

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
PETITIONER'S MOTION FOR
RECONSIDERATION AND
CLARIFICATION OF
SUPERINTENDENT'S
DECISION AND ORDER**

I. PROCEDURAL HISTORY

See the August 19, 2011 Decision and Order for a detailed history of this proceeding to that date. Capitalized terms used but not defined in this Order have their respective meanings in the Decision and Order.

On September 6, 2011, the Petitioner filed with the Hearing Officer a timely Motion for Reconsideration and Clarification of Superintendent's Decision and Order. The Hearing Officer ordered that MEMIC would have until September 14th to respond. Code Me. R. 350(7)(C). MEMIC did so on September 14th.

II. POSITIONS OF THE PARTIES

Bourne asks that the Superintendent revise the Decision and Order in three regards, as follows:

Bourne's first request includes two alternatives. First, he says that there is sufficient proof that the five sole proprietors (Johnson, Deslauriers, Durgin, Roundy and Brokish) and the partner (Stoltz) have "lawfully secured [their respective] workers' compensation obligations" and that their remuneration should not be considered in setting Bourne's premium because of the last sentence of Part Five (C)(2), of the policy. Second, he says that, if there is not enough proof that they have done so, MEMIC should treat Part Five (C)(2) of the policy as separate from the test in 39-A M.R.S. § 105-A(I)(B) for premium purposes and determine whether those workers have lawfully secured their obligations under Title 39-A and, if so, not base premium on their remuneration; but, if not, then apply the section 105-A(I)(B) test to each worker and base premium accordingly on each finding.

Bourne also asks that the Superintendent clarify what proof Bourne must submit to MEMIC and for various findings of fact and conclusions of law.

MEMIC seems to agree with Bourne that Part Five (C)(2) and section 105-A(I)(B) are separate questions. MEMIC argues in essence that Part Five does not prohibit MEMIC from charging premium to a general contractor based on remuneration paid to a sole proprietor who does not have to insure him- or

herself because of that status. MEMIC generally concludes that a policyholder's failure to comply with the company's audit rules must have consequences. MEMIC asks that the Superintendent revise Section V of the Decision and Order.

III. DISCUSSION

The parties are at this pass for two reasons. First, Bourne did not comply with his contractual obligation to give MEMIC "proof that the employers of [the workers at issue] lawfully secured their workers' compensation obligations." As explained in the Alert, Bourne could have done so through either certificates of worker's compensation coverage or approved predeterminations of independent contractor status from the Board. Such proof would have answered the question about their status as workers. He did not do so, however, for reasons that I think resulted from a misunderstanding. He simply did not realize that a worker who need not have Title 39-A coverage on him- or herself—such as a sole proprietor—could still be an employee of a hiring agent by operation of the 39-A M.R.S. § 105-A(I)(B) 12-part test. Second, MEMIC did not comply with the requirement of 24-A M.R.S. § 2320(2) that it "provide . . . reasonable means" for Bourne to contest the company's application of the rating system.

Contrary to the parties' common concern, I do understand that Part Five of the policy is distinct from the section 105-A test. The points of the Decision and Order in part are that the Alert does not amend the policy, that Bourne's failure to give MEMIC the information that the Alert sought does not automatically make the "paperless workers" his employees, and that MEMIC must comply with section 2320(2). I said in Part VI of the Decision and Order that "[t]he parties should focus on the 12-part test in 39-A M.R.S. § 105-A(I)(B)" because there were neither certificates of Title 39-A coverage nor approved predeterminations covering the workers in question.

I looked for cases interpreting usefully for the parties' purposes the phrase "reasonable means whereby any person aggrieved by the application of its rating system may be heard." There was not much to work with. The Florida Supreme Court in *Florida Welding & Erection Service, Inc. v. American Mut. Ins. Co.*, 285 So. 2d 386, observed that this language does not address the "how and when" specifically because what is reasonable varies from case to case. The Iowa Supreme Court said in *Travelers Indem. Co. v. D.J. Franzen, Inc.*, 792 N.W.2d 242, 248, that similar language "clearly outlines" the process for resolving premium disputes. And in *American Home Assurance Company v Daffodil General Cont.*, 2008 NY Slip Op 32434U, a New York trial judge denied the insurer's motion for summary judgment because it was not clear whether the insurer had provided such a means.

While the cases from other states are not, in my view, particularly helpful, the statute does say that the means must be reasonable. What is reasonable in one case might not be reasonable in another. I therefore decline to prescribe a specific procedure for the parties to follow, other than to say that MEMIC's basic

obligation is 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. MEMIC's August 23, 2011 letter to Mr. Cole seems to set out a reasonable process for doing so. MEMIC may indicate what information it would like to have, as it has done. However, Bourne has the burden, which includes deciding what information he wants to present.

I decline to amend my August 19, 2011 Decision and Order as requested by either party.

V. ORDER

I HEREBY ORDER that the August 19, 2011 Decision and Order denying the Petition is REAFFIRMED. Consistent with that Decision and Order, the parties may return to the Bureau for further proceedings in this case, if necessary, after MEMIC has, consistent with section 2320(2), heard Bourne's evidence concerning the workers at issue and reviewed the manner in which it applied the rating system.

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: September 28, 2011

By: _____
BENJAMIN YARDLEY
Attorney