

**ANTHONY KEEFE  
ENTERPRISES, INC.**

**v.**

**MAINE EMPLOYERS' MUTUAL  
INSURANCE COMPANY**

**DOCKET NO. INS-08-103**

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**CORRECTED  
DECISION AND ORDER**

Anthony Keefe Enterprises, Inc. is a builder and general contractor in Woolwich. Most people who perform work for Keefe Enterprises are paid as subcontractors rather than as employees. In January of 2008, however, after reviewing the audit for Keefe Enterprises' 2006-07 policy, the Maine Employers' Mutual Insurance Company (MEMIC) determined that a number of these workers should be treated as employees for rating purposes. Although the number of additional employees was reduced to five after further review, that still resulted in an audit premium bill of \$12,579, approximately doubling the premium for that policy period. Keefe Enterprises contested the audit premium, and the Superintendent held an adjudicatory hearing on June 9, 2008.<sup>1</sup> For the reasons set forth below, the petition is granted.

This Decision and Order was originally issued on August 15, 2008. As noted in Footnote 5, it contained an error which was called to the Superintendent's attention this morning by MEMIC. Pursuant to Bureau of Insurance Rule 350, § 19, MEMIC's request for reconsideration is granted, the Decision and Order is reissued as corrected (no other changes have been made), and the time for appeal is extended accordingly.

***General Background on the Issues***

This case shares a number of common issues of fact and law with *Gleason v. MEMIC*, No. INS-08-102, and *Alley Builders, Inc. v. MEMIC*, No. INS-08-104. Decisions in all three of these cases are being issued today, and the following background discussion is incorporated in identical form in all three decisions.

The ultimate question, when there is a dispute as to whether a worker belongs on the policyholder's payroll for rating purposes, is "Was this person the policyholder's employee during the policy period?" Pursuant to 39-A M.R.S.A. § 201, benefits are payable only to employees. Pursuant to 39-A M.R.S.A. § 102(11)(A)(7), an independent contractor is not a employee. The problem is that saying a worker is an independent contractor does not necessarily make it so, even if the understanding is memorialized in a written agreement. Workers' compensation is not a right an employee can waive, and the existence of a contract is only one of eight factors to be weighed in determining whether a worker is an employee or an independent contractor.<sup>2</sup> "In applying these factors, 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.A. § 102(13).

Because there is a broad range of borderline cases where the status of the worker is not obvious, and the decision process in these cases is fact-specific and judgmental, employee status is a question that can only be decided conclusively if and when the worker is injured on the job and files a claim for benefits, with limited exceptions that do not apply here. This situation creates considerable uncertainty for all parties. The standard workers’ compensation policy form issued by MEMIC and other workers’ compensation insurers responds to this uncertainty by providing for premium to be 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 [*sic*] Compensation Insurance) of this policy.” Pursuant to these terms, which have been approved by the Superintendent, MEMIC may charge premium not only for workers who have been acknowledged as employees and formally included in the payroll, but also anyone else who might be determined to be an employee if he or she files a claim against the policyholder.

This 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. Furthermore, the kinds of risk that may be considered significant, for purpose of this contract provision, must be interpreted in light of the reasonable expectations of the insured. This is particularly important in a line of insurance where the premium is initially calculated on an estimated basis, and revised retroactively at the end of the policy period based on the insurer’s audit of the policyholder’s payroll. If the information provided by the policyholder at the time of application was accurate, and there has been no growth or change in the business or other material changes in the risk during the policy period, then it will normally be reasonable for the policyholder to expect only a relatively small adjustment in the premium when the audit bill arrives, and when problems appear, it is reasonable to expect an opportunity to take corrective action when that is feasible.

Since 1991, one way Maine policyholders can deal with uncertainty regarding who is an employee is through a voluntary predetermination process under 39-A M.R.S.A. § 105, which permits a worker, a business, or an insurer to request an advisory ruling from the Workers’ Compensation Board as to whether the worker is one of the employees of the business or whether the worker is an independent contractor. A predetermination that the worker is or is not an employee establishes a presumption in any subsequent claim for benefits by that worker against that business, but this presumption is rebuttable, 39-A M.R.S.A. § 105(1)(A), and the claim will be decided by the Board on the basis of the evidence available at that time relating to the work being performed at the time of the injury. Nevertheless, although these rulings are nonbinding, they are made by the same agency that would decide any contested workers’ compensation claim, applying the same legal standard.

MEMIC has honored predeterminations for rating purposes, but formerly also honored a range of other evidence of independent contractor status that its policyholders might offer. In particular, undisputed testimony in these hearings

demonstrates that employers in the construction industry would often rely on certificates demonstrating that their purported subcontractors had general liability insurance. However, MEMIC has testified that recognizing subcontractors with that level of documentation led to a number of successful claims against MEMIC by workers whose employers had not paid premium.

In order to make its premium base more consistent with exposure, MEMIC implemented new standards. For policies issued to employers in the construction industry on or after October 1, 2006, a worker in the same line of business as the policyholder would not be accepted as an independent contractor without either a workers' compensation policy, evidence of coverage as an employee under a third party's workers' compensation policy, or a predetermination of independent contractor status issued by the Workers' Compensation Board.

In June of 2006, before implementing the new program, MEMIC sent a one-page "Subcontractor Alert" to all affected policyholders,<sup>3</sup> advising them that "we recommend review and/or action in the following areas regarding your company's subcontracting relationships." Recommendation 3 was "Independent Contractor Predetermination Forms," and MEMIC included the following text at the end of the paragraph, in substantially the following format:<sup>4</sup> **Note: Failure to furnish evidence that a subcontractor has workers' compensation insurance or an approved Predetermination of Independent Contractor Status form will result in MEMIC's premium auditor treating your subcontractor as an employee and including the subcontractor in your premium audit. Also, if your subcontractor hires employees, and does not have a workers' compensation policy covering the employees, you will be charged a premium based on the NCCI Basic Manual rule that governs subcontractors.**

MEMIC now also uses a Supplemental Questionnaire as part of its application process in the construction industry. Question 4 asks the applicant, among other things, "Do you obtain copies of approved Application for Predetermination of Independent Contractor Status for all subcontractors?" and "Do you verify workers' compensation from all subcontractors by means of a certificate of insurance?" Beneath this question is the warning: **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.**

In response, many policyholders who did not already have a practice of obtaining predeterminations began doing so. Unfortunately, other policyholders did not read the Alert and continued to rely on evidence of independent contractor status that MEMIC no longer considered sufficient, such as general liability certificates. A series of premium disputes followed, including this one.

Although 39-A M.R.S.A. § 105(1)(B) expressly provides that "Nothing in this section requires a worker, an employer or a workers' compensation insurance carrier to request predetermination," MEMIC has not said that predetermination is the only

means by which a policyholder may prove that a worker is an independent contractor. To date, no employer whose petition has been heard has claimed that the alternatives now provided by MEMIC are inadequate. The issue in these proceedings, therefore, is not whether MEMIC's new requirements are inappropriate, but the effect of the employer's delay in complying with those requirements.

All of these cases share certain key facts, supported by uncontested and persuasive testimony and documentary evidence. The policyholders began obtaining predeterminations for their subcontractors no later than a short time after the disputed audits. The Board found that all of those workers were in fact independent contractors, and these included many of the same workers for whom premium was charged in the audit, and for some employers included all of them. There were no material changes in the nature of their work or the terms of their contractual relationship between the inception of the disputed policy and the issuance of the predetermination. When there were subcontractors who had stopped working for the policyholder without ever getting predeterminations, they were performing substantially similar work under substantially similar terms as other workers who did stay on and obtain predeterminations that they were not employees.

The Legislature has given the Workers' Compensation Board exclusive jurisdiction over the question of employee status at the time of a claim, and Section 105 must be read as giving the Board primary jurisdiction to make preliminary rulings on the same question when no injury has occurred. Because a predetermination under Section 105 establishes a rebuttable presumption in a subsequent claim dispute, a similar presumption ought to apply in a premium dispute.<sup>5</sup> Even where no predetermination has been made, or the predetermination does not apply to the time period in question, deference must be given to the conclusions the Board has drawn from substantially identical facts. In these cases, MEMIC has offered no evidence or argument tending to rebut the presumption that the Board's predeterminations were correct.

Therefore, I find by a preponderance of the evidence that none of the workers in question was in fact an employee during the policy period, to the extent that meaningful answers can be given to that question at this time. All other things being equal, this factor should be decisive in favor of the policyholder. MEMIC's real goal in cases such as these, where the subcontractors do in fact qualify for predetermination, should be to ensure that the subcontractors have those predeterminations, not to collect a premium for a transitional period that is much higher than the premium charged for the same risk both before that time (when MEMIC did not require predeterminations) and after that time (when the required predeterminations were in place).

On the other hand, all other things are not necessarily equal. The Workers' Compensation Board decisions were nonbinding predeterminations, made at different times and sometimes involving different workers. In any event, a finding that a worker is more likely than not an independent contractor is hardly the same as saying MEMIC is certain to prevail if the worker is injured and files a claim.<sup>6</sup> It is

appropriate, therefore, for MEMIC to take reasonable measures to mitigate the residual risk that remains, as long as those measures are fair to the policyholder and not unduly burdensome. Therefore, a policyholder that knowingly or recklessly fails to comply with MEMIC's reasonable documentation requirements should not be able to fall back on litigating the underlying facts after the policy audit.

### ***Application to the Facts of the Case***

Although Anthony Keefe, the owner, and Jim Magno, the manager, failed to read MEMIC's Subcontractor Alert, this would not rise, in and of itself, to the level of knowing or reckless noncompliance for the reasons discussed in *Gleason v. MEMIC*. Furthermore, in this case MEMIC conducted an interim audit of the policy in question on October 30, 2006. The auditor reported: "Spot checked subs and certificates and all subs checked had certificates on file. All records in good order. Insured uses many subs." Although MEMIC's witness testified that the audit was conducted for underwriting purposes and the results were not shared with the policyholder, the process nevertheless gave Keefe Enterprises good reason to believe that its documentation processes remained adequate, since premium auditors visited the site, looked through the certificates of insurance, and found nothing amiss.<sup>7</sup>

### ***Order and Notice of Appeal Rights***

It is therefore *ORDERED* that the Petition is hereby *GRANTED*. MEMIC may not charge premium on Keefe Enterprises' 2006-07 policy for any of the workers who were paid as subcontractors, and may not charge premium on Keefe Enterprises' 2007-08 policy for any worker who was paid as a subcontractor and who obtained a favorable predetermination from the Workers' Compensation Board before April 1, 2008. MEMIC may not rely solely on failure to obtain a predetermination as the basis for charging premium on Keefe Enterprises' 2007-08 policy for any worker who performed no services for Keefe Enterprises on or after April 1, 2008.

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 (2000) and M.R. Civ. P. 80C. Any party to the hearing may 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 on or before October 14, 2008. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

<sup>1</sup> Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority. The time for issuance of a decision was extended, pursuant to 24-A M.R.S.A. § 235(2), by orders issued June 25 and July 31, 2008

<sup>2</sup> Furthermore, a contract is only considered evidence of independence if it provides "for the person to perform a certain piece or kind of work at a fixed price." 39-A M.R.S.A. § 102(13)(A).

<sup>3</sup> In July of 2007, the program was extended to other classifications and a version of the Subcontractor Alert was sent to those policyholders as well.

<sup>4</sup> The type was smaller, but the size was consistent with the rest of the text.

<sup>5</sup> In the Decision and Order as originally issued on August 15, this sentence erroneously read: "Because a predetermination under Section 105 establishes a rebuttable presumption in a subsequent claim dispute, a similar presumption ought to apply in a subsequent claim dispute."

<sup>6</sup> MEMIC has questioned whether the rebuttable presumption created by predetermination really does make more likely than not that the Board will still find the worker to be an independent contractor at the point when there is a claim. However, those concerns are not relevant here because MEMIC does accept predeterminations as acceptable proof of status and the findings made here are based on persuasive evidence that had timely applications for predetermination been submitted, they would have been granted.

<sup>7</sup> The final audit summary did indicate that two of Keefe Enterprises' 21 subcontractors carried workers' compensation insurance. However, it is implausible that the audit's spot check would have randomly chosen precisely those subcontractors and no others, especially since they were outside plumbing and insulation contractors whose status was never in question.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

**SEPTEMBER 2, 2008**

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**ROBERT ALAN WAKE**  
**DESIGNATED HEARING OFFICER**