

IN RE:)	
)	
YOUNG’S BUILDING CONTRACTORS, INC.)	
)	
v.)	
)	DECISION AND ORDER
MAINE EMPLOYERS’ MUTUAL)	
INSURANCE COMPANY)	
)	
Docket No. INS-09-100)	
)	

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 Young's Building Contractors, Inc (the “Petitioner”) and Maine Employers’ Mutual Insurance Company (“MEMIC”). In January 2009, the Petitioner asked that the Superintendent set a hearing to determine whether or not MEMIC charged premium based in part on payments to workers whom the employer considered to be independent contractors. The purpose of the hearing was to determine whether MEMIC properly designated these workers as employees and charged premium consistent with applicable legal standards and with the rating plan approved by the Superintendent.

In a January 22, 2009 Notice of Hearing, the Hearing Officer set a hearing for February 27, 2009, with an intervention deadline of February 26, 2009. The Hearing Officer rescheduled the hearing to March 12, 2009 with the parties’ consent by a Procedural Order dated March 5, 2009. The Hearing Officer did not receive any applications for intervention. The public hearing took place as rescheduled at the Bureau’s Gardiner, Maine office. Present at the hearing were the Hearing Officer, Jeffery Young for the Petitioner, and Craig Reynolds and Daniel Montembeau for MEMIC. MEMIC Exhibits 1 through 3 were offered and admitted into evidence. The Petitioner offered no exhibits. The following witnesses testified under oath: Jeffery Young for the Petitioner, and Craig Reynolds and Daniel Montembeau 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 four workers whom the Petitioner considers independent contractors. MEMIC argues that the Petitioner did not obtain predeterminations as to independent contractor status for those workers for the policy period at issue and, in any event, these workers do not meet the test set forth in 39-A M.R.S.A. § 102(13) and therefore are employees.

III. FINDINGS OF FACT

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

1. The Petitioner is a Maine corporation operating a construction business in Mt. Desert. Mr. Young is the Petitioner's sole shareholder and oversees its building activities. The Petitioner contracts with a bookkeeper for accounting and some business management services. *Hearing Transcript ("Hrg. Tr.")*, 8-9.
2. MEMIC is a Maine corporation authorized to transact insurance.
3. In October 2006 MEMIC sent a notice to its policyholders with construction-related business a notice indicating that MEMIC would require approved predeterminations from the Maine Workers' Compensation Board in order for workers to be considered independent contractors for the purpose of establishing premium.
4. The Petitioner was a policyholder in October 2006 and received the notice. *Hrg. Tr.* 18, 42.
5. On October 24, 2006, Mr. Young signed a Construction Supplemental Questionnaire in connection with the Petitioner's renewal policy of workers' compensation insurance with MEMIC for the period starting January 11, 2006. Mr. Young checked the answer "yes" to the question "Do you obtain copies of approved Application[s] for Predetermination of Independent Contractor Status for all subcontractors?" (emphasis in original) and to the question "Do you verify workers' compensation from all subcontractors by means of a Certificate of Insurance?" MEMIC Ex. 1, *Hrg. Tr.* 22.
6. MEMIC issued policy number 1810076267 effective from January 11, 2007 to January 11, 2008 to the Petitioner.
7. On April 17, 2007, MEMIC performed a premium audit of the Petitioner for the policy that had been effective from January 11, 2006 to January 11, 2007. Its auditor discussed the need for approved predetermination forms for uninsured subcontractors with the Petitioner's bookkeeper and left copies for the Petitioner to complete. MEMIC Ex. 3, *Hrg. Tr.* 29, 35-36.
8. On March 18, 2008, MEMIC performed a premium audit of the Petitioner for the policy at issue in this proceeding. The audit showed that the Petitioner had paid remuneration to four subcontractors and that, based on their remuneration, the Petitioner owed another \$27,488 in premium. MEMIC Ex. 2.
9. The Petitioner did not obtain predeterminations from the Maine Workers' Compensation Board concerning the employment status of any of these workers. *Hrg. Tr.* 8, 13-14, 15.

ANALYSIS AND CONCLUSIONS OF LAW

The Petitioner uses employees and subcontractors in its residential building and remodeling business. MEMIC collects workers' compensation insurance premium based on the remuneration paid to those workers identified as employees. As to the other workers, before October 2006, MEMIC would accept certificates of general liability insurance as evidence that they were independent contractors whose remuneration would not be included in the premium base. That month, MEMIC changed this practice and sent its residential building policyholders a notice to the effect that they should obtain from the Maine Workers' Compensation Board approved predeterminations as to independent contractor status of these workers. The Petitioner received a copy of this notice.

Because the Petitioner's workers' compensation policy would be renewing in January 2007, MEMIC also sent the Petitioner a Construction Supplemental Questionnaire. Question 4 of this questionnaire asked if the Petitioner obtained "copies of approved Application[s] for Predetermination of Independent Contractor Status for all subcontractors" (emphasis in original). Question 4 also asked if the Petitioner verified "workers' compensation from all subcontractors by means of a Certificate of Insurance". The Petitioner answered both questions "yes". The following note appeared just below these questions:

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. [Boldface and emphasis in original.]

Mr. Young signed the questionnaire for the Petitioner on October 24, 2006. Mr. Young did not obtain Board-approved predeterminations or certificates indicating workers' compensation coverage from the four workers at issue. In fact, concerning evidence of his subcontractors' insurance for workers' compensation, he testified that he "did not require them to have Workers' Comp on themselves." *Hrg. Tr.* 15.

These failures are problematic because the workers' activities for the Petitioner during the policy period might have exposed MEMIC to potential liability under the Maine Workers' Compensation Act had any of them claimed a work-related injury. If so, then MEMIC would have been justified in deciding as an underwriting matter that it should collect premium from the Petitioner based on the remuneration that it paid to them. The question in this case is the effect of the Petitioner's failure.

The Petitioner was a MEMIC policyholder in October 2006, when the company sent the notices about predeterminations. Mr. Young admitted signing the questionnaire and did not deny receiving the notice. He testified, credibly, that he focused on the practical side of his business and left the paperwork to the bookkeeper and the insurance agent.¹ He testified that he "didn't realize that there was ever any time stated to by my insurance agent or my bookkeeper or

anyone that without this, you will pay premiums on these people." *Hrg. Tr.* 17. However, he also testified that he had heard about the predeterminations in 2006 "as a method to basically legitimize and make sure that you knew the difference between my employees and my subcontractors." *Hrg. Tr.* 24. He had the opportunity in October 2006 either to provide correct information when he completed the two questions from the questionnaire or, if he did not understand them, to ask. Instead, he gave inaccurate answers to question 4 of the questionnaire. As was the case in *Alley Builders v. MEMIC*, INS-08-104, those answers were material to MEMIC's assessment of the risk that it assumed, and Mr. Young is responsible to MEMIC for the error.

V. ORDER

IT IS HEREBY ORDERED that the Petition is DENIED. MEMIC may charge and collect premium based on the remuneration attributable to the four workers in question.

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 MEMIC audited the Petitioner's remuneration the following April and discussed with Mr. Young's bookkeeper the need for predeterminations. The policy at issue here had been in effect for about three months. MEMIC could reasonably assume that the bookkeeper spoke for Mr. Young as to payroll matters and would pass along to him the information that she received related to the audit.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: April 13, 2009

By: _____
BENJAMIN YARDLEY
Attorney