

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

Combined Management, Inc.)	
)	
vs.)	
)	
Maine Employers' Mutual Insurance Company)	DECISION AND ORDER
)	
Docket No. INS-02-789)	
)	

In the proceeding the Superintendent is asked to consider a premium dispute regarding workers' compensation insurance issued by Maine Employers' Mutual Insurance Company ("MEMIC")¹ to the account of Combined Management, Inc. ("CMI"), an employee leasing company that had under contract ninety (90) client lessee companies under an employee leasing arrangement² during the coverage period of the dispute.

¹ Pursuant to the provisions of 24-A M.R.S.A. § 3701: "[t]he Maine Employers' Mutual Insurance Company is established for the purposes of providing workers' compensation insurance and employers' liability insurance incidental to and written in connection with workers' compensation coverage to employers of this State at the highest level of service and savings consistent with reasonable applicable actuarial standards and the sound financial integrity of the company. It is also the purpose of the company to encourage employer involvement and to be responsive to employer experience and advice."

² As defined pursuant to the provisions of Bureau of Insurance Rule ("Rule") 560 (3)(A), an "employee leasing arrangement" means an arrangement, under contract or otherwise, whereby one business or other entity leases all or a significant number of its workers from another business. Rule 560 (3)(C) defines "lessee" to mean an entity that obtains all or part of its work force from another entity through an employee leasing arrangement or employs the services of an entity through an employee leasing arrangement.

I. PROCEDURAL HISTORY

By letter dated August 26, 2002, CMI requested that the Superintendent hold a hearing concerning workers' compensation insurance coverage issued by MEMIC, stating the issues for consideration as follows:

- (1) The underwriting process, procedure, [experience] rating and the application of applicable credits [and/or debits] relative to the issuance of [workers' compensation insurance] policies [by MEMIC] to CMI's clients; and
- (2) The subsequent audit performed by MEMIC and the amount of money [premium] that MEMIC asserts is due.

The Superintendent further reserved the right to address any other related issues raised by any party or by the Superintendent that the Superintendent, in his sole discretion, deems appropriate to address in the proceeding. See, Notice of Pending Proceeding and Hearing at page 2, Section II.

The genesis of CMI's hearing request is based on premium subject to dispute, as defined in Rule 560 (3)(F). Based on a final audit, MEMIC submitted premium bills to CMI on June 20, July 16, and July 18, 2002, for additional premium owed in the amount of \$82,859.25 (this premium is in addition to premium paid by CMI to MEMIC in the amount of \$250,721.75 in December 2001). It is the additional amount owed of \$82,859.25 that is the premium subject to dispute in the proceeding.

On September 6, 2002, the Superintendent issued a Notice of Pending Proceeding and Hearing. In the Notice, the parties to the proceeding were identified as CMI, MEMIC, National Council on Compensation Insurance ("NCCI")³, and a Bureau of Insurance Advocacy Panel. The Notice also provided an opportunity for persons to submit applications for intervention in the proceeding. In accordance with the provisions of Rule 560 (3)(F), the Superintendent ordered CMI to provide an estimate of the premium it believed to be correct, and to promptly pay to MEMIC any undisputed portion of the premium.

³ NCCI is the advisory rating organization designated by the Superintendent pursuant to 24-A M.R.S.A. § 2382-B (2) to assist in gathering, compiling, and reporting relevant statistical information from workers' compensation insurers on their workers' compensation experience in accordance with a uniform statistical plan approved by the Superintendent.

By correspondence dated September 18, 2002, CMI responded to the Superintendent's directive and stated the position that MEMIC owed CMI a refund in the amount of \$35,940.25 as opposed to CMI owing MEMIC the amount of \$82,859.25.

By correspondence dated September 19, 2002, the Advocacy Panel suggested that the Superintendent consider treating CMI's client lessee companies as entitled to receive individual notice of the proceeding pursuant to the provisions of 5 M.R.S.A. § 9052 (1)(A). In response thereto, on September 20, 2002, the Superintendent ordered CMI to file with the Superintendent a list of CMI's client lessee companies that were provided workers' compensation insurance coverage by MEMIC for the period of the premium dispute, together with each lessee's mailing address and the name of the authorized agent (president, treasurer, officer, or other contact) of each lessee. CMI provided that list to the Superintendent by correspondence dated September 20, 2002.

On September 23, 2002, the Superintendent issued a Procedural Order that, among other matters, established certain deadlines in the proceeding. By the Procedural Order the Superintendent also directed the Advocacy Panel to deliver to each person on the CMI Client List a copy of the Notice of Pending Proceeding

and Hearing, together with a copy of the Procedural Order, and a neutral, fact-specific "information disclosure memorandum" summarizing the pending proceeding and notifying the persons on the CMI Client List of their opportunity to submit an application for intervention in the proceeding. The Advocacy Panel delivered the Information Disclosure Memorandum to the CMI Client List entities on September 24, 2002. No person submitted an application to intervene in the proceeding.

By filing made September 30, 2002, MEMIC requested, in accordance with the provisions of 24-A M.R.S.A. § 2320 (3), that the Superintendent continue the hearing. By Order dated October 1, 2002, the Superintendent granted the motion for continuance and scheduled a prehearing conference for October 18, 2002, for purposes of: (a) identifying the issues to be addressed at the hearing; (b) establishing a schedule (as determined by the Superintendent) for all investigation, discovery, and hearing preparation reasonably necessary based upon the nature and scope of the hearing; and (c) establishing a date (as determined by the Superintendent) for the hearing.

The prehearing conference was held as scheduled on October 18, 2002.⁴ At the conclusion of the prehearing conference, the Superintendent established and advised the parties in attendance of certain deadlines that were memorialized in writing by subsequent Scheduling Order dated October 24, 2002.

⁴ By correspondence dated October 15, 2002, NCCI explained that it would not be attending the prehearing conference. All other parties were in attendance.

Also on October 18, 2002, the Advocacy Panel served its First Discovery Requests on CMI and MEMIC. On October 28, 2002, the Advocacy Panel served a First Discovery Request on NCCI. CMI submitted discovery responses on October 28, 2002, MEMIC responded on October 31, 2002, and NCCI filed no response.

By filing made October 23, 2002, CMI identified the following additional issues to be considered by the Superintendent in the proceeding:

(1) Whether or not the final audit/billing of MEMIC in the amount of \$82,839.25 is inoperative and/or moot under the circumstances and, therefore, unenforceable.

(2) Whether or not the premiums charged were excessive, inadequate or unfairly discriminatory under the provisions of Title 24-A M.R.S.A. § 2382 and whether the premium/rates applied by MEMIC were arbitrary in violation of the provisions of Title 24-A M.R.S.A. § 2387.

On October 28, 2002, CMI served interrogatories on MEMIC and NCCI. MEMIC submitted responses on November 4, 2002, as supplemented on November 13, 2002, and NCCI responded on November 7, 2002.

By filings made October 26, 2002, CMI submitted the prefiled testimony and exhibits of its witnesses Robert Murch, Marcel Dube, Jim Deprey, and Rosemary M. McAndrew; and MEMIC submitted the prefiled testimony and exhibits of its witnesses Craig Reynolds and Wayne Curtis.

On the first day of hearings on December 2, 2002, the Advocacy Panel made an oral motion requesting the Superintendent to rule as a matter of law with respect to: (a) MEMIC’s rating system; and (b) Rule 470. After hearing argument by the Advocacy Panel in support of its position on these matters, the Superintendent heard from MEMIC and CMI. NCCI did not present any argument. The Superintendent declined to rule at the time on the motions, instead taking the matters under advisement.

By Order dated December 13, 2002 (the “December 13th Order”), the Superintendent made certain rulings of law as to MEMIC’s rating system. The Superintendent declined to rule at the time on the motion regarding Rule 470. At the continued hearing on December 19, 2002, the Superintendent heard further oral argument on the Advocacy Panel’s Rule 470 motion, again declining to rule at the time but taking the matter under further advisement.

At the public hearing held in Gardiner, Maine, on December 2 and 3, 2002, and in Augusta, Maine, on December 19, 2002, live testimonial evidence was provided by witnesses Reynolds, Curtis, Murch, Dube, Deprey, and McAndrew; and the following documentary evidence was admitted into the record:

EXHIBIT LIST	
MEMIC Exhibit 1	Prefiled testimony of Wayne I. Curtis
MEMIC Exhibit 2	Prefiled testimony of Craig Reynolds
MEMIC Exhibit 2-1	Prefiled Exhibit 1 (example CMI policy)
MEMIC Exhibit 2-2	Prefiled Exhibit 2 (example CMI application second page)
MEMIC Exhibit 2-3	Prefiled Exhibit 3 (summary of CMI loss information)
MEMIC Exhibit 2-4	Prefiled Exhibit 4 (spreadsheet of CMI final audit bills)
MEMIC Exhibit 2-5	Prefiled Exhibit 5 (MEMIC Managed Care Credit)
MEMIC Exhibit 2-6	Prefiled Exhibit 6 (MEMIC Loss Free Discount Plan)
MEMIC Exhibit 2-7	Prefiled Exhibit 7 (MEMIC Employee Care Credit)
MEMIC Exhibit 2-8	Prefiled Exhibit 8 (MEMIC Preferred Tier Rating Plan)
MEMIC Exhibit 2-9	Prefiled Exhibit 9 (MEMIC Premium Discount Table)
MEMIC Exhibit 2-10	Prefiled Exhibit 10 (recalculated spreadsheet with updated CMI premium amounts)
MEMIC Exhibit 2-11	Prefiled Exhibit 11 (rerating of CMI’s experience rated client lessee companies)
MEMIC Exhibit 2-12	Prefiled Exhibit 12 (application of Managed Care Credit to individual CMI client lessee companies)
MEMIC Exhibit 2-13	Prefiled Exhibit 13 (total payroll for individual CMI client lessee companies)
MEMIC Exhibit 2-10 Revised	Spreadsheet with updated rerating of CMI’s client lessee companies following Superintendent’s December 13th Order
Advocacy Panel Exhibit 1	6/20/02, 7/16/02, and 7/18/02 final audit bills from MEMIC to CMI

Advocacy Panel Exhibit 2	MEMIC Schedule Rating Plan
CMI Exhibit C-1 (Confidential)	MEMIC Workers' Compensation Underwriting Guide
CMI Exhibit 2	Prefiled testimony of Rosemary M. McAndrew
CMI Exhibit 2-1	Prefiled McAndrew Exhibit 1 (curriculum vitae)
CMI Exhibit 2-2	Prefiled McAndrew Exhibit 2 (spreadsheet by CMI client lessee companies of premium owed)
CMI Exhibit 3	Prefiled testimony of Jim Deprey
CMI Exhibit 4	Prefiled testimony of Marcel Dube
CMI Exhibit 5	Prefiled testimony of Robert Murch
CMI Exhibit 5-1	Prefiled Murch Exhibit 1 (CMI's initial calculation of premium subject to dispute)
CMI Exhibit 5-2	Prefiled Murch Exhibit 2 (spreadsheet by CMI client lessee companies of premium owed)
CMI Exhibit 5-3	Prefiled Murch Exhibit 3 (table identifying CMI Exhibits produced in response to Advocacy Panel discovery)
CMI Exhibit 6	Revised Table: updated 12/6/02 to reflect identification of experience rated eligible CMI client lessee companies
CMI Exhibit 7	NCCI Report
Hearing Officer Exhibit 1	All responses to discovery

By motion filed January 3, 2003, MEMIC requested that the Superintendent clarify and/or modify certain portions of the December 13th Order. The Superintendent ruled on the motion by making clarifications pursuant to Order issued January 16, 2003.

II. SCOPE OF PROCEEDING

Pursuant to the provisions of 24-A M.R.S.A. § 2320 (3), CMI asserts that it is aggrieved by MEMIC's application of its rating system and, therefore, CMI is entitled to a hearing held by the Superintendent for purposes of affirming or reversing MEMIC's action.

In the proceeding, the Superintendent determines that the burden of proof rests in the first instance with MEMIC to establish a prima facie case of the premium owed by CMI pursuant to the application of MEMIC's rating system to CMI's client lessee companies. The record demonstrates, as discussed below, that at the effective date of the policy period MEMIC did not sufficiently consider or evaluate certain information made available by CMI related to the applicability of MEMIC's rating system to CMI's client lessee companies, nor did MEMIC apply the relevant components of its rating system to CMI's client lessee companies when issuing the workers' compensation insurance policies. As explained below, the Superintendent concludes that MEMIC's failure or refusal both to sufficiently consider or evaluate CMI's client lessee company information for underwriting purposes and to apply the relevant components of MEMIC's rating system to the

CMI client lessee companies when issuing the workers' compensation insurance policies violates certain provisions of the Maine Insurance Code and Insurance Regulations promulgated thereunder. One purpose of the proceeding, therefore, is to examine the relevant components of MEMIC's rating system and of the underwriting data produced or made available by CMI to determine which credits (or debits) should be applied in the rating of CMI's client lessee companies.

III. RELEVANT COMPONENTS OF MEMIC'S RATING SYSTEM

The components of MEMIC's rating system (comprised of its filed rates, supplementary rate information, and supporting information⁵) implicated by this premium dispute are as follows:

- (a) Schedule Rating Plan, effective May 1, 1996;
- (b) Preferred Tier Rating Plan, effective July 31, 1998;
- (c) Managed Care Credit, effective October 31, 1997;
- (d) Loss Free Discount Plan, effective July 1, 2000;
- (e) Employee Care Credit, effective October 31, 1997; and
- (f) Premium Discount Table, dated December 12, 1994.

⁵ The terms "rate," "supplementary rate information," and "supporting information" have technical meaning and are defined at 24-A M.R.S.A. § 2381-C as follows:

"Rate" means the cost of insurance per exposure base unit, prior to any application of individual risk variations based on loss or expense considerations, and does not include minimum premiums.

"Supplementary rate information" means any manual or plan of rates, classification system, rating schedule, minimum premium, policy fee, rating rule, rating plan and any other similar information needed to determine the applicable premium for an insured.

"Supporting information" means the experience and judgment of the filer and the experience or data of other insurers or organizations relied on by the filer, the interpretation of any statistical data relied on by the filer, descriptions of methods used in making the rates, and any other similar information required by the superintendent to be filed.

(a) Schedule Rating Plan (Advocacy Panel Exhibit 2). This rating plan is a one-page document that identifies the percentage ranges that premium may be modified to reflect certain characteristics of the risks that are not reflected in an insured's experience, subject to a maximum modification of 25%. The possible ranges of modifications (generally ranging from a 10% credit to a 10% debit, with some ranges being from a 5% credit to a 5% debit) are established for five criteria, specifically:

- (A) Management Stability and Commitment to Safety;
- (B) Employee Selection, Training, Supervision, Post Injury Control, Return to Work Program;
- (C) Premises – Care and Conditions;

- (D) Classification Peculiarities and/or Experience Trends; and
- (E) Cooperation with Insurer.

The rating plan further lists 6 terms and conditions applicable to the Schedule Rating Plan.

(b) Preferred Tier Rating Plan (MEMIC Exhibit 2-8). This rating plan establishes preferred rates for eligible insureds. The preferred rates are approximately a 16% discount from MEMIC's standard rates.

(c) Managed Care Credit (MEMIC Exhibit 2-5). This rating rule is a two-page document that identifies the percentage ranges that premium may be credited to reflect reductions in losses that can be achieved by the use of effective managed care programs, subject to a maximum credit of 10%. The possible range of credits (generally ranging from 1 to 3%, with one credit available to 4%) is established for three criteria, specifically:

- (1) Reporting to MEMIC, first reports of injury within 48-72 hours;
- (2) Use of MEMIC's Managed Care Provider Network; and
- (3) Documented Use of Light Duty Programs.

(d) Loss Free Discount Plan (MEMIC Exhibit 2-6). This rating plan is a one-page document that identifies the percentage ranges that premium may be credited based on an insured's demonstration of loss free time for the specified period of time for which the credit applies, as established in the plan. The possible range of credits is from 8% to 25%.

(e) Employee Care Credit (MEMIC Exhibit 2-7). This rating rule is a one-page document that identifies the percentage ranges that premium may be credited to employers who assume the active position of employee advocate providing a work culture focused on creating a strong relationship with their employees, and thereby reducing workers compensation losses. A credit of 1%, up to a maximum credit of 5%, is available to employers for the following criteria:

- (1) Employer has a health plan for employees;
- (2) Employer has a long term disability policy for employees;
- (3) Employer has an Employee Assistance Plan;
- (4) Employer has a written policy regarding drug and alcohol use/abuse; and
- (4) Employer has all of the above.

(f) Premium Discount Table (MEMIC Exhibit 2-9). This rating table is a one-page document that identifies standard premium amounts ranging from \$0 to \$22,490,000 and over, and identifies a corresponding percentage discount figure ranging from 0.0% to 14.4% applicable to the specified premium amounts. There are no filed terms and conditions within or accompanying the table.

IV. THE DECEMBER 13TH ORDER

On the first day of hearings on December 2, 2002, the Advocacy Panel made an oral motion requesting that the Superintendent rule as a matter of law with respect to MEMIC's rating system. As to MEMIC rating system items (a) through (e) described in Section III, above, the issues presented to the Superintendent are: (a) whether the rating is applicable to experience rated entities⁶ only; and (b) whether MEMIC has discretion in applying the rating to a particular insured. On item (f) described in Section III, above, the issue is whether application of the Premium Discount Table to policies issued on a multiple coordinated policies basis must be applied to the aggregate premium amount due on all of the policies, or applied to the separate premium amount due for each individual policy.

⁶ In Maine, a risk is eligible for experience rating when the payrolls or other exposures developed in the last year or last two years of the experience period produced a minimum premium of at least \$9,000. If more than two years, an average annual premium of at least \$4,500 is required.

By the December 13th Order the Superintendent ruled as a matter of law on MEMIC's rating system as follows:

1. The Schedule Rating Plan, Preferred Tier Rating Plan, Managed Care Credit, and Employee Care Credit are applicable only to experience rated entities.
2. The Loss Free Discount Plan is applicable only to other than experience rated entities.
3. The Schedule Rating Plan, Preferred Tier Rating Plan, Managed Care Credit, and Employee Care Credit (or parts thereof) are discretionary in accordance with the findings in the December 13th Order.
4. The Loss Free Discount Plan is non-discretionary in accordance with the findings in the December 13th Order.
5. With respect to the exercise of discretion in the application of its rating system, MEMIC must be reasoned and not arbitrary, capricious, or abusive. The exercise of reasoned discretion requires MEMIC to review and analyze all available relevant information related to the applicability of discretionary rating system components to insureds on a case-by-case basis. In evaluating whether MEMIC appropriately exercised its reasoned discretion, the Superintendent would consider relevant the extent and sufficiency of supporting documentation within the underwriting files to justify the actual discretion exercised. This data would further assist in addressing allegations of whether MEMIC's exercise of discretion in the application of its rating system was discriminatory between similarly situated insureds in violation of Maine law.

Concerning the Premium Discount Table, the Superintendent declined to make a ruling as a matter of law on that component of MEMIC's rating system, finding the issue to be moot.⁷

⁷ The evidence in the record of the proceeding shows that the premium subject to dispute in the amount of approximately \$83,000 was derived based on MEMIC's application of the Premium Discount Table on an aggregate premium basis. The evidence in the record further demonstrates that CMI's final premium bill was established within 120 days after CMI's policy ended. In accordance with the provisions of Rule 470 (7), MEMIC is prohibited from collecting any additional premium from CMI exceeding the final premium bill. Because the result of application of the Premium Discount Table on an individual premium basis would increase the premium due MEMIC from CMI, and because the billing and collection of such increase is prohibited by Rule 470, the premium discount issue presented by the Advocacy Panel is moot.

V. ANALYSIS

The Superintendent analyzes certain aspects of the proceeding and makes the following findings of fact and conclusions of law:

1. CMI and its Workers' Compensation Insurance Coverage with MEMIC. In December 2001, CMI secured workers' compensation insurance coverage from MEMIC on a multiple coordinated policies basis.⁸ The initial premium was determined for an annual policy period and totaled in excess of \$1,000,000.00, with MEMIC receiving a quarterly installment payment from CMI in the amount of \$250,721.75. CMI did not pay the next installment billing as it had secured workers' compensation insurance coverage with another carrier effective March 29, 2002. Because the coverage lapsed due to non-payment of premium, MEMIC canceled the CMI policies pro-rata. Reynolds Prefiled Testimony at p. 6. The resulting MEMIC coverage period for the CMI account was December 15, 2001, through March 29, 2002. Following a final premium audit, MEMIC billed CMI for additional premium owed in the amount of \$82,859.25.⁹ That is the premium subject to dispute in the proceeding.

⁸ Rule 560 (3) (E) defines "multiple coordinated policies basis" to mean, among other matters, that: (a) each client lessee has its own policy; (b) all policies have the same renewal date; (c) all policyholder notices are sent to the employee leasing company; and (d) a single master invoice is sent to the employee leasing company for all lessee policies.

⁹ Rule 470 (2) defines "final premium" to mean the premium determined using payroll or other appropriate premium basis and the rates, rules, and classifications approved for use during the policy period. Pursuant to the provisions of Rule 470 (3), an insurer may determine the final premium after the policy expiration date using the actual premium basis, proper classifications, and approved rates and rating rules that apply during the period of coverage.

In December 2001 when CMI applied for workers' compensation insurance coverage for its client lessee companies from MEMIC, CMI witnesses Murch, Dube, and Deprey each testified in one way or another that CMI brought to a meeting with MEMIC certain CMI client lessee company information to be used

by MEMIC for underwriting purposes and that MEMIC declined or otherwise failed to consider or evaluate that information because MEMIC had no intention of performing any underwriting of the CMI account.¹⁰ Murch 12/19 Transcript ("Tr.") at pp. 132, line 24, through 135, line 11; Dube 12/19 Tr. at p. 22, lines 9-19, and p. 29, lines 10-23; Deprey 12/3 Tr. at pp. 151, line 23, through 154, line 18, and p. 159, lines 22-24. While it appears that MEMIC witness Curtis disputes the production by CMI in December 2001 of the client lessee company information, the Superintendent finds CMI's testimony persuasive on this fact. MEMIC witness Curtis testified that the individual CMI client lessee company policies would issue at MEMIC's standard tier with no credits. Curtis Prefiled Testimony at p. 2; Curtis 12/2 Tr. at p. 52, lines 18- 24. MEMIC witness Reynolds testified that he joined in MEMIC witness Curtis's underwriting opinion that the CMI account would be written at MEMIC's standard tier rating with the application of no rating credits. Reynolds 12/2 Tr. at p. 100, lines 1-3. Reynolds further testified that the general practice of MEMIC in underwriting employee leasing companies was not to apply the type of rating credits at issue in the proceeding, and that it was not prudent to do so. Reynolds 12/2 Tr., p. 95, lines 4-16, and p. 145, lines 6-13. With this underwriting position, there would be no purpose in MEMIC considering or evaluating any CMI client lessee company information.

¹⁰ Beginning at page 6, line 15, through page 7, line 26, of the Prefiled Testimony of CMI witness Murch is an identification of the client lessee company information made available by CMI to MEMIC at the December 2001 meeting comprised of CMI exhibits produced in response to discovery as follows: Exhibits A, B, C, D, H, I, J, K, L, M, N, O, P, R, S, T, U, V, W, Y, Z, and AA (also identified in CMI Exhibit 5-3 in the proceeding).

By reason of the foregoing, the Superintendent finds that MEMIC failed or refused to sufficiently consider or evaluate the CMI client lessee company information necessary to exercise a sound underwriting technique in accordance with the provisions of Section 15 of MEMIC's Workers' Compensation Underwriting Guide. See Confidential CMI Exhibit C-1. The Superintendent further finds that MEMIC failed or refused to apply the relevant components of MEMIC's rating system to the CMI client lessee companies when issuing the workers' compensation insurance policies. In this regard, the Superintendent explains that nowhere in the relevant components of MEMIC's rating system applicable to the proceeding (as identified in Section III, above) do MEMIC's rate filings differentiate between an employee leasing company including its client lessee companies and non-employee leasing companies. Thus, the Superintendent concludes that MEMIC is legally obligated to apply its rating system to employee leasing companies and their client lessee companies substantially and materially equivalent to the method in which MEMIC applies its rating system to similarly situated non-employee leasing company applicants and insureds. The failure or refusal to do so is unfairly discriminatory in violation of Maine law as discussed in Section V (2), below.

2. Violations of the Maine Insurance Code and Insurance Regulations. Provisions of the Maine Insurance Code and Insurance Regulations promulgated thereunder that are relevant to MEMIC's underwriting and rating of the CMI account include but are not limited to the following:

(a) 24-A M.R.S.A. § 2316 which states in relevant part that: "[n]o insurer shall make or issue a contract or policy [of insurance], except in accordance with the filings which are in effect for the insurer as provided in [chapter 25]¹¹"

(b) 24-A M.R.S.A. § 2381-A (2) and (4) which state that the purposes of the Maine Workers' Compensation Rating Act¹² (the "Act") are: "[t]o protect policyholders and the public from the adverse effects of excessive, inadequate or unfairly discriminatory rates" and "[t]o improve availability, fairness and reliability of insurance."

(c) 24-A M.R.S.A. § 2382 (1) which states that in the making and use of workers' compensation rates under the Act: "[r]ates may not be excessive, inadequate, or unfairly discriminatory."

(d) Rule 470 (2) and (3) which state that final premium: "shall mean the premium determined using payroll or other appropriate premium basis and the rates, rules, and classifications approved for use during the policy period" and that "[a]n insurer may determine the final premium after the policy expiration date using the actual premium basis, proper classifications, and approved rates and rating rules that apply during the period of coverage."

¹¹ 24-A M.R.S.A. §§ 2301 - 2387-B.

¹² 24-A M.R.S.A. §§ 2381 - 2387-B.

The Superintendent found (as described in more detail in Section V (1), above) that MEMIC failed or refused to sufficiently consider or evaluate the CMI client lessee company information necessary to exercise a sound underwriting technique in accordance with the provisions of Section 15 of MEMIC's Workers' Compensation Underwriting Guide. The Superintendent further found (as described in more detail in Section V (1), above) that MEMIC failed or refused to apply the relevant components of MEMIC's rating system to the CMI client lessee companies when issuing the workers' compensation insurance policies.

By reason of the foregoing, the Superintendent concludes that:

(A) The making and issuing of workers compensation insurance policies by MEMIC to the CMI client lessee companies without applying MEMIC's rating system violates the provisions of 24-A M.R.S.A. § 2316.

(B) The failure or refusal of MEMIC to apply its rating system to the CMI client lessee companies constitutes unfair discrimination and contravenes fairness

thereby violating the provisions of 24-A M.R.S.A. §§ 2381-A (2) and (4), and 2382 (1).

(C) The issuance of a final premium bill without applying MEMIC's rates, rules, and classifications approved for use during the policy period violates the provisions of Rule 470 (2) and (3).

The provisions of 24-A M.R.S.A. § 2387 establish that in addition to any other penalty that may be provided by law, the Superintendent may impose civil penalties for each violation of the Act.

3. The Advocacy Panel's Rule 470 Motion & Ruling by the Superintendent. On the first day of hearings on December 2, 2002, the Advocacy Panel made an oral motion requesting the Superintendent to rule as a matter of law with respect to Rule 470. After hearing argument by the Advocacy Panel in support of its motion, the Superintendent heard from MEMIC and CMI. NCCI did not present any argument. The Superintendent declined to rule at the time on the motion, instead taking the matter under advisement. At the continued hearing on December 19, 2002, the Superintendent heard further oral argument on the Rule 470 motion, again declining to rule at the time but taking the matter under further advisement.

The legal issue presented to the Superintendent is whether the "limit on subsequent premium adjustments" provision of Rule 470 (5) applies to the aggregate CMI premium amount for all 90 CMI client lessee companies or to the separate premium amount for each individual CMI client lessee company.¹³ In other words, following a de novo underwriting of the CMI client lessee companies, is the Rule 470 limit on subsequent premium adjustments applied to the last billed aggregate premium amount of \$82,859.25 or to the last billed separate premium amount for each of the individual 90 CMI client lessee companies.

¹³ The Rule 470 (5) limit on subsequent premium adjustments provision establishes generally that if an insurer has not established the final premium within 120 days after the policy period ends, the insurer is prohibited from billing or collecting any additional premium exceeding the latest billed premium immediately prior to the 120-day time limit.

The position of the Advocacy Panel is that Rule 470 in this particular circumstance will foreclose MEMIC from arguing that it is eligible for certain funds and will set a limit as to the amount that CMI would have to pay in premium. The Advocacy Panel argues that MEMIC's final audit bill to CMI sets a premium cap for each of the 90 individual CMI client lessee companies on a case-by-case basis. Under this analysis, none of the CMI client lessee companies would owe more in premium than the amount separately identified in MEMIC's final audit bill for each individual CMI client lessee company.

MEMIC responds in two ways: one, that the Advocacy Panel's motion is not timely or appropriately raised; and two, that the Advocacy Panel's position is

wrong. On the first point, MEMIC argues that the Rule 470 motion is a new issue that was not appropriately identified by the parties in accordance with proper procedure and, therefore, the Company has not had the opportunity to present testimony or to have discovery on the issue. On the second point, MEMIC argues that its final audit bill is a single master invoice and, therefore, that the Rule 470 limit on subsequent premium adjustments provision applies to the aggregate premium amount, not to the separate premium amounts for the individual CMI client lessee companies on a case-by-case basis.

CMI responded arguing that MEMIC's position that the Advocacy Panel's motion is not timely or appropriately raised ignores CMI's October 23, 2002, designation of additional issues. In that designation of additional issues, one of the matters CMI identified for consideration by the Superintendent in the proceeding is: "[w]hether or not the final audit/billing of MEMIC in the amount of \$82,839.25 is inoperative and/or moot under the circumstances and, therefore, unenforceable." Stating that the CMI issue identified is somewhat different than that posed by the Advocacy Panel's motion, CMI asserted that the similarities are such that they should both be considered together. CMI's overall position on Rule 470 and the final premium bill is that MEMIC's final premium bill is moot.

NCCI declined to present any argument on the Rule 470 motion.

As to MEMIC's position that the Rule 470 motion is not timely or appropriately raised, the Superintendent disagrees for the following reasons:

(i) The Advocacy Panel's Rule 470 motion seeks a ruling by the Superintendent as a matter of law as to whether the limit on subsequent premium adjustments provision applies to the aggregate CMI premium amount or to the separate premium amount for each individual CMI client lessee company. MEMIC complains that it has not had the opportunity to present testimony or to have discovery on the issue. On this particular motion, testimony or discovery is not necessary for the Superintendent to make the legal ruling.

(ii) In the September 6, 2002, Notice of Pending Proceeding and Hearing the Superintendent specifically stated that: "[t]he purpose of the hearing is to address the issues identified by CMI in its August 26, 2002, hearing request, as well as any other related issues raised by any party or by the Superintendent that the Superintendent, in his sole discretion, deems appropriate to address in this proceeding." The Advocacy Panel's Rule 470 motion raises a legal issue that is directly related to the proceeding and the Superintendent exercises his discretion and deems it appropriate to address the issue in the proceeding.

(iii) CMI's August 26, 2002, hearing request identified as one of the issues before the Superintendent the final audit performed by MEMIC and the amount of money [premium] that MEMIC asserts is due. CMI's October 23, 2002, designation of additional issues identified the effectiveness and enforceability of

MEMIC's final audit bill as another issue before the Superintendent. While not specifically identifying the Rule 470 legal issue presented by the Advocacy Panel's motion, MEMIC had notice that the final audit premium and the calculation thereof, as analyzed pursuant to the provisions of the Maine Insurance Code and Insurance Regulations promulgated thereunder, was the subject matter of the proceeding.

As to MEMIC's argument that the Advocacy Panel's Rule 470 position is wrong, the Superintendent agrees with the Advocacy Panel's analysis. As a matter of law, the Superintendent interprets the Rule 470 (5) limit on subsequent premium adjustments provision to apply to the separate premium amount for each individual CMI client lessee company. MEMIC's final audit bill to CMI, therefore, sets a premium cap for each of the 90 individual CMI client lessee companies on a case-by-case basis.

The Superintendent's Rule 470 legal interpretation is based on an analysis of the provisions of Rules 560 and 470. Beginning with the provisions of Rule 560 (3)(E)(1)(a), insurance issued on a "multiple coordinated policies basis," like that issued by MEMIC to CMI's client lessee companies, means that "[e]ach lessee shall have its own policy covering its leased employees required to be covered pursuant to the laws of this state." The provisions of 560 (E)(4) state that "[t]he servicing carrier shall arrange to have all notices sent to the employee leasing company and to have a single master invoice sent to the employee leasing company for all policies covering the lessees of that leasing company." As a matter of law, the Superintendent interprets these regulatory provisions to provide each lessee company under workers' compensation insurance issued on a multiple coordinated policies basis to have the rights of individual policyholders. The Superintendent further interprets these regulatory provisions to require the insurance company to issue a single master invoice to the employee leasing company for all of the individual policies. The issuance of a single master invoice to the employee leasing company, however, does not remove the legal rights provided to lessee companies as individual policyholders under multiple coordinated policies.

One of the legal rights provided to policyholders is the protection afforded pursuant to the limit on subsequent premium adjustments provision of Rule 470 (5). That provision mandates that if an insurer has not established the final premium within 120 days after the policy period ends, the insurer is prohibited from billing or collecting any additional premium exceeding the latest billed premium immediately prior to the 120-day time limit.¹⁴ The latest billed premium within the 120-day time limit is that reflected in the MEMIC premium bills issued to CMI on June 20, July 16 and 18, 2002. See Advocacy Panel Exhibit 1. The separate premium amounts identified in the June 20, July 16 and 18, 2002, MEMIC bills establish the maximum premium amount for each individual CMI client lessee company. The Superintendent determines that MEMIC may not bill to or collect from CMI or its client lessee companies any premium in excess of the separate amounts identified in the June 20, July 16

and 18, 2002, bills for each individual CMI client lessee company on a case-by-case basis.

¹⁴ The provisions of Rule 470 (7), which are not relevant to MEMIC and CMI in this proceeding, do allow additional time for the establishment of the final premium by an insurer in those circumstances where the insurer is unable to examine and audit the records of the insured that relate to the calculation of the final premium and the inability is solely due to the failure of the insured to cooperate in the audit.

4. The Premium Discount. In determining both the initial annual premium and the final premium for the CMI account, MEMIC applied its Premium Discount Table on the aggregate premium amount for the 90 CMI client lessee companies. Determining the premium discount on this basis, MEMIC witnesses Curtis and Reynolds testified that the premium discount applied by MEMIC to the CMI account was 13.3%. Curtis 12/2 Tr. at p. 85, lines 15-21; Reynolds 12/2 Tr. at p. 125, lines 21-25. MEMIC witness Reynolds further testified that following the final audit the premium discount applied by MEMIC to the CMI account final bills remained at 13.3%. Reynolds 12/2 Tr. at pp. 174, line 25, through 175, line 7.

In the proceeding, MEMIC argues for a different application of its Premium Discount Table to the CMI account. Instead of applying the premium discount on an aggregate premium basis, MEMIC now argues for the application of the premium discount to the CMI account based on the individual CMI client lessee company premium on a case-by-case basis. The record reflects that at no time up to and including the period through MEMIC's determination and issuance of the final premium bills did it assert that a different premium discount was applicable other than the 13.3% reflected in both the initial and final CMI account bills.

VI. FINDINGS AND CONCLUSIONS

On the basis of the evidence in the record of the proceeding, the Superintendent makes the following enumerated findings and conclusions (in addition to the rulings made as a matter of law with respect to the application of MEMIC's rating system in the December 13th Order, as clarified, and with respect to Rule 470 in this Decision and Order, above):

1. MEMIC performed insufficient underwriting of CMI's client lessee companies and willfully failed or refused to apply MEMIC's rating system to CMI's client lessee companies when issuing the workers' compensation insurance policies. As established in MEMIC's Workers' Compensation Underwriting Guide at Section 15 (confidential CMI Exhibit C-1), the exercise of sound underwriting technique by an underwriter includes the necessary steps of gathering information using all available sources, analyzing all components of the risk, and making an evaluation of the entire risk situation. MEMIC states in its Underwriting Guide: "[u]nless the underwriter has the necessary information and a thorough understanding of the risk, it will be impossible to conduct a proper underwriting analysis and make an intelligent decision." Because MEMIC failed to adhere to its own requirements for the exercise of sound underwriting technique as established in the Underwriting Guide for the rating of CMI's client lessee companies and further failed or

refused to apply MEMIC's rating system to the CMI client lessee companies, both the initial annual premium and the final premium and, therefore, the premium subject to dispute in the proceeding is unsupportable. The Superintendent reverses MEMIC's actions in determining both the initial annual premium and the final premium for the CMI account consistent with the ordering paragraphs in Section VII, below.

2. In determining both the initial annual premium and the final premium, MEMIC willfully declined and failed to apply to CMI's client lessee companies any credits (or debits) otherwise available to insureds pursuant to MEMIC's rating system, specifically its Schedule Rating Plan, Preferred Tier Rating Plan, Managed Care Credit, Loss Free Discount Plan, and Employee Care Credit. The Superintendent concludes that such action by MEMIC violates the Maine Insurance Code and Insurance Regulations promulgated thereunder, including but not limited to Code provisions at 24-A M.R.S.A. §§ 2316, 2381-A, and 2382, and Insurance Regulation at Rule 470 (2) and (3). The Superintendent imposes a civil penalty against MEMIC for these violations consistent with ordering paragraph (1) of Section VII, below.
3. In determining both the initial annual premium and the final premium, MEMIC applied the Premium Discount Table on the aggregate premium amount for the CMI account applying a 13.3% discount. The Superintendent concludes that MEMIC is estopped from applying any premium discount other than that applied by it to the CMI account at all times through and including the determination of the final premium, that discount being 13.3%.

VII. ORDER

By reason of the foregoing, the Superintendent ORDERS as follows:

1. Within thirty (30) days from the date of this Decision and Order, MEMIC shall pay a civil penalty in the amount of \$3,000.00 payable to the Treasurer, State of Maine, for violations of the Maine Insurance Code and Insurance Regulations promulgated thereunder.
2. MEMIC shall promptly undertake a de novo underwriting of the 90 CMI client lessee companies consistent with the Superintendent's determinations in this Decision and Order (including the December 13th Order, as clarified) and through the exercise of sound underwriting technique as established in Section 15 of MEMIC's Workers' Compensation Underwriting Guide. The information MEMIC shall rely upon for purposes of undertaking the de novo underwriting of CMI's client lessee companies shall be the documentary evidence in the record of the proceeding as identified in the Exhibit List in Section I, above.
3. Simultaneous with the de novo underwriting pursuant to ordering paragraph 2 above, MEMIC shall determine the final premium in accordance with the provisions of Rule 470 (2) and (3), and deliver to CMI and submit with the Superintendent a final premium bill for the CMI account. In accordance with the Superintendent's ruling as a matter of law regarding the limit on subsequent premium adjustments provision of Rule 470 (5), MEMIC shall exclude from the final premium for the CMI account any premium difference that exceeds the final premium for any individual CMI client lessee company as identified by MEMIC for such company in the June 20, July 16 or 18, 2002, final premium bills.
4. MEMIC shall complete its de novo underwriting and deliver the final premium bill pursuant to ordering paragraphs 2 and 3, above, within forty (40) days from the date of this Decision and Order.
5. At the time of delivering the final premium bill pursuant to ordering paragraph 3 above, MEMIC shall provide to CMI and submit with the Superintendent a Final Premium Table similar in form to MEMIC Exhibit 2-4, with the following refinements: (a) column 1, Client Name, shall also identify those CMI client lessee companies that are eligible for experience rating; (b) column 2, Manual Premium, shall also identify for each CMI client lessee company whether standard or preferred tier rating is being applied to the

company; (c) column 6, Experience Mod, shall also identify for each CMI client lessee company the experience modifier MEMIC is using for the company; (d) column 8, Schedule Rating, shall also identify for each CMI client lessee company the specific credits/debits being applied to the company; (e) column 9, Managed Care, shall also identify for each CMI client lessee company the specific credits being applied to the company; (f) column 10, Managed Care, shall also identify for each CMI client lessee company the specific credits being applied to the company; (g) column 11, Premium Discount, shall apply a 13.3% discount to each CMI client lessee company; (h) column 18, Difference, shall also identify for each CMI client lessee company the difference, if any, that exceeds the final premium determined by MEMIC in the June 20, July 16 or 18, 2002, bills to CMI; and (i) similar to the second row of MEMIC Exhibit 2-4, the new table shall identify the formula for determining the results under each column. In accordance with the Superintendent's ruling as a matter of law regarding the limit on subsequent premium adjustments provision of Rule 470 (5), MEMIC shall exclude from the Final Premium Table any premium difference that exceeds the final premium for any individual CMI client lessee company as identified by MEMIC for such company in the June 20, July 16 or 18, 2002, final premium bills.

6. If CMI disputes MEMIC's exercise of sound underwriting technique following receipt of the final premium bill delivered pursuant to ordering paragraph 3 above, CMI shall deliver to MEMIC and submit with the Superintendent a written notice of dispute identifying CMI's specific concerns and proposed resolution as specifically related to the particular CMI client lessee company (ies). MEMIC shall promptly deliver to CMI and submit with the Superintendent a detailed written response to CMI's specific concerns and proposed resolution. MEMIC will bear the burden of demonstrating in writing the application of its rating system to the disputed item(s) as specifically related to the particular CMI client lessee company (ies). The Superintendent retains jurisdiction to issue a ruling on the matter if CMI and MEMIC are unable to reach mutual agreement in resolution of the dispute. To make any such ruling, the Superintendent may exercise his discretion to utilize an independent consultant for purposes of determining a final premium for the CMI account, the costs of which the Superintendent likely will impose on MEMIC and/or CMI as the Superintendent deems appropriate under the circumstances.

VIII. NOTICE OF APPEAL RIGHTS

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It may be appealed to the Superior Court in the manner provided by 24-A M.R.S.A. § 236, 5 M.R.S.A. § 11001, et seq. and M.R. Civ. P. 80C. Any party to the proceeding 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 within forty days of the issuance of this decision. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

Dated: January 31, 2003

ALESSANDRO A. IUPPA
Superintendent