

IN RE:)	
)	
CROSSWINDS AIR, INC)	
)	
v.)	
)	DECISION AND ORDER
MAINE EMPLOYERS' MUTUAL)	
INSURANCE COMPANY)	
)	
Docket No. INS-08-109)	
)	

I. PROCEDURAL HISTORY

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.

The parties to the proceeding are Crosswinds Air, Inc. (the "Petitioner") and Maine Employers' Mutual Insurance Company ("MEMIC"). On September 19, 2008, the Petitioner asked that the Superintendent set a hearing to determine whether or not MEMIC charged premium based in part on payments to a person whom the employer considered to be an independent contractor. The purpose of the hearing is to determine whether MEMIC properly designated this person an employee and charged premium consistent with applicable legal standards and with the rating plan approved by the Superintendent.

In a September 25, 2008 Notice of Hearing, the Hearing Officer set a hearing for October 20, 2008, with an intervention deadline of October 17, 2008. The Hearing Officer did not receive any applications for intervention. The public hearing took place as scheduled at the Bureau's Gardiner, Maine office. Present at the hearing were the Hearing Officer, Dawn Youland for the Petitioner, and Craig Reynolds for MEMIC. Petitioner's Exhibits 1 through 3,¹ and MEMIC Exhibits 1 through 4 were offered and admitted into evidence. The following witnesses testified under oath: Dawn Youland and Brenda Spurling for the Petitioner, and Craig Reynolds for MEMIC. The hearing was recorded and in public session.

The Hearing Officer conducted the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter IV; 24-A M.R.S.A. §§ 229 to 236; Bureau of Insurance Rule Chapter 350; and the Notice of Hearing. All parties had the right to present evidence, to examine or cross-examine witnesses, and to be represented by counsel; except for the last, they did exercise those rights.

II. POSITIONS OF THE PARTIES

The Petitioner argues that MEMIC improperly charged premium based on the remuneration paid to one person whom the Petitioner considers an independent

contractor. MEMIC argues that the person at issue does not meet the test set forth in 39-A M.R.S.A. § 102(13) and is therefore an employee.

III. FINDINGS OF FACT

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

1. The Petitioner is a corporation operating a private airport in Turner. The Petitioner's business manager is Dawn Youland. Hearing Transcript ("Hrg. Tr."), 11, 47; MEMIC Ex. 3.
2. MEMIC is a Maine corporation authorized to transact insurance.
3. In May 2006 MEMIC sent a document entitled "Subcontractor Alert for Construction-Related Policyholders." In part, this document said that the failure to "furnish evidence that a contractor has workers' compensation insurance or of an approved Predetermination of Independent Contractor Status form will result in MEMIC's premium auditor treating your subcontractor as an employee." Petitioner Ex. 1.
4. The Petitioner was not a policyholder in May 2006 and did not receive the notice until Ms Spurling sent it to the Petitioner on September 28, 2008. Hrg. Tr. 22.
5. On March 22, 2007 MEMIC received, through its agent The Whitmore Agency, an application for workers' compensation insurance from the Petitioner ("Application"). The Application was dated March 21, 2007 and signed by Brenda Spurling, of The Whitmore Agency, and another person for the Petitioner. MEMIC Ex. 1.
6. MEMIC issued policy number 1810084386 as a result of the Application.
7. The Petitioner obtained applications for waivers, which its two inactive principals signed, exempting them from workers' compensation coverage. The Petitioner also obtained applications for waivers from three people whom it considered to be independent contractors. The person at issue in this proceeding was Chris Twitchell. Hrg. Tr. 14, 48 - 49.
8. On behalf of the Petitioner, Ms Spurling sent all five applications to MEMIC. *Id.*
9. The "General Information" section of the Application included 24 questions. Question 6 asked "Are sub-contractors used?" and question 7 asked "Any work sublet without certificates of ins.?" The "General Information" section was left blank. MEMIC Ex. 1.
10. On May 9, 2007 MEMIC's Underwriting Department sent Ms Spurling an e-mail message stating that "[w]e are still missing some information from [the Petitioner] ... We still need ... the General Information Questions Section on the Application completed." MEMIC Ex. 2.
11. On June 4, 2007, MEMIC received another copy of the Application with the General Information section completed. MEMIC Ex. 2.
12. The answers to Question 6 and Question 7 on the revised Application were "no." *Id.*
13. On May 29, 2008 MEMIC performed a premium audit of the Petitioner. The audit showed that the Petitioner had paid remuneration to three subcontractors. MEMIC Ex. 3.
14. During the audit, MEMIC gave the Petitioner applications for predetermination. Hrg. Tr. 15.
15. Mr. Twitchell performs odd jobs and assists a mechanic with changing floats on airplanes. Hrg. Tr. 27.
16. Mr. Twitchell works when the Petitioner asks him to, if he has time available. *Id.*
17. The Petitioner pays Mr. Twitchell \$15 per hour and documents this with an IRS Form 1099. Hrg. Tr. 28.

18. Mr. Twitchell provides tools such as a screwdriver and hammer. *Id.*
19. The Petitioner has employees who also do the same tasks that Mr. Twitchell does. *Id.*
20. Mr. Twitchell has worked for the Petitioner since July 23, 2007. Hrg. Tr. 30.
21. Mr. Twitchell assists the mechanic but does not use the mechanic's tools. He also assists the airport manager. Hrg. Tr. 39 – 40, 44.
22. There is no evidence whether Mr. Twitchell hires his own assistants.
23. The Petitioner did not obtain a predetermination from the Maine Workers' Compensation Board concerning Mr. Twitchell's status as an independent contractor.

IV. ANALYSIS AND CONCLUSIONS OF LAW

The issue here is whether or not Mr. Twitchell's work for the Petitioner during the policy period exposed MEMIC to potential liability under the Maine Workers' Compensation Act ("WCA") had he claimed a work-related injury. 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 Mr. Twitchell.

The WCA protects employees from economic loss resulting from injuries "arising out of and in the course of employment." 39-A M.R.S.A. § 201(1). Such protection is mandatory. Only a few exceptions let a person waive coverage under the WCA. 39-A M.R.S.A. § 102(11). One such exception is for an independent contractor. The WCA 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.A. § 102(13). The WCA also lists eight factors for the Workers' Compensation Board, which has exclusive jurisdiction over a person's employee or independent contractor status, to consider in deciding if a person meets the definition.²

The WCA allows a worker's status to be predetermined voluntarily. 39-A M.R.S.A. § 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 he or she has a workplace injury and the parties litigate this status in a proceeding before the Board. As there was no Board predetermination for Mr. Twitchell, MEMIC could look into this question during its premium audit.

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." 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.

The evidence supports MEMIC's decision to consider Mr. Twitchell an employee for underwriting purposes during the policy period. There was no contract obligating him to a fixed price for his work. There is no evidence that he hired or supervised his own assistants; in fact, he assisted some of the Petitioner's employees. He furnished no tools other than possibly a screwdriver or a hammer. Ms Youland testified that he did not do much work that requires tools. She also testified that he worked for the Petitioner if he had time available. However, this testimony does not show that Mr. Twitchell controlled the progress of his work. Such control in any event would be inconsistent with the testimony that he was merely an assistant. As he was an assistant, his work was necessarily part of the Petitioner's regular business operating a small airport. Ms Youland testified that it is common for workers to do as independent contractors the type of labor he did. She also said that the Petitioner has other workers, whom she described as employees, doing the same work as Mr. Twitchell. This factor suggests that it was not typical for his work to be of an independent nature. Ms Youland testified that Mr. Twitchell started working on July 23, 2007 and received \$7,050 for his labor in 2007. At \$15 hourly, this equals 470 hours of labor for the 23 weeks remaining in 2007 when he started working for the Petitioner. It is reasonable to conclude that he worked about 20 hours on average each week. While he might have had enough time to work for other outfits, this calculation also suggests that he and the Petitioner had arranged for him to work basically as a half-time employee. This conclusion fits with Ms Youland's testimony that the Petitioner paid him by the hour, not by the job.

Ms Youland raised the interesting argument at hearing that MEMIC accepted two other workers at the Petitioner as independent contractors, based on the same information that MEMIC used to conclude that Mr. Twitchell was an employee. However, Ms Youland did not offer any other evidence to support this argument. I therefore do not find that MEMIC acted unfairly or inconsistently when it reached, if it did, a different conclusion about Mr. Twitchell's status.

V. ORDER

IT IS HEREBY ORDERED that the Petition is DENIED. MEMIC may charge and collect premium based on the remuneration attributable to Mr. Twitchell.

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.A. § 236, 5 M.R.S.A. § 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.A. § 11004.

¹ Petitioner's Exhibit 2 supposedly is a statement from Chris Twitchell, the person whose employment status led to this proceeding. The statement is unsworn, and Mr. Twitchell was not at the hearing to testify. Notwithstanding that MEMIC did not object to this document being admitted as evidence, I have elected not to consider it in reaching my decision. The Maine Administrative Procedure Act, 5 M.R.S.A. Chapter 375, subchapter IV provides in part that admitted evidence must be the sort "upon which reasonable persons are accustomed to rely on in the conduct of serious affairs." 5 M.R.S.A. § 9057(2). Because the author was not available for cross-examination, this document is especially unreliable hearsay. It is also not sworn and therefore not qualified under 5 M.R.S.A. § 9057(3).

² 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 progress of the work, 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.A. § 102(13).

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: November 7, 2008

By: _____
BENJAMIN YARDLEY
Attorney