IN RE:

DAVID BOURNE, D/B/A DAVE BOURNE BUILDING

v.

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY

Docket No. INS-11-100

DECISION AND ORDER ON RENEWED PETITION AND COMPLAINT OF DAVID BOURNE, D/B/A DAVE BOURNE BUILDING

I. PROCEDURAL HISTORY

Persons interested in a detailed history of this proceeding should refer to my August 19, 2011 and September 28, 2011 Decision and Orders. They are available on the Bureau's web site at www.maine.gov/pfr/insurance/hearing_decisions/index.htm#workers. Capitalized terms used but not defined in this Decision and Order have their respective meanings in the earlier decisions.

Those decisions in part ordered MEMIC to provide the Petitioner, consistent with 24-A M.R.S. § 2320(2), a reasonable means by which he could present proof that the workers at issue were independent contractors. On December 12, 2011, the parties met, without me, to discuss the Petitioner's proof concerning the workers' status. This proof consisted of affidavits with supporting materials from these workers. The Bournes also answered questions from their and MEMIC's counsel during the meeting.

On January 25, 2012, MEMIC issued its decision finding that the workers did not meet some or all of the standards for determining independent status in 39-A M.R.S. §§ 105-A(1)(B)(2), (4), (6), (7) and (10). MEMIC concluded that each worker was the Petitioner's employee and, after crediting the Petitioner for the cost of materials, and assessed $13,503 in final additional premium. On February 23, 2012, the Petitioner filed with the Bureau a Renewed Petition and Complaint of David Bourne, d/b/a Dave Bourne Building.

After discussions with the parties, by an April 3, 2012 Notice of Pending Proceeding and Hearing, I scheduled a hearing for May 14, 2012 with an intervention deadline of May 11th. I did not receive any applications for intervention.

The hearing took place as scheduled at the Bureau's Gardiner, Maine office. Present were David Bourne, Danielle Bourne and Attorney John Cole for the Petitioner, and Karen Schwartz, Daniel Montembeau and Attorney Allan Muir for MEMIC. Attorney Jon Oxman testified as an expert witness for the Petitioner, and Attorney Elizabeth Griffin as an expert witness for MEMIC. The hearing went forward 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 exercised their respective rights to present

evidence, to examine or cross-examine witnesses and to have counsel. The hearing was recorded and in public session.

I took notice of the prior proceedings in this case, including testimony and exhibits, and admitted into evidence these new exhibits:

Exhibit Number	Description
Bourne 05/14/12 # 1	Affidavit of Ronald E. Durgin Affidavit of Jeremy Johnson Affidavit of Curtis T. Roundy Affidavit of Craig Murray Affidavit of Philip H. DesLauriers Affidavit of Sue B. Stultz Affidavit of Thomas J. Brokish
Bourne 05/14/12 # 2	Renewed Petition and Complaint of David Bourne
Bourne 05/14/12 # 3	Transcript of 12/12/2011 Meeting
MEMIC 05/14/12 # 1	April 11, 2012 Letter from Bernie Bean, WCB to Attorney Muir

Except for the MEMIC exhibit, there were no objections. I admitted the MEMIC exhibit over the Petitioner's objection and noted his exception.

II. POSITIONS OF THE PARTIES

The parties' positions have not changed materially since this case arose. The Petitioner says that he has proven, through the affidavits, that each worker did lawfully secure his or her workers' compensation obligations as required by Part Five (C)(2) of the policy, that each worker was a construction subcontractor under 39-A M.R.S. § 105-A(1)(B), and that none posed a "significant risk" of being an employee during the policy period. He also says that MEMIC did not properly apply Part 5(C)(2) of the policy to the workers. MEMIC says that it allowed the Petitioner a reasonable means for him to make his case concerning these workers, that it diligently and in good faith reviewed and acted on the Petitioner's materials, that he did not rebut the employment status presumption in Section 105-A, and that the Superintendent must defer to MEMIC's determination.

III. FINDINGS OF FACT

I incorporate into this Decision and Order the Findings of Fact set forth in my August 19, 2011 Decision and Order and find further that:

27. On December 12, 2011, MEMIC met with the Petitioner so that he could give, under 24-A M.R.S. § 2320(2), his proof that each of the workers in question had secured his obligations under the Maine Workers' Compensation Act (the "Act") and complied with the 12-part test set out in Section 105-A(1)(B) of the Act. The Petitioner's proof consisted of affidavits with supporting materials from these workers. Mr. Bourne and Mrs. Bourne testified, including cross-examination by MEMIC's counsel, during the meeting.

28. On January 25, 2012, MEMIC issued its decision finding each worker at issue to be an employee and, after crediting the Petitioner for the cost of materials, assessing final additional premium of $13,503.

29. MEMIC found that the workers did not meet the standards for determining independent status in Section 105-A as follows:

Worker	Tests
Ronald Durgin	105-A(1)(B)(6)—continuing or recurring business liabilities or obligations
	105-A(1)(B)(7)—success or failure of business dependent on relationship between receipts and expenditures
	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
Jeremy Johnson	105-A(1)(B)(2)—control over means and manner of performance of the work
	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
Curtis Roundy	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
Craig Murray	105-A(1)(B)(4)—the person hires and pays assistants
	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
Philip DesLauriers	105-A(1)(B)(7)— success or failure of business dependent on relationship between receipts and expenditures
	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
The Painter Women	105-A(1)(B)(7)—success or failure of business dependent on relationship between receipts and expenditures
	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability
Thomas Brokish	105-A(1)(B)(10)—responsibility for satisfactory completion of work, with contractual liability

30. Based on its findings, MEMIC concluded that it faced significant risk that, should any of these workers claim benefits under the Act, he or she would be considered the Petitioner's employee. Using information provided by the Petitioner, MEMIC recalculated its final audit premium by removing charges attributable to materials. MEMIC sent the Petitioner a new final premium bill for $13,305.

31. On February 23, 2012, the Petitioner appealed MEMIC's decision to the Superintendent.

IV. DISCUSSION

Introduction

This workers' compensation premium dispute arose for a number of reasons that developed throughout the history of the Petitioner's policy. There are two principal reasons. The Petitioner did not comply with MEMIC's request, articulated through its Alert and Construction Supplemental Questionnaire, to obtain either Board-approved Applications for Predetermination of Independent Contractor Status or certificates of Title 39-A coverage for the workers who it con-

sidered independent contractors. Either such document would have been proof under Part Five (C)(2) of the policy that the Title 39-A obligations of those workers had been "lawfully secured." Then, after MEMIC's premium audit resulted in an invoice for additional premium, MEMIC did not comply with the statute that requires an insurer to give its policyholder a reasonable means to review how the insurer applied its rating system to the policyholder's insurance.

Now that the parties have met their various mutual contractual and statutory obligations[1], I can assess the merits of their respective position on the underlying issue: Did MEMIC properly designate the workers to be employees and charge premium consistent with applicable legal standards and with the rating plan approved by the Superintendent?

Analysis

Before I reach the underlying issue, I must decide whether MEMIC provided the Petitioner with a "reasonable means" by which he could be heard to review how the insurer applied its rating system to his insurance. 24-A M.R.S. § 2320(2). This involves two questions. The first relates to the mechanics of the review. The parties agreed to meet on December 12, 2011 at Pierce Atwood's offices in Portland. The transcribed part of the meeting lasted about 2 ½ hours. The Petitioner chose what evidence to present concerning his disagreement over the final premium. The evidence included sworn affidavits, with various supporting materials, from each worker at issue. Mr. and Mrs. Bourne also answered MEMIC's questions at the meeting. The Petitioner does not say that this process was unreasonable. I find that MEMIC complied with my September 28, 2011 Decision and Order's direction to "provide this opportunity at a mutually agreeable time and to hear what Bourne has to say relevant to how MEMIC applied its rating system." To this extent, MEMIC also has complied with Section 2320(2). The Petitioner met the statute's appeal period.

The second question relates to the substance of MEMIC's action, evidenced by its January 25, 2012 letter. Concerning the Superintendent's review of this letter, Section 2320(2) provides that the Superintendent "may affirm or reverse such action" after a hearing. MEMIC says that this language does not mean that the Superintendent may "substitut[e] his own judgment for that of MEMIC." However, as the official charged with enforcing Maine's insurance laws, the Superintendent is expert in insurance and may exercise his discretion in assessing a regulated entity's compliance with the law. See, e.g., *Consumers for Affordable Health Care, Inc. v. Sup't of Ins.*, 809 A.2d 1233 (Me. 2002), 2002 ME 158, ¶ 30. The issue is whether MEMIC was "reasoned and not arbitrary, capricious, or abusive [in exercising its discretion in applying the rating system]. The exercise of reasoned discretion requires MEMIC to review and analyze all available relevant information ... on a case-by-case basis. ... In evaluating [this exercise of] discretion, the Superintendent would consider relevant the extent and sufficiency of supporting documentation within the underwriting files to justify the actual discretion exercised." *Combined Management, Inc. v. Maine Employers' Mutual Insurance Company*, Docket No. INS-02-789. The relevant documentation here is the evidence developed in this case before my September 28,

[1] This process consumed a witness deposition, a 13-hour, two-day hearing at the Bureau, post-hearing arguments, a Bureau decision, a request for reconsideration, a Bureau decision on that request, a lengthy meeting between the parties at which they reviewed the Petitioner's evidence concerning the workers' employment status, an appeal from MEMIC's decision following that review, and a second all-day hearing.

2011 Decision and Order, the information offered at the December 12, 2011 meeting, and MEMIC's January 25, 2012 letter. I will also consider the testimony developed at the May 14th hearing.

The January 25, 2012 Letter

MEMIC's letter opens by describing the issue as "whether the work performed by each claimed contractor presented significant risk to MEMIC in the event of an injury and claim" against the Petitioner under his workers' compensation policy.[2] The letter then lists, by worker, the "most obvious" reasons why each would not be an independent contractor. The reasons track the 12-part test set out in 39-A M.R.S. § 105-A(1)(B).[3] In summary, MEMIC found that one worker failed Section 105-A(1)(B)(2) because Mr. Bourne had instructed him how to handle a change at the work site; one failed Section 105-A(1)(B)(4) because the Board did not approve his 39-A M.R.S. § 102(11)(A)(4) waiver until about five months after the policy had expired; one failed Section 105-A(1)(B)(6) because he changed an answer on the predetermination application that he filed with the Board; three failed Section 105-A(1)(B)(7) because the Petitioner paid them hourly plus materials; and they all failed Section 105-A(1)(B)(10) because there were no written contracts making each responsible for failure to complete the work.

Section 105-A(1)(B)(2)

This section requires the worker to have "control and discretion over the means and manner of

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[2] The letter's next sentence describes the Petitioner's affidavits and their attachments as "helpful." The letter continues to say that MEMIC would guide its review of this evidence with the "cautionary fact" that the Petitioner and "in all likelihood" the workers "are motivated to demonstrate that each worker was an independent contractor" and that each worker who did not carry insurance on him- or herself "would very likely be motivated to demonstrate that each was an employee" in case of an injury. The Petition does evidence the Petitioner's motivation to establish the workers' employment status as independent contractors. However, the record is devoid of evidence on which to conclude that any worker would reverse course in case of an injury. I therefore accept these observations only as a rhetorical flourish, not as a statement reflecting the company's underwriting assumptions.

[3] Effective January 1, 2010, Section 105-A applies to construction subcontractors. It presumes that a construction subcontractor is an employee unless "(1) The person possesses or has applied for a federal employer identification number or social security number or has agreed in writing to carry out the responsibilities imposed on employers under this chapter; (2) The person has control and discretion over the means and manner of performance of the construction work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the hiring agent; (3) The person has control over the time when the work is performed and the time of performance is not dictated by the hiring agent. Nothing in this paragraph prohibits the hiring agent from reaching an agreement with the person as to a completion schedule, range of work hours and maximum number of work hours to be provided by the person; (4) The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; (5) The person purports to be in business for that person's self; (6) The person has continuing or recurring construction business liabilities or obligations; (7) The success or failure of the person's construction business depends on the relationship of business receipts to expenditures; (8) The person receives compensation for construction work or services performed and remuneration is not determined unilaterally by the hiring agent; (9) The person is responsible in the first instance for the main expenses related to the service or construction work performed; however, nothing in this paragraph prohibits the hiring agent from providing the supplies or materials necessary to perform the work; (10) The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work; (11) The person supplies the principal tools and instruments used in the work, except that the hiring agent may furnish tools or instruments that are unique to the hiring agent's special requirements or are located on the hiring agent's premises; and (12) The person is not required to work exclusively for the hiring agent."

performance of the construction work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the hiring agent." MEMIC asserted that one worker, Jeremy Johnson, failed to meet this criterion and cited three items from Mr. Bourne's testimony. The first two were from the May 2011 hearing. He testified that if Mr. Johnson "runs into something he wasn't expecting, he'll call it to my attention there and then and say what do you want to do about this." *Tr.*-1, 265. Then, in response to MEMIC's question, "And then you may say, yeah, go ahead and do whatever the change is --," Mr. Bourne said "Right. I understand it's going to cost more." *Id.*, 268. MEMIC also cited Mr. Bourne's December 2011 meeting testimony that "nobody is in the house when [Mr. Johnson]'s sanding and finishing floors," Bourne 05/14/12 # 3, p. 32, and his testimony at the May 2011 hearing that Mr. Bourne was "always on-site." *Tr.*-1, p. 265. The problem with these citations to the hearing record is that they ignore two other things that Mr. Bourne said. At the December 2011 meeting, he also said "a lot of the time I'd be working on another part of the house while some of these people were doing whatever they were doing. It was a big enough house we could spread out." Bourne 05/14/12 # 3, p. 32. Construing what he said together, I think it is more reasonable to conclude that he was on site but not always where the workers were. The other testimony that MEMIC overlooked was something that he said, between the testimony appearing at pages 265 and 268 of the May 2011 hearing transcript, as follows:

> HO: When you're dealing with the tile man, for example.
> A: Yeah.
> HO: Would you tell him how you wanted the job completed? Would you just say here's the bathroom, here's the kitchen, do it?
> A: There's --
> HO: Aside from that there would be specifications.
> A: There's several meetings with me, the tile guy, the architect, and whoever else would be involved in, say, a custom shower stall, the glass company, the slab work people, the plumber.
> HO: But you wouldn't be telling the tile man how to lay his bed of mortar.
> A: No, and I wouldn't want him telling me how to pound nails either so...
> HO: Thank you.
> MR. MUIR: May I?
> HO: One sec. And would that apply to the other of these people?
> A: Yeah. They all know their business, they know their trades, and I have complete faith in them to do exactly what they say they're going to do generally when they say they're going to do it, and they do. That's why we get good jobs.

Tr.-1, p. 266 – 267. Importantly, this exchange establishes that, while Mr. Johnson might have asked Mr. Bourne about particular issues—the evidence actually produced only one such issue, involving a floor outlet that was removed after the homeowner wanted a wall moved, 05/14/12 *Tr.*, 23 – 24, 115, and 200—Mr. Bourne did not direct the means and manner in which Mr. Johnson, or the other six workers, worked. Rather, he bargained for expertise in their respective trades. In fact, at the December 2011 meeting, he offered a good reason for doing so when he expounded on his relationship with a painter, Ronald Durgin. Asked if he helped Mr. Durgin paint, Mr. Bourne said no. Bourne 05/14/12 # 3, p. 49. Pressed for details on helping with cleanup and trim, he said, "Painting, me? No, I hate painting. That's why I hire him. He does a much better job than me, and I have no desire to learn how to do it."

Section 105-A(1)(B)(4)

This section requires that the worker "hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work." MEMIC found that one worker, "Craig Murray DBA CWM Tile," failed this criterion. MEMIC's explanation was that the Board did not approve Mr. Murray's waiver of benefits under Title 39-A, as the president and 20 percent shareholder of a corporation, until after the policy had expired. Mr. Murray would therefore have been entitled to claim Title 39-A benefits under the policy.

The uncontroverted evidence is that CWM Tile, Inc. is a Maine corporation, with Mr. Murray as its president, treasurer, sole shareholder and only employee. Bourne 05/14/12 # 1, *Affidavit of Craig Murray*. The facts that MEMIC relied on concerning the waiver of benefits are not relevant to the criterion.

Section 105-A(1)(B)(6)

This section requires that the worker have "continuing or recurring construction business liabilities or obligations." MEMIC found that one worker, Mr. Durgin, failed this criterion. He filed a predetermination application of his employment status with the Board the day after the Petitioner's policy expired. Mr. Durgin originally answered "no" to the question "[d]o you have continuing or recurring business liabilities or obligations?" The Board employee who reviews predetermination applications sent the application back with a note saying that the answer should be "yes in order to be considered a construction subcontractor." Mr. Durgin changed his answer and returned the application with a note saying, "Sorry, I misunderstood the question." Bourne 05/14/12 # 1, *Affidavit of Ronald Durgin.* MEMIC found that his affidavit was not "conclusive evidence of meeting this standard." MEMIC did not explain, in either its January 25 letter or June 7, 2012 closing letter, why it reached this conclusion. Furthermore, MEMIC has argued throughout this proceeding that the post-policy-period predeterminations are not relevant.[4] If that is so, then MEMIC had no business relying on an error in Mr. Durgin's application to the Board.

Section 105-A(1)(B)(7)

This section requires that the "success or failure of the person's construction business depends on the relationship of business receipts to expenditures." MEMIC found that three workers—Mr. Durgin, Philip DesLauriers and The Painter Women—failed this criterion because the Petitioner paid them by the hour and for their materials. Except for details peculiar to each case, MEMIC explained each failure in identical language: Because the worker "was paid by the hour, this does not suggest that the success of [his or her] business depends on the relationship of business receipts to expenditures."

MEMIC did not explain this conclusion in the January 25 letter. The company did argue in its June 7, 2012 closing letter that there is no difference between the workers' business risk and that "faced by someone hired at $12 an hour to operate a machine. The test ... mean[s] that the sub has some skin in the game or some risk or chance to succeed or fail depending on whether his

[4] MEMIC's closing letter, at page 7, says, "[i]n addition, MEMIC attached no weight to the post policy predeterminations because they would not be admissible to create a presumption of independent contractor status ..."

bids were adequate." The analogy is inapt because MEMIC's hypothetical machine operator is probably an employee performing "part of the regular business of the employer." 39-A M.R.S. § 102(13)(E). In any event, the conclusion implies that MEMIC did not consider that a bid would be entirely appropriate for one job—for example, painting three coats on the outside of a newly trimmed and sided clapboard house—and folly in another—for example, preparing and painting the previously painted trim and clapboards of a house where the condition of the wood under the paint is uncertain. The evidence is that Mr. Bourne's projects were in the latter category. For example, at the December 2011 meeting, MEMIC asked Mr. Bourne about his financial arrangement with Mr. Durgin (Bourne 05/14/12 # 3, p. 47):

> Q Was it the same kind or arrangement where you described the project to him, and he looked at it and gave you a ballpark and said that he gets or charges $35 an hour, and you went from there?
> A Yeah, and normally actually, he gives me a relatively fixed price and sticks to it. This particular building is -- it's got a textured stucco, and it's a post-and-beam frame with the textured stucco comes up to the natural posts and natural beam ceiling. There was a huge amount of taping off and cutting in on textured stucco, which is a pain to paint anyway that he had no real idea how long it was going to take him. We had a slightly different arrangement there. And he said, I figure it's going to probably cost 8 or 10 grand or whatever to paint this area. However, he preferred to do it at $35 an hour because he didn't know what he was getting into.
> Q Because otherwise if he estimated wrong, there would be considerable risk to him?
> A Yeah. He'd be working for five bucks an hour.

And with The Painter Women (Bourne 05/14/12 # 3, pp. 25 – 27):

> Q And do you do sort of the same thing as you described with the owner, that is to say, you talk to them and they give you a ballpark and you tell them what's involved?
> A Yeah, in this particular job when they first to -- when I first spoke to them, you, what I asked them to paint was a much smaller area than what they ended up painting obviously. So they came in and gave me a somewhat ballpark figure of painting three or four rooms and an estimated time. I gave them an idea of when we'd be ready for them to come in and start painting so I could get on their schedule. And then, you know, after a couple of site visits from the homeowner and the architect, the homeowner decided she'd like more painting done, too. They were there for quite a bit longer than they intended to be.
> Q And it looks like The Painter Women bills you for time, I think I did the math, it comes out to $28 an hour?
> A Yeah, exactly. That was what they agreed on initially.
> Q You say that's what they agreed on, how did this conversation unfold, when you talk to them, do you say what do you charge, how does that work?
> A Well, as I say, initially we'd ask them -- they've given me a ballpark price of doing a certain area. Then they said we basically charge $28 an hour. So not knowing what's going to be added or how long it's going to take or the other thing is you don't really know when an area is going to be ready for people. There's a lot of coming and going and setting up and, you know, they'll be in and they'll paint an area one day. And if the room next to it is not ready for them, they have to pack everything up, leave, go do something else and come back. So it's not -- it's not effective for them to give me a fixed price a lot of time. And what I found out there in particular is people just

> if the room next to it is not ready for them, they have to pack everything up, leave, go do something else and come back. So it's not -- it's not effective for them to give me a fixed price a lot of time. And what I found out there in particular is people just don't give fixed prices for anything they do. They're in a position out there where they will charge -- they'll give you an hourly rate and that's what they'll do.

And with Mr. DesLauriers, who installed wiring for internet, telephone and entertainment systems (Bourne 05/14/12 # 3, p. 101 – 102):

> Q Time and materials, he'd bill you periodically, come in and give you a good faith estimate on what he thought the job would cost?
> A I think so, yeah. And within -- I mean, materials are hard to predict because you don't know how much wire you're going to need to run.
> ******
> Q Then when you communicate with the owner, you estimate the cost of the project accordingly?
> A Well, in this particular case, she -- I don't think anybody even asked, she specified she wanted certain things done in the house as far as access to the internet and where she wanted jacks and that sort of thing. And Phil did the work.

The record shows that Mr. Bourne took on work presenting technical problems that no rational person would have committed to solving for an acceptable fixed price. And because of his clientele's expectations, the final product would be better. He explained it this way at the December 2011 meeting:

> I think it's the nature of that type of job in that you get a better product over asking somebody to paint out – you know, give me a price to paint this room, they give you a low-ball price to paint the room, and then they are rushing to make sure they're making a profit at that fixed price. The level the homeowners and the architects are looking for in these houses, you end up with a better product if there's some flexibility for the subcontractor to say, you know, I think it's going to take me eight days to get this area painted, but if it runs to 10, I don't want to lose my shirt. So it works better for them to be able to say, you know, listen, we need the flexibility to be able to charge time and materials.

Id., 69-70. Furthermore, the project acquired a life of its own as the homeowner changed its scope over time. Mr. Bourne agreed with MEMIC's question at the December 2011 meeting that "What's going to be done sort of evolves." Bourne 05/14/12 # 3, p. 21. Under these circumstances, it was impractical for work for progress on anything but a cost-plus basis. Last, it is also reasonable to conclude that these workers had superior bargaining position and would only work on a cost plus basis.

Section 105-A(1)(B)(10)

This section requires that the worker be "responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work." MEMIC found that all seven of the workers failed this criterion. Again, except for changing their names and the hourly

discrepancies in the Bournes' testimony on whether they had written contracts. Also, the Petitioner had "not provided evidence that a written contract [with a clause holding the worker responsible for unsatisfactory work] existed. ...[I]t is MEMIC's position that you have not proven that [the worker] could be held contractually responsible for failure to complete the work."

The Bournes were not particularly convincing when they testified about their record making and recordkeeping practices. Their testimony was confusing as to whether they had written contracts with the workers. See, e.g., Bourne 05/14/12 # 3, p. 25 (Mr. Bourne: "I think they were verbal contracts. Some people we've had written contracts with, and some people we've had verbal contracts, depending if I've done work with them a lot in the past"); Hearing Tr. 05/14/12, p. 85 (Mrs. Bourne: "During the policy period which started in 2009 ... we had several written contracts, my husband always does verbal contracts. On a number of occasions he asked me to do a written contract, and on some occasions if we used big corporations ... they would supply us with a contract."). However, their testimony on this issue did not poison their overall testimony about their business, which was generally very credible. For example, Mr. Bourne was clear at the December 2011 meeting that he hired the workers because of their respective expertise. He explained that, when the homeowner wanted the house:

> completely rewired, replumbed, insulated, drywalled and the plaster fixed where it needed to be, floors refinished, custom shower stalls in the bathrooms, new kitchen cabinets, painted, and new windows in certain areas, you know what's going to be involved with that, and who, you know, the faces are that are going to be involved. And as I say, I have selection of subcontractors that I have used over the years that come in and do specific tasks.

Bourne 05/14/2 #3, p. 22. He was also clear that the workers promised to perform according to the owner's and architect's specifications. *Id.*, p. 39 ("They've repaired certain things for free the architect or the homeowner wasn't particularly thrilled about."), and p. 33 ("They would, you know, prep and paint the various areas that we wanted painted to the level the architect or the homeowner was happy with.").

MEMIC says that it focused on the lack of written contracts because of Mrs. Bourne's testimony that the Petitioner had used them. However, Section 105-A(1)(B)(10), not how the Petitioner might or might not have handled its agreements, provides the standard. This section does not require a written contract for someone to meet that criterion.[6] The point is that the worker be responsible for his or her work. Clearly, Mr. Bourne thought the workers were responsible and that he could attempt to have them make good on their promises.

Moreover, the phrase "may be held contractually responsible" is of questionable value given the Law Court's decision in *Gosselin v. Better Homes, Inc.*, 256 A.2d 629 (Me. 1969), 1969 Me. Lexis 300. This case involved a builder's oral promise to build someone the "shell" of a house. The builder failed to do so in some manner, and the homeowner sued for damages. The builder on appeal argued that the trial court erred in considering evidence of workmanship and the plaintiff's expert testimony concerning the cost of repairs. The Law Court disagreed. Although the

[6] Similarly, the Maine Construction Contract Act defines a "construction contract" to mean "any agreement, whether written or oral, to perform or to supply materials for work on any real property." 10 M.R.S. § 1111(2).

parties did not have "an express provision respecting the quality of the work to be done or the manner of its performance[,] in any oral or written construction contract, the law implies therein an undertaking to perform the work in a reasonably skilful [sic] and workmanlike manner, having regard to the general nature and situation of the projected object and the purpose for which it was manifestly designed." 256 A.2d at 639 – 40. See also *VanVoorhees v. Dodge*, 679 A.2d 1077 (Me. 1996). There the plaintiffs sued the defendant for breaching an oral contract to build them a house. The Law Court affirmed the trial court's award of damages, reasoning that the parties had "mutually assented" to the material terms of their agreement; that they "manifested [their agreement] in the contract, either expressly or impliedly"; and that their contract was "sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties." 679 A.2d at 1080. Had the results that any of these workers achieved not been either reasonably skillful or work, Mr. Bourne would have had the right to hold them responsible for their shortcomings.

The Other Criteria

As noted above, MEMIC focused on the "most obvious" criteria and did not apply the remaining ones to the workers. An argument exists that MEMIC had waived those points, but I think that conclusion would be unfair, especially as the parties were dealing with a recently enacted set of standards.[7] The parties did at least briefly address the remaining criteria in their closing letters to me. I therefore address them here.

> *Section 105-A(1)(B)(1) "The person possesses or has applied for a federal employer identification number or social security number or has agreed in writing to carry out the responsibilities imposed on employers under this chapter"* — Each worker asserted in his or her affidavit that he or she had a federal employer identification or social security number. MEMIC did not refute this. I therefore find that each worker met this standard.
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> *Section 105-A(1)(B)(2) "The person has control and discretion over the means and manner of performance of the construction work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the hiring agent"* — Except for Mr. Johnson's case, discussed above at page 6, MEMIC did not dispute the workers' affidavits that they negotiated with the Petitioner to provide him with a finished product but that he did not control the means or manner in which each did his or her work. MEMIC correctly says that the test under Section 102(13) is the Petitioner's right to control, whether or not he exercised the right. *West v. C.A.M. Logging, et al.*, 670 A.2d 934, 938 (Me. 1996). But Section 102(13)(D) asks "[w]hether or not the person has the right to control the progress of the work, except as to final results." Section 105-A(1)(B)(2) does not. It asks whether the independent contractor "has control and discretion over the means and manner of performance of the construction work." This is a narrower focus than Section 102(13)'s, and I do not think that the judicial overlay on Section 102(13) helps today's question. I therefore find that each worker met this standard. Last, in Mr. Johnson's case, the evidence developed at the

[7] Section 105-A(1)(B) became effective on September 12, 2009. See PL 2009, c. 452 §5. It will remain effective only until December 31, 2012. See PL 2012, c. 643 § 9. A new independent contractor test will replace its 12-part test.

December 2011 meeting and the May 14, 2012 hearing is that he had a question for Mr. Bourne about how to repair a discontinued floor outlet. There was no evidence that, once they had agreed to lay new boards instead of to insert a small patch, that he told Mr. Johnson how to install the new boards. This event characterizes the types of discussions on a work site that further the final result.

Section 105-A(1)(B)(3) "The person has control over the time when the work is performed and the time of performance is not dictated by the hiring agent. Nothing in this paragraph prohibits the hiring agent from reaching an agreement with the person as to a completion schedule, range of work hours and maximum number of work hours to be provided by the person" — The workers testified that they came and went as they chose and had only to meet the Petitioner's overall construction schedule. MEMIC did not refute this, saying in its closing letter that this "one could go either way depending on the facts adduced at hearing." That is an unassailable observation, and in the premium context it does not add up to substantial risk.

Section 105-A(1)(B)(4) "The person hires and pays the person's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work" — The only worker who had an employee on site was Thomas Brokish, the sole proprietor cabinetmaker. He did not insure himself under Title 39-A but, when he told Mr. Bourne that he would have someone help install the cabinets, Mr. Bourne told him to get a workers' compensation policy for that employee. Mr. Brokish did so, and that person did not present significant risk to MEMIC.

Section 105-A(1)(B)(5) " The person purports to be in business for that person's self" — MEMIC says that it is "not sure exactly what this means" but did not refute the workers' respective assertions that each was in business for him- or herself. Mr. Bourne's testimony, mentioned above, that he did not help the painter and that what he "found out there in particular is people just don't give fixed prices for anything they do" supports their assertions.

Section 105-A(1)(B)(6) "The person has continuing or recurring construction business liabilities or obligations" — Except for its argument about Mr. Durgin, MEMIC admits to "some risk here assuming the Bournes paid for materials and the sub does not maintain an office." "Some risk" is not substantial risk without more evidence, and the unrebutted evidence is that each worker did bill for his or her materials. There was no evidence, other than inferentially that Mr. Brokish has a cabinet shop in Portland, that the other workers do have business addresses outside their homes. MEMIC did not push this issue.

Section 105-A(1)(B)(7) "The success or failure of the person's construction business depends on the relationship of business receipts to expenditures" — Other than Mr. Durgin, The Painter Women and Mr. DesLauriers, whom I have dealt with above, MEMIC did not seriously contest this issue. The remaining workers' asserted in their affidavits that they had to charge enough to make a profit. MEMIC did not rebut this testimony.

Section 105-A(1)(B)(8) "The person receives compensation for construction work or services performed and remuneration is not determined unilaterally by the hiring agent" — The workers' testimony that Mr. Bourne did not unilaterally determine what he would pay them accords with his observation about their financial practice—that they would not give fixed prices for their work.

Section 105-A(1)(B)(9) "The person is responsible in the first instance for the main expenses related to the service or construction work performed; however, nothing in this paragraph prohibits the hiring agent from providing the supplies or materials necessary to perform the work" — The workers testified that they each paid for the transportation, tools, equipment and materials necessary for them to do their work. The evidence is that they all charged the Petitioner for their time plus materials. The evidence does not support MEMIC's observation that "if the Bournes paid for all materials, the person was not responsible in the first instance" for those expenses.

Section 105-A(1)(B)(10) "The person is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work" — See above.

Section 105-A(1)(B)(11) "The person supplies the principal tools and instruments used in the work, except that the hiring agent may furnish tools or instruments that are unique to the hiring agent's special requirements or are located on the hiring agent's premises" — The workers all testified that they did supply their own tools and materials. MEMIC did not contest this point.

Section 105-A(1)(B)(12) "The person is not required to work exclusively for the hiring agent" — The workers testified that they had other jobs in addition to those with Mr. Bourne. MEMIC did not contest this point.

Conclusion

For the above reasons, I find that MEMIC did not have a reasonable basis on which to conclude that the workers at issue were engaged in work that presented significant risk should any of them suffer an injury at any of the covered projects. There is no reason to reach the Petitioner's argument that MEMIC did not properly apply Part 5(C)(2) of the policy to the workers.

V. ORDER

I HEREBY ORDER that the Petition is granted. MEMIC may not charge and collect premium based on the remuneration attributable to the workers at issue.

VI. NOTICE OF APPEAL RIGHTS

This Decision and Order on Petitioner's Motion for Reconsideration and Clarification of Superintendent's 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.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: July 3, 2012

By: _____
BENJAMIN YARDLEY
Attorney