

of the corporation, is eligible to waive coverage, but did not file his waiver of coverage until March of 2003, after the policies in question had terminated.

It is undisputed that from March 1, 1999 until March 1, 2001, MEMIC billed Mr. Sharkey as a sole proprietor and did not include him in the payroll. For most of that time, this arrangement was erroneous, as MEMIC acknowledges. Indeed, MEMIC has provided documentation demonstrating that it was aware at least as early as May of 2000 that Sharkey Builders was no longer a sole proprietorship. In effect, what Sharkey Builders is arguing is that this establishes an implicit contract under which MEMIC had agreed not to cover Mr. Sharkey and not to charge him for that coverage. As evidence of this understanding, Mr. Sharkey points to shoulder surgery which he paid for out of his own pocket rather than filing a claim with MEMIC. He testified that he had no idea that there might be a problem until June of 2002, when he received his final audit bill on Sharkey Builders' 2001-02 policy.

MEMIC agrees up to a point, conceding that Mr. Sharkey was covered under the 2000-01 policy but that MEMIC was not entitled to collect the additional premium for that coverage. However, MEMIC has provided copies of documents from the March 2001 renewal. By way of background, a renewal quote addressed to Sharkey Builders' producer, dated 2/7/01, advised that "this is now a corporation. Please confirm FEIN. If Joseph Sharkey wants to be excluded from coverage a wavier [*sic*] must be submitted to the State for approval. As a corporation officers are automatically included."

This was followed by a letter on the producer's letterhead, addressed to Mr. Sharkey and dated 2/12/01, explaining that "We need to make a decision regarding your worker compensation. In my today's mail I received your renewal. The premium has increased due to rate increase and loss run. They want me to have you complete the supplemental questionnaire-contractor, a wavier if you don't want to be included in your workers compensation and because you're a corporation they need for me to confirm your FEIN, which I think is your federal ID number?" The letter lists the "wavier" as one of the three enclosures. Based on the documentation and the witnesses' testimony, I find it more probable than not that Mr. Sharkey did receive this letter and the enclosed waiver form. Even if he might have had some basis before that time for relying on his prior dealings with MEMIC, he was now on notice that the situation had changed and he had a responsibility to follow through if he wished to waive coverage.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is hereby *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 March 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.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

FEBRUARY 11, 2004

**ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER**

¹ There was some discussion at the hearing of whether any claim might be barred by the 90-day notice requirement set forth in 39-A M.R.S.A. § 301, which provides: "The notice must be given to the employer, or to one employer if there are more employers than one; or, if the employer is a corporation, to any official of the corporation; or to any employee designated by the employer as one to whom reports of accidents to employees should be made. It may be given to the general superintendent or to the supervisor in charge of the particular work being done by the employee at the time of the injury. Notice may be given to any doctor, nurse or other emergency medical personnel employed by the employer for the treatment of employee injuries and on duty at the work site. If the employee is self-employed, notice must be given to the insurance carrier or to the insurance carrier's agent or agency with which the employer normally does business." As noted, however, the Superintendent does not have jurisdiction to decide whether Mr. Sharkey would be considered a self-employed individual or an employee of Sharkey Builders, Inc. for purposes of the Workers' Compensation Act.

² 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.