

IN RE:	)	
	)	
JENKINS, INC.	)	
	)	
v.	)	
	)	DECISION AND ORDER
MAINE EMPLOYERS' MUTUAL	)	
INSURANCE COMPANY	)	
	)	
Docket No. INS-08-111	)	
	)	

I. PROCEDURAL HISTORY

Superintendent Mila Kofman delegated all legal authority to Bureau of Insurance attorney Benjamin Yardley to act in the Superintendent's name as the hearing officer in this proceeding.

The parties to the proceeding are Jenkins, Inc. (the "Petitioner") and Maine Employers' Mutual Insurance Company ("MEMIC"). The Petitioner contests MEMIC's attempted cancellation for not cooperating with a premium audit. The Petitioner also contests MEMIC's attempt to charge premium based in part on payments to workers whom the Petitioners considered to be independent contractors. The purpose of the hearing is to determine whether MEMIC may cancel the policy and charge premium for those workers.

In a December 30, 2008 Notice of Hearing, the Hearing Officer set the hearing for January 8, 2009, with an intervention deadline of 5:00 p.m. January 7, 2009. The Hearing Officer did not receive any applications for intervention. The hearing took place as scheduled at the Bureau's Gardiner, Maine office. Present at the hearing were the Hearing Officer, Cathy Jenkins for the Petitioner; and Craig Reynolds and Daniel Montembeau for MEMIC. The hearing was recorded and in public session. The Hearing Officer conducted the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter IV; 24-A M.R.S.A. §§ 229 to 236; Bureau of Insurance Rule Chapter 350; and the Notice of Hearing. All parties had the rights to present evidence, and to examine or cross-examine witnesses, and exercised those rights. Mrs. Jenkins testified for the Petitioner. Mr. Reynolds testified for MEMIC. Petitioner's Exhibit 1 was offered and admitted into evidence. The parties also had the right to be represented by counsel, but no attorneys appeared on behalf of either party.<sup>1</sup>

The Hearing Officer continued the hearing with the parties' consent to give them an opportunity to ask the Maine Workers' Compensation Board for approved predeterminations as to the workers whose employment status is in question. On February 25, 2009, the Hearing Officer held a telephone conference to discuss the status of the case. As a result of this discussion, the Hearing Officer

issued a Procedural Order on March 3, 2009 resetting the hearing for May 4, 2009 at 1:30 p.m. That Order also addressed three discovery items:

- By March 6, 2009, MEMIC would identify to the Petitioner the name of each worker for whom MEMIC received a certificate of workers' compensation insurance coverage from the Petitioner. On March 9, 2009, MEMIC complied with this discovery order.
- By March 16, 2009, the Petitioner would identify to MEMIC the name of the MEMIC employee Petitioner alleges met with it to discuss the process concerning independent contractors. On February 27, 2009, the Petitioner complied with this discovery order.
- By March 16, 2009, the Petitioner would (a) identify to MEMIC the name of each worker whom the Petitioner considered to be an independent contractor at any time during the policy period at issue in this case, and (b) deliver to MEMIC legible copies of IRS Forms 1099 for each such worker. At the May 4, 2009 hearing, Mr. Reynolds represented to the Hearing Officer that MEMIC had received nothing from the Petitioner in response to this discovery order.

On Sunday, May 3, 2009 at 2:45 p.m., the Bureau received an e-mail from Mrs. Jenkins as follows:

I am still not in Maine, as I delayed my return. I was in a car accident and my car was totaled when I was hit by a taxi who failed to stop at an intersection. I will be back in Maine soon. I should also note that I will be off line for much of this coming week due to computer problems.

On the morning of May 4, 2009, the Hearing Officer's secretary tried to contact Mrs. Jenkins at work in order to find out whether or not the Petitioner was asking to continue the hearing. She spoke to someone at the Petitioner's answering service, who said that he would try to reach Mrs. Jenkins. The Bureau did not hear from anyone at the Petitioner. Therefore, the May 4, 2009 hearing went forward as scheduled, starting at approximately 1:40 p.m. After reviewing the status of the case and reading the May 3rd e-mail into the record, the Hearing Officer went off the record to ask his secretary if anyone from the Petitioner had contacted the Bureau. No one had done so, and the hearing resumed at 2:00 p.m. Present were the Hearing Officer, and Mr. Reynolds and Mr. Montembeau for MEMIC. Mr. Reynolds, and to a lesser extent Mr. Montembeau, testified under oath for MEMIC. MEMIC Exhibits 1 through 7 were offered and admitted into evidence.

This hearing was also recorded and conducted in public session in compliance with relevant law.

## II. POSITIONS OF THE PARTIES

The Petitioner argues that its process for establishing independent contractor status is more effective than the Maine Workers' Compensation Board's provisional determinations under 39-A M.R.S.A. § 105 and that it therefore does not need to give MEMIC access to its remuneration information for premium audit purposes. MEMIC argues that its insurance contract gives it the right to cancel for not cooperating with a premium audit request and that MEMIC may therefore cancel the policy effective November 6, 2008. MEMIC also argues that, because the Petitioner has not given it access to remuneration records, it

is unable to determine whether or not the workers at issue meet the test set forth in 39-A M.R.S.A. § 102(13).

### III. FINDINGS OF FACT

After considering the hearing testimony and exhibits and the parties' respective arguments, I find that:

1. The Petitioner is a Maine corporation, incorporated in 1987, engaged in installing drywall. It is owned by Floyd and Cathy Jenkins.
2. The Petitioner is a client of World Wide Personnel Services of Maine, an employee leasing company.
3. Mrs. Jenkins principally does clerical work.
4. Mr. Jenkins sets projects up, estimates jobs, communicates with property owners, visits jobsites when necessary, and attends weekly job meetings on jobs that require this.
5. The Petitioner uses subcontractors extensively. Many of these workers install sheetrock. This function is an essential part of the Petitioner's business.
6. The Petitioner does not use the Maine Workers' Compensation Board predetermination process to establish the employment status of its contractors. Instead, among other steps, it has its contractors sign waivers of workers' compensation coverage and statements that they do not have employees.
7. MEMIC is a Maine corporation authorized to transact workers' compensation insurance.
8. In 2006 MEMIC sent its policyholders a document entitled "Subcontractor Alert for Construction-Related Policyholders." In pertinent part, this document said that the failure to "furnish evidence that a contractor has workers' compensation insurance or of an approved Predetermination of Independent Contractor Status form will result in MEMIC's premium auditor treating your subcontractor as an employee." MEMIC Ex. 3.
9. The Petitioner received a copy of the Subcontractor Alert. MEMIC Ex. 3.
10. MEMIC insured the Petitioner through policy number 1810080301, effective February 1, 2007 to February 1, 2008, and through its renewal, effective February 1, 2008. MEMIC Ex. 2. An endorsement to the policy extends coverage to employees leased from World Wide Personnel Services of Maine, including Floyd and Cathy Jenkins.
11. In April 2008, MEMIC attempted to perform a premium audit of the 2007-2008 policy. As part of the audit, MEMIC reviewed payroll records at World Wide Personnel Services. MEMIC also asked the Petitioner for information about its operations and subcontractor exposure. The Petitioner did not respond to those requests.
12. On October 1, 2008, MEMIC sent the Petitioner a notice of cancellation of the 2008-2009 policy, effective November 6, 2008, based on "noncompliance w/ premium audit[.] Insured is in substantial breach of policy conditions by failing to submit to an examination of their records that relate to this policy for audit purposes."
13. The policy did cancel on November 6, 2008, and the Petitioner obtained workers' compensation coverage through another insurer.

### IV. ANALYSIS AND CONCLUSIONS OF LAW

This case raises an important issue concerning an insurer's right to remuneration information during a premium audit and an insured's duty to cooperate with such an audit. A second issue is whether or not the tasks of various workers, whom the Petitioner considers to be independent contractors, exposed MEMIC during the policy period to potential liability under the Maine

Workers' Compensation Act (the "Act") had any of them claimed a work-related injury. If so, then MEMIC would be justified in deciding as an underwriting matter that it should collect premium from the Petitioner based on the remuneration that it paid to them. A final issue is the Petitioner's failure to comply fully with the Hearing Officer's discovery order.

#### A. Audit and Duty to Cooperate.

The basis for workers' Compensation premiums is remuneration paid to employees during the policy year. Because the total amount of remuneration is not known at the policy's inception, the insurer estimates it. The insured gives the insurer the right, after the policy expires, to audit its relevant records to establish the final premium. MEMIC's policy spells out the final premium process at Part Five (E):

The premium shown on the Information Page, Schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.

The policy also spells out the policyholder's obligations concerning remuneration records at Part Five (F):

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

Last, the policy spells out the audit process at Part Five (G):

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

One purpose of the retrospective audit is to learn how much remuneration the insured paid to its employees. This is because the employer's premium is based in part on its payroll. Another purpose is to sort out the employees from the independent contractors. This information is necessary because the Act only protects employees against economic loss resulting from work-related injuries. 39-A M.R.S.A. § 201(1). The Act does not protect independent contractors because, by definition, they are not employees.

MEMIC's policy addresses premium calculation and independent contractors, at Part Five (C):

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all 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 ... of this policy [emphasis added]. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph **2.** [sic] will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations.

Section (C)(2) is a catch-all because a person's independent contractor status for workers' compensation purposes depends on a variety of factors.<sup>2</sup> While the factors are a guide, the outcome in each case depends on its peculiar circumstances. The Act recognizes this uncertainty by allowing a worker's status to be predetermined voluntarily. 39-A M.R.S.A. § 105. The predetermination creates a rebuttable presumption in a later claim for benefits. A worker's independent contractor status is not resolved as a legal matter unless he or she has a workplace injury and the parties litigate this status in a proceeding before the Board.

Mrs. Jenkins testified that the Petitioner has a process for identifying its workers who are independent contractors. The Petitioner has each such worker sign a document entitled "Independent Contractors [sic] Statement." The statement is addressed to the Petitioner and says that the worker provides "miscellaneous construction work on various projects" for the Petitioner, is an independent contractor "in business for myself," has no employees, works for others, and declines workers' compensation insurance. The statement also includes a waiver of such coverage and hold harmless agreement in the Petitioner's favor. Mrs. Jenkins testified that the Petitioner also has either a purchase order or subcontract with the worker and that the worker must have an "established business" and general liability insurance. She did not describe what factors determine whether or not the worker has established a business. She argued that, because the Petitioner brings workers in at the last minute and cannot wait the two weeks that the Act gives the Board to act on predeterminations, she cannot obtain them from the Board.<sup>3</sup>

The Petitioner's position ignores not only the policy provisions quoted above but also the fact that the Act allows only one process for obtaining predeterminations. Neither the Act nor the Workers' Compensation Board has sanctioned the Petitioner's process. The Petitioner's position also puts MEMIC in the difficult, and commercially unreasonable, position of having to accept the Petitioner's word that these workers are actually independent and not employees. Although a Board hearing officer might find that a particular worker meets the section 102(13) eight-point test, the Petitioner's position deprives MEMIC of the ability to make underwriting judgments and charge appropriate premium for the risk that it chooses to accept. This certainly prejudices MEMIC's ability to function as an insurer. See, *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 649 (Me. 1993).

Last, the Petitioner's position ignores how workers' compensation functions. As the Bureau has observed in another decision, *Project Staffing, Inc., et al. v. MEMIC*, INS-05-101, workers' compensation in Maine is meant to be a self-

contained system, at both the claims and the policy levels. The Act is generally the sole remedy for an employee injured on the job. Workers' compensation premiums are based on a uniform classification system and uniform experience rating plan, 24-A M.R.S.A. § 2382-B(1), as well as each insured's safety record and resulting experience rating. Implicit in this system is the expectation that an insurer may evaluate the entire workers' compensation risk that an employer presents, so that each insured pays premium that matches its exposure and so that other policyholders do not wind up subsidizing that insured beyond the normal expectations of pooled risk inherent to any insurance program.

Mrs. Jenkins testified that a MEMIC employee, David Lantagne, discussed the Petitioner's process for identifying independent contractors with her and a World Wide Personnel employee. She believed that Mr. Lantagne accepted this process. She argued that MEMIC therefore waived its right to conduct the premium audit. There is no evidence other than her testimony, which I do not find credible on this point, to support this claim.

In view of the foregoing, I find that the Petitioner has not cooperated with MEMIC and therefore that the cancellation may remain in effect.

#### B. Independent Contractors.

In 2006, MEMIC notified its policyholders with employees in the classification code related to drywall, among other activities, that it would require those policyholders to provide it with either evidence of workers' compensation insurance or an approved Workers' Compensation Board predetermination form as to any worker who might be an independent contractor. The Petitioner received a copy of this notice. MEMIC Ex. 3. Mr. Reynolds testified that there is no indication in MEMIC's file for Jenkins, Inc. that anyone from the Petitioner asked any questions about the notice or what effect failing to give MEMIC this evidence would have on its premium. The Petitioner did give MEMIC some certificates of workers' compensation insurance for these workers, albeit not for the entire coverage period at issue. However, the Petitioner did not give MEMIC any predeterminations. MEMIC Ex 1. Ms Jenkins' own testimony shows that she did not misunderstand the point of the predeterminations. To the contrary, her testimony implies that she considered them unnecessary.<sup>4</sup>

I therefore find 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.

#### C. Discovery Order

By requesting and participating in a hearing before the Superintendent of Insurance, the Petitioner has submitted to the Superintendent's jurisdiction and the applicable provisions of Title 24-A of the Maine statutes, the Insurance

Code. This includes agreeing to comply with the Superintendent's orders. During the February 25, 2009 status conference, the Petitioner agreed to send MEMIC (a) the name of each worker whom the Petitioner considered to be an independent contractor at any time during the policy period at issue in this case, and (b) legible copies of IRS Forms 1099 for each such worker. As noted in the Procedural History above, at the May 4, 2009 hearing, Mr. Reynolds represented that MEMIC had received nothing from the Petitioner in response to this discovery order.

I therefore find that the Petitioner must either comply with the order or explain why it has not.

## V. ORDER

IT IS HEREBY ORDERED that:

- a. The Petition is denied. The policy cancellation effective as of November 6, 2008 may remain in place;
- b. MEMIC may also charge and collect premium based on the remuneration attributable to those workers as to whom the Petitioner did not send to MEMIC, for the period between February 1, 2007 and November 6, 2008, either an approved Independent Contractor Status form from the Workers' Compensation Board or evidence of workers' compensation insurance; to this end, the Petitioner shall give MEMIC access to its remuneration records and other information relevant to calculating premium due for this period; and
- c. The Petitioner shall file with the Bureau of Insurance, and simultaneously deliver to MEMIC, by 5:00 p.m. EST on May 19, 2009 either (a) information complying with the March 3, 2009 Procedural Order or (b) an explanation why it has not complied fully with the Procedural Order; otherwise, the Hearing Officer will consider assessing civil sanctions on the Petitioner under 24-A M.R.S.A. § 12-A for its not having complied with an order of the Superintendent.

## VI. NOTICE OF APPEAL RIGHTS

This Decision and Order is final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. Any party may appeal this Decision and Order to the Superior Court as provided by 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001, *et seq.* and M.R.Civ.P. 80C. Any such party must 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 within forty days after the issuance of this Decision and Order. There is no automatic stay pending appeal; applications for stay may be made as provided in 5 M.R.S.A. § 11004.

<sup>1</sup> Mrs. Jenkins testified at the hearing that she is "very hands on in all legal matters; I like to oversee those items myself in particular." Later, she characterized herself as not having "the benefit of legal representation."

<sup>2</sup> The Act defines an independent contractor as "a person who performs services for another under contract, but who is not under the essential control or

superintendence of the other person while performing those services.” 39-A M.R.S.A. § 102(13). The Act also lists eight factors for the Workers’ Compensation Board, which has exclusive jurisdiction over a person’s employee or independent contractor status, to consider in deciding if a person meets the definition. The factors are: whether a contract exists for the person to perform a certain piece or kind of work at a fixed price; whether the person uses assistants with the right to supervise their activities; whether the person must furnish any necessary tools, supplies and materials; whether the person controls the progress of the work, except as to final results; whether the person’s work is part of the employer’s regular business; whether the person’s business or occupation is typically of an independent nature; how much time the person is employed; and whether the person is paid by time or by the job. The Board “may not give any particular factor a greater weight than any other factor, nor may the existence or absence of any one factor be decisive ... [but] shall consider the totality of the relationship” when it makes the determination of control. 39-A M.R.S.A. § 102(13).

<sup>3</sup> She also said that the predetermination must be done annually and characterized this as a “ridiculous” requirement. Section 105 of the Act does not mention an annual requirement; the Workers’ Compensation Board has not imposed it by rule. Board decisions on appeals of predeterminations generally say that predeterminations are valid for one year from the date of the decision. MEMIC Ex. 6. The authority for this result is unclear.

<sup>4</sup> Access to the Petitioner’s remuneration records appears to have been an ongoing issue for MEMIC. Its auditor noted that the audit for the 2007-2008 policy presented the “[s]ame issue as last year.” Mr. Reynolds explained that this referred to the Petitioner’s refusal to discuss its operations and subcontractor exposure with MEMIC.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

DATED: May 12, 2009

By: \_\_\_\_\_  
BENJAMIN YARDLEY  
Attorney