STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	)	
	)	
PROJECT STAFFING, INC., ONE SOURCE PREFERRED, INC., and SPECIAL TEAMS, INC.	)	
v.	)	
	)	
MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY	)	
	)	DECISION AND ORDER
	)	
and	)	
	)	
NATIONAL COUNCIL ON COMPENSATION INSURANCE	)	
	)	
	)	
Docket No. INS-05-101	)	

Bureau of Insurance ("Bureau") Deputy Superintendent Eric A. Cioppa (the "Deputy Superintendent") issues this Decision and Order in this proceeding.

I. PROCEDURAL HISTORY

Superintendent Alessandro A. Iuppa delegated all legal authority to the Deputy Superintendent to act in the Superintendent's name as the presiding officer in this proceeding. Bureau Attorney Benjamin Yardley is legal counsel to the Deputy Superintendent.

The parties to the proceeding are Project Staffing, Inc., One Source Preferred, Inc., Special Teams, Inc. (the "Petitioners", or individually a "Petitioner"), Maine Employers' Mutual Insurance Company ("MEMIC"), and the National Council on Compensation Insurance ("NCCI").[1] On May 6, 2005, the Petitioners requested that the Superintendent set a hearing to determine whether or not the Petitioners were improperly combined for experience rating purposes and placed in MEMIC's high risk program. The Petitioners, as more specifically detailed in their complaints, seek the following determinations:

1. whether or not MEMIC complied with applicable statutes, rules and regulations, rating plans and manuals:
    1. in placing the Petitioners in its high risk program thereby substantially increasing their premiums,
    2. by combining the Petitioners' respective experience rating modifiers with other companies thereby increasing, changing or revising each Petitioner's experience rating modifier,
    3. in combining the Petitioners thereby increasing, changing or revising each Petitioner's loss ratio,

4. with respect to the notice and timing requirements governing changes by an insurer regarding experience rating modifiers, loss ratio and placement in the high risk program;

2. whether or not MEMIC acted at all times in good faith regarding changes to status and premiums of the Petitioners or whether MEMIC's actions were in any way unfair, arbitrary or discriminatory under Maine law; and
3. whether or not any premiums paid or to be paid by any Petitioner are excessive under Maine law and applicable rating system and, if so, whether or not any refunds or credits are due to any Petitioner.

In his June 6, 2005 Notice of Pending Proceeding and Pre-Hearing Conference, the Deputy Superintendent reserved the right to address in this proceeding any other related issues raised by any party or by the Deputy Superintendent that the Deputy Superintendent, in his sole discretion, deemed appropriate to address.

On June 8, 2005, the Deputy Superintendent held a telephone conference, which all parties attended. The parties agreed to deadlines for discovery and a hearing date of November 15, 2005. On June 16, 2005, the Deputy Superintendent issued a Scheduling Order and Notice of Hearing which confirmed such deadlines and hearing date. The parties requested one enlargement of the discovery deadlines, which the Deputy Superintendent granted, and completed discovery within such time. The June 6, 2005 Notice of Pending Proceeding and Pre-Hearing Conference had set an intervention date of June 26, 2005. Because of the length of time set for discovery, the Deputy Superintendent on his own motion, by Order dated July 7, 2005, enlarged the intervention date to August 12, 2005. The Deputy Superintendent did not receive any applications for intervention.

The public hearing took place on November 15 and 16, 2005 at the Bureau's Gardiner, Maine office. Present at the hearing were the Deputy Superintendent and his legal counsel; Thomas R. McNaboe, counsel for the Petitioners; Allan M. Muir, counsel for MEMIC; and Harold Pachios, counsel for NCCI. Petitioners' Exhibits 1 through 17, and MEMIC Exhibits 1 through 12 and 14 through 25 were offered and admitted into evidence. The Deputy Superintendent admitted MEMIC Exhibit 3 over the Petitioners' relevancy and accuracy objections. NCCI did not offer any exhibits. The following witnesses testified under oath: Richard Holden, Barbara Mahoney and Mark Burns for the Petitioners; Craig Reynolds and Cathy Duranceau for MEMIC; and Glen Goldberg and Michelle Baker for NCCI. The hearing was in public session.

The Deputy Superintendent held the record open after the hearing for the parties to file written position papers by November 29, 2005. NCCI argued its position orally at the end of the hearing and did not file a position paper. The Petitioners and MEMIC did file papers timely.

II. PURPOSE OF THE PROCEEDING

The purpose of the proceeding is to determine whether or not the Petitioners were improperly combined for experience rating purposes and placed in MEMIC's high risk program. The Deputy Superintendent 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 June 16, 2005 Scheduling Order and Notice of Hearing. All parties had the right to present evidence, to examine or cross-examine witnesses, and to be represented by counsel and did exercise those rights.

III. POSITIONS OF THE PARTIES

The Petitioners allege that NCCI improperly combined the experience of Project Staffing, Inc. ("PSI"), One Source Preferred, Inc. ("OSP") and Special Teams, Inc. ("STI") and that MEMIC improperly assigned them to its high risk program.

MEMIC argues that the Petitioners did not timely appeal NCCI's ruling combining them for experience rating purposes. MEMIC also argues that the Petitioners avoided workers' compensation experience modifications by moving operations among themselves and another entity, Variable Employment, Inc. ("VEI").

The issue affecting NCCI is whether the Petitioners may properly be combined under Rule 3-D of the NCCI Experience Rating Plan Manual. NCCI acknowledges that each Petitioner has only one shareholder and that no Petitioner owns a majority interest in any other Petitioner. It points out, however, that the three shareholders of the Petitioners had an express agreement to share in the profits of an enterprise. It argues that this characteristic of the agreement makes the enterprise a partnership under 31 M.R.S.A. § 286.

IV. FINDINGS OF FACT

Based on the filings on record at the Bureau of Insurance in this proceeding and the testimony and exhibits presented at the hearing, and after considering the parties' respective arguments, the Deputy Superintendent finds that:

1. Barbara Mahoney, Mark Burns and Richard Holden reside in Maine. *Hearing Transcript 11-15-05*, pp. 15, 132, and 172.
2. Mr. Holden is the sole shareholder of VEI, which is not a party to this proceeding. *Id*., p. 173.
3. VEI is a Maine corporation. MEMIC's Exhibit 17. VEI was founded in or about 1995, and is engaged in providing temporary staffing in light industrial, construction and clerical positions. *Hearing Transcript 11-15-05*, p. 173.
4. Ms Mahoney is the sole shareholder of PSI. PSI is a Maine corporation, founded in 1995, and provides temporary clerical and construction employees. *Id. 11-15-05*., pp. 16-17.

5. Mr. Burns is the sole shareholder of OSP and STI. OSP is a Maine corporation, founded between 1997 and 1998, and is a Maine-licensed employee leasing company, handling bakery and clerical employees. STI is a Maine corporation, was founded in or about 2000, and focuses on long-term employee leasing in the plumbing trade.*Id*., pp. 132-133.
6. On June 3, 1998, Mr. Holden, Ms Mahoney and Mr. Burns entered into an agreement to have VEI, OSP and PSI provide services to each other (the "Agreement"). MEMIC's Exhibit 1.
7. The Agreement provides that VEI would handle marketing, sales and client development services, OSP would administer customer accounts and labor and human resources law compliance, and PSI would handle financial management and billing. Agreement, § 2.
8. The Agreement provides that Mr. Holden, Ms Mahoney and Mr. Burns would receive equal compensation each calendar year from each of their respective companies, with the net annual profits of each company to be shared equally among these individuals. *Id*., § 3.
9. The Agreement provides that Mr. Holden, Ms Mahoney and Mr. Burns would equally share any guaranty liability or investment required for any of the three companies.*Id*., § 4.
10. The Agreement provides that Mr. Holden, Ms Mahoney and Mr. Burns would each have complete control over their respective companies but that the individuals would inform each other of "developments concerning hiring and firing employees, selling any assets, entering into contracts and spending funds in excess of $5,000 for any one purpose." *Id*., § 5.
11. The Agreement provides that Mr. Holden, Ms Mahoney and Mr. Burns must consent to the sale of the stock or all or substantially all of the assets of any of the three companies and, upon any such sale, to distribute the net profits and resulting tax burden equally among the three individuals. *Id*., § 7.
12. The Agreement provides that "[f]ailure to insist on strict compliance with the terms and conditions of this Agreement shall not be deemed a waiver of such terms . . ."*Id*., § 13.
13. The Agreement provides that each of the companies would be a separate corporation and that the Agreement would "be viewed solely as an agreement between the principals of each corporation to share profit, to coordinate services, and to share certain expenses. This Agreement shall not be viewed as creating a partnership, joint venture or other arrangement between the corporations which would create joint and/or mutual liability of such corporations to any third party." *Id*., § 14.
14. The Agreement provides that it could be amended only in a writing signed by all of the parties. *Id*., § 15.
15. VEI, OSP and PSI charged approximately $250 per hour for services rendered to each other. *Hearing Transcript 11-15-05*, p. 151.
16. MEMIC charges $100 per hour for safety services. *Id. 11-16-05*, p. 57.
17. PSI did not carry workers' compensation insurance between approximately 2001 and 2003. *Id*., pp. 38-40.
18. In 2002, VEI's experience modification increased from zero to 1.04, and in 2003 from 1.04 to 1.84. MEMIC's Exhibit 12 (sheet 2).
19. In March 2003, VEI and PSI effectuated a transfer of customers from VEI to PSI, in which VEI and PSI presented proposals for staffing services to VEI customers, including those which VEI had purchased from Maine Staffing Services, Inc. The proposals offered by PSI were lower than those offered by VEI because of the cost of workers' compensation insurance. *Hearing Transcript 11-15-05*, pp. 192, 69-70.
20. In April 2003, VEI allowed its workers' compensation insurance policy with MEMIC to lapse. *Id*., p. 192.

21. In 2003, PSI resumed worker's compensation insurance with MEMIC and had an experience rating of 1.47. MEMIC's Exhibit 2.
22. The Petitioners and VEI do business under the trade name Maine Staffing Group, with offices at 22 Stanwood Street, Brunswick, Maine, including shared telephone and facsimile numbers. Petitioners' Exhibit 2.
23. MEMIC is established under 24-A M.R.S.A. Chapter 52 as a workers' compensation insurer in the voluntary and residual markets.
24. MEMIC provided separate policies of workers' compensation insurance to PSI, OSP and STI at times relevant to this proceeding. Petitioners' Exhibit 1.
25. The renewal date for the OSP policy is January 1, and for the STI policy January 3. *Id*.
26. The renewal date for the PSI policy is April 8. *Hearing Transcript 11-15-05*, p. 41.
27. NCCI is the designated advisory organization designated by the Superintendent of Insurance under 24-A M.R.S.A. Chapter 25, Subchapter 2-B.
28. On January 29, 2004 MEMIC asked NCCI to verify whether PSI and VEI were evading experience rating by transferring operations among themselves and to discuss whether their experience was combinable. Petitioners' Exhibit 2.
29. On March 22, 2004 NCCI ruled that PSI, VEI, OSP and STI, as well as another entity, Maine Staffing Services, Inc. were combinable with an experience rating modification of 1.52 effective April 8, 2004. Petitioners' Exhibit 8.
30. Representatives of the Petitioners and MEMIC met in July 2004 to discuss the combination and high risk program issues. *Hearing Transcript 11-16-05*, pp. 55-56, 78-79.
31. According to MEMIC's calculations, on a combined basis, the Petitioners had at least two lost-time claims greater than $10,000 each and a loss ratio greater than 1.00 between 2001 and 2004. Petitioners' Exhibit 13.
32. On March 8, 2005 MEMIC notified the Petitioners' agent of MEMIC's decision to combine PSI, STI and OSP for high risk program purposes based on PSI's eligibility effective April 8, 2005.[2] Petitioners' Exhibit 13.

V. ANALYSIS AND CONCLUSIONS OF LAW

Workers' compensation in Maine is meant to be a self-contained system, at both the claims and the policy levels. Thus, the Workers' Compensation Act of 1992, M.R.S.A. Title 39-A, provides the sole remedy for a worker injured on the job, unless his employer has not obtained the required coverage. The system's purpose in part is to provide for "the prompt delivery of benefits legally due", 39-A M.R.S.A. § 151-A, so that an injured worker has some confidence that he will receive medical care and indemnity benefits to hasten a successful return to work or to support him during an incapacity. In the same vein, the Maine Insurance Code, M.R.S.A. Title 24-A, through its rating provisions, requires that workers' compensation insurers "adhere to a uniform classification system and uniform experience rating plan." 24-A M.R.S.A. § 2382-B(1). Each insured's safety record determines its experience rating, 24-A M.R.S.A. § 2381-C(4), and the experience rating contributes to its premium calculation. Last, the rating plan must provide for "reasonable and equitable limitations on the ability of policyholders to avoid the impact of past adverse claims experience through

change of ownership, control, management or operation." 24-A M.R.S.A. § 2382-D(1)(D). One purpose of this uniform system is to ensure that each insured pays premium that matches its exposure, which includes expected losses[3], so that other policyholders do not wind up subsidizing them beyond the normal expectations of pooled risk that are inherent to any insurance program.

These purposes will guide the Deputy Superintendent's evaluation of this case.

A. Necessary Parties

A clearer understanding of the relevant facts might have been available were VEI a party to this case. However, the Petitioners did not bring a complaint in VEI's name, and MEMIC did not move for its joinder, notwithstanding that NCCI combined VEI and OSP and STI. The Deputy Superintendent notes that VEI has no current policy to be assessed additional premium. *Hearing Transcript 11-15-05*, p. 173. The Deputy Superintendent will decide the issues presented without VEI's participation.

B. Timeliness

MEMIC argues that the Petitioners did not timely appeal the combination of their experience. This argument is not valid. Section 229 of the Insurance Code provides that a "person aggrieved by any act or impending act, or by any report or order of the superintendent" may apply to the Superintendent for a hearing. 24-A M.R.S.A. § 229(2)(B). Such application must be within 30 days after the applicant knew or should have known of the act. *Id*., § (3). The combination was in March 2004, and the Petitioners did not file their hearing requests until May 2005. However, NCCI's combination and MEMIC's application of the combination are not orders of the Superintendent under 24-A M.R.S.A. § 229, and therefore did not trigger the 30-day period within which an aggrieved person must appeal an act of the Superintendent.[4] The Petitioners properly appealed MEMIC's notice of cancellation under 24-A M.R.S.A. § 2908.

C. Combination

The Petitioners argue that nothing supported NCCI's ruling that OSP and STI had taken action that resulted in an improper application of an experience rating modification and that, in fact, MEMIC had not asked that NCCI combine them. They also say that MEMIC did not apply the modification timely. MEMIC argues that the Petitioners were properly combined because they were a partnership and that the Petitioners' did not disclose the Agreement's existence. After reviewing the evidence and parties' respective positions, the Deputy Superintendent concludes that, if there was little for NCCI to go on in 2004, it was because of the Petitioners' failure to disclose the Agreement.

i. Cooperation

No question exists that Mr. Holden, Ms Mahoney and Mr. Burns had entered into the Agreement in June 1998 and that the Agreement was a means by which they coordinated the activities of three of their companies. The evidence also shows that MEMIC's underwriters were aware for several years that the companies shared telephone numbers and an address. The underwriters also suspected that there was some correlation between increases in the companies' experience modification followed by decreases in payroll. One of MEMIC's witnesses, Craig Reynolds, testified that he had "started asking the agent, and I would say, you know, is there an agreement? Is there a management or revenue sharing agreement, and I was consistently told no." *Hearing Transcript 11-16-05*, p. 52. The Petitioners' witnesses testified that they did not disclose the Agreement in response to those questions. For example, in July 2004, representatives of the Petitioners and MEMIC met to talk about the combinability issue. The subject of their operations also came up. In response to the question "did anybody ask for a copy of that agreement," Ms Mahoney testified that "I believe that Craig Reynolds' words were, how do you operate?" And to the follow up question, "Were you forthcoming? Did you say, actually, we have an agreement," she said, "No, because that wasn't asked for."[5] *Id. 11-15-05*, p. 47.

Even if MEMIC did not ask the precise question about an agreement, the Deputy Superintendent finds that the Petitioners had an obligation under the workers' compensation statutory and regulatory scheme to provide adequate details about their operation. Section 2382-D requires the experience rating plan to include provisions for "reasonable and equitable limitations on the ability of policyholders to avoid the impact of past adverse claims experience through change of ownership, control, management or operation." 24-A M.R.S.A. § 2382-D(1)(D). Bureau Rule 450, which relates to the workers' compensation rating system, provides in part that an insurer may not increase an employer's experience rating modification factor either after the policy's effective date without first issuing a pending experience rating endorsement or more than 90 days after the policy's effective date. Me. Dep't of Prof. & Fin. Reg., 02 031 CMR 450, subchapter I, § 2(A) and (B). An exception exists, however, if NCCI cannot calculate the modification factor "solely because the employer has failed to cooperate in an audit affecting the modification calculation or solely due to the fault of the employer or an agent of the employer." *Id*., § 2(D).

The Bureau has prior experience with this provision, affirmed by the Law Court in *CWCO, Inc., et al. v. Supt. of Ins., et al.*, 703 A.2d 1258 (Me. 1997). CWCO had not disclosed on its application for workers' compensation insurance that it was related to another entity, Commercial Welding, Inc., through common ownership. The insurer notified CWCO and Commercial Welding of their combination and premium increase 130 days after the policy had become effective. The insurer did not formally appeal for an enlargement of the 90-day period as required by CMR 450 § 2(B). The Law Court affirmed the Superintendent's exercise of discretion in waiving the 90-day period's

application because of the insured's misrepresentation and because the insured knew that the insurer had disputed the insured's ownership structure. Just as CWCO misrepresented by an omission, the Petitioners also failed to disclose information that is material to MEMIC's full understanding of their underwriting situation.

ii. Rule 3-F

The Petitioners argue that NCCI improperly combined them under Rule 3-F of the Experience Rating Plan Manual. This rule provides that, "[r]egardless of intent, any action [by an employer] that results in the miscalculation or misapplication of an experience rating modification determined in accordance with the [Rating] Plan is prohibited." The rule goes on to list the type of suspect avoidance actions, such as failure to report changes in ownership, change in ownership, change in combinability, creation of a new entity, transfer of operation between non-combinable entities, and misrepresentation or noncooperation in an audit. The Petitioners admit that they transferred employees twice, in 2000 and 2003, and even assert that one such transfer was at MEMIC's suggestion, so that it could write more of their business. They argue, however, that the record does not disclose any such action since December 2003, when Rule 3-F became effective, that the rule may not be applied retroactively, and that the Deputy Superintendent should conclude that the combination was improper. MEMIC argues that Rule 3-F does not apply because the actions that it covers include "[t]ransfer[s] of operations from one entity to another entity that is not combinable according to Rule 3-D."

As explained in the next section, the Deputy Superintendent finds that the Petitioners are combinable under Rule 3-D of the Experience Rating Plan Manual and therefore makes no ruling on Rule 3-F.

iii. Rule 3-D

MEMIC argues that the Petitioners are combinable under Rule 3-D because of the existence of the 1998 agreement. This rule provides in part that "[t]he combination of two or more entities requires common majority ownership. Combination requires that . . . [t]he same person, group of persons or corporation owns more than 50% of each entity." Rule 3-D(1)(a). The issue is whether or not Mr. Holden, Ms Mahoney and Mr. Burns are a "group of persons" within the meaning of Rule 3-D.

The only case reported in Maine dealing with this term in the context of workers' compensation rating experience is *CWCO*, mentioned above. Lauren Engineers & Construction, Inc. was the sole parent of CWCO and Commercial Welding before 1993. Cleve Whitener and Michael Breed were the sole shareholders of Lauren Engineers, the former owning 88 percent of its stock and the latter 12 percent. In 1993, Breed redeemed his interest in Lauren and bought 80 percent of that company's stock in Commercial Welding. Breed wound up owning no part of Lauren, and Lauren owned 20 percent of Commercial Welding. CWCO

and Commercial Welding argued that there was no common majority ownership. The Law Court disagreed because there was evidence, properly relied on by the Superintendent, that these transactions had not actually taken place when the companies' witnesses testified they had, so that the corporations did share common owners during the policy term at issue. *CWCO*, 703 A.2d at 1262. The Petitioners do not have common shareholders, and the analysis therefore turns to whether or not common ownership exists under Rule 3-D(2). Subsection 3-D(2)(d) is the relevant provision. It says that a majority ownership interest may exist if "each general partner [participates] in the profits of a partnership." This section requires that the Deputy Superintendent examine whether or not the Petitioners were part of a partnership and whether or not that partnership contemplated the sharing of profits.

The Agreement, entered into by Mr. Holden, Ms Mahoney and Mr. Burns as shareholders, respectively, of VEI, PSI and OSP, is the starting point. It provides in part that it is to "be viewed solely as an agreement between the principals of each corporation to share profit, to coordinate services, and to share certain expenses. This Agreement shall not be viewed as creating a partnership . . . or other arrangement between the corporations which would create joint and/or mutual liability of such corporations to any third parties." This language does not bind third parties, and the Deputy Superintendent may examine the parties' relationship under Maine's version of the Uniform Partnership Act ("UPA"). 31 M.R.S.A. §§ 281-323. The UPA provides in part that a partnership is an "association of 2 or more persons, including an association of a husband and wife, to carry on as coowners a business for profit." 31 M.R.S.A. § 286. The Agreement mentions profitability or profits several times and indicates that one of its purposes was for the parties—that is, the individuals—to share profits.[6] The key to this purpose is that the parties "shall coordinate the services which they offer to customers to maximize profitability." *Agreement*, § 1. There is no evidence that Mr. Holden, Ms Mahoney or Mr. Burns entered individually into any employee leasing or placement services with any customer. Therefore, it is reasonable to conclude that the Agreement means nothing if it does not mean to increase the companies' profits and to bind the companies into a profitable relationship. In fact, the very next sentence in section 1 commits the corporations to "provide each other with services and share certain expenses." The services were that VEI would handle marketing, sales and client development services, OSP would administer customer accounts and labor and human resources law compliance, and PSI would handle financial management and billing. *Id*., § 2.

The Agreement also provides that the individuals would share equally "the net profit of the three corporations." *Id*., § 3. When asked whether that had ever happened, Ms Mahoney testified that they had not, because it "would be counterproductive and probably disruptive to the companies to take their profits out, and each company – our goal is for each company to stand on its own even though we out source services to each other." *Hearing Transcript 11-15-05*, p.

52. However, Mr. Holden testified that the companies let their customers choose which one they preferred to do business with. Id., pp. 192-193. This practice is inconsistent with Ms Mahoney's testimony that each company would stand on its own. It also reveals intent to direct business to the company with the lowest experience modification, as explained in greater detail below.

Other evidence that the companies, including the Petitioners, held themselves out to the world as a common enterprise lies in a facsimile cover sheet included in Petitioners Exhibit 2 and a February 17, 2004 printout of a posting at JobsInME.com. The cover sheet carries the banner Maine Staffing Group at its top, with the names of PSI, OSP, VEI and STI appearing below the banner. A Brunswick address, telephone and facsimile number appear near the top of the page.[7] The website describes PSI and VEI as subsidiaries and mentions that "human resource consulting services and employee leasing options" are available from SOP. The website also describes Maine Staffing Group as "a Maine owned and operated business offering a complete range of staffing services." These points do not prove that the Petitioners had common shareholders, but they do support a finding that their shareholders treated the companies as one entity.[8]

There is also evidence that, despite the Agreement's precatory language in section 14 about preserving the companies' identity, they in fact engaged in rather informal internal operations. For example, Mr. Burns testified as to the lack of invoices for services rendered under the Agreement. He explained that "we always took the larger. . . . If I owed Barbara 20 bucks and she owed me 10, she'd invoice me for the $10." *Hearing Transcript 11-15-05*, p. 155.

Still, Mr. Holden, Ms Mahoney and Mr. Burns did not own shares in each other's companies. A finding that they were a "group of persons" under Rule 3-D requires the Deputy Superintendent to go beyond the corporate form that the shareholders adopted. It is commonplace that "corporations are separate legal entities." *Anderson v. Kennebec River Pulp & Paper Co*., 433 A.2d 752, 756 n.5 (Me. 1981). Courts are therefore "generally reluctant to disregard the legal entity and will cautiously do so only when necessary to promote justice." *Id*. Disregarding the corporate entity requires that, first, "some manner of dominating, abusing, or misusing the corporate form" have occurred and, second, that "an unjust or inequitable result . . . would arise if the court recognized the separate corporate existence." *Johnson v. Exclusive Properties Unlimited, et al*., 720 A.2d 568, 571 (Me. 1998) (cites omitted). In short, a court may disregard the corporate entity only if it is more important to protect "those who deal with the corporation." 433 A.2d at 571. A variety of factors illuminates the question whether one has abused the corporate form. *Johnson* cites twelve factors: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity, assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the

dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud. 433 A.2d at 571 (citing*The George Hyman Constr. Co. v. Gateman*, 16 F. Supp. 2d 129, 149-50 (D. Mass. 1998)). Not all of these factors need be present; any of them will support a decision to disregard the corporate form.

The evidence in this proceeding shows that, as discussed above, the Petitioners did not keep adequate records of their transactions. The netting of invoices suggests that the shareholders intended to operate the companies, including the Petitioners, as one entity. While the Petitioners' witnesses rely on the Agreement to support the position that there was no common ownership, both Ms Mahoney and Mr. Burns testified that they never shared revenue. *Hearing Transcript 11-15-05*, p. 49; *id. 11-16-05*, p 144. This was a material term of the Agreement, and the failure to enforce this term suggests that the shareholders did not really intend to follow the Agreement. The evidence also shows an historical pattern between the increases in the Petitioners' experience modification ratings and transfer of operations from one company to another. Further, for example, customers would receive bills for services from PSI when VEI was actually the employer of leased employees. Ms Mahoney explained that this was because VEI "did not have the cash flow to carry the receivables, and [therefore] the customer would then pay us instead of paying Variable Employment because I purchased the receivables from them." *Id*., p. 55. While the Petitioners argue correctly that such transfers did not occur during the policy period in question, that argument is relevant only as to whether the Deputy Superintendent may apply Rule 3-F. This rule does not apply for the reasons discussed above, and the Deputy Superintendent has looked at these transfers only in the context of the question whether the Petitioners' shareholders disregarded the corporate form.[9] Last, while at section 2 the Agreement uses the phrase "coordinate the services" that the three companies offered to their customers, section 3 makes it clear that the purpose of the Agreement is to coordinate the activities of the companies between themselves, taking advantage of the expertise, as Mr. Holmes testified, that their respective shareholders had in sales, bookkeeping and safety. *Hearing Transcript 11-15-05*, p. 182.

As to the second test, whether injustice or inequitable consequences might result, it is essential to return to the purpose of the uniform rating system, that each insured employer pays the premium appropriate to its experience based on its classification, payroll and loss history. The Law Court observed in *Johnson* that this test does not require a finding of fraud or illegality. It is enough to "prevent injustice or inequitable consequences." 433 A.2d at 572. MEMIC and NCCI point out that the shareholders could have accomplished their business objectives through one entity. Ms Mahoney testified that the shareholders did not form a new company because she wanted "to run my own company, be responsible for my destiny." *Hearing Transcript 11-15-06*, p. 88.

She also testified that she, Holden and Burns discussed the general terms of the Agreement before having a lawyer draft it but that she did not remember discussing workers' compensation costs. *Id*., pp. 88-89. Mr. Burns testified that they never discussed the effect that the Agreement might have on such costs. *Id*., p. 168. The Deputy Superintendent does not find it credible that three businesspeople, two of whom had prior experience in employee leasing and temporary services, did not talk about how the cost of workers' compensation insurance might work into their arrangement.[10]

In view of the foregoing, the Deputy Superintendent finds that for the purposes, and within the meaning, of Rule 3-D the Petitioners were part of a partnership and that the terms of the partnership permitted them to share profits, whether or not they actually did. It was therefore proper for NCCI to combine their experience under Rule 3-D(2)(d).

D. High Risk Program

The Petitioners contend that MEMIC improperly assigned them to the 24-A M.R.S.A. § 3714(7) high risk program and that it did not comply with the notice requirement of section 3714(7)(C). Section 3714(7) requires that MEMIC place "an employer" in this program "if the employer has at least 2 lost-time claims, each greater than $10,000 of incurred loss, and a loss ratio greater than 1.0 during the previous 3-year experience rating period." 24-A M.R.S.A. § 3714(7)(A). The high risk program serves two important purposes: First, it protects an employer with average or below average claims experience from employers who demonstrate a higher than average risk of workers' compensation claims. Second, it encourages a "high risk" employer to adopt safety measures by charging it premiums that reflect its experience. If treated as "an employer," the Petitioners must be assigned to the high risk program under section 3714 because their aggregate experience meets the requirements of the statute. MEMIC's Exhibit 13. The issue here is whether or not MEMIC properly treated them as "an employer". The Deputy Superintendent concludes that the Petitioners do operate as and are "an employer" for the purposes, and within the meaning, of section 3714(7) and that MEMIC's determination was therefore proper. The Deputy Superintendent further concludes that MEMIC's notice was timely.

i. Section 3714(7) "An Employer"

MEMIC properly treated the Petitioners as "an employer" because they shared, through express agreement and ongoing practices, their resources and skills in order to promote a common enterprise, notwithstanding the appearance of separateness offered by the different corporate entities. Although there is no overlapping ownership among the Petitioners, in reality they operate in a manner that not only involves intermingled resources and personnel but also is inconsistent with their ostensible separate corporate existence. Several facts in evidence support this conclusion. First, the Agreement specifies that the

Petitioners must share profits and inform each other of purchases greater than $5,000, sales of any assets, contracts, and hiring and firing decisions. Agreement, § 5. Second, as discussed above in the section on Rule 3-D, the Petitioners did bill each other for services but generally did so on a net amount basis. Third, the Petitioners shared responsibilities by allocating discrete aspects of management according to their respective shareholders' skills—Mr. Holmes' being sales and marketing, Mr. Burns' being safety and human resources, and Ms Mahoney's being bookkeeping. The Petitioners have pooled these skills into one enterprise aimed at employee leasing and temporary staffing services. Fourth, the Petitioners share office space and contact information and have presented themselves, at least some of the time, to the world at large under the name Maine Staffing Group. The facsimile letterhead, discussed above, has a common address, telephone number and fax number for the Petitioners. Fifth, there is evidence that the Petitioners presented themselves to MEMIC as a unified operation. For example, MEMIC's Exhibit 18 consists of various documents from its underwriting file on PSI. One is a January 15, 2004 letter to MEMIC concerning various safety issues. The letter is on PSI stationery and is signed by Mr. Burns. Mr. Burns is the sole shareholder of OSP and STI, while Ms Mahoney is the sole shareholder of PSI. It is reasonable to infer that Mr. Burns was acting directly for PSI, not on its behalf in his capacity as PSI's safety contractor. Last, the March 2003 transfer of customers from VEI to PSI is evidence of intent to evade the effect of experience modification. Mr. Holmes testified that VEI let its workers' compensation insurance policy lapse in April 2003 "because we talked with our customers, provided them pricing from both Variable and Project Staffing, and Project Staffing's price was favorable to the clients, so they chose to do business with Project Staffing." *Hearing Transcript 11-15-05*, p. 192. This explanation does not ring true in light of Ms Mahoney's testimony that they wanted "each company to stand on its own." *Id*., p. 52. This transfer came after VEI's experience rating modification had risen from zero to 1.04, then from 1.04 to 1.84. MEMIC's Exhibit 12. PSI had not had workers' compensation insurance since 2001 and therefore had no ratable experience.

The Deputy Superintendent finds that this sharing of financial, physical, and personnel resources, along with the division of management responsibilities among the corporations, is sufficient to establish that Petitioners qualify as "an employer" for purposes and within the meaning of section 3714(7).

The Petitioners argue that the Law Court's decision in *National Industrial Constructors v. Superintendent of Ins*., 655 A.2d 342 (Me. 1995) requires the Deputy Superintendent to find in their favor. This reliance is misplaced. The facts in *NIC* are clearly distinguishable from those presented in this case. In *NIC*, the Law Court determined that NCCI had improperly combined two companies and assigned them to the accident prevention account. The companies were wholly owned subsidiaries of a third entity but had "operate[d] as separate companies under separate management, and each company ha[d] its own assets, equipment and personnel." *Id*. at 344. These factors led the Law

Court to hold that it was improper for NCCI to have combined their loss ratios for safety or accident account eligibility. The facts in this case show that PSI, OSI and STI do not operate as separate companies. They share revenue[11], assets, offices, and skills. The Superintendent finds by a preponderance of the evidence that the Agreement and the Petitioners' business practices qualify them as "an employer" under section 3714(7).

In *NIC*, the Law Court found "[e]mployer is not a term that can mean more than one applicant for insurance simply because those applicants are corporate affiliates." *Id*. at 345. The facts of this case are also distinguishable from *NIC* on these grounds. The Petitioners are not merely corporate affiliates but partners in an enterprise that provides various employee services to others. On these distinguishable facts, *NIC* does not prevent the Deputy Superintendent from finding that the Petitioners are "an employer" under section 3714(7).

Finally, Petitioners actions clearly had the effect of avoiding the costs of worker's compensation insurance in a way that would have been impossible without the Agreement. Had they not cooperated with each other, the history of poor worker safety would have caught up with each of them in succession, so that their respective insurance rates would have increased to reflect the risk their operations presented to other employers in the Maine workers' compensation market. Instead, the Petitioners transferred employees in the same risk class to their partners with cleaner records and lower worker's compensation costs. This result is incompatible with the intent and letter of Maine's workers' compensation laws.

In view of the foregoing, the Deputy Superintendent concludes that MEMIC properly treated the Petitioners as "an employer" and properly assigned them to the high risk program under section 3714(7).

ii. Section 3714(7)(C) Timeliness

The Petitioners assert that MEMIC did not notify them timely of their assignment to the high risk program under section 3714(7)(C). This statute provides that an insurer must apply the high risk program eligibility requirements "annually at the policy renewal date or, if the necessary claim history is not available at that time, 30 days after notice to the insured." 24-A M.R.S.A. § 3714(7)(C). OSP's policy renewal date is January 1, and STI's is January 4. MEMIC did not notify the Petitioners of the high risk endorsement until March 8, 2005, effective April 8, 2005. The phrase "necessary claim history" refers to the eligibility requirements in section 3714(7)(A). As discussed above, this is the history of "an employer". Whatever the basis for MEMIC's decision in March 2005 to combine the Petitioners effective that April, it did not have the necessary claim history because it did not have the Agreement. MEMIC did not have the Agreement because the Petitioners did not disclose it. Given the importance of the Agreement in establishing that the Petitioners are "an employer" under section 3714(7), the Deputy Superintendent concludes that the necessary claim

history was not available at the renewal dates of the affected policies but that MEMIC did meet the 30-day requirement of section 3714(7)(C) and that the assignment is effective as of April 8, 2005.

E. Good Faith; Premium Refunds or Credits

The last two issues raised in the Petitioners' request for a hearing are whether or not (i) MEMIC acted in good faith regarding changes to the Petitioners' status and premiums or whether or not its actions were in any way unfair, arbitrary or discriminatory, and (ii) any of the Petitioners' premiums are excessive such that the Petitioners, or any of them, are due credits or refunds. The Petitioners presented no evidence at hearing on these issues and did not argue them in their position paper. The Deputy Superintendent does not find that MEMIC acted unfairly or arbitrarily as to the Petitioners or discriminated against them or that their premiums were excessive.

VI. Section 235(2)

Section 235(2) provides in part that "[w]ithin 30 days after termination of a hearing, or of any rehearing thereof or reargument thereon . . . or within such further reasonable period as the superintendent for good cause may require, the superintendent shall make his order on hearing covering matters involved in such hearing . . . ." As noted in the Procedural History section above, the hearing took place on November 15 and 16, 2005, and the Petitioners and MEMIC filed their respective position papers on November 29, 2005 as ordered. There was no rehearing or reargument after November 29, 2005. Under section 235(2), a decision was due by December 29, 2005 unless the Superintendent found good cause to extend the decision date. The Deputy Superintendent finds that the complexity of the issues raised in this proceeding provides good cause for enlarging the period for issuing a decision in this case.

VII. ORDER

The Deputy Superintendent ORDERS that the 30-day period in 24-A M.R.S.A. § 235(2) for issuing a decision is hereby enlarged to the date of this Decision and Order. The Deputy Superintendent further ORDERS that the Petitions are DENIED. NCCI may combine the experience of the Petitioners effective April 8, 2004 and MEMIC may charge and collect premium based on that combined experience. MEMIC may also place the Petitioners in its high risk program effective April 8, 2005 and charge and collect premium based on that placement.

VIII. 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 of 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.

[1] Because NCCI is the rating organization under 24-A M.R.S.A. § 2382-B, the Deputy Superintendent designated it a party to this proceeding in his June 6, 2005 Notice of Pending Proceeding and Pre-Hearing Conference.

[2] The record is unclear why MEMIC did not combine VEI for high risk purposes.

[3] Premiums in a workers' compensation policy are determined in advance (subject to audit after the policy expires) based on the hazards associated with the type of jobs related to the employer's business classification, payroll and prior experience. The insurer applies an experience modification to employer's premium if the employer qualifies. From a high level perspective, the experience modifier compares an employer's actual loss history over a three year period to what was "expected" for that type of business based on the reported payrolls for the same time period. If the actual losses are higher than the expected losses, the insured is surcharged; if the actual losses are less than expected, the insured receives a credit.

[4] Further, the parties had discussed the combination and high risk program issues at least since a meeting in June 2004. Hearing Transcript 11-16-05, p. 55. The proceeding did not start until the Petitioners appealed MEMIC's threatened cancellation of their policies for nonpayment of disputed premium, an issue which the parties had been discussing for months. The Bureau's policy is to encourage parties to reach their own solutions to workers' compensation disputes and to come to it when they cannot do so. Under these circumstances, and in view of such policy, the Deputy Superintendent concludes that time ostensibly used to resolve a dispute may not be used as a bar should the parties' efforts not resolve the case.

[5] Ms Mahoney also testified that the Petitioners' agent, Tom Holden, never told the Petitioners that MEMIC was looking into whatever revenue and account-sharing arrangements might exist. Hearing Transcript 11-15-05, p. 48. On rebuttal, she testified that the agent never asked her whether an agreement existed between the companies or the individuals. Id., 11-16-05, pp. 76-77. MEMIC's witnesses testified that they did talk to Tom Holden about combinability, and a May 17, 2004 letter from MEMIC to him supports this testimony. Petitioners' Exhibit 17. The letter says that he and MEMIC had "discussed the combinability issue a few times over the years following the conversations started when you and Jeff Shaw were working on the account together." Petitioners' Exhibit 17. The Deputy Superintendent finds it incredible

that the agent did not discuss this with the Petitioners or their shareholders, especially as the evidence also shows that Tom Holden and Richard Holden, the owner of VEI, are brothers. Hearing Transcript 11-15-05, pp. 178-179.

[6] The Petitioners argue that the Agreement did not create a partnership because there is no evidence that profits were shared. Applying the UPA, the Law Court has held that, even absent such evidence, "sharing is not required if . . . the agreement itself implies that the parties contemplated the sharing of profits." Dalton v. Austin, 432 A.2d 774, 777 (Me. 1981). In the present case, the Agreement clearly addresses the parties' goal on this point.

[7] Three other "office" addresses appear at the bottom of the page, without any indication that each belongs to a particular company.

[8] The Petitioners argue that they "corrected" the website by substituting the word "members" in favor of "subsidiaries" and that Maine Staffing Group was only a trade name and not a real company, that NCCI must have confused it with Maine Staffing Services, Inc. These points do not address the substantive issue here, whether there was a common purpose.

[9] Mr. Holden agreed on cross-examination that OSP's pricing in 2003 was lower than VEI's because OSP's experience rating modification was only 1.47 and VEI's was 1.84. Hearing Transcript 11-15-05, p. 192. Explaining this difference in her testimony, Ms Mahoney said that "[w]orkers' comp is one of the biggest driving factors in cost of temping." Id, p. 70.

[10] To this end, the Deputy Superintendent notes, without making specific findings, that workers' compensation has been a significant topic of business in Maine since at least 1992, such that State government went through a period of shutdowns in 1992 and that the Legislature completely revised the workers' compensation statute effective January 1, 1993. Further, Mr. Burns expressed well-developed views on workers' compensation, explaining some of the Petitioners' experience modifications of 1.47, 1.52 and 1.72: "The system stinks, because the way the system is now, all right, you can turn around and have people who are not injured on the job that can turn around and collect for four years. I can bring up instance upon instance this has happened, MEMIC paying somebody $50,000 with no approval from us or nothing, no knowledge at all to us that they paid them $50,000, and this goes on all the time." Hearing Transcript 11-15-06, p. 157. This assertion ignores the obvious point that experience modifications represent an employer's experience as compared to other employers in the same category, so mathematically there must be employers with better track records than those modifications represent. The assertion also ignores the importance of implementing safety programs as the most effective—and legal—means of avoiding experience modifications.

[11] The Petitioners charge approximately $250 per hour for services to each other, including sales, and safety. Craig Reynolds testified for MEMIC that it

charges $100 for safety services. While this is not conclusive evidence of the prevailing rate for such services, the Deputy Superintendent concludes that the $250 standard charge is so high as not to reflect the actual market and is meant merely to move revenue from one company to another while the Petitioners preserve the appearance of separateness.

PER ORDER OF THE SUPERINTENDENT OF INSURANCE

DATED: February 10, 2006

By: _____
ERIC A. CIOPPA
Deputy Superintendent