#### WOODBURY, INC.

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#### MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY

#### **DECISION AND ORDER**

### Docket NO. INS-07-100

This adjudicatory proceeding arises out of a petition filed with the Superintendent by Woodbury, Inc., pursuant to 24 A M.R.S.A. §§ 229 and 2320, requesting that the Superintendent order Woodbury's workers' compensation insurer, Maine Employers' Mutual Insurance Company ("MEMIC"), to lower its workers' compensation insurance premium. Woodbury contends that the premium charged by MEMIC for its 2005–06 policy was excessive because its owner's son was inappropriately included in the payroll for rating purposes. The Superintendent held an adjudicatory hearing to consider the Petition on January 31, 2007.<sup>1</sup> For the reasons discussed below, the petition is denied.

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Woodbury, Inc. is a small handyman business based in Raymond, Maine, wholly owned by Richard Woodbury. It has been insured with MEMIC for several years.

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, and if the owner waives coverage, then "The parent, spouse or child of a person who has made a waiver" may also waive coverage. However, owners and their family members 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). Because they are fully eligible for workers' compensation benefits, and any claim they might file will be fully covered under the policy, they are included in the calculation of the employer's payroll for rating purposes.

The owner, Richard Woodbury, executed and filed a waiver of coverage at the time he first obtained workers' compensation insurance for his business in 2003, and therefore he has always been excluded from the policy. However, his son Jason Woodbury joined the business in 2005 as operations manager, and he did not file a waiver of coverage. This first came to the Woodburys' attention approximately a year later, when MEMIC conducted an annual premium audit to determine the final bill for Woodbury, Inc.'s 2005–06 policy. Jason Woodbury now has a valid waiver of coverage on file and is no longer treated as an employee for rating purposes, but his inclusion in the payroll for last year's policy resulted, according to Richard Woodbury, in a premium bill approximately four times as high as he had intended to pay. Since it is undisputed that the intent was to exclude both Woodburys from coverage at all times, the corporation requests that its premium be recalculated as if the waiver had been filed when intended.

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.

The nature of insurance, with an insurer accepting relatively small amounts from each policyholder in return for the promise to compensate them if needed for potentially catastrophic losses, makes it imperative that the contract spell out clearly what is covered and what is not from the outset, before either party knows whether there is a claim. The need for clear written documentation has been highlighted by recent coverage disputes that have made the front pages. The Legislature has incorporated a bright-line waiver process into Maine law, and this law not only protects the insurer that knows what risk it has assumed and what premium to charge for it, but also protects the employer that knows it will no incur unintended premium charges because its exempt workers have filed waivers, and the worker who knows his or her claim will be paid, if there is an accident, because he or she has not filed a waiver.

When a business incorporates, it agrees to assume the responsibilities as well as the benefits of corporate status. *See Joyce, Dumas, David & Hanstein, P.A. v. MEMIC*, No. INS-94-15 (Me. Bur. Ins. June 7, 1995) One of those responsibilities is to provide workers' compensation coverage for all of its employees, including working owners and their family members, unless a valid waiver of coverage has been filed in advance. MEMIC has acted within its rights in charging premium accordingly.

## 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 12, 2007. 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 31, 2007

ROBERT ALAN WAKE DESIGNATED HEARING OFFICER