

**James Peterson,
d/b/a RED OAK FORESTRY
v.**

**MAINE EMPLOYERS' MUTUAL INSURANCE
COMPANY**

Docket NO. INS-05-109

DECISION AND ORDER

This adjudicatory proceeding arises out of a petition filed with the Superintendent by James Peterson, doing business as Red Oak Forestry, pursuant to 24-A M.R.S.A. § 2908(6), contesting the cancellation of Red Oak's workers' compensation insurance policy by the Maine Employers' Mutual Insurance Company ("MEMIC"). As discussed more fully below, I find that Red Oak has failed to comply with reasonable safety requirements established by MEMIC, and therefore deny the petition.

In general, MEMIC is required to make coverage available to all Maine employers pursuant to 24-A M.R.S.A. § 3711(1). However, exceptions to this general requirement are set forth in 24 A M.R.S.A. § 3711(3), which requires MEMIC to "deny coverage to any employer who owes undisputed premiums to a previous workers' compensation carrier or to the workers' compensation residual market mechanism, or fails to comply with reasonable safety requirements the company is legally authorized to establish." Moreover, 24-A M.R.S.A. § 2908(2)(D) expressly provides that "Failure to comply with reasonable loss control recommendations" is a permissible ground for cancellation of a casualty insurance policy.¹

Red Oak, based in Rumford, Maine, cuts timber at various locations in Western and Central Maine. On August 25, 2003, MEMIC conducted a site visit, issued a Field Notice of Loss Potential, and negotiated a Logging Action Plan, signed by Mr. Peterson. Directly above Mr. Peterson's signature is a conspicuous notice warning that "Completion of action is a condition of insurance." MEMIC conducted at least eight subsequent site visits over the next two years, and expressed ongoing safety concerns.

On July 8, 2005, MEMIC Safety Consultant Stewart Hall issued a Notice of Hazardous Workplace Conditions, with an acknowledgment signed by Mr. Peterson. MEMIC provided both written and photographic descriptions of the conditions observed, spelled out a list of required action steps, and warned that the hazards observed were "life threatening" and that failure to initiate prompt corrective action could result in policy cancellation. On July 13, after finding Mr. Peterson's initial response unsatisfactory, MEMIC issued a cancellation notice, with a scheduled effective date of August 18.

Mr. Peterson then provided a more detailed response and action plan, in hopes of persuading MEMIC to rescind the policy cancellation. On August 12, Mr. Hall conducted further visits to three sites, and wrote Mr. Peterson that "A Notice of Hazardous Workplace Conditions was issued on July 8, 2005 because poor felling skills and unmanaged hazard trees created life threatening conditions.... Several employees continue to exhibit poor felling techniques, while all four loggers showed clear evidence of having worked within two tree lengths of unmanaged hazard trees.... Thirty five days have passed since the issuance of the notice, and compliance levels remain at unacceptable levels, while life threatening conditions continue to be present on these job sites." Red Oak requested a hearing pursuant to 24-A M.R.S.A. § 2908(6) to contest the cancellation, and MEMIC agreed to stay cancellation pending the issuance of a decision. An adjudicatory hearing was held before the Superintendent on September 15, 2005.²

It is uncontested that MEMIC gave adequate and timely notice. Pursuant to 24-A M.R.S.A. § 2908(6), MEMIC has the burden of proof of the reason for the cancellation. Thus, MEMIC must prove both that it has established reasonable safety requirements and that Red Oak has failed to comply.

I find that the testimony and documentation submitted by MEMIC demonstrate that MEMIC has placed a priority on logging safety, has established a comprehensive safety and training program, that MEMIC's logging safety requirements are reasonable, and that they have been properly established and communicated to affected policyholders, including Red Oak. The standards at issue in this case, governing felling practices and hazard-tree management, are based on requirements of general applicability established by OSHA.

Red Oak has not questioned the reasonableness of these standards except with regard to standing dead trees. Mr. Peterson testified that it is impractical to cut all dead trees in a stand before harvesting. Mr. Hall, MEMIC's safety consultant, agreed, and acknowledged that the proper management of dead trees was in part a matter of judgment. However, he also testified that he saw too many dead trees left standing in a condition and location that was inconsistent with sound judgment, and that Red Oak was cited for a number of other felling and hazard management practices which did not involve judgment calls.

Mr. Peterson also testified that he did not receive all of the leaflets and pamphlets that were included in the packet of policyholder informational materials provided by MEMIC. However, the evidence as a whole conclusively demonstrates that even if he did not receive those specific documents, he was sufficiently apprised of the specific hazardous conditions MEMIC had observed, and what specific safety practices would correct or prevent these hazards.

I also find that Red Oak has failed to comply with the standards established by MEMIC, and that the noncompliance has been significant and ongoing. I find that Mr. Hall is qualified and experienced, and there is no evidence that he has

unreasonably or inappropriately exercised his oversight authority with Red Oak or with other policyholders. He has provided extensive documentation, both written and photographic, of the hazards and the evidence of unsafe practices that he has observed first-hand.

Red Oak objects that some of Mr. Hall's conclusions were derived not from observation of actual unsafe practices in the field, but rather from observation, after the fact, of stumps and felled trees. I find this circumstantial evidence, especially when corroborated by some real-time field observations, to be "evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs" within the meaning of the Maine Administrative Procedure Act.³ Mr. Hall's testimony included clear and credible descriptions why the condition of the stumps and felled trees he observed and photographed were signs of specific hazardous practices.

Finally, Red Oak contends that MEMIC failed to prove that the hazardous practices that Mr. Hall observed, or inferred from the circumstantial evidence, represented hazards to Red Oak employees, because a significant portion of Red Oak's operations are conducted by hiring independent contractors who own their own equipment, are paid on a piecework basis, and are not covered by MEMIC's policy.

It is reasonable and appropriate, however, for workplace safety requirements to apply to the entire workplace. If the insurer identifies unsafe workplace conditions, it is the policyholder's responsibility, if correcting the hazards is impossible, to explain why the hazards are beyond the policyholder's control and that the policyholder's own employees are not exposed to the hazards. Mr. Hall testified credibly that he did make efforts to identify which workers were employees and which workers were independent contractors. In some cases, the workers themselves did not know whether they were employees or independent contractors. In these circumstances, an insurer can reasonably infer that it has loss exposure.

Nevertheless, Mr. Peterson testified – and MEMIC acknowledged – that for premium audit purposes MEMIC has chosen not to require documentation of independent contractor status to be in place until the time of the premium audit. This is a matter of underwriting judgment, however. It does not provide a safe harbor to the employer for all purposes, and does not deprive MEMIC of the right to require all of its policyholders to maintain their workplaces in a manner that is safe, at a minimum, for all workers who are acknowledged employees of the policyholder or who might subsequently be determined to be employees of the policyholder.

Mr. Peterson himself acknowledged significant deficiencies in some of his workers' safety practices and in his own training and oversight. MEMIC, likewise, has acknowledged positive steps taken by Mr. Peterson. However, the inspection conducted after the cancellation notice was issued demonstrated that

the progress was inadequate. We hope that a more effective compliance plan might still be negotiated within the time remaining on the policy, and that Red Oak will then be able to follow through on its good intentions. However, the power to establish safety requirements is meaningless without the power to cancel coverage for noncompliance. Red Oak has already received several other second chances, and anything more is purely a matter of MEMIC's discretion.

Order and Notice of Appeal Rights

It is therefore *ORDERED* that the Petition is *DENIED*, and that MEMIC may proceed with the cancellation of Red Oak's policy, effective 12:01 a.m. on October 12, 2005, unless MEMIC rescinds the cancellation or the parties agree to a different effective date.

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 November 7, 2005. There is no automatic stay pending appeal; application for stay may be made in the manner provided in 5 M.R.S.A. § 11004.

¹ Casualty insurance includes workers' compensation coverage. 24-A M.R.S.A. § 707(1)(C).

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.

³ At 5 M.R.S.A. § 9057(2).

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

SEPTEMBER 27, 2005

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER