

Support Solutions, however, contended that the improvement in its safety program was so impressive that it should be entitled to a schedule rating credit instead of a surcharge. MEMIC refused, and Support Solutions requested a hearing. An adjudicatory hearing was held before the Superintendent on July 30, 2004,³ and the record closed upon the submission of the parties' post-hearing briefs on August 6.

Support Solutions challenges the rating on procedural, contractual, and factual grounds. Procedurally, Support Solutions contends that MEMIC acted in violation of its own filed rating plan and in violation of the schedule rating procedures ordered by the Superintendent in *Combined Management, Inc. v. MEMIC*, No. 02-789. In particular, the Superintendent ruled that:

With respect to the exercise of discretion in the application of its rating system, MEMIC must be reasoned and not arbitrary, capricious, or abusive. The exercise of reasoned discretion requires MEMIC to review and analyze all available relevant information related to the applicability of discretionary rating system components to insureds on a case-by-case basis. In evaluating whether MEMIC appropriately exercised its reasoned discretion, the Superintendent would consider relevant the extent and sufficiency of supporting documentation within the underwriting files to justify the actual discretion exercised.... The Superintendent notes that the terms and conditions of the Schedule Rating Plan require MEMIC to base its application of the schedule debits and credits on documentation and evidence that is contained in the insured's file, including what is identified as a schedule rating worksheet. The schedule rating worksheet, and the other file documentation and evidence, is the empirical data that MEMIC must evaluate in the exercise of its reasoned discretion discussed above.⁴

Subsequently, he further clarified his ruling as follows:

As to the schedule rating worksheet, the Superintendent hereby clarifies that a completed worksheet shall be contained in MEMIC's underwriting file for every insured that has a schedule debit or credit applied to their policy. In those circumstances where MEMIC in the exercise of its reasoned underwriting discretion has determined that it will not afford a schedule debit or credit to an insured, no worksheet is required to be contained in MEMIC's underwriting file for that insured.⁵

Although the context of this order was an unrelated proceeding involving a different policyholder, these principles apply to the rating plan generally. MEMIC concedes that it never completed the narrative portion of the schedule rating worksheet, the part that explains the reasons for its decision. This is particularly troubling when the statutory carrier of last resort is using its discretionary schedule rating adjustments to impose a

surcharge rather than granting a credit. This appears to be a systemic practice, and this matter is being referred for investigation. However, in the context of the specific dispute between the parties to this specific proceeding, the claim frequency and the results of MEMIC's safety inspections, which I find were reported in good faith and not fabricated to justify a particular result,⁶ provide compelling justification for MEMIC's decision to impose the 25% surcharge. Although Support Solutions' loss history and safety practices both improved dramatically during 2003, the nature of insurance dictates that the premium rate for 2003 must be based on the insurer's reasoned evaluation of the risk at the beginning of the policy period.⁷

Support Solutions asserts further that there is a contradiction between the stated purpose of schedule rating and the way it was implemented in this case, observing that MEMIC's 1996 submission letter to the Superintendent explained that the plan "would allow Maine Employers' to be more responsive to those insureds who until now have been relegated to the High Risk Division," and that "The ability to offer schedule rating to these accounts based on their individual efforts to improve their workplace safety would provide an added incentive to continue the process." It is true that schedule rating is generally thought of, and generally applied as, a mechanism for providing credits for accounts that are determined to be better risks than the rating formulas would imply. However, the approved plan by its terms provides for debit rating as well as credit rating, MEMIC has offered evidence that the debit rating applied to Support Solutions is by no means unique, and in this case there was agreement up front between the parties as to the terms of the debit rating. It must be reiterated that debit schedule rating by a statutory carrier of last resort, where the insured might have no other alternatives available in the marketplace, must be used sparingly and given particular regulatory scrutiny.

However, on the facts of this case, it withstands that scrutiny. Support Solutions' claim that MEMIC was simply out "to facilitate euchering [*sic*] more premium," regardless of the actual risk, is unsupported by the record. MEMIC does not apply the maximum schedule rating debit – or any schedule rating debit at all – to every policyholder it perceives as a captive audience unable to obtain a better rate in the voluntary market, but only to a limited number of risky accounts, and there is no evidence that MEMIC singled out Support Solutions for any reason other than that it considered Support Solutions to be a particularly risky account.

Although in this case Support Solutions consented in advance to the schedule rating arrangement, it contends that MEMIC violated the terms of their unwritten agreement. It is unnecessary to consider the application of the Statute of Frauds or analogous requirements of the Insurance

Code, because the existence and general terms of the unwritten agreement are not in dispute and Support Solutions was not prejudiced by the manner in which MEMIC implemented its adjustments to the surcharge. Although MEMIC only made two quarterly adjustments rather than four, Support Solutions never asked for the other two followup meetings. Furthermore, MEMIC reduced the surcharge retroactively to policy inception, while the rating plan calls for such adjustments to be implemented prospectively. Support Solutions is actually significantly better off from a 10-point reduction in the surcharge applied to the entire policy period than it would be from three 5-point reductions effective after the first three quarterly meetings.⁸

Finally, Support Solutions observes that it was already in the High-Risk Division and its experience modification factor – 2.09 for Policy Year 2003⁹ – already reflected seriously adverse loss experience. However, because of the way experience mods are calculated, that figure did not reflect the most recent year of losses, which if considered would have brought the experience mod up to 2.41. Thus, taking that experience into account would also have increased the premium by approximately 25%.

Support Solutions contends further that its loss history was distorted by three large claims which MEMIC allegedly mishandled. However, Support Solutions has disclaimed any challenge to the inclusion of those claims in its experience mod, and the rating formula is designed to avoid giving undue weight to a single large claim or a few large claims, so the difference in Support Solutions' experience mod is unlikely to be as significant as Support Solutions might have thought. Claim frequency, not claim severity, was the most troubling element of Support Solutions' rating history. And even though a post-operative infection represents a stroke of bad luck with no direct relation to the risk, the more injuries occur, the more likely it is that some of the claims will result in losses disproportionate to the severity of the original injury. Furthermore, only one of the three disputed claims occurred in 2002, and if Support Solutions' experience mod had been lower to begin with, there would have been even more reason to adjust the premium for 2003 to reflect the deteriorating trend in Support Solutions' loss experience.

Of course, that trend turned around dramatically beginning in 2003, and MEMIC recognized this by offering a schedule rating credit rather than a debit if Support Solutions had renewed for the current policy year. This gives rise to Support Solutions' final claim – that MEMIC was correct when it concluded, at the time of the 2003 renewal, that support Solutions' earlier losses were clearly caused by safety problems so pervasive that they could not be remedied in a single year. The conclusion Support Solutions draws, in hindsight, is that this proves that Support Solutions must have already been a good risk at the beginning of the policy year!

Perhaps such latent improvements did exist, but they would not have been visible to a reasonable underwriter at the time the policy was renewed, and therefore MEMIC acted reasonably in waiting until its midterm conferences and its 2004 renewal quote to put its money behind its belief in the existence and effectiveness of those improvements. By Support Solutions' own testimony, several significant actions were taken in 2003. A year and a half does not make a trend, so it still remains to be seen how permanent the current spectacular safety results will be, and we will never know for sure how much of it was the result of changes that occurred in 2003, how much was the result of changes that had already occurred in 2001 and 2002, and how much is simply Support Solutions' turn to enjoy some good luck in the place of the bad luck that had dogged it and its workers during the years that preceded.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is hereby *DENIED*:

1. Support Solutions shall make arrangements with MEMIC to pay the disputed premium promptly.
2. Liberty Mutual Insurance Company may not cancel coverage for nonpayment of the disputed MEMIC premium, as long as Support Solutions acts in good faith either to comply promptly with the terms of this Decision and Order or to prosecute a timely appeal.
3. The Bureau of Insurance shall investigate whether the underwriting practices demonstrated in this case constitute a violation of any order of the Superintendent or other legal obligations. If a violation is found, and if the remedy for this violation includes any sort of class-wide relief for a class of employers that includes Support Solutions, then Support Solutions may participate on the same terms as other affected employers notwithstanding the findings that MEMIC acted within its discretion if this particular account is considered in isolation.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing may initiate an appeal within thirty days after receiving this notice. Any aggrieved non-party whose interests are substantially and directly affected by this Decision and Order may initiate an appeal on or before October 12, 2004. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

¹ Liberty Mutual has been joined as a limited party because its rights and obligations are affected by MEMIC's cancellation request, which was stayed by order of the Superintendent when this proceeding was convened. However, Liberty Mutual neither attended the hearing nor actively participated in this proceeding. In order to achieve finality in this proceeding, I am denying MEMIC's cancellation request, without prejudice

to MEMIC's right to initiate a new adjudicatory proceeding if Support Solutions fails to comply with its obligations under this Decision and Order.

² The policy anniversary date is actually January 9, but for simplicity the policy years will be referred to as if they were calendar years.

³ Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

⁴ *CMI v. MEMIC*, order of December 13, 2002.

⁵ *CMI v. MEMIC*, order of January 16, 2003.

⁶ Support Solutions argues that MEMIC's own inspection report reveals that things were not so bad because it shows that "SSI passed three out of five categories." However, failing even one category demonstrates significant problems, and all three "passing grades" were 2 on a 5-point scale where the word "Poor" appears beneath the figure 1, "Excellent" beneath the figure 5, and "Meets MEMIC Standards" beneath the figure 3.

⁷ Unless the parties agree to a retrospective rating plan, or other arrangements under which the policyholder retains significant claims risk. Support Solutions is now under a retrospective rating plan with its new insurer, but the contract with MEMIC was a traditional prospectively rated insurance policy.

⁸ Even if a meeting had been held to discuss fourth-quarter results, it would have been held after policy expiration and there would be no prospective relief available for that policy period.

⁹ And 2.10 in 2002. These indicate that Support Solutions could be expected to have losses more than twice those of the average employer in its rating classification.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

SEPTEMBER 2, 2004

**ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER**