

**STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE**

NORTHLAND ROOFING, INC.)	
)	
v.)	
)	
MAINE EMPLOYERS' MUTUAL INSURANCE)	DECISION AND ORDER
COMPANY)	
)	
Docket NO. INS-03-450)	
)	

Thomas M. Record, Designated Presiding Officer, now enters the following Decision and Order in the above captioned matter.

PROCEDURAL HISTORY

On November 25, 2003, Northland Roofing, Inc. ("Northland"), located in Presque Isle, filed with the Superintendent of Insurance what it labeled a "Petition for Return of Unearned Premium." Northland stated that it was filing this petition pursuant to 24-A M.R.S.A. §§ 229 and 2320(3) and Insurance Rule chapter 470. Specifically, Northland requested that the Superintendent hold a hearing on the matter and issue an order requiring Maine Employers Mutual Insurance Company ("MEMIC") to return unearned workers compensation premiums for coverage of certain roofers who were working for Northland, but for whom Northland alleges were not covered under its policy with MEMIC from January 3, 2003, through July 10, 2003.

On December 22, 2003, the Superintendent's designated hearing officer issued an order setting a hearing for January 26, 2004. At a prehearing conference held on January 12, 2004, MEMIC requested that Southwind Industrial Services ("Southwind"), an entity from which Northland alleged it obtained its non-office staff workers, be joined to the proceeding for the limited purpose of discovery. As a result of MEMIC's request and in order to accommodate discovery between the parties, the hearing officer issued an order on January 13, 2004, that established a discovery schedule and rescheduled the hearing to February 27, 2004. On February 20, 2004, Northland requested a continuance of the hearing until sometime after March 12, 2004. That same day, the hearing officer granted Northland's motion and continued the hearing until further notice.

Following this order of continuance, the hearing officer issued a series of orders pertaining to discovery disputes as well as an order on February 20, 2004, that encouraged MEMIC to seek alternatives to requesting that all eleven of Northland's roofers from Presque Isle be present as witnesses at the hearing in Augusta. On April 13, 2004, the hearing officer issued an order requiring the parties to brief certain issues that would enable him to determine whether the testimony of the roofers would be relevant to the proceeding.

MEMIC responded that the roofers' testimony was relevant to the issue of whether Southwind was, in fact, an employee leasing company as opposed to a temporary help services provider. It further argued that this distinction was relevant because Southwind was not registered as an employee leasing company and if Southwind was, in fact, an employee leasing company, its lack of registration as such would mean that Northland would have been required by Rule 560(4) to cover its roofers under the MEMIC policy as opposed to having them covered under a policy issued to Southwind. On June 21, 2004, the hearing officer issued an order scheduling the hearing for July 21, 2004. On July 21, 2004, the hearing was held in Augusta.

HEARING

At the start of the hearing, the parties submitted a list of fifteen stipulated facts and eighty-six stipulated exhibits. The Stipulation of Facts reads in its entirety as follows:

1. Maine Employers' Mutual Insurance Company ("MEMIC") issued policies of workers' compensation insurance that covered the employees of Northland Roofing, Inc. ("Northland") from July 10, 1993 through and including the July 10, 2002 to July 10, 2003 policy year ("policy year") at which time Northland non-renewed with MEMIC.
2. Northland is in the roofing business.
3. At issue is premium paid by Northland to MEMIC with respect to non-clerical laborers and/or roofers (hereinafter "roofers") between January 12, 2003 and July 10, 2003 ("disputed period").
4. At all time during the policy year the roofers were "employees" of Northland as that term is defined in common law and at 39-A M.R.S.A. § 102(11).
5. MEMIC issued a policy of workers' compensation insurance to Preferred Management, Inc. ("Preferred") effective March 10, 2001. MEMIC renewed the policy on March 10, 2002.
6. Northland further memorialized its contractual relationship with Preferred by entering into a service contract with Preferred on July 12, 2002 (Exhibit 11).
7. At the beginning of the policy year the MEMIC policy covered Northland's roofers on an "if any" basis.
8. MEMIC cancelled the Preferred policy effective July 19, 2002 for non-compliance with safety standards (Exhibit 50).
9. The only policy that covered the roofers between July 19, 2002 and January 12, 2003 was the MEMIC policy. MEMIC charged and collected premium for roofers during this time. MEMIC's entitlement to this premium is not disputed by the parties.
10. MEMIC endorsed the Northland policy on about September 6, 2002 to add roofers, effective July 10, 2002, the date the policy issued (Exhibit 13).
11. Northland entered into a service contract with Southwind Industrial Services, Inc. ("Southwind") effective January 12, 2003 (Exhibits 16, 17).
12. The relationship between Northland and Southwind during the disputed period with respect to the roofers fell within the definition of "employee leasing arrangement" and not "temporary help services" as defined at 32 M.R.S.A. § 14051(3)(C) 39-A M.R.S.A. § 104 and Bureau of Insurance Rule 560(3)(A).
13. Southwind never registered with the State of Maine as an employee leasing company under 32 M.R.S.A. § 14052 and Rule 560(3)(A).

14. Southwind first obtained workers' compensation insurance to cover its employees on January 1, 2003 and such coverage remained in effect from then through the end of the policy year (See Exhibits 1, 86).
15. MEMIC continued to charge and collect premium for roofers between January 12, 2003 and July 10, 2003. The parties disagree as to MEMIC's right to charge and collect premium during that time. The amount of such premium is unknown because MEMIC has never asked for or obtained payroll records that began on January 12, 2003.

At the hearing, Northland provided substantial evidence that was uncontroverted by MEMIC showing that, MEMIC's agent, the Hayden Perry Agency, had represented to Northland that the roofers would be removed from the MEMIC policy upon Northland obtaining workers compensation coverage for the roofers under a separate arrangement. Furthermore, the evidence shows that MEMIC, after initialing paying a claim on a Northland roofer injured during the disputed period then discovered that Northland had obtained coverage through Southwind and consequently denied the claim on the basis that the roofer was "not covered under Northland's workers' compensation policy" (Stipulated Exhibit 41). In addition, even months after MEMIC cancelled the Northland policy it still demanded that Southwind's carrier reimburse MEMIC for its initial inadvertent claim payment because the roofer "was not an employee of Northland Roofing but rather an employee of Southwind Industrial Services." (Stipulated Exhibit 43).

MEMIC attempted to show that, notwithstanding any of the representations by its employees and agents, under the provisions of the policy and due to Southwind being a *de facto* employee leasing company, Maine law would have obligated MEMIC to pay claims by the roofers during the entire policy period and, therefore, it should be entitled to premiums even though Northland had other duplicative coverage. MEMIC's arguments are unpersuasive because coverage does not, as a matter of law, equate to an entitlement to premium. For example, an insurer may be estopped from denying coverage without having a corresponding entitlement to premium for that coverage.

SUPERINTENDENT'S AUTHORITY

The Superintendent has only the powers expressly conferred upon him by the Legislature or that arise therefrom by necessary implication from those powers. See *Valente v. Board of Environmental Protection*, 461 A.2d 716, 718 (Me. 1983). This concept is codified in the Insurance Code, which states that the Superintendent shall have "the powers and authority expressly vested in him by or reasonably implied from [Title 24-A]" and "such additional rights, powers and duties as may be provided by other laws." 24-A M.R.S.A. §§ 211(2) and 211(3). Pursuant to 24-A M.R.S.A. §§ 2320(2) and 2320(3), a person aggrieved by the *application of the workers compensation rating system* has a right to appeal the decision to the Superintendent and obtain a hearing before the Superintendent. At such a hearing, which is a *de novo* hearing, the Superintendent sits in essentially an appellate role and his authority is limited to either affirming or reversing the rating action. *Id.* at § 2320(2).

In the present case, there is no controversy over the rating action taken by MEMIC. Northland does not contest that its roofers were improperly rated by MEMIC under classification code 5551. As both parties repeatedly assert, this case is a coverage and premium case. MEMIC argues that the roofers were covered under the MEMIC policy and, therefore, it is entitled to premiums from Northland for this coverage. Northland, on the other hand, argues that there was no coverage and to the extent there may have been some coverage, MEMIC is not entitled to premiums because of representations made by its agents. In other words, there was no enforceable contract that would entitle MEMIC to the premiums.

Unfortunate for Northland, is the Superintendent's lack of authority to decide what is essentially a contract dispute between Northland and MEMIC. No matter how convincing its case was that under its contract with MEMIC, MEMIC was not entitled to the disputed premium, the Superintendent lacks the authority in this instance to order MEMIC to reimburse the disputed premium. There is simply no evidence indicating that there was any misapplication of the rating system. Nor does MEMIC's failure to assert this defense act as a waiver of the issue. This is a jurisdictional issue. The courts are the proper forum for resolving such contractual disputes. The Superintendent cannot act as a cost effective arbitrator for the parties on this issue.

FINDINGS OF FACT

1. MEMIC applied the rating classification code 5551 to the roofers under its policy issued to Northland.
2. There is no evidence showing that MEMIC improperly applied the *rating system* to Northland.
3. Northland's evidence relates only to the coverage provided by the MEMIC policy and not the rating of the policy.

CONCLUSIONS OF LAW

1. Northland's Petition for Return of Unearned Premium is not properly brought pursuant to 24-A M.R.S.A. § 2320.
2. Northland's Petition is essentially an action on the contract or for unjust enrichment.
3. The Superintendent does not have the authority to resolve the contract issue that is in dispute in this case.

ORDER

Northland's Petition for Return of Unearned Premium is DENIED.

NOTICE OF APPEAL RIGHTS

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001-11007, and M.R.Civ.P. 80C. Any party to the proceeding may initiate an appeal within thirty (30) days after receiving this notice. Any aggrieved non-party whose interests may be substantially and directly affected by this Decision may initiate an appeal within forty (40) days of the date of this Decision. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

Per Order of

DATED: December 17, 2004

Thomas M. Record
Senior Staff Attorney
Designated Presiding Officer