



Exhibits 1 and 2.<sup>3</sup> Mr. Warren, Mrs. Bourne, Mr. Bourne, Michael Bourque, Ms. Schwartz and Mr. Montembeau testified under oath. After the hearing, the parties submitted a second stipulation concerning one worker's predetermination, the November 2, 2010 courier delivery of a package from MEMIC to Bourne, the various predetermination forms, and the source of a facsimile version of the December 2, 2009 Construction Supplemental Questionnaire ("2nd Stipulation").

The parties submitted post-hearing memoranda on June 16, 2011 and reply memoranda on June 23rd. In response to the Hearing Officer's request for more information about one worker, Mr. Cole submitted an offer of proof on July 13, 2011. Two days later MEMIC indicated that it did not object to this offer. The Hearing Officer declared the record closed as of July 20, 2011.

## II. POSITIONS OF THE PARTIES

Bourne argues that MEMIC improperly charged premium based on remuneration paid to workers whom the Petitioner considers independent contractors. Bourne says that neither its insurance policy nor Maine insurance law authorizes MEMIC to require that its insureds obtain certificates of workers' compensation insurance or Workers' Compensation Board subcontractor predeterminations in order to avoid paying premium on those workers. Bourne also says that MEMIC's requirements as to proof were unreasonable and that MEMIC did not communicate its requirements adequately and breached its duty of good faith and fair dealing. Because of these failures, Bourne asks that the Hearing Officer bar MEMIC from assessing post-audit premium.

MEMIC says that its policy, at Part Five (C)(2), does authorize it to charge premium for workers whose work could make the insurer liable for workers' compensation benefits, that MEMIC notified Bourne nine times of its requirements concerning subcontractors and that Bourne knowingly or recklessly disregarded those requirements. MEMIC also argues that each worker's status should not be subject to fact review at audit or appeal of audit as this would be an impossible burden for an insurer's auditors. MEMIC asks that the Hearing Officer order that Bourne pay the disputed premium of \$22,603, less any adjustments for removing the cost of materials from the remuneration at issue.

## III. FINDINGS OF FACT

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

1. Bourne is a sole proprietor engaged in the business of adding to, remodeling and building residences. During the term of the policy at issue in this case, Bourne was remodeling a house in North Haven. *Hearing Transcript*, Vol. I<sup>4</sup>, 107, 175, 219.
2. David Bourne handles the construction, Danielle Bourne the bookkeeping, including workers' compensation matters. *Id.*, 107 - 8.

3. MEMIC is a Maine corporation authorized to transact insurance, 24-A M.R.S. § 3701 – 3714, and holds Bureau of Insurance license PCD35999.
4. Robert Warren has held a resident producer license in Maine, PRR52999, since January 7, 1998 with property and casualty authority, and has been appointed as a MEMIC producer since February 21, 2007. Mr. Warren is the responsible individual at Mid-Coast Insurance Agency (“Mid-Coast”) of Bath, Maine.<sup>5</sup> Mid-Coast holds Maine license AGR98090.
5. In October 2009, MEMIC received through Mid-Coast an application for workers’ compensation insurance from Bourne (“Application”). The Application was dated October 21, 2009. Mr. Warren signed it for Mid-Coast and Mrs. Bourne for Bourne.
6. The Application indicated that Bourne used subcontractors but did not indicate what percent of its work was subcontracted.
7. Bourne also submitted a Construction Supplemental Questionnaire (identified as form ConstructionSQ v0902008MEM) to MEMIC also dated October 21, 2009 and signed by Mrs. Bourne and Mr. Warren (“Questionnaire”).
8. The Questionnaire includes, under the bold-face, all capital letter caption “Important Notice Regarding Use of Subcontractors,” the following warning, in bold-face italicized font:

WARNING: You must obtain either a current Certificate of Workers’ Compensation Insurance or a current Workers’ Compensation Board (WCB) Application for Predetermination of Independent Contractor Status (WCB-261) before any subcontractor begins work for you. Failure to do so will result in additional premium charges.

(Underlining in original.)

9. This question appears just below the warning:

3. Do you obtain either a current Certificate of Workers’ Compensation Insurance (Note: A Certificate of General Liability Insurance by itself is not sufficient evidence of independent contractor status) or a current Workers’ Compensation Board **approved** Application for Predetermination of Independent Contractor Status (WCB-261) before any subcontractor begins work for you? Yes  No

(Underlining and bold-face in original.) Neither Bourne nor Mid-Coast answered this question before Mid-Coast sent the Questionnaire to MEMIC.

10. On or about October 26, 2009, MEMIC issued a standard workers’ compensation policy to Bourne, number 1810092432, effective from October 26, 2009 through October 26, 2010. The estimated annual premium was \$3,825 based in part on \$20,000 remuneration attributable to the National Council on Compensation Insurance (“NCCI”) Class Code 5645 Carpentry – Detached 1 or 2 Family. The policy included an “Alert” concerning subcontractors and independent contractors.
11. The policy provides at Part Five, Section C that:

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 (Workers’ Compensation Insurance) of this policy. 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. will not apply if you give us proof that the employers of these persons lawfully secured their workers’ compensation obligations.

12. On October 29, 2009, MEMIC employee Nick Burke sent an e-mail to Mr. Warren concerning the Questionnaire and asking him to "discuss subcontractor requirements with the insured, and request that question =3 [sic] be answered as "Yes" to document that the insured will comply with these requirements. ... [A] "Yes" answer ... will indicate that they have been advised of the requirements and will comply should they hire subcontractors within the policy period."
13. On November 17, 2009, Bourne filled out by hand a different version of the Questionnaire (identified as form ConstructionSQ v02-2006MEM). This version included several items at question 4. Bourne answered "no" to "Do you obtain copies of approved Application for Predetermination of Independent Contractor Status for all subcontractors?" and "yes" to "Do you verify workers' compensation from all subcontractors by means of a Certificate of Insurance?" *Tr.-I, 126 - 8.*
14. This version of the Questionnaire includes the following bold-face wording in question 4:  
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.  
  
(Underlining in original.) *Joint Exhibit 1, 211.*
15. Bourne received this document by mail and returned it to MEMIC in the self-addressed envelope that it arrived with. *Tr.-I, 126 - 8.*
16. On November 23, 2009, Mr. Burke sent Mr. Warren an e-mail asking if he had had "any luck getting the insured to revise question 3 of the attached questionnaire." This e-mail referred to the Questionnaire. *Joint Exhibit 1, 212, 213.*
17. On December 2, 2009 at 12:33 p.m., MEMIC employee Joanna DeBie sent Mid-Coast a two-page facsimile including a cover sheet and the Questionnaire. The cover sheet contained a note substantially to MEMIC's October 29, 2009 e-mail and the statement, "Please note, the questionnaire submitted on 11/23/2009 is an out dated [sic] version of this form, and is no longer acceptable." *Joint Exhibit 1, 217 - 218.*
18. On December 2, 2009, someone at Mid-Coast returned the Questionnaire to MEMIC with the question 3 "yes" box checked by hand. *Tr.-I, 50 - 4; Joint Exhibit 1, 219.*
19. Bourne engaged seven workers who provided various services on a cost-plus-materials basis for the remodeling project as follows:

<b>Name</b>	<b>Legal Form</b>	<b>Dates of Service</b>	<b>Trade</b>	<b>Overall Remuneration</b>
CWM Tile & Marble, Inc.	Corporation (one shareholder employee)	3-1-10 - 6-21-10	Tiling	\$37,289
Jeremy Johnson, d/b/a Maine Heritage Wood Floors	Sole Proprietor (no employees on site)	1-4-10 - ongoing	Flooring	\$28,173
Philip DesLauriers	Sole Proprietor (no employees on site)	2-22-10 - 12-15-10	Electronic equipment installation	\$5,061
Ron Durgin, d/b/a Ronald Durgin	Sole Proprietor (no employees on site)	11-1-09 - ongoing	Painting	\$10,374

Name	Legal Form	Dates of Service	Trade	Overall Remuneration
Painting				
Curtis Roundy— Superior Solid Surfaces	Sole Proprietor (no employees on site)	4-19-10 – 4-20-10	Counters	\$1,750
Sue Stolz—The Painter Women	Partnership (no employees on site)	3-20-10 – ongoing	Painting	\$31,106
Thomas Brokish	Sole Proprietor (one employee on site for three days)	1-25-10 – 6-6-10	Cabinets & millwork	\$19,762

20. Bourne obtained liability insurance certificates on the ACORD form from these workers and, when Mr. Brokish had an employee on site, required him to have an ACORD form evidencing workers' compensation coverage. *1st Stipulation; Tr.-I, 156 – 7.*

21. The seven workers had other employment while the policy was in effect. *Tr.-I, 254 – 255.*

22. On August 8 and September 6, 2010, Bourne filled out and returned to MEMIC two more versions of the Questionnaire (form ConstructionSQ v03-2010MEM). Bourne answered "yes" on each form to question 3:

Do you obtain either a current Certificate of Workers' Compensation Insurance (Note: A Certificate of General Liability Insurance by itself is not sufficient evidence of independent contractor status) or a current Workers' Compensation Board approved Application for Predetermination of Construction Subcontractor (WCB-264) before any subcontractor begins work for you?

(Underlining in original.) These versions of the Questionnaire related to the upcoming renewal of the Bourne policy. *Tr.-I, 337 – 8; Joint Exhibit 1, 332, 335.*

23. MEMIC conducted its final premium audit on October 21, 2010. *Tr.-I, 161.* This audit led MEMIC to recalculate the policy premium to include the remuneration paid to the seven workers because none of them had a certificate of workers' compensation coverage or a Certificate of Independent Status from the Maine Workers' Compensation Board ("Board").

24. MEMIC excluded remuneration paid to workers who were in separately licensed trades, such as plumbers or electricians, who had certificates of workers' compensation insurance, or who were MEMIC policyholders. On November 3, 2010, MEMIC sent Bourne an invoice for \$22,603 audit premium due.

25. After receiving MEMIC's statement for additional premium, Bourne asked several times, through Mr. Warren, to meet with MEMIC to discuss the premium audit results, including reviewing Bourne's business records at home. MEMIC told Mr. Warren that this was "not a practice they normally do, that they wouldn't be honoring it." *Tr.-I, 79, 81, 163 – 4.*

26. Between October 27, 2010 and November 22, 2010, the Board issued Certificates of Independent Status for the seven workers. *1st Stipulation, Tr.-I, 155 – 6.*

## IV. ANALYSIS AND CONCLUSIONS OF LAW

### *Introduction*

This case arises from a premium audit relating to a policyholder's workers whose status as employees or independent contractors is in dispute. The Petitioner is a residential construction contractor, operating as a sole proprietorship, in which Mr. Bourne manages its construction activities and Mrs. Bourne the bookkeeping and insurance. MEMIC is a private mutual insurer established in the early 1990s when the Legislature substantially reformed Maine's workers' compensation laws. One of MEMIC's functions is to act as the insurer of last resort for "employers otherwise entitled to coverage, but not able or not electing to purchase coverage in the voluntary insurance market." 24-A M.R.S. § 3711.

The parties' dispute relates to \$22,603 premium that MEMIC charged after an audit of Bourne's payroll for the policy period in question. The disputed premium relates to remuneration paid to workers who Bourne says are independent contractors and MEMIC says are employees. Each party urges me to reach a very different conclusion to their dispute. Bourne says that MEMIC may not impose additional audit premium because it breached its insurance contract. MEMIC says that Bourne should pay the audit premium because he recklessly or knowingly violated its request for certificates showing workers' compensation insurance for his independent contractors or Workers' Compensation Board approved applications for predetermination of status. For the reasons set forth below, I reach a third outcome.

### *Background*

Determining workers' compensation premium depends in part on analysis of the policyholder's business activities. Workers' compensation insurers in Maine must rate risks according to "a uniform classification system." 24-A M.R.S. § 2382-B(1). NCCI promulgates this system in Maine. Because one purpose of this system is to treat like risks similarly, NCCI classifies risk based on the policyholder's entire business. The insurer applies the basic classification that best describes the policyholder's business.<sup>6</sup> The basic classification applies to all of the policyholder's activities, job duties and operations. Although standard exceptions exist for operations that are common to most businesses, such as clerical work, the insurer does not examine the activities of individual workers in establishing the applicable classification. Notwithstanding this system's focus on the policyholder's overall business, whether a specific worker's remuneration is part of the policyholder's payroll can affect the premium.

Determining a worker's status as an employee or independent contractor depends on fact-specific analysis. In Maine, an employer or worker may apply to the Board for a predetermination of the worker's status.<sup>7</sup> Maine recognizes the uncertainty that goes with this determination by making the

predetermination a rebuttable presumption. A worker's status is not determined as a final matter until a worker files a claim for benefits under Title 39-A<sup>8</sup> and the claim goes through the Board's dispute resolution program, which might include a hearing. Title 39-A requires that the insurer refund premium attributable to the worker in question if the predetermination fails, and that the employer remit additional premium otherwise. 39-A M.R.S. § 105(2).

Before October 2006, MEMIC would accept a variety of evidence that a policyholder's workers were independent contractors. This evidence included WCB-261 forms approved by the Board as well as such other information as certificates of general liability coverage. The problem with accepting the insurance certificates, for example, was that MEMIC wound up paying claims filed by workers whose employers had not paid workers' compensation premium attributable to their pay. See *Alley Builders, Inc. v. MEMIC*, INS-08-104. MEMIC evaluated the position that it found itself in and, in an effort to align its premium base with its construction industry exposure, decided that it needed to change its approach to underwriting independent contractors. *Gleason v. MEMIC*, INS-08-102. In June 2006, MEMIC began sending its construction policyholders a one-page Alert notifying them of its new procedure, to be effective for policies issued on or after October 1, 2006.<sup>9</sup> The Alert in part recommended that policyholders start obtaining approved WCB-261s from the Board. MEMIC would not accept as an independent contractor a worker in the same line of business as the policyholder unless the policyholder made one of three showings. The worker at issue had to have either a workers' compensation policy, evidence of coverage as an employee under another party's workers' compensation policy, or an approved WCB-261. MEMIC has revised the Alert since then and has included it with new policies for several years. MEMIC also uses a Construction Supplemental Questionnaire ("CSQ") as part of its application process in the construction industry. The CSQ has also gone through several revisions. In the version that MEMIC first used in this case, Question 3 asks whether the applicant, among other steps, obtains either a "current Certificate of Workers' Compensation Insurance ... or a current ... Board **approved** Application for Predetermination of Independent Contractor Status (WCB-261) before any subcontractor begins work for you" (emphases in original).<sup>10</sup>

In the wake of MEMIC's 2006 announcement, a number of policyholders filed requests for rating hearings with the Bureau of Insurance contesting MEMIC's audit premiums. See, e.g., *JMAC's Custom Concrete, Inc. v. MEMIC*, INS-09-104; *Lexington Outdoors, Inc. v. MEMIC*, INS-09-103; *Young's Building Contractors, Inc. v. MEMIC*, INS-09-100; *Jenkins, Inc. v. MEMIC*, INS-08-111; *Crosswinds Air, Inc. v. MEMIC*, INS-08-109; *Bruce Fadden, dba Custom Building and Remodeling v. MEMIC*, INS-08-105; *Alley Builders, Inc.*, supra; *Anthony Keefe Enterprises, Inc. v. MEMIC*, INS-08-103; and *Gleason*, supra. Until now, as noted in *Alley Builders, Inc.*, an employer has not called into question the procedures that MEMIC uses to resolve disputes over audit

premium related to workers who have neither a WCB-261 nor a certificate of insurance that shows workers' compensation coverage.

### *Analysis*

The question is whether MEMIC may require its policyholder who has not obtained certificates of workers' compensation insurance or WCB-261s to pay premium attributable to their remuneration without further inquiry into the circumstances surrounding those workers' activities for the policyholder. On one hand, the company has made a diligent effort through the Alert since 2006 to address the independent contractor issues outlined above. On the other hand, the WCB-261 process is voluntary, and MEMIC has not made any form filings with the Bureau that make the practice outlined in the Alert part of its standard insurance policy. As MEMIC testified, the Alert is "a stuffer or a notice ... [that] does not change the policy." *Tr.-I*, p. 326. Indeed, after reminding the policyholder that it is "responsible for safe working conditions on all your projects," the Alert's introductory paragraph goes on to "*recommend* review and/or action" in four areas concerning the policyholder's subcontracts (emphasis added). Simply put, although the Alert does spell out MEMIC's intentions should the policyholder not follow the recommendations, the Alert does not amend the actual insurance policy that MEMIC issued and therefore does not as a final matter determine the parties' contractual relationship with each other.

MEMIC's policy covers premium at Part Five C. This defines premium as the product of "a rate times a premium basis," most commonly remuneration. Remuneration, in turn, is payroll paid to two categories of workers employed by the policyholder. The first is officers and employees. Their remuneration is included because these workers have a direct employment relationship with the policyholder. The second category is "other persons engaged in work that could make us liable." However remuneration paid to workers in this category is not part of premium basis if the policyholder "give[s MEMIC] proof that the employers of these persons lawfully secured their workers' compensation obligations."

The policy does not define the phrase "persons engaged in work that could make us liable." MEMIC says that "it means just what it says," citing a Wisconsin case to the effect that the phrase indicates "less than certainty" as to the insurer's liability. MEMIC 06-16-11 *Position Letter*, p. 9. However, MEMIC's liability depends on the worker's status as an employee, and that phrase is not an open invitation for an insurer to charge premium for any worker whose status could conceivably come into question. The Bureau has never interpreted it so broadly. To the contrary, the Bureau held in *Alley Builders*, that this language "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."

This interpretation is consistent with the Insurance Code's requirement, which neither party raised in its final arguments, that "[e]very ... insurer shall provide within this State reasonable means whereby any person aggrieved by the application of its rating system may be heard, in person or through an authorized representative, on written request to review the manner in which such rating system has been applied in connection with the insurance afforded that person." 24-A M.R.S. § 2320(2). An aggrieved policyholder need not exercise its subsection 2320(2) option. *Campbell v. First Am. Title Ins. Co.*, 644 F. Supp. 2d 126 (D. Me. 2009). Once it does, however, the insurer must follow through.

This requirement applies even when an employer has not obtained either WCB-216s or certificates of workers' compensation Insurance as to workers whose status is legitimately in question. The insurer must follow section 2320 and honor its contractual commitment to allow the policyholder an adequate opportunity to give the company proof that those workers' Title 39-A obligations were lawfully secured. In this case, MEMIC did not do so, although to its credit it had accepted during the audit that the specially licensed workers, such as electricians and plumbers, were independent of Bourne. That decision did benefit Bourne to some extent. However, the company's refusal to consider the matter further, despite Bourne's several requests through MEMIC's appointed agent, did not give Bourne a chance to explain how the other workers might have been independent contractors.

MEMIC did testify that it would have reviewed information relating to the materials portion of the remuneration paid to the workers at issue. *Tr.-II*, 104. However, even had it done so, this review would still have begged the more important question concerning those workers' employment status. The last question is what to do about this failure.

Neither party's proposed outcome is attractive for various reasons. Bourne's outcome—do not allow MEMIC to collect the disputed premium because of the breach of contract—would make sense if the parties were litigating this as a contract case in civil court. It might also be supportable were this an enforcement action based on a pattern of violations of law which might merit a punitive outcome. However, we are in an administrative proceeding whose focus is whether the company has properly applied its rating system. MEMIC's outcome—let it collect the disputed premium—is unsatisfactory because we do not have a good answer yet to the question of these workers' status. Premium is based on risk, and risk should be based on a thorough analysis of the insured's operations. Workers' compensation in Maine relies on a uniform classification system and rating plan. 24-A M.R.S. § 2382-B(1). One purpose of this system is to match premium with exposure. This ensures that each policyholder pays the premium that its risk presents. This also prevents, within the confines of a pooled risk system, other policyholders from subsidizing risks that they do not present. Because we do not know whether the workers at issue

in this case are employees or independent contractors, neither party's proposed outcome advances this purpose.

## V. ORDER

I HEREBY ORDER that the Petition is denied to the extent that it seeks to avoid paying the audit premium altogether. I further ORDER that MEMIC promptly provide, consistent with 24-A M.R.S. § 2320(2), a reasonable means by which Bourne, who has the burden, may present proof that the workers in question have secured their Title 39-A obligations. The parties should focus on the 12-part test in 39-A M.R.S. § 105-A(1)(B). The parties may return to the Bureau for further proceedings in this case, if necessary, after they have completed this process.

## 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. § 236, 5 M.R.S. § 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. § 11004.

<sup>1</sup> Former Superintendent Mila Kofman delegated all legal authority to Bureau of Insurance ("Bureau") attorney Benjamin Yardley to act in the Superintendent's name as the hearing officer in this proceeding.

<sup>2</sup> Witness Robert Warren and his Attorney Bernard Kubetz also attended part of the first hearing day.

<sup>3</sup> The Hearing Officer entered two items into the record over Bourne's objection as part of MEMIC 2. They were Governor Baldacci's Executive Order establishing the Joint Enforcement Task Force on Employee Misclassification and the Annual Report of the Joint Enforcement Task Force.

<sup>4</sup> References to the transcript will be *Tr.-I*, [page] or *Tr.-II*, [page].

<sup>5</sup> I use Mid-Coast's name as it appears on the Bureau's records— "Mid-Coast Insurance Agency LLC"—however I note that the agency's name appears on Mr. Warren's business card and e-mail signature line as "Midcoast Insurance Agency."

<sup>6</sup> NCCI's Basic Manual allows the assignment of more than one basic classification in a construction business if the policyholder maintains separate payroll records for each operation. NCCI *Basic Manual*, Rule 1(D)(3).

<sup>7</sup> Application for Predetermination of Independent Contractor Status to Establish Rebuttable Presumption (Form WCB-261).

<sup>8</sup> The Board must consider the eight-part balancing test, none of whose elements are determinative, set out in 39-A M.R.S. § 102(13) in deciding if a worker meets the definition, unless the worker is a construction subcontractor, as of January 1, 2010, as defined in 39-A M.R.S. § 105-A. In that case, a 12-part cumulative test applies, the result of which is to raise the likelihood that the worker will be an employee.

<sup>9</sup> On December 9, 2010, Mr. Montembeau sent an e-mail to three other MEMIC employees saying in part that the Bourne audit "was a new policy so there was no sub-contractor alert letter which would have been sent. I believe however their [sic] is a subcontractor questionnaire in the file which supports our position." *Joint Exhibit 1*, p. 436.

<sup>10</sup> The parties spent considerable time on Mr. Warren's involvement in preparing the application and responding to MEMIC's requests that it have an answer to question 3 of the Questionnaire. Mr. Warren's testimony generally consisted of a failure of memory. *Tr.-I*, 47 – 54. The Bournes testified in essence that they did not know until after the premium audit about the resubmitted form. According to the parties' 2nd Stipulation, MEMIC's facsimile records do not show the December 2, 2009 transmission's source. *Tr.-I*, 124, 136; *Tr.-II*, 151 – 152; *2nd Stipulation*, 2. On this mixed record, I make no findings concerning Mr. Warren's role other than that the transmission came from his office. *Tr.-I*, 52 – 53.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

DATED: August 19, 2011

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