



the Notice of Hearing. All parties had the right to present evidence, to examine or cross-examine witnesses and to be represented by counsel, and did exercise those rights.

As jointly agreed, MEMIC gave its closing argument orally at the end of the hearing, and the Petitioner submitted its closing argument in writing on September 10, 2009.

## II. 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, formed in 2006, all of whose common stock the Theobald Family Trust holds. The Petitioner's officers are Dorothy Clark, president; Kenneth Theobald, III, vice-president; Pamela Theobald, treasurer; and Kenneth Theobald, Jr., clerk. Kenneth Theobald, Jr. is a trustee of the family trust, and Kenneth Theobald III and Dorothy Clark are trustees and beneficiaries of the trust. These family members work for the Petitioner in varying capacities.
2. MEMIC is a Maine corporation authorized to transact workers' compensation insurance. Relevant to this proceeding, it insured the Petitioner between March 21, 2007 and March 21, 2008, then between March 21, 2008 and July 3, 2008.
3. The Petitioner's March 20, 2007 application for insurance shows remuneration attributable to clerical office employees and to woodenware manufacturing.
4. The Petitioner's July 3, 2008 application, made when the Petitioner changed producers, shows remuneration attributable to clerical office employees, woodenware manufacturing and sawmill operations.
5. The Petitioner buys wood logs approximately four feet long and measuring between five to ten inches in diameter. Using machines such as band saws, chainsaws, wood chippers, edgers and sanders, the Petitioner turns the logs into wood chips, chunks, grilling planks, smoking logs, and smoking dust for sale to restaurants and retailers.
6. On November 7, 2008, the Maine Workers' Compensation Board approved Applications for Waiver of workers' compensation coverage filed by Kenneth Theobald, Jr., Kenneth Theobald, III, Pamela Theobald and Dorothy Clark.

## III. ANALYSIS AND CONCLUSIONS OF LAW

The Petitioner contends, first, that MEMIC should allow waivers of workers' compensation coverage on individuals who do not own corporate stock but who are executors or beneficiaries of a family trust that owns stock in the Petitioner. Related to this issue, the Petitioner argues that the waivers should retroactively cover the policy period because MEMIC and its producers delayed the Petitioner from applying for the waivers. Second, the Petitioner contends that MEMIC should classify the Petitioner's entire sawmill operation as woodenware. MEMIC's position is, first, that the Workers' Compensation Act does not permit retroactive waivers and that MEMIC made no misrepresentations, and, second, that it has properly rated the Petitioner's business operations between woodenware and sawmill.

### A. Waivers

The Workers' Compensation Act generally applies to employees. However, "a bona fide owner of at least 20% of the outstanding voting stock of the corporation by which that person is employed or a shareholder of the professional corporation by which that person is employed" may apply to the Workers' Compensation Board for a waiver of coverage. 39-A M.R.S.A. § 102(11)(A)(4). Until the Board approves a waiver, the insurer is liable for benefits if the working owner suffers an injury. The insurer may therefore charge premium for that risk. In this case, there would not be a question that each working member of the Theobald family could waive coverage had he or she owned enough stock directly in the Petitioner. In fact, a prior shareholder, Ken Johnson, received a waiver as a 20 per cent owner in April 2007. The issue here is whether or not the waiver signed by a Theobald family member would have insulated MEMIC from liability under the Maine Workers' Compensation Act had he or she claimed a work-related injury during the policy periods at issue. If not, 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 the family members.

The workers' compensation system is a legislative alternative to litigating employment related injuries in the tort system. The system's success depends in part on a uniform understanding of what sort of nexus between the employer and employee qualifies for waiver under section 102(11)(A)(4).

Section 102(11)(A)(4) sets a clear standard to follow. It requires that, first, the applicant for waiver be a "bona fide owner." This term requires that the ownership be "actual" or "genuine", with the powers that go with ownership. An essential question is whether the owner holds the property for his own benefit. A trustee by definition does not hold property for his or her own benefit. Similarly, a beneficiary does not hold the body of a trust for his or her own benefit. Second, the statute requires that the person own 20 percent of the outstanding stock of a corporation. There is no evidence that the family members own voting stock in a corporation. The evidence is that the Theobald Family Trust owns the Petitioner's stock. Had a family member claimed a work-related injury, and the validity of his or her waiver called into question, it is probable that MEMIC would have been found liable under the Workers' Compensation Act. MEMIC therefore had a reasonable basis for charging premium based on remuneration attributable to the family members seeking waiver as trustees or beneficiaries of the family trust.

## B. Retroactivity

The Petitioner argues that the waivers that the Board approved in November 2008 should be retroactive to March 20, 2007 because the family members delayed their applications to the Board based on advice from MEMIC.

A section 102(11)(A)(4) waiver is not effective until "the board has found that" the person is qualified. In other words, waivers are not effective until the Board

approves them. Except for Mr. Johnson, that did not occur until November 7, 2008.

There is no evidence that the producers to whom the Petitioner turned for advice told either the Petitioner or the family members not to apply for the waivers. For example, on February 5, 2007 a producer at Readfield Insurance sent an e-mail to Ms Clark saying that an executor of a trust could not waive coverage. Mr. Theobald testified that his daughter, Dorothy Clark, talked with a producer at Thibodeau Insurance, which was agent of record between March 2007 and July 3, 2008, about the waiver. He testified that the producer told Ms Clark that as "owners and operators, we could not be waived." Last, there is a September 19, 2008 e-mail message to Ms Clark from Readfield Insurance explaining why the producer did not think that "these individuals can waive coverage". Nevertheless, the producer sent waiver forms for the family members to complete and return to the producer for filing with the Board. She said, "[w]e'll see if we can get them approved."<sup>1</sup> At most, I can only conclude that the producers warned the Petitioner that waivers might not be effective.

There is also no evidence that MEMIC directly or indirectly delayed this process. Mr. Theobald testified only that he was "assuming that the underwriters at MEMIC talked to our brokers, and they knew what the application was for and they approved it, because they had to approve it before we filled out the application, or we would not have filled out the application." Mr. Montembeau testified that he did not know about the trust until sometime in 2008. Ms Schwartz testified that her review of MEMIC's records showed that MEMIC had no communication with anyone about the trust issue until the Petitioner filed a complaint with the Bureau. Ms Clark wrote to MEMIC on November 8, 2008 to say that the Petitioner was filing a complaint. This was the day after the Board approved the Theobald family members' waivers.

## B. Classification

Workers' compensation insurers in Maine must rate risks according to "a uniform classification system," which in Maine is promulgated by NCCI. 24-A M.R.S.A. § 2382-B(1). In part, the purpose of this system is to treat like risks similarly. NCCI classifies risk based on an insured's entire business. The appropriate basic classification is made by fitting the insured's business activities to the proper NCCI codes. Generally speaking, the basic classification applies to all of the insured's activities, job duties and operations. Standard exceptions are made for operations that are common to most businesses, such as clerical work. General exclusions are also rated separately if the basic classification does not include the hazards associated the excluded operations. Sawmill operations are one general exclusion.

MEMIC classified much of the Petitioner's payroll as woodenware manufacturing, under Code 2841. NCCI describes this activity as "the manufacture of a variety of wood products ... requiring only a minor amount of finishing and assembly

work." NCCI gives a long list of products, including baseball bats, bobbins, bowls, brush and broom handles, toothpicks, toys and window shade rollers. The important risk factor in this code is not so much the type of product that the insured makes but the fact that its process involves only "a minor amount of finishing and assembly work." The Petitioner's operations supporting this classification include making small planks for cooking fish.

MEMIC also put some of the Petitioner's payroll in the sawmill operations because of the raw material and processes that the Petitioner uses to make its products. Sawmill operations are a separate classification<sup>2</sup> and a general exclusion under the NCCI classification system. General exclusions are activities involving hazards that are classified separately unless included in the insured's basic classification. General exclusions are riskier activities, such as aircraft operations, new construction and stevedoring. The woodenware manufacturing description recognizes this risk by stating that "[s]ome insureds engaged in woodenware manufacturing may also engage in sawmill operations."

The parties' respective testimony differed in detail over the description of the raw materials that the Plaintiff fashions into products. For example, Mr. Theobald testified that the business would "purchase four-foot wood from local landowners" and that the pieces of wood are "not even logs. They're four-foot sticks." He also described them as being "four-, five-, six-inch diameter." Mr. Webb described the raw material as "a log, it's a piece of tree four feet long. Whether you get 4 to 16 feet, it's coming in as a log with bark on its exterior surface, and with their product line they're not sawing large diameter logs, they're sawing smaller logs to make their product." Mr. Webb's Loss Control Survey dated July 11, 2008 described the logs as being between five and ten inches in diameter.

While the Petitioner's testimony tended to minimize the size of the raw material, the undisputed evidence is that Petitioner put the logs through more than minor finishing and assembly and to some extent engaged in work that was under the sawmill class code.<sup>3</sup> NCCI's description of woodenware, Code 2841, puts it this way: "Since Code 2841 does not include 'sawmill' in its phraseology, Code 2710 is applicable to sawmill operations engaged in by woodenware manufacturing operations." MEMIC's premium audit revisions indicate that the insurer did account for the Petitioner's sawmill activities.

#### IV. ORDER

For the foregoing reasons, it is hereby ORDERED that the Petition is denied.

#### V. 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.

<sup>1</sup> That the Workers' Compensation Board did issue waivers does not show that the producers were wrong or that they misled the Petitioner. The waiver form is basically a certification to the Board that the information on the form is "truthful and accurate." A waiver's validity would not be tested until a claim for benefits were presented to the Board. See, for example, *Swett v. Classic Carriers, Inc. et al.*, 2006 West Law 6097717 (ME. Work. Comp. Bd.)

<sup>2</sup> Code 2710 describes sawmill operations as "sawing logs into desired lengths to produce rough lumber by use of circular carriage or band saws. It applies to all sawmills, whether portable or stationary."

<sup>3</sup> NCCI was not a party to this proceeding but did participate in the August 3, 2009 telephone discussion. As a result of that discussion, it issued an e-mail on August 14, 2009 stating in part that "[b]ased on NCCI's review of the information provided to us that classifications assigned to Lexington Outdoors are correct." This was admitted to the record as Hearing Officer Exhibit 1. Because NCCI did not explain the reasons underlying its conclusion, I have not considered it in reaching my opinion.

**PER ORDER OF THE SUPERINTENDENT OF INSURANCE**

DATED: October 13, 2009

By: \_\_\_\_\_  
BENJAMIN YARDLEY  
Attorney