

**Bruce Fadden
d/b/a CUSTOM BUILDING
AND REMODELING**

v.

**MAINE EMPLOYERS' MUTUAL
INSURANCE COMPANY**

DOCKET NO. INS-08-105

DECISION AND ORDER

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Bruce Fadden, doing business as Custom Building and Remodeling, has filed a petition with the Superintendent, contending that his business has been inappropriately charged by the Maine Employers' Mutual Insurance Company ("MEMIC") for workers' compensation coverage for his two sons, whom he did not intend to cover under the policy. Because the sons had not waived coverage during the period in dispute, the petition is denied.

After a period of time in business for themselves, the sons went back to work in the family business in 2006. Although Mr. Fadden's testimony reflected some confusion over the differences between employees and independent contractors and the legal and reporting requirements that apply to each type of work, he was clear that his sons were "family employees" at all relevant times, not independent contractors. Unfortunately, he was under the misapprehension that family employees are not covered under the policy.

That is not the case. A sole proprietor, such as Mr. Fadden, and certain immediate family members who work in the business, have the option to decide whether or not to be eligible for workers' compensation benefits. However, the default arrangement under 39-A M.R.S.A. §§ 102(11)(A)(5) & 102(11)(B), unless the proprietor affirmatively elects coverage in writing or one or more family members affirmatively waive coverage in writing, is that the proprietor is not covered but the family members are. See Bonville d/b/aNCT v. MEMIC, No. INS-00-14 (Me. Bur. Ins. June 20, 2000).

If a family member is injured on the job at any time before a waiver of coverage is approved by the Workers' Compensation Board, he or she is entitled to benefits, and the insurer is obligated to pay them. In this case, the policy took effect on June 1, 2006, but the sons' waivers of coverage did not take effect until September 7, 2007, after the policy had expired and MEMIC had conducted a premium audit and charged additional premium based on the sons' compensation. As the situation was summarized in *NCT*:

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 employer's sons] 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.

NCT at Page 2. As explained further in *North American Whitewater Expeditions, Inc. v. MEMIC*, No. INS-03-449 (Me. Bur. Ins. Jan. 15, 2004):

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.

Similarly, Mr. Fadden's application asked him to list all relatives to be included or excluded, but the only individual listed in the schedule of partners, officers, and relatives was Mr. Fadden himself. Because MEMIC provided coverage for Mr. Fadden's sons and was not on any notice that the coverage might be unintended, charging premium for that coverage is 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 September 15, 2008. 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

AUGUST 6, 2008

ROBERT ALAN WAKE
DESIGNATED HEARING OFFICER