

| | | |
|------------------------------|---|--------------------|
| IN RE: |) | |
| |) | |
| JMAC'S CUSTOM CONCRETE, INC. |) | |
| |) | |
| v. |) | |
| |) | DECISION AND ORDER |
| MAINE EMPLOYERS' MUTUAL |) | |
| INSURANCE COMPANY |) | |
| |) | |
| Docket No. INS-09-104 |) | |
| |) | |

I. PROCEDURAL HISTORY

Superintendent Mila Kofman delegated all legal authority to Bureau of Insurance attorney Benjamin Yardley to act in the Superintendent's name as the hearing officer in this proceeding.

The parties to the proceeding are JMAC'S Custom Concrete, Inc. (the "Petitioner") and Maine Employers' Mutual Insurance Company ("MEMIC"). The purpose of the proceeding is to determine whether the Petitioner's principal, Michael McCarthy, waived coverage under 39-A M.R.S.A. § 102(11)(a)(4) and whether the premium charged was otherwise consistent with applicable legal standards and with the rating plan approved by the Superintendent.

In a July 2, 2009 Notice of Hearing, the Hearing Officer set the hearing for July 17, 2009, with an intervention deadline of July 16, 2009. The Hearing Officer did not receive any applications for intervention. The hearing took place as scheduled at the Bureau's Gardiner, Maine office. Present at the hearing were the Hearing Officer; Mr. McCarthy for the Petitioner; and Karen Schwartz, Daniel Montembeau and Jeff Bryan for MEMIC. Petitioner's Exhibit 1 and MEMIC Exhibits 1 through 6 were offered and admitted into evidence. Mr. McCarthy testified under oath for the Petitioner; and Ms Schwartz, Mr. Montembeau and Mr. Bryan testified for MEMIC. The hearing was recorded and in public session.

The Hearing Officer conducted the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M.R.S.A. chapter 375, subchapter IV; 24-A M.R.S.A. §§ 229 to 236; Bureau of Insurance Rule Chapter 350; and the Notice of Hearing. The parties exercised their respective rights to present evidence and to examine or cross-examine witnesses. Neither party appeared through counsel.

II. POSITIONS OF THE PARTIES

The Petitioner says that MEMIC improperly charged premium based on the remuneration paid to Mr. McCarthy, as he did not want to have coverage for himself. MEMIC says that he did not need to opt out of coverage while he was a sole proprietor and that, after he incorporated his business, MEMIC did not receive a waiver of coverage approved by the Workers' Compensation Board for the policy period at issue.

III. FINDINGS OF FACT

After considering the hearing testimony and exhibits and the parties' respective arguments, I find that:

1. Mr. McCarthy is engaged in the business of pouring concrete foundations, floors, and slabs.
2. MEMIC is a Maine corporation authorized to transact workers' compensation insurance.
3. On March 17, 2008, MEMIC received, through its agent, the Normand M. Methot Agency, Inc., an application for workers' compensation insurance from the Petitioner ("Application"). The Application was dated March 17, 2008 and signed by Brian Methot for the agency and Mr. McCarthy for the Petitioner. MEMIC Exh. 2.
4. MEMIC issued a policy effective March 20, 2008 as a result of the Application. The policy insured Mr. McCarthy as an individual.
5. On April 1, 2008, the agency prepared an Application for Waiver in Mr. McCarthy's name as a sole proprietor and submitted it to MEMIC. MEMIC Exh. 1.
6. On April 23, 2008, MEMIC sent the agency a memorandum explaining that Mr. McCarthy would need to file an election for coverage. MEMIC Exh. 6.
7. On or about July 1, 2008, Mr. McCarthy formed a corporation—JMAC's Custom Concrete, Inc.—to carry on his concrete business.
8. On March 25, 2009, MEMIC conducted a premium audit of the policy and learned for the first time that Mr. McCarthy had formed a corporation. MEMIC Exh. 5.
9. On May 19, 2009, the Workers' Compensation Board sent MEMIC an approved Application for Waiver signed by Mr. McCarthy.

IV. ANALYSIS AND CONCLUSIONS OF LAW

While I am sympathetic to Mr. McCarthy's assertion that he did not want coverage for himself at any time, the problem is that no one conveyed that information to MEMIC during the policy period at issue. For the reasons explained below, I find that MEMIC appropriately charged the premium in dispute.

The Workers' Compensation Act, M.R.S.A. Title 39-A ("WCA") protects employees from economic loss resulting from injuries "arising out of and in the course of employment." 39-A M.R.S.A. § 201(1). Such protection is generally mandatory, and the usual process under Title 39-A is that the person who does not want coverage must opt out, if allowed by law. For example, someone who owns at least 20 percent of the outstanding voting stock of a corporation must apply to the Workers' Compensation Board for approval to waive coverage. 39-A M.R.S.A. § 102(11)(A)(4). However, "any person who regularly operates a business or practices a trade ... whether or not the person hires employees" must opt in for workers' compensation coverage. 39-A M.R.S.A. § 102(11)(B). Thus, while Mr. McCarthy was a sole proprietor, his policy did not cover him unless he elected coverage for himself. After he became a shareholder in his corporation, his policy would have covered him unless he applied to the Workers' Compensation Board for permission to waive coverage for himself.

Mr. McCarthy's application for workers' compensation insurance indicated that he was to be included in coverage. MEMIC Exh. 2. He testified that this was a mistake

on the agent's part. Whether or not that was the case is not an issue before the Bureau and, in any event, MEMIC did not consider Mr. McCarthy's pay in calculating the Petitioner's premium before he formed his corporation on July 1, 2008.

The problem here is that Mr. McCarthy did not file a waiver of coverage form with the Board until after the premium audit in March 2009. This was well after he had formed his corporation. He testified that he had advice from his accountant about this change but that he did not talk to MEMIC's agent about the corporate change until after the audit. *Hearing Transcript*, p. 33. MEMIC did not learn about this change until it conducted the premium audit after the policy had ended.

The Bureau has decided similar cases in which, as was observed in *Bonville d/b/a NCT v. MEMIC*, No. INS-00-14 (Me. Bur. Ins. June 20, 2000), MEMIC "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." That Mr. McCarthy had no injury during the policy year is not relevant; MEMIC assumed the risk that he might and should therefore be able to charge its permitted premium.

V. ORDER

IT IS HEREBY ORDERED that the Petition is DENIED. MEMIC may charge and collect premium based on the remuneration attributable to Mr. McCarthy after the corporation was formed. I encourage the parties to enter into a payment arrangement that the Petitioner can meet.

VI. 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.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: August 12, 2009

By: _____
BENJAMIN YARDLEY
Attorney