012, after which, the AIU filed a complaint against Holyoke seeking penalties for failing to comply with the Act's coverage provisions. A testimonial hearing was held over four days on March 13, 2012, April 10, 2012, May 22, 2012, and July 17, 2012.

[¶5] The hearing officer issued a decision on November 2, 2012, granting the AIU's complaint in part and imposing a civil penalty of $30,000, due December 31, 2012, with the funds to go to the board's employment rehabilitation fund. In further findings of fact and conclusions of law issued January 8, 2013, the board added a third paragraph to the relief portion of the November 2, 2012, decision, without changing the overall outcome. Holyoke timely filed this appeal.

II. FACTUAL BACKGROUND

[¶6] Holyoke is a general building contractor in the business of constructing private residences. The business was incorporated in 2007 and is solely owned by Nate Holyoke. For the period relevant to this case, from January 1, 2010, through December 31, 2011, Holyoke employed between fourteen and seventeen employees, and had an additional sixteen workers he considered independent contractors. He carried workers' compensation insurance on his fourteen to seventeen employees during all relevant periods, first through Maine Employers' Mutual Insurance Company (MEMIC), and then through Acadia. He did not carry workers' compensation insurance for the individuals he considered independent contractors. The policies he maintained not only provided coverage for those individuals Holyoke considered employees, but would also cover any workers later deemed to be employees, even though payroll related to the latter group was not initially included in the calculation of premiums.

[¶7] The board had granted predetermined independent contractor or construction subcontractor status in 2010 and again in 2011 to all the workers in issue, pursuant to 39-A M.R.S.A. § 105(1) or (1-A) (Supp. 2013). Holyoke began routinely obtaining predeterminations for workers he considered independent contractors in 2009 after being assessed a premium adjustment of $50,000 by MEMIC. According to Holyoke, MEMIC required board-issued predeterminations as documentation of an individual's independent contractor status for the purpose of establishing premiums.

[¶8] The board's Audit Division determined in 2010 that Holyoke may have misclassified workers as independent contractors who were by law employees. The Audit Division identified Holyoke for further investigation after determining that the workers treated as independent contractors had not procured workers' compensation insurance for themselves. The Audit Division generated a report dated December 8, 2010, recommending further investigation by the AIU. The AIU then commenced the underlying proceedings in this case.

[¶9] Upon review of the testimony of witnesses and the documentary evidence, the hearing officer concluded that nine of the workers classified as independent contractors were instead employees under the Act, and that there was insufficient evidence to reach any conclusion regarding the employment status of the other seven workers. The board determined that Holyoke had failed to secure

coverage for the nine employees as required by sections 401 and 403, and imposed a penalty of $30,000 pursuant to section 324(3).

III. DISCUSSION

A. Standard of Review

[¶10] The Appellate Division's role on appeal is "limited to assuring that the [hearing officer's] factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerlau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). When called on to construe "provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986). "All words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed." *Central Me. Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262 (quotation marks omitted). We will look beyond the plain meaning and

consider other indicia of legislative intent, including legislative history, only if the statute is ambiguous. *Damon v. S.D. Warren Co.*, 2010 ME 24, ¶ 10, 990 A.2d 1028. "Statutory language is ambiguous if it is reasonably susceptible of different interpretations." *Id*. (quotation marks omitted).

B. The Workers' Compensation Act's Coverage Requirements

[¶11] The AIU alleged and the hearing officer found a violation of 39-A M.R.S.A. § 324(3), which provides, in relevant part:

> If any employer who is required to secure the payment to that employer's employees of the compensation provided for by this Act fails to do so, the employer is subject to the penalties set out in paragraphs A, B and C. The failure of any employer to procure insurance coverage for the payment of compensation and other benefits to the employer's employees in compliance with sections 401 and 403 constitutes a failure to secure payment of compensation within the meaning of this subsection.
>
> . . . .
>
> **B.** The employer is liable to pay a civil penalty of up to $10,000 or an amount equal to 108% of the premium, calculated using Maine Employers' Mutual Insurance Company's standard discounted standard premium, that should have been paid during the period the employer failed to secure coverage, whichever is larger, payable to the Employment Rehabilitation Fund.

Thus, an employer who has failed to secure the required coverage may be liable to pay a civil penalty in an amount of up to $10,000, or 108% of the premium that should have been paid had appropriate coverage been obtained. *Id*. § 324(3)(B). Title 39-A M.R.S.A. § 105-A(3) (Supp. 2013) makes the penalties authorized by

section 324(3) specifically applicable to circumstances involving workers in the construction industry who are "deemed to be . . . employees under this section."

[¶12] Title 39-A M.R.S.A. § 401(1) provides, in relevant part: "Every private employer is subject to this Act and shall secure the payment of compensation in conformity with this section and sections 402 to 407 *with respect to all employees*, subject to the provisions of this section." (Emphasis added). Section 403(1),[4] applicable to Holyoke, authorizes compliance with section 401 "by insuring and keeping insured the payment of such compensation and other benefits under a workers' compensation insurance policy." Section 403 also provides that failure to procure insurance coverage for the payment of compensation constitutes failure to secure payment of compensation under section 324(3) and subjects the employer to penalties provided by that section.

[¶13] Holyoke contends it met the requirements of these provisions because its workers' compensation policies not only covered the workers Holyoke

[4] Title 39-A M.R.S.A. § 403 reads, in relevant part:

> An employer subject to this Act shall secure compensation and other benefits to the employer's employees in one or more of the ways described in this section. The failure of any employer subject to this Act to procure insurance coverage for the payment of compensation and other benefits to the employer's employees in one of the ways described in this section constitutes failure to secure payment of compensation provided for by this Act within the meaning of section 324, subsection 3 and subjects the employer to the penalties prescribed by that section.
>
> **1. Insuring under workers' compensation insurance policy.** The employer may comply with this section by insuring and keeping insured the payment of such compensation and other benefits under a workers' compensation insurance policy. . . .

considered to be employees, but also *would* cover any worker who was *later determined* to be an employee under the Act, regardless of how either Holyoke or the board characterized the employee at the time the contract of insurance was entered into.[5] According to Holyoke, this situation is contemplated by the Legislature in 39-A M.R.S.A. § 105(2), which allows for coverage by the insurer and a post-hoc premium adjustment when a construction subcontractor not initially considered an employee is later determined by law to be an employee.[6] Holyoke further contends that the board has no authority to interfere in what is in essence a matter of contract between itself and its insurer, provided compensation has been secured for all employees.

[¶14] The hearing officer rejected these arguments, construing section 401 as requiring employers "to provide the required coverage to their employees concurrent with their employment." He reasoned as follows:

---

[5] Both insurance policies covering the relevant periods provide that the insurer "will pay promptly when due the benefits required of you by the workers' compensation law." The policies further provide that the "premium basis includes payroll and other remuneration paid or payable during the policy period for the services of: 1. all your officers and employees engaged in work covered by this policy; and 2. all other persons engaged in work that could make us liable under Part One (Workers' Compensation Insurance) of this policy."

[6] Title 39-A M.R.S.A. § 105(2) provides:

> **Premium adjustment**. If it is determined that a predetermination does not withstand board or judicial scrutiny when raised in a subsequent workers' compensation claim, then, depending on the final outcome of that subsequent proceeding, either the workers' compensation insurance carrier shall return excess premium collected or the employer shall remit premium subsequently due in order to put the parties in the same position as if the final outcome under the contested claim were predetermined correctly.

> It is not sufficient for an employer to provide coverage to a portion of their workers. Taken to its logical conclusion, the employer's argument would permit a large employer to insure only one worker and pay later if others were deemed to be employees. The funding mechanism of the workers' compensation system could not function under this interpretation. The Board has the authority to determine whether the workers in question have been properly classified as independent contractors for purposes of determining compliance with Section 324(3) and 401 of the Act.

[¶15] We agree with the hearing officer's interpretation of the governing statutes. Section 401 plainly requires employers to secure the payment of compensation "with respect to *all employees*" (emphasis added), and section 324(3) plainly requires compliance with section 401. The statute does not purport to authorize payment for coverage for less than all employees, and we cannot interpret the statute in a way that would render the word "all" mere surplusage. *See Devereux Marine*, 2013 ME 37, ¶¶ 15-17, 68 A.3d 1262 (construing statute providing that an employer that "causes, permits or allows any work or activity in violation of a provision of this chapter" will be liable in full to the line owner for "all" damages, to require full indemnification to line owner despite line owner's potential contributory negligence).

[¶16] Read with section 401 and 403, section 105(2) does not authorize an employer to pay for coverage for only a fraction of its employees, and then pay more later if an uncovered employee is injured. That provision is remedial in nature in the event that a predetermination does not withstand later board or

judicial scrutiny in a claim for benefits; it does not provide a means for employers to avoid paying a premium for a covered risk *unless and until an injury occurs*. Holyoke's reading of the statute would defeat the purpose of section 401 and 403's requirement that employers obtain insurance to secure payment for all employees—which is to spread the risk among the entire pool of potential claimants—not just among the fraction of that pool selected by the employer to be covered. *See generally* 24-A M.R.S.A. §§ 2381-2387-B (2000 & Supp. 2013) (establishing rate-setting process for workers' compensation insurers); *see also* Françoise Carré and Randall Wilson, *The Social and Economic Costs of Employee Misclassification in the Maine Construction Industry*, http://www.law.harvard.edu /programs/lwp/Maine%20Misclassification%20Maine.pdf (last visited April 24, 2014) (discussing impact of underpayment of premiums caused by misclassification).

C. Status of Holyoke's Workers

[¶17] Having determined that Holyoke was required to obtain insurance coverage for all of its workers who are in-fact employees, we proceed to evaluate whether the hearing officer correctly assessed the status of Holyoke's workers in 2010 and 2011. The AIU alleged that Holyoke had misclassified sixteen individuals performing work for Holyoke during that period, and the hearing

officer determined that the AIU met its burden of proof and persuasion with respect to nine of those workers.[7]

[¶18] For the period relevant to this case, whether the workers are independent contractors is determined by considering whether they met the definition "construction subcontractor" in 39-A M.R.S.A. § 105-A(1)(B). *See* 39-A M.R.S.A. § 102(13) (Supp. 2012).[8] Section 105-A(1)(B) provides:

> **§ 105-A. Construction contractors**
>
> . . . .
>
> **B.** "Construction subcontractor" means a person who performs construction work on a construction site for a hiring agent if that person satisfies all of the following criteria:
>
> > (1) The person possesses or has applied for a federal employer identification number or social security number or has agreed in writing to carry out the responsibilities imposed on employers under this chapter;

[7] The AIU raises an issue regarding whether two evidentiary presumptions were applicable in this case. We conclude that neither presumption applies. First, the presumption of employee status in 39-A M.R.S.A. § 105-A(2)(A) (Supp. 2013) contains an exception for persons who are "construction subcontractor[s]." Accordingly, before affording the AIU with this presumption, the hearing officer would first have to decide the ultimate issue in the case—whether the individuals were construction subcontractors under the Act. This tautology appears to render the presumption meaningless or at best, ambiguous, in the context of penalty proceedings, and the legislative history does not clarify the ambiguity. *See* L.D. 1456, § 3, Summary (124th Legis. 2009) ("This bill provides that, beginning January 1, 2010, a person performing construction work on a construction site for a hiring agent [is] presumed to be an employee of the hiring agent for purposes of workers' compensation, unless the person . . . meets the definition of "construction subcontractor[.]"). Moreover, as discussed more fully below, because this misclassification proceeding involved the imposition of a penalty, we would construe the ambiguity strictly against the AIU.

Second, the construction subcontractor presumption in 39-A M.R.S.A. § 105(1-A)(A), expressly does not apply because this is not a case involving a "later claim for benefits under this Act."

[8] Title 39-A M.R.S.A. § 102(13) (Supp. 2012) has since been repealed and replaced. *See* P.L. 2011, ch. 643, § 7 (effective December 31, 2012) (codified at 39-A M.R.S.A. § 102(13-A) (Supp. 2013)).

(2) The person has control and discretion over the means and manner of performance of the construction work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the hiring agent;

(3) The person has control over the time when the work is performed and the time of performance is not dictated by the hiring agent. Nothing in this paragraph prohibits the hiring agent from reaching an agreement with the person as to a completion schedule, range of work hours, and maximum number of work hours to be provided by the person;

(4) The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work;

(5) The person purports to be in business for that person's self;

(6) The person has continuing or recurring construction business liabilities or obligations;

(7) The success or failure of the person's construction business depends on the relationship of business receipts to expenditures;

(8) The person receives compensation for construction work or services performed and remuneration is not determined unilaterally by the hiring agent;

(9) The person is responsible in the first instance for the main expenses related to the service or construction work performed; however, nothing in this paragraph prohibits the hiring agent from providing the supplies or materials necessary to perform the work;

(10) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work;

(11) The person supplies the principal tools and instruments used in the work, except that the hiring agent may furnish tools

> or instruments that are unique to the hiring agent's special requirements or are located on the hiring agent's premises; and
>
> (12) The person is not required to work exclusively for the hiring agent.

[¶19] The hearing officer correctly read the statute to require that if the AIU proved that any one of the twelve criteria in paragraph B was not met, the individual was not an independent "construction subcontractor" but rather an employee. *Cf. Workers' Comp. Bd. Abuse Investigation Unit v. Ring*, W.C.B. No. 14-1, ¶ 15 (App. Div. 2014) (holding the Abuse Investigation Unit needed to negate one of eight factors to meet its burden that certain freight transportation, courier, or messenger service workers were employees under 39-A M.R.S.A. § 114 (Supp. 2012) (effective Sept. 28, 2011) (repealed by P.L. 2011, ch. 643, § 10 (effective Dec. 31, 2012)).

[¶20] The hearing officer found that the AIU proved that the four criteria contained in subparagraphs 2, 6, 7, and 9 were not met for the nine individuals involved, based on the following factual findings: these individuals had worked almost exclusively for Holyoke for a number of years; their income was almost exclusively generated from work performed for Holyoke; they were paid by the hour; and they did not supply materials necessary for construction beyond their tools. The hearing officer also concluded that Holyoke controlled the work performed by these individuals.

[¶21] These facts found by the hearing officer are supported by competent evidence in the record. The hearing officer neither misconstrued nor misapplied the law when determining that the nine workers were employees pursuant to the Act.

D. The Board's Authority to Sanction a Noncompliant Employer

[¶22] Having determined that Holyoke was required to but failed to insure the nine employees in 2010 and 2011, we next determine whether imposition of a penalty was authorized by the Act. Holyoke contends that the board lacks authority in the absence of fraud to impose a penalty under section 324(3) when the individuals had been predetermined by the board to be independent "construction subcontractors" pursuant to section 105(1-A)(A), and because the insurers were aware of the board's predetermination decisions when the premium was determined and the policies were issued.

[¶23] The hearing officer rejected these arguments, relying on 39-A M.R.S.A. § 105(1-A)(A), which provides:

> **1-A. Predetermination permitted for construction subcontractors.** A person, as defined in section 105-A, subsection 1, paragraph E, may apply to the board for a predetermination that the person performs construction work in a manner that would not make the person an employee of a hiring agent, as defined in section 105-A, subsection 1, paragraph D.
>
> > **A.** The predetermination issued by the board pursuant to this subsection is valid for one year and creates a rebuttable presumption that the determination is correct in any later claim for benefits under this Act.

[¶24] The hearing officer reasoned that a predetermination under this section does nothing more than create a rebuttable presumption regarding the predetermined worker's status as independent *in the context of a later claim for damages*—it does not insulate the employer from penalties for misclassifying employees. *See* 39-A M.R.S.A. § 105(5) ("The board shall provide the petitioning party a certified copy of the decision regarding predetermination that is to be used as evidence *at a later hearing on benefits*." (emphasis added)). The hearing officer therefore imposed penalties for violating the statute pursuant to section 324(3) despite the individuals' having obtained predeterminations as construction subcontractors from the board.

1. General Authority

[¶25] As a preliminary matter, we agree with the hearing officer that the board has general authority to sanction employers for failing to secure compensation for misclassified employees. That authority stems from 39-A M.R.S.A. § 152(7) (Supp. 2013), which invests the board with powers necessary to carry out its functions under the law, including the enforcement of statutory penalties for failing to secure the payment of workers' compensation for all employees under sections 401 and 403.[9] *See also Doucette v. Hallsmith/Sysco*

[9] The Law Court has recognized a legislative intent to delegate broad authority to the board to interpret the Act, either by rule or through its appellate authority, when the statutory language is ambiguous. *Jasch v. The Anchorage Inn*, 2002 ME 106, ¶ 9, 799 A.2d 1216; *Russell v. Russell's Appliance Serv.,* 2001 ME

Food Servs., Inc., 2011 ME 68, ¶ 13, 21 A.3d 99 (*"*The mission of the Board is 'to serve the employees and employers of the State fairly and expeditiously by ensuring compliance with the workers' compensation laws. . . . [39-A M.R.S.A. § 151-A (2001)].'"). We also agree that the board has the authority, long-recognized by the Law Court, to determine whether an individual is an employee who must be covered under the Act, or an independent contractor who is not covered. *See, e.g.*, *Timberlake v. Frigon & Frigon*, 438 A.2d 1294, 1296-98 (Me. 1982).

[¶26] Although the legislative authorization for the board to assess penalties for failure to secure payment of compensation under section 324(3) appears to be broad, the board's authority is not uncircumscribed in the Act. In addition to section 324(3), the Legislature enacted the specific penalty provision applicable in cases involving the status of workers on construction sites, 39-A M.R.S.A. § 105-A(3). It remains to be considered, in the circumstances of this case, whether the particular penalty imposed by the hearing officer was authorized by the Act due to the interplay between section 324(3) and section 105-A. For the reasons that follow, we conclude that it was not.

32, ¶ 10 n.3, 766 A.2d 67. The Board has adopted rules that govern its exercise of authority in penalty assessments. Me. W.C.B. Rule, ch. 15, § 7.

2. Specific Authority

a. A Specific Statutory Provision is Favored Over a General Provision.

[¶27] The hearing officer in this case imposed the penalty pursuant to section 324(3) without reference to section 105-A(3). As set forth above, section 324(3) provides, in relevant part:

> If any employer who is required to secure the payment to that employer's employees of the compensation provided for by this Act fails to do so, the employer is subject to the penalties set out in paragraphs A, B and C.

Title 39-A M.R.S.A. § 105-A(3), on the other hand, provides:

> **3. Penalties.** A person who is required to but fails to secure the payment of compensation *with respect to persons deemed to be that person's employees under this section* is subject to the penalties under section 324, subsection 3.

(Emphasis added).

[¶28] It is a "fundamental rule of statutory construction" that "the application of a specific statutory provision [is favored] over the application of a more general provision when there is any inconsistency." *Devereux Marine*, 2013 ME 37, ¶ 22, 68 A.3d 1262. Section 324(3) is broadly applicable and there is very little statutory or regulatory guidance demarcating the board's discretion regarding the imposition of penalties for lack of coverage pursuant to that statute. In contrast, section 105-A(3) is found in a provision entitled "Construction contractors" and appears to be limited in its application to the construction industry. By its terms, it

subjects to penalties only "persons" who have failed to secure compensation with respect to "persons deemed to be that person's employees under this section." Because section 105-A(3) is narrower and more specific, it follows that it applies in this case. *See Devereux Marine*, 2013 ME 37, ¶ 22, 68 A.3d 1262.

b. Title 39-A M.R.S.A. § 105-A(3) is Ambiguous.

[¶29] When attempting to discern whether Holyoke's penalty is authorized under section 105-A(3), we look first to its plain language in an attempt to determine who are the "persons deemed to be that person's employees *under this section.*"[10] Section 105-A itself does not clearly refer to any specific proceedings that could result in a person being "deemed [an] employee." The phrase could mean "deemed" pursuant to any proceeding in which the definition of "construction subcontractor" is applied that results in the person being deemed an employee. *See* 39-A M.R.S.A. § 105-A(2) (broadly referring to the entire Act when it provides for a presumption of employee status for persons "performing

[10] Title 39-A M.R.S.A. § 105-A(1)(E) defines "person" as:

> (1) An individual;
> (2) A sole proprietor;
> (3) A working member of a partnership;
> (4) A working member of a limited liability company;
> (5) A parent, spouse or child of a sole proprietor, partner or working member of a limited liability company under section 102, subsection 11, paragraph A;
> (6) A working owner or part owner of a corporation; and
> (7) A working shareholder of a professional corporation.

construction work on a construction site . . . *for purposes of this Act*, unless,: . . . The person is a construction subcontractor[.]" (emphasis added)).[11]

[¶30] Examining the statutory scheme of which section 105-A(3) forms a part, however, could result in a narrower meaning. That scheme includes not only section 105-A, but also section 102, which contains the definitions of "employee" and "independent contractor" applied generally when deciding whether employees have been misclassified, and section 105, which governs predetermination of independent contractor and construction contractor status.

[¶31] Section 102(13) defines "independent contractor," but *specifically excludes* construction subcontractors as defined in section 105-A from the general definition. Likewise, section 102(11)(A)(8) defines "employee" to exclude "independent contractors" *except as provided in section 105-A.* These exceptions appear to indicate a legislative intent that the construction industry and construction subcontractors be treated specifically as provided in section 105-A.

[¶32] Section 105 speaks to two different types of proceedings after which a person could be deemed an employee. First, it refers to predetermination proceedings for construction subcontractors. *See* 39-A M.R.S.A. § 105(1-A)(A),

[11] As noted above, the presumption of employee status in 39-A M.R.S.A. § 105-A(2) contains an exception for persons who are "construction subcontractors." As such, in any penalty proceeding, the presumption would not be afforded until after the ultimate issue in the case—whether the person is a construction subcontractor—is decided. The exception precludes application of the rule in penalty cases under section 105-A(3) because all cases "under this section" would involve alleged construction subcontractors, some of which have been predetermined to be independent.

(3), (4), (5) (providing for: submissions to the board by the party seeking predetermined status pursuant to board-approved forms, a decision by the board on the request for predetermined status, and a hearing after the board's decision, if requested). Second, it refers to formal hearings on claims for benefits. *Id.* § 105(1-A)(A), (2), (5) (providing for: a rebuttable presumption of independent contractor status afforded in later claims for benefits, premium adjustments to correct predeterminations that do "not withstand board or judicial scrutiny when raised in a subsequent workers' compensation claim," and a certified copy of the predetermination decision "to be used as evidence at a later hearing on benefits"). It does not speak to penalty proceedings for employee misclassification.

[¶33] Section 105-A(3) is therefore susceptible of at least two meanings. It can be read to apply in any proceeding in which the definition of "construction subcontractor" is applied that could result in the person being "deemed" an employee; or, it can be read in context to limit the board's authority to bring section 324(3) penalty proceedings that arise under section 105-A's umbrella to those cases in which a person has been deemed an employee either (1) after predetermination proceedings by the board, or (2) in the context of a claim for benefits—after a workplace injury and the worker's status has been litigated as a matter of law.

c. We Construe Ambiguous Statutes that Impose a Penalty Strictly Against the Imposition of the Penalty.

[¶34] Because the scope of section 105-A(3)'s authorization to impose penalties pursuant to section 324(3) is ambiguous, we can look beyond the plain meaning and consider other indicia of legislative intent, including legislative history, to attempt to discern its meaning. *See Damon*, 2010 ME 24, ¶ 10, 990 A.2d 1028.

[¶35] Having reviewed the legislative history of section 105-A(3), it becomes apparent that the Legislature identified misclassification of employees on construction sites as a problem that results in inadequate compensation for injured workers, puts compliant employers at a competitive disadvantage, and results in underpayment of workers' compensation insurance premiums, as well as state income and unemployment taxes. *See* Testimony before the Joint Standing Committee on Labor regarding L.D. 1465, An Act to Ensure That Construction Workers are Protected by Workers' Compensation Insurance (May 5, 2009). Enforcement of the coverage requirement, including penalties for noncompliance, would likely encourage compliance. *See Doucette*, 2011 ME 68, ¶ 24, 21 A.3d 99 (stating that purpose of a penalty may be to encourage compliance with the Act).

[¶36] This aside, the record demonstrates significant uncertainty with respect to the meaning of the entire statutory scheme. In Holyoke's case, its workers have not been "deemed employees" through the predetermination process

or in the context of a claim for benefits, and in fact were twice deemed by the board to be independent contractors—with the second round of predeterminations occurring *while the penalty proceeding was ongoing*. It is not unforeseeable that Holyoke or any other employer or hiring agent would use that predetermination when deciding, in conjunction with its insurer, how many individuals it needs to insure. In fact, at the hearing on May 22, 2012, the Board's representative testified that the purpose of obtaining a predetermination that an individual is an independent contractor was so that employers would not have to "put a workers' comp policy on them or be considered an employee."[12]

[¶37] In addition, the Department of Insurance has long been aware of and has allowed the practice of using board predeterminations as an element of proof of independent contractor status when determining payroll for the purpose of calculating workers' compensation insurance premiums. *See, e.g. In re: Jenkins, Inc. v. Maine Employers' Mutual Ins. Co.*, INS-08-111 (May 12, 2009) (stating

[12] The Board representative testified as follows:

Q: And what's your understanding of the purpose of presenting [the predetermination certificate] to multiple or any general contractors?
A.: Just so that we can view them as subcontractors so that they're – let me start over. General contractors out there sometimes either have to have a policy on their people or a predetermination. That's what the predetermination is for is just--
Q.: So the certificate is for the subcontractor to be able to present to the general contractors for the general contractor to rely on that the person is a subcontractor --
A: Exactly.
Q: -- not an employee?
A: Right, so they won't have to put a workers' comp policy on them or be considered an employee.

Hearing Tr., 29: 10-24, May 22, 2012.

"that MEMIC may charge and collect premium for any worker as to whom the Petitioner did not give MEMIC either evidence of workers' compensation insurance in effect between February 1, 2007 and November 6, 2008 or an approved Board predetermination form"); *Alley Builders, Inc. v. Maine Employers' Mutual Ins. Co.*, INS-08-104 (Sept. 2, 2008) (stating that Board predeterminations afford a presumption of independent contractor status in premium disputes); *David Bourne v. Maine Employers' Mutual Ins. Co.*, INS-11-100 (July 3, 2012) (stating "either Board-approved Applications for Predetermination of Independent Contractor Status or certificates of Title 39-A coverage for the workers whom it considered independent contractors . . . would have been proof under Part Five (C)(2) of the policy that the Title 39-A obligations of those workers had been 'lawfully secured'").

[¶38] Moreover, the Law Court has, in an appeal from a Department of Labor proceeding, viewed a board predetermination of independent contractor status, along with other proof, as evidence that demonstrates "the lack of direction or control that exists in a contractual relationship between a business and an independent contractor." *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶¶ 26, 27, 73 A.3d 1061.

[¶39] In light of the ambiguity in the statute and the climate of uncertainty in which it has been applied, we are mindful that section 105-A(3) provides for the

imposition of a penalty. Provisions that impose a fine, including civil penalties, are considered penal in nature, and must be strictly construed. *Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶¶ 55-56, 896 A.2d 271. Strict construction requires that we resolve all doubt against the imposition of the penalty. *Id.*; *see also Estate of Michael Joyce v. Commercial Welding Co.*, 2012 ME 62, ¶ 24, 55 A.3d 411 (construing the statute and rule authorizing a penalty for a fourteen-day rule violation strictly, so as not to require interest on the payment).

[¶40] The ambiguity in section 105-A(3) casts doubt on whether a penalty is authorized, particularly during the period when the person at issue has been predetermined to be a construction subcontractor, and has not been deemed an employee in either a subsequent predetermination or in an action for benefits. We resolve this doubt against the imposition of the penalty.[13] While we acknowledge that the Legislature intended to address the problem of misclassification by means of imposing penalties on noncompliant employers, we also acknowledge that to do so in this case would subject an employer to a penalty for failing to recognize the legal status of its employees when that status is dependent on a complicated legal analysis that was preliminarily determined in the employer's favor by the very agency later charged with making the ultimate legal determination.

[13] The dissent misconstrues the majority's decision as interpreting section 105-A(3) to mean that a worker must be deemed an employee in the context of a claim for benefits or a predetermination proceeding before a penalty can be imposed. This decision merely states that section 105-A is susceptible of that interpretation and at least one other interpretation, and is therefore ambiguous.

IV. CONCLUSION

[¶41] We affirm the hearing officer's decision that Holyoke was required to secure the payment of compensation for all of its employees, including those who were predetermined to be independent contractors but later determined to be employees pursuant to the Act. We also conclude that the hearing officer did not err when determining those individuals were, in fact, employees. Finally, because the penalty provision in section 105-A(3), which appears to constrain the board's otherwise broad authority to assess the penalties provided for in section 324(3), is ambiguous with respect to the scope of the board's authority to impose penalties on workers in the construction industry, we construe the provisions narrowly against the imposition of the penalty.

The entry is:

> The decision of the Workers' Compensation Board hearing officer is vacated with respect to the imposition of the penalty. In all other respects, the decision is affirmed.

Hearing Officer Stovall, dissenting

[¶42] I respectfully dissent. I find no ambiguity in the imposition of penalties in this case. Title 39-A M.R.S.A. § 401(1) requires every private employer who hires and pays employees to have workers' compensation coverage for those employees. Section 403 provides that failure to procure insurance

coverage for the payment of compensation constitutes failure to secure payment of compensation under section 324(3). I agree with the majority's conclusion that Holyoke violated sections 401(1) and 403. However, I disagree with the majority's conclusion that penalties do not apply. By its terms, penalties under section 324(3) are applicable upon a violation of sections 401(1) and 403, section 105-A(3) notwithstanding.

[¶43] While the majority's opinion adopts the hearing officers finding that the employer violated section 324(3), the effect of its interpretation of "deemed" in section 105-A(3) is that the Abuse Unit can *never* prevail in bringing a case for lack of coverage against the very companies that have been noted to have a disproportionate share of misclassified employees, construction companies. In my estimation, this is contrary to the legislative intent.

[¶44] Title 39-A M.R.S.A. § 105-A(3), states:

> **3. Penalties.** A person who is required to but fails to secure the payment of compensation with respect to persons deemed to be that person's employees under this section *is subject to the penalties under section 324, subsection 3*.

(Emphasis added).

[¶45] In this case, Holyoke was required to secure the payment of compensation for the individuals in question but failed do so. The hearing officer deemed these individuals to be employees under section 105-A(1)(B). Thus, under the express terms of section 105-A(3), penalties under section 324 are applicable.

[¶46] The effect of some employers misclassifying their employees is well known. As noted in the Annual Report of the Joint Enforcement Task Force on Employee Misclassification, dated February 25, 2010:

> Combating misclassification is important to Maine's businesses. The vast majority of Maine's businesses are upstanding, law-abiding businesses. These businesses are harmed by having to compete against businesses that have lowered costs by violating the law.

[¶47] In the case before us the employer was found, after a premium audit, to have underpaid premiums by $50,000.00. According to the hearing officer's findings of fact, this "spurred him to ask these workers to begin filing the predetermination form." The employer was found *not* to have relied upon the predetermination form. To the contrary, it appears to have been used as a shield to avoid providing coverage for particular employees. In my view, penalties are in order.[14]

[¶48] Holyoke created a competitive advantage over its competitors who were playing by the rules, abiding by the law, and insuring their employees. The fact is that Holyoke had some employees for years but did not obtain coverage for them.

[14] The rebuttable presumption under the predetermination provision, 39-A M.R.S.A. § 105(1-A), now serves as a conclusive presumption in a section of the Act in which it has no place in my opinion. By its terms, the presumption provision applies to a claim for benefits. This matter does not involve a claim for benefits.

[¶49] The unfair competitive advantage of employers who misclassify their employees to avoid paying for workers' compensation insurance is already substantial. I am concerned that this decision will eliminate all incentive for employers to comply with the requirement to secure payment.[15]

Any Party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

Attorney for Appellant:
James D. Poliquin, Esq.
NORMAN, HANSON & DETROY
P.O. Box 4600
Portland, ME 04112-4600

Attorney for Appellee:
Jan M. Adams, Esq.
Seanna Crasnick, Esq.
Abuse Investigation Unit
Workers' Compensation Board
27 State House Station
Augusta, ME 04333-0027

[15] As it was, the penalty Holyoke received was far less than what Holyoke saved by violating the law. The penalty was $30,000.00. Holyoke saved over $100,000.00 by not insuring all of its employees.