

other factor, nor may the existence or absence of any one factor be decisive. The board shall consider the totality of the relationship in determining whether an employer exercises essential control or superintendence of the person.” 39-A M.R.S.A. § 102(13).

Because there is a broad range of borderline cases where the status of the worker is not obvious, and the decision process in these cases is fact-specific and judgmental, employee status is a question that can only be decided conclusively if and when the worker is injured on the job and files a claim for benefits, with limited exceptions that do not apply here. This situation creates considerable uncertainty for all parties. The standard workers’ compensation policy form issued by MEMIC and other workers’ compensation insurers responds to this uncertainty by providing for premium to be based on “payroll and all other remuneration ... for the services of ... all other persons engaged in work that could make us liable under Part One (Workers [*sic*] Compensation Insurance) of this policy.” Pursuant to these terms, which have been approved by the Superintendent, MEMIC may charge premium not only for workers who have been acknowledged as employees and formally included in the payroll, but also anyone else who might be determined to be an employee if he or she files a claim against the policyholder.

This must be understood as meaning a significant risk that the worker is an employee, since the insurer may not charge premium disproportionate to the exposure. Furthermore, the kinds of risk that may be considered significant, for purpose of this contract provision, must be interpreted in light of the reasonable expectations of the insured. This is particularly important in a line of insurance where the premium is initially calculated on an estimated basis, and revised retroactively at the end of the policy period based on the insurer’s audit of the policyholder’s payroll. If the information provided by the policyholder at the time of application was accurate, and there has been no growth or change in the business or other material changes in the risk during the policy period, then it will normally be reasonable for the policyholder to expect only a relatively small adjustment in the premium when the audit bill arrives, and when problems appear, it is reasonable to expect an opportunity to take corrective action when that is feasible.

Since 1991, one way Maine policyholders can deal with uncertainty regarding who is an employee is through a voluntary predetermination process under 39-A M.R.S.A. § 105, which permits a worker, a business, or an insurer to request an advisory ruling from the Workers’ Compensation Board as to whether the worker is one of the employees of the business or whether the worker is an independent contractor. A predetermination that the worker is or is not an employee establishes a presumption in any subsequent claim for benefits by that worker against that business, but this presumption is rebuttable, 39-A M.R.S.A. § 105(1)(A), and the claim will be decided by the Board on the basis of the evidence available at that time relating to the work being performed at the time of the injury. Nevertheless, although these rulings are nonbinding, they

are made by the same agency that would decide any contested workers' compensation claim, applying the same legal standard.

MEMIC has honored predeterminations for rating purposes, but formerly also honored a range of other evidence of independent contractor status that its policyholders might offer. In particular, undisputed testimony in these hearings demonstrates that employers in the construction industry would often rely on certificates demonstrating that their purported subcontractors had general liability insurance. However, MEMIC has testified that recognizing subcontractors with that level of documentation led to a number of successful claims against MEMIC by workers whose employers had not paid premium.

In order to make its premium base more consistent with exposure, MEMIC implemented new standards. For policies issued to employers in the construction industry on or after October 1, 2006, a worker in the same line of business as the policyholder would not be accepted as an independent contractor without either a workers' compensation policy, evidence of coverage as an employee under a third party's workers' compensation policy, or a predetermination of independent contractor status issued by the Workers' Compensation Board.

In June of 2006, before implementing the new program, MEMIC sent a one-page "Subcontractor Alert" to all affected policyholders,³ advising them that "we recommend review and/or action in the following areas regarding your company's subcontracting relationships." Recommendation 3 was "Independent Contractor Predetermination Forms," and MEMIC included the following text at the end of the paragraph, in substantially the following format:⁴ **Note: Failure to furnish evidence that a subcontractor has workers' compensation insurance or an approved Predetermination of Independent Contractor Status form will result in MEMIC's premium auditor treating your subcontractor as an employee and including the subcontractor in your premium audit. Also, if your subcontractor hires employees, and does not have a workers' compensation policy covering the employees, you will be charged a premium based on the NCCI Basic Manual rule that governs subcontractors.**

MEMIC now also uses a Supplemental Questionnaire as part of its application process in the construction industry. Question 4 asks the applicant, among other things, "Do you obtain copies of approved Application for Predetermination of Independent Contractor Status for all subcontractors?" and "Do you verify workers' compensation from all subcontractors by means of a certificate of insurance?" Beneath this question is the warning: **Please note: Without appropriate subcontractor information (either an approved Predetermination of Independent Contractor Status form WCB-261 and/or a current Certificate of Insurance) for all subcontractors, additional charges may be applied at audit.**

In response, many policyholders who did not already have a practice of obtaining predeterminations began doing so. Unfortunately, other policyholders did not read the Alert and continued to rely on evidence of independent contractor status that MEMIC no longer considered sufficient, such as general liability certificates. A series of premium disputes followed, including this one.

Although 39-A M.R.S.A. § 105(1)(B) expressly provides that “Nothing in this section requires a worker, an employer or a workers’ compensation insurance carrier to request predetermination,” MEMIC has not said that predetermination is the only means by which a policyholder may prove that a worker is an independent contractor. To date, no employer whose petition has been heard has claimed that the alternatives now provided by MEMIC are inadequate. The issue in these proceedings, therefore, is not whether MEMIC’s new requirements are inappropriate, but the effect of the employer’s delay in complying with those requirements.

All of these cases share certain key facts, supported by uncontested and persuasive testimony and documentary evidence. The policyholders began obtaining predeterminations for their subcontractors no later than a short time after the disputed audits. The Board found that all of those workers were in fact independent contractors, and these included many of the same workers for whom premium was charged in the audit, and for some employers included all of them. There were no material changes in the nature of their work or the terms of their contractual relationship between the inception of the disputed policy and the issuance of the predetermination. When there were subcontractors who had stopped working for the policyholder without ever getting predeterminations, they were performing substantially similar work under substantially similar terms as other workers who did stay on and obtain predeterminations that they were not employees.

The Legislature has given the Workers’ Compensation Board exclusive jurisdiction over the question of employee status at the time of a claim, and Section 105 must be read as giving the Board primary jurisdiction to make preliminary rulings on the same question when no injury has occurred. Because a predetermination under Section 105 establishes a rebuttable presumption in a subsequent claim dispute, a similar presumption ought to apply in a premium dispute.⁵ Even where no predetermination has been made, or the predetermination does not apply to the time period in question, deference must be given to the conclusions the Board has drawn from substantially identical facts. In these cases, MEMIC has offered no evidence or argument tending to rebut the presumption that the Board’s predeterminations were correct.

Therefore, I find by a preponderance of the evidence that none of the workers in question was in fact an employee during the policy period, to the extent that meaningful answers can be given to that question at this time. All other things being equal, this factor should be decisive in favor of the policyholder. MEMIC’s real goal in cases such as these, where the subcontractors do in fact qualify for

predetermination, should be to ensure that the subcontractors have those predeterminations, not to collect a premium for a transitional period that is much higher than the premium charged for the same risk both before that time (when MEMIC did not require predeterminations) and after that time (when the required predeterminations were in place).

On the other hand, all other things are not necessarily equal. The Workers' Compensation Board decisions were nonbinding predeterminations, made at different times and sometimes involving different workers. In any event, a finding that a worker is more likely than not an independent contractor is hardly the same as saying MEMIC is certain to prevail if the worker is injured and files a claim.⁶ It is appropriate, therefore, for MEMIC to take reasonable measures to mitigate the residual risk that remains, as long as those measures are fair to the policyholder and not unduly burdensome. Therefore, a policyholder that knowingly or recklessly fails to comply with MEMIC's reasonable documentation requirements should not be able to fall back on litigating the underlying facts after the policy audit.

Application to the Facts of the Case

In this case, I find that Mr. Gleason's failure to obtain timely predeterminations does not rise to the level of knowing or reckless noncompliance. The question is a close one, since the information he gave MEMIC on the Construction Supplemental Questionnaire to his renewal application contained a material inaccuracy. He left the question about predeterminations blank, which might have alerted MEMIC that its message about the need for better documentation had not registered, but then he checked the "Yes" box after the question about certificates of insurance. This was not correct, since the question asked about workers' compensation, and all of the ACORD forms admitted into evidence for Mr. Gleason's subcontractors showed only commercial general liability insurance. Apparently Mr. Gleason either overlooked or did not understand the phrase "verify workers' compensation."

The course of dealing between the parties had established proof of general liability insurance as an acceptable method of documenting independent contractor status. MEMIC discovered that it was unsuitable for that purpose, so it became necessary to alter that course of dealing and establish new requirements. Until MEMIC had made him aware of those new requirements, however, however, it was not unjustifiable for Mr. Gleason to continue to provide documentation in the same way that had been acceptable in the past.

Mr. Gleason made some mistakes, but there is no evidence that he made them in bad faith, and the misunderstanding was complicated by some mixed signals sent by MEMIC as it began implementing its new program. The boldface warning on the application form said he would be charged premium for any purported subcontractor without a predetermination "and/or a current Certificate of Insurance," but Mr. Gleason had "current Certificates of Insurance," and they

were the same kind that had consistently sufficed in the past. The Subcontractor Alert did warn unequivocally that "Failure to furnish evidence that a subcontractor has workers' compensation insurance or an approved Predetermination of Independent Contractor Status form will result in MEMIC's premium auditor treating your subcontractor as an employee and including the subcontractor in your premium audit." However, this warning appeared in a list of "recommendations" that the policyholder had no contractual obligation to read, and Mr. Gleason was by no means the only policyholder who failed to read it. Furthermore, the warning was accompanied by a further warning that MEMIC would also charge premium for employees of uninsured subcontractors in accordance with NCCI rating rules. However, that warning is erroneous because the rating rule on which MEMIC purports to rely is not valid in Maine, which does not have a law imposing vicarious liability for employees of uninsured contractors.⁷

Finally, MEMIC failed to take advantage of its clearest chance to put Mr. Gleason unequivocally on notice when it conducted its audit of his 2005-06 policy. In March of 2007, almost five months after the policy period currently in dispute began, MEMIC determined that all of Mr. Gleason's subcontractor relationships were valid and that MEMIC owed him money. MEMIC did not, however, let Mr. Gleason know that if the same audit were conducted on the current policy with the same documentation, the result would have been a \$36,000 charge instead of a credit. Mr. Gleason is certainly fully on notice now, but in the circumstances of this case, I cannot find that he was sufficiently on notice then.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is hereby *GRANTED*. MEMIC may not charge premium on Mr. Gleason's 2006-07 policy for any of the workers who were paid as subcontractors, and may not charge premium on Mr. Gleason's 2007-08 policy for any worker who was paid as a subcontractor and who obtained a favorable predetermination from the Workers' Compensation Board before April 1, 2008. MEMIC may not rely solely on failure to obtain a predetermination as the basis for charging premium on Mr. Gleason's 2007-08 policy for any worker who performed no services for Mr. Gleason on or after April 1, 2008.

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 14, 2008. 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 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. The time for issuance of a decision was extended, pursuant to 24-A M.R.S.A. § 235(2), by orders issued June 25 and July 31, 2008

² Furthermore, a contract is only considered evidence of independence if it provides "for the person to perform a certain piece or kind of work at a fixed price." 39-A M.R.S.A. § 102(13)(A).

³ In July of 2007, the program was extended to other classifications and a version of the Subcontractor Alert was sent to those policyholders as well.

⁴ The type was smaller, but the size was consistent with the rest of the text.

⁵ In the Decision and Order as originally issued on August 15, this sentence erroneously read: "Because a predetermination under Section 105 establishes a rebuttable presumption in a subsequent claim dispute, a similar presumption ought to apply in a subsequent claim dispute."

⁶ MEMIC has questioned whether the rebuttable presumption created by predetermination really does make more likely than not that the Board will still find the worker to be an independent contractor at the point when there is a claim. However, those concerns are not relevant here because MEMIC does accept predeterminations as acceptable proof of status and the findings made here are based on persuasive evidence that had timely applications for predetermination been submitted, they would have been granted.

⁷ This does not, of course, preclude MEMIC from including such workers in the policyholder's premium base, in a manner consistent with this Decision and Order, to the extent that there is a significant risk that they would be found to be employees of the policyholder in the event of an injury.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

SEPTEMBER 2, 2008

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER