

IN RE:)
)
ROBERT L. MORIN BUILDER, INC.)
)
v.)
)
MAINE EMPLOYERS' MUTUAL)
INSURANCE COMPANY)
)
Docket No. INS-11-101)
)

DECISION AND ORDER

I. PROCEDURAL HISTORY

The parties to the proceeding are Robert L. Morin Builder, Inc. (the "Petitioner") and Maine Employers' Mutual Insurance Company ("MEMIC"). On February 8, 2011, the Petitioner asked that the Superintendent set a hearing to determine whether MEMIC charged premium based in part on payments to workers whom the Petitioners considered independent contractors. The purpose of the hearing was to determine whether MEMIC properly designated these workers to be employees and charged premium consistent with applicable legal standards and with the rating plan approved by the Superintendent.

In a February 18, 2011 Notice of Hearing, the Hearing Officer¹ set the hearing for March 4, 2011, with an intervention deadline of March 3, 2011. The Hearing Officer did not receive any applications for intervention. The hearing took place as scheduled at the Bureau's office in Gardiner, Maine. Present at the hearing were the Hearing Officer, Robert L. Morin for the Petitioner; and Karen Schwartz and Daniel Montembeau for MEMIC. The Hearing Officer conducted the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M.R.S. chapter 375, subchapter IV; 24-A M.R.S. §§ 229 to 236; Bureau of Insurance Rule Chapter 350; and the Notice of Hearing. The parties had the right to present evidence, to examine or cross-examine witnesses, and to be represented by counsel and, except for obtaining counsel, did exercise those rights.

MEMIC Exhibits 1 through 12 were offered and admitted into evidence, as shown on Attachment A to this Order. Mr. Morin, Mr. Montembeau and Ms. Schwartz all testified under oath. The hearing was recorded and in public session. The Hearing Officer kept the record open so that MEMIC could comply with his request for additional exhibits. MEMIC did so by e-mails on March 8 and March 9, 2011, with copies to the Petitioner. The Hearing Officer also admitted these e-mails into evidence as shown on Attachment A. Mr. Morin did not submit a response or opposing exhibits by March 14, 2011, the time allowed by the Hearing Officer's March 9, 2011 Scheduling Order. On April 12, 2011, the Hearing Officer issued an order allowing the parties until April 22, 2011 to submit arguments concerning a case, *Young's Building Contractors, Inc. v.*

MEMIC, INS-09-100, that MEMIC had referred to at the hearing. Neither party submitted a response to this order.

II. POSITIONS OF THE PARTIES

The Petitioner says that MEMIC improperly charged premium based on the remuneration paid to workers whom the Petitioner considers independent contractors. The Petitioner also says that he did not understand what sort of certificates of insurance would meet MEMIC's requirements. MEMIC argues that these workers do not meet the test set forth in the Maine Workers' Compensation Act, Title 39-A M.R.S., and are therefore employees.

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 engaged in residential construction. Mr. Morin holds at least 20 percent of Petitioner's stock according to a September 26, 2007 Application for Waiver that he filed with the Maine Workers' Compensation Board. MEMIC Exhibit 3.
2. MEMIC is a Maine corporation authorized to transact insurance.
3. On June 17, 2009 MEMIC received, through its agent Chapman & Chapman, an application for workers' compensation insurance from the Petitioner ("Application"). Mr. Morin signed the Application for the Petitioner. MEMIC Exhibit 1. The Petitioner had not been insured with MEMIC before this. *Hearing Transcript* ("Tr."), 9.
4. The Petitioner also submitted MEMIC's Construction Supplemental Questionnaire ("Questionnaire") with the Application. Mr. Morin partially filled out and signed the Questionnaire for the Petitioner. MEMIC Exhibit 2; *Tr.*, 43.
5. Question 3 of the Questionnaire asked if the applicant "obtain[s] either a 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" (emphasis in original). Mr. Morin answered "yes" to this question.
6. As a result of the Application, MEMIC issued policy number 1810091567, effective June 19, 2009 through June 19, 2010. The policy included a copy of MEMIC's Important Notice concerning independent contractors. MEMIC Exhibit 4.
7. While the policy was in effect, the Petitioner was building a residential home, for which it was the general contractor. *Tr.*, 30.
8. At various times in 2009, following Chapman & Chapman's instructions, the Petitioner obtained Certificates of Liability Insurance on the ACORD form from the workers and businesses that it contracted with to provide various construction services. *Tr.*, 8; MEMIC Exhibit 11.
9. Between May and July 2010, MEMIC audited the Petitioner's business records to calculate the final premium due.² MEMIC Exhibits 6 – 10. During this review, MEMIC excluded some of the Petitioner's workers either because the records showed that they had workers' compensation insurance coverage or because they otherwise qualified as independent contractors. MEMIC Exhibit 11; *Tr.*, 14.
10. In February 2011, MEMIC calculated final premium due of \$9,596.25. MEMIC Exhibit 10; *Tr.*, 51.

11. MEMIC based its final premium in part on its conclusion that eight workers were employees. Of those, one was a painter (Lee Hochgraf), one a wood flooring installer (Chops Hardwood a/k/a Randy Harrell), one a roofer (Anthony Simaitis), and five were carpenters/framers (Jason Chapman, Richard Bissett, Steve Wescott, W & C Construction a/k/a Walter Thompson, and Woodbury McLean). *Tr.*, 14 – 23; MEMIC Exhibit 11.

IV. ANALYSIS AND CONCLUSIONS OF LAW

The preliminary issue is the Petitioner's argument that Mr. Morin did not understand what sort of certificate of insurance would meet MEMIC's requirement. He testified that this was the first policy that he had had with MEMIC and that MEMIC's insurance agent, Chapman & Chapman, had told him to get certificates of insurance, which he did. When asked if any of the trades people had workers' compensation insurance, he explained that it was his understanding, from the agency, that "it was not required for them to produce [evidence] of workmen's comp." *Tr.* 9.

There are two documentary problems with this argument. First, Mr. Morin signed MEMIC's Questionnaire and affirmatively answered the question about obtaining certificates of workers' compensation coverage. Although he testified that he did not fill out this part of the Questionnaire, he also said that he and the agent "had no discussion really to speak of" about the certificates of Title 39-A coverage. *Tr.*, 43. Second, Mr. Morin had an active role in obtaining the certificates. He testified that the agency asked him to get them and that he did so during the latter part of 2009. *Tr.*, 47, 52. At least two of the certificates show Title 39-A coverage.³ If Mr. Morin was confused about MEMIC's requirements, he had time while the policy was in effect to raise those concerns either with the company or the agent.

The principal issue in this case is whether the tasks that the workers in question did for the Petitioner during the policy period exposed MEMIC to potential liability under the Maine Workers' Compensation Act ("Act") had a work-related injury occurred. 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 those workers.

Maine requires that employers protect their employees from losses resulting from injuries "arising out of and in the course of employment." 39-A M.R.S. § 201(1). This requirement has only a few exceptions. A long-standing one is for independent contractors. 39-A M.R.S. § 102(11). 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. § 102(13). The Act also lists eight factors that the Workers' Compensation Board, which has exclusive jurisdiction over a person's employee or independent contractor status for purposes of resolving claims for benefits under the Act, must consider in deciding if a person meets the definition.

In 2009, the Maine Legislature amended the Act to make a special rule for determining a construction contractor's status as an employee or as an independent contractor. P.L. 2009, c. 452, §5, enacted in part as 39-A M.R.S. § 105-A. The presumption is that, "[b]eginning January 1, 2010, a person performing construction work on a construction site for a hiring agent" is an employee unless that person is a construction subcontractor, as defined in section 105-A(1)(B), or owns a piece of heavy equipment. In order to be a construction subcontractor, the person must meet all 12 criteria set out in section 105-A(1)(B). The effect of this change was to lower the likelihood that construction workers would be independent contractors.

The Act allows a worker's status to be predetermined voluntarily. 39-A M.R.S. § 105. The resulting predetermination is provisional; it creates a rebuttable presumption in a later claim for benefits. A worker's status as an employee or independent contractor is not resolved as a legal matter unless this status becomes an issue in a claim for benefits before the Board. As the Petitioner had not obtained Board predeterminations or certificates of workers' compensation insurance for the workers at issue,⁴ MEMIC could look into this question during its premium audit.

The parties did not present any evidence showing whether any of these workers continued their work for the Petitioner into 2010. On February 22, 2010, MEMIC mailed the Petitioner a notice cancelling the policy effective March 30, 2010 for nonpayment of premium. MEMIC Exhibit 6. Based on this evidence, I will apply the eight-factor test in section 102(13).⁵

MEMIC's policy says in part that it may charge premium 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['] Compensation Insurance) of this policy" (Part Five—Premium § C(2)). MEMIC Exhibit 4. These terms, which the Superintendent has approved, allow MEMIC to charge premium for workers whom the employer has acknowledged as employees and put on the payroll and for any other worker whom the Board might determine is an employee in a litigated claim against the policyholder. Here, the question is whether the carpenters', the painter's, the floor installer's and the roofer's respective work put MEMIC at risk.

The evidence supports MEMIC's decision to consider the carpenters as employees for underwriting purposes during the policy period. Mr. Morin testified that the carpenters provided their own tools and were under agreements to work for fixed prices, but he also testified that he supplied the building materials. *Tr.*, 31. He also described them as having "worked as a group together" and that he hired them to "[f]rame the building" rather than to do specific rooms. *Tr.*, 29, 57.⁶ There is no evidence that any of them had employees. Their work was part of the Petitioner's regular business, and it is not typically independent in nature. An incident with one carpenter, Steve Wescott, underscores the employer/employee nature of their relationship with the

Petitioner. According to Mr. Morin, Mr. Wescott began “not showing up, and he was putting the rest of the job in a tight situation. I approached him one morning to – to see what his problem was ...” *Tr.*, 32. After some back-and-forth between the two, Mr. Wescott left the site and did not return. Although Mr. Morin insisted at the hearing that he did not fire Mr. Wescott, I conclude from this episode and the other evidence concerning the carpenters, that their work did put MEMIC at risk had one of them claimed a work-related injury.

This analysis also applies to the painter and floor installer. MEMIC did not rebut Mr. Morin’s testimony that each brought his or her own tools and was paid by the job. *Tr.*, 16, 18. However, there is no evidence that either of them had assistants whose work they supervised. They worked alone. The Petitioner supplied their materials. Although they worked in different trades than Mr. Morin did, their work was close enough to the Petitioner’s regular business as to be part of it.

The roofer presents different circumstances. He brought his own tools, including scaffolding and ladders. *Tr.*, 21. Mr. Morin paid him by the job. The roofer had a crew of about three men. *Tr.*, 21 – 22, 59. Mr. Morin was not able to say how the roofer paid them, *Tr.*, 22, but it is clear that this was not Mr. Morin’s responsibility. Further, although he testified that he was not aware that the roofer worked for other people while he worked on Mr. Morin’s house project, he did say, as an example, that had the roofer told him that he could not work at a particular time because he had another job going, then Mr. Morin would have waited for him to show up. *Tr.*, 31. This contrasts with Mr. Morin’s approach to Mr. Wescott described above. I therefore find that for premium purposes the roofer was not an employee.

V. Section 235(2)

The Insurance Code provides that “[w]ithin 30 days after termination of a hearing, or of any rehearing thereof or reargument thereon . . . or within such further reasonable period as the superintendent for good cause may require, the superintendent shall make his order on hearing covering matters involved in such hearing” 24-A M.R.S. § 235(2). As noted in the Procedural History section above, the hearing took place on March 4, 2010, and I kept the record open through April 22, 2011 for several reasons. Under section 235(2), a decision was due by May 22, 2011 unless I found good cause to extend the decision date.

I was hearing officer in another matter, *Bourne v. MEMIC*, INS-11-100, while this proceeding was pending. Conferences that I had with the parties in *Bourne* made me think that the two proceedings had common issues and that, because the parties in *Bourne* had retained counsel, those issues would have a thorough presentation. As it turned out, the issues developed in *Bourne* did not help me in this proceeding. Nevertheless, I thought at the

time that I had good cause for enlarging the period for issuing a decision in this case.

V. ORDER

I HEREBY ORDER that the Petition is granted in part and denied in part. MEMIC may charge and collect premium based on the remuneration attributable to the workers at issue except for the roofing contractor. I encourage the parties to enter into a payment arrangement that the Petitioner can meet.

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.

¹ Former 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.

² MEMIC audited the records then because the policy had been canceled effective March 30, 2010 for nonpayment of premium. MEMIC Exhibit 6.

³ One certificate is for a contractor, Curtis Construction, that MEMIC removed from the audit because it supplied a workers' compensation certificate. Another covers Lash Excavating, which MEMIC excluded because it owned heavy equipment. *Tr.* 12 – 13. A third ACORD certificate shows Title 39-A coverage for Sigler Drilling & Blasting. This worker's role in the premium audit is unclear. I have therefore not considered this certificate for any purpose.

⁴ Between May and July 2010, MEMIC audited the Petitioner's business records to calculate the final premium due. MEMIC Exhibits 6 – 10. During this review, MEMIC excluded some of the Petitioner's workers either because the records showed that they had workers' compensation insurance coverage or because they otherwise qualified as independent contractors. MEMIC Exhibit 11; *Tr.*, 14.

⁵ 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 work's progress, 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. 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. § 102(13).

6 At another point he made it sound as if the carpenters would give him bids on discrete parts of the building:

MR. MONTEMBEAU: Okay. Did they propose you a bid? Let's say -- I'm not that familiar with it, but like to do a wall in this room this week, frame it or --

MR. MORIN: Right.

MR. MONTEMBEAU: Okay. And they would give you a bid that you could accept or reject?

MR. MORIN: Right.

Tr., 58. I do not accept this testimony as being consistent with the description that the carpenters worked as a group.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: August 23, 2011

By: _____
BENJAMIN YARDLEY
Attorney

Attachment A

Exhibits Admitted at Hearing		
No.	Description	Pages
1	06-17-09 Workers' Compensation Application	3
2	06-17-09 Construction Supplemental Questionnaire	1
3	09-26-07 Application for Waiver	1
4	06-19-09 Policy No. 1810091567	26
5	06-19-10 Policy No. 1810091567 Renewal	25
6	02-22-10 Notice of Cancellation	3
7	05-27-10 Audit Premium Worksheet	6
8	06-03-10 Audit Premium Worksheet	2
9	07-21-10 Audit Premium Worksheet	2
10	02-04-11 Audit Premium Worksheet	7
11	09-21-09 ACORD Certificates	16
12	10-22 - 27-10 e-mail	6
Post-Hearing Exhibits		
No.	Description	Pages
13	03-08-11 e-mail	1
(a)	06-06 Subcontractor Alert	1
(b)	12-27-09 E-mail	3
(c)	12-09 MEMIC Alert	9
(d)	01-01-10 MEMIC Important Policyholder Notice	1
(e)	Workers' Compensation Board web page	1
(f)	Construction Supplemental Questionnaire form	1
(g)	Application for Predetermination form	7
(h)	12-09 Subcontractor Mailing List	1
(i)	03-08-11 E-mail between MEMIC and Workers' Compensation Board	2
(j)	03-08-11 E-mail to Karen Schwartz from Wendy Bowden with attachments	12
14	03-09-11 e-mail	1
(a)	MEMIC web site screen shots	3
(b)	03-31-10 MEMIC Alert with Attachments	11