## NORTH AMERICAN WHITEWATER EXPEDITIONS, INC. v.

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY

Docket NO. INS-03-449

## **DECISION AND ORDER**

North American Whitewater Expeditions, Inc. has filed a petition with the Superintendent, contending that it has been inappropriately charged by the Maine Employers' Mutual Insurance Company ("MEMIC") for workers' compensation coverage for North American Whitewater's two owners, Peter Dostie and Elizabeth Mallen (now Elizabeth Mallen Caruso) for the period of time between May 2, 2001, when North American Whitewater first became covered by MEMIC, and November 13, 2002, when Mr. Dostie's and Ms. Mallen's waivers of coverage were accepted by the Workers' Compensation Board. The Superintendent held an adjudicatory hearing to consider the Petition on January 8, 2004. For the reasons set forth below, the Petition is denied.

Under Maine law, participation in the workers' compensation system by "a bona fide owner of at least 20% of the outstanding voting stock of the corporation by which that person is employed" is voluntary. However, owners who work in the business are considered covered employees unless they file written waivers of coverage with the Workers' Compensation Board. 39-A M.R.S.A. § 102(11)(A)(4).

The situation that can arise when an employer does not intend to provide coverage for its owner/employees, but does not file the proper waiver of coverage, was described in *Bonville* d/b/a *NCT v. MEMIC*, No. INS-00-14 (Me. Bur. Ins. June 20, 2000):

The result was that MEMIC had provided a year of coverage to [the employer] at a level that [the employer] neither needed nor wanted. At this point, there is no way to return the parties to their original position – either [the employer] must be ordered to pay for the unnecessary coverage, or MEMIC must be ordered to provide coverage for free. The fact that [the owner/employee] turned out not to have been injured during the policy period is irrelevant to the analysis. MEMIC assumed the risk of that injury, and the premium in question is the market price for assuming that risk. Just because a car never gets into a collision, that does not mean the airbag has no value.

It is the employer's legal responsibility to file the waiver of coverage. This can have harsh consequences if the employer is unaware of this obligation, which is why the workers' compensation insurance application asks the employer to list its executive officers and to indicate whether the employer intends to cover them. Unfortunately, in this case, the application filled out on North American Whitewater's behalf failed to list Ms. Mallen at all, and requested that Mr. Dostie be included on the policy, not excluded.

There is persuasive evidence that the producer, Michael A. Fetchero of CBIZ Benefits and Insurance Services, may have filled out the application incorrectly without adequately consulting with Mr. Dostie and Ms. Mallen. The error may have been compounded by MEMIC accepting an unsigned application. However, neither Mr. Fetchero nor CBIZ is a party to this proceeding, so questions of liability arising out of possible flaws in the application process are being dealt with separately. Therefore, this Decision and Order is limited to determining whether the terms of the contract between North American Whitewater and MEMIC called for coverage of Mr. Dostie and Ms. Mallen, until the effective date of their waiver of coverage, assuming that the policy application was valid. On that assumption, there was coverage and the premium charge was appropriate.

## Order and Notice of Appeal Rights

It is therefore ORDERED that the Petition is DENIED.

This Decision and Order is a final agency action of the Superintendent of Insurance within the meaning of the Maine Administrative Procedure Act. It is appealable to the Superior Court in the manner provided in 24-A M.R.S.A. § 236 (2000) and M.R. Civ. P. 80C. Any party to the hearing 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 on or before February 23, 2004. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

<sup>1</sup> Pursuant to 24-A M.R.S.A. § 210, the Superintendent has appointed Bureau of Insurance Attorney Robert Alan Wake to serve as hearing officer, with full decisionmaking authority.

## PER ORDER OF THE SUPERINTENDENT OF INSURANCE

JANUARY 15, 2004	
	ROBERT ALAN WAKE
	DESIGNATED HEARING OFFICER