

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,  
Petitioner

v.

Fisk Trucking, LLC, Respondent

Docket No. 13-11WCPen

By: Jane Woodruff, Esq.  
Hearing Officer

For: Anne M. Noonan  
Commissioner

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on September 9, 2011  
Record closed on October 7, 2011

**APPEARANCES:**

Rebecca Smith Esq., for Petitioner  
Scott Fisk, *pro se*, for Respondent

Mailed  
State of Vermont

**OCT 27 2011**

Department of Labor  
Workers' Compensation

**ISSUE PRESENTED:**

1. What administrative penalty should be assessed against Respondent for its failure to secure workers' compensation insurance for its employees as required by 21 V.S.A. §687(a)?
2. What administrative penalties should be assessed against Respondent for its failure to report a work injury and file related forms as required by Workers' Compensation Rules 3.0500, 3.0700 and/or 3.0900?

**EXHIBITS**

Joint Exhibit 1:	Joint Statement of Undisputed Facts
Joint Exhibit 2:	Second Joint Statement of Undisputed Facts
Petitioner's Exhibit 4:	Information page, Liberty Mutual policy #WC5-31S-380810-011
Petitioner's Exhibit 5:	Payroll records, 2008-2010
Petitioner's Exhibit 6:	NCCI Assigned Risk premium rates, 2008-2010
Petitioner's Exhibit 7:	Investigator's worksheet

Defendant's Exhibit A: Jiffy Mart Fuel Statements, July-August 2007  
Defendant's Exhibit B: IRS Notice of Intent to Levy, 2008  
Defendant's Exhibit C: Wells River Bank loan documents, March 2008  
Defendant's Exhibit D: Wells River Bank loan document, January 2008  
Defendant's Exhibit E: Letter to Diane Osasa, June 4, 2010; letter to Susan Turkos, January 11, 2009  
Defendant's Exhibit F: IRS Installment Agreement, November 30, 2009  
Defendant's Exhibit G: IRS Notice of Penalty Charge, October 19, 2009  
Defendant's Exhibit I: Vermont Department of Taxes Notice of Insufficient Payment, May 15, 2006  
Defendant's Exhibit J: John Deere Credit statement, December 20, 2006  
Defendant's Exhibit K: Discover Card statement, May 18, 2007

**STIPULATED FACTS:**

1. Respondent is a limited liability company located in Bradford, Vermont. It was formed in November 2007 for the purpose of conducting trucking and logging operations. Scott Fisk is the company's sole member.
2. Between May 30, 2008 and January 27, 2011 inclusive, Respondent continuously employed one or more employees who were not exempt or excluded from workers' compensation insurance coverage.
3. Respondent did not secure workers' compensation insurance for its employees between May 30, 2008 and January 27, 2011 inclusive.
4. Respondent did secure workers' compensation insurance for its employees effective January 28, 2011.
5. Mr. Fisk first applied for exclusion from workers' compensation coverage by filing a Form 29 with the Department on January 29, 2011. That application was approved effective February 1, 2011.
6. For calendar years 2008, 2009 and 2010, Respondent's total gross payrolls, including wages paid to Mr. Fisk, were as follows:

2008: approximately \$225,841.72

2009: approximately \$247,743.00

2010: approximately \$256,083.25

7. Respondent's employees perform different types of work that correspond to the class codes included in the workers' compensation insurance policy issued to it in 2011, that is:

Logging or tree removal – log hauling and drivers  
Logging or tree removal – mechanized equipment operators; and  
Clerical office

8. Mr. Fisk's work for Respondent falls primarily into the second classification above. The wages paid him during calendar years 2008 through 2010 were as follows:

2008: \$20,800.00  
2009: \$20,800.00  
2010: \$21,520.00

9. One of Respondent's employees was injured in a slip and fall accident sometime between May 30, 2008 and January 27, 2011. This was the period during which Respondent did not have workers' compensation coverage. Mr. Fisk does not recall either the injured worker's name or the date of his injury.
10. As a result of his work injury, the injured employee was disabled from working for approximately two weeks. He also incurred medical bills. Respondent paid the medical bills, as well as 75 percent of the injured worker's salary during the period of time when he was unable to work.
11. Respondent did not report its employee's work injury to the Department, nor did it provide any other documentation pertaining to it.

**FINDINGS OF FACT:**

12. I accept the parties' jointly stipulated facts, Paragraphs 1 through 11 above, as true.
13. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on June 28, 2011 and of the Amendment to the Administrative Citation and Penalty issued on September 8, 2011.
14. Before forming a limited liability company, Mr. Fisk operated his logging business as a sole proprietorship for more than ten years. During this time he maintained workers' compensation insurance covering his employees.

15. While running the business as a sole proprietorship, Mr. Fisk incurred significant debts, tax liabilities and penalties, both personal and business-related. He owed money for federal and state taxes, fuel bills, loans on equipment and other debts.
16. Mr. Fisk credibly testified that he did not learn of his federal tax arrearages until early 2008. He was recently divorced at that point, and his ex-wife delivered to him various IRS notices, dating back to 2004, of which he previously had been unaware.
17. When interviewed by Petitioner's investigator, Mr. Fisk was quite candid in stating that his decision to cancel Respondent's workers' compensation insurance coverage was a purely financial one. In his assessment, if he did not do so Respondent would go out of business.
18. As noted above, *see* Paragraph 7 *supra*, and as reflected in the workers' compensation policy issued to Respondent in 2011, Respondent's employees perform work corresponding to the following class codes: (a) 2701 (logging or tree removal—log hauling and drivers); (b) 2709 (logging or tree removal—mechanized equipment operators); and (c) 8810 (clerical office). For the years 2008 through 2010, the approved rates (per \$100 of payroll) for these class codes were as follows:

	<u>Class Code 2701</u>	<u>Class Code 2709</u>	<u>Class Code 8810</u>
2008	\$15.88	\$9.37	\$0.61
2009	\$13.23	\$7.77	\$0.51
2010	\$13.51	\$7.92	\$0.54

19. The difference in these premium rates reflects the difference in risk between the first two codes, for log haulers, drivers and equipment operators, and the third code, for office or clerical employees. They are an indication of the hazardous nature of the work involved in logging and removing trees versus the non-hazardous nature of office or clerical work.
20. During the period when Respondent was uninsured, its workforce varied between five and ten employees. Considering both its payroll and the above class code rates, if Respondent had maintained workers' compensation insurance coverage between May 30, 2008 and January 27, 2011 it would have paid approximately \$64,700.00 in total premiums.

21. Petitioner issued an Administrative Citation and Penalty to Respondent on June 28, 2011 and an Amended Citation and Penalty on September 8, 2011. The amended citation proposed a penalty of \$106,800.00 for Respondent's failure to maintain workers' compensation insurance from May 30, 2008 through January 27, 2011, a total of 972 days, in violation of 21 V.S.A. §687. This represents the maximum possible penalty allowed by the statute.
22. Petitioner also proposed various penalties relating to Respondent's failure to take certain steps relative to its employee's work-related injury, specifically:
  - (a) A \$100.00 penalty for Respondent's failure to report the injury to the Department, in violation of 21 V.S.A. §702 and Workers' Compensation Rule 3.0500;
  - (b) A \$200.00 penalty for Respondent's failure to file a Wage Statement (Form 25) and Certificate of Dependency (Form 10/10S), in violation of Workers' Compensation Rules 3.0700; and
  - (c) A \$500.00 penalty for Respondent's failure to notify the Department of its compensability determination, in violation of Workers' Compensation Rule 3.0900.
23. The total penalty proposed, therefore, is \$107,600.00.
24. Respondent seasonably contested the Amended Administrative Citation and Penalty.

#### **CONCLUSIONS OF LAW:**

1. According to Vermont's workers' compensation statute, unless an employer is approved to self-insure it must maintain workers' compensation insurance coverage for its employees. 21 V.S.A. §687.
2. Effective July 1, 2007 the statute provided that an employer who failed to comply with the requirements of §687 would be assessed an administrative penalty of not more than \$100.00 for each day of violation. 21 V.S.A. §692(a). Effective July 1, 2010 the statute was amended. It now provides for a penalty of not more than \$100 for the first seven days of violation and not more than \$150 for every day thereafter.
3. Respondent operated without workers' compensation insurance from May 30, 2008 through January 27, 2011, a total of 972 days. Using the rates prescribed by 21 V.S.A. §692(a), the maximum possible penalty in this case for failing to secure and maintain workers' compensation coverage is \$106,800.00.

4. An administrative penalty is mandatory in all instances in which an employer is determined to have violated the provisions of §687. *Workers' Compensation and Safety Division v. Darcy Hodgdon and Quick Fix Truck Parts, Inc.*, 171 Vt. 526, 529 (2000). Pursuant to Workers' Compensation Rule 45.5100, however, the Commissioner has discretion to reduce the amount of any penalty assessed if the employer demonstrates:
  - That failure to obtain or maintain insurance was inadvertent or the result of excusable neglect and was promptly corrected;
  - That the penalty amount exceeds the amount of any premium expenditures that would have been paid if a policy was properly obtained or maintained; or
  - That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.
5. Respondent merits no special consideration on account of the first factor. Mr. Fisk admitted that he made a conscious decision to cancel Respondent's workers' compensation insurance coverage for financial reasons. In his assessment, the business choice was either to do so or to go out of business. He chose cancellation. Thereafter, Respondent continued to operate without insurance coverage for two and a half years. These facts show neither excusable neglect nor prompt correction.
6. As to the second factor, the amount of the premium avoidance in this case is \$64,700.00. The proposed penalty of \$106,800.00 is the maximum allowed by statute, but still less than two times the amount of premium avoidance. This is a sufficient and appropriate deterrent.
7. As to the third factor, although Respondent's operation was relatively small, it involved hazardous employment. This is reflected in the relatively high premium rates charged for work of this nature. Further, during the period that Respondent was uninsured one of its employees was injured on the job. I conclude that this factor works against Respondent rather than for it.
8. Though I recognize the financial constraints, both personal and business-related, that Mr. Fisk faced during the period in question, I cannot allow this to excuse his actions in any way. The law mandates that an employer purchase workers' compensation coverage as a means of protecting its workers from the financial consequences of a work-related injury. A business that cannot afford to do so cannot afford to be in business.


9. I conclude that the proposed penalty assessed against Respondent for its failure to maintain workers' compensation insurance covering its employees from May 30, 2008 through January 27, 2011 is appropriate.
10. Vermont's workers' compensation statute provides for an administrative penalty of up to \$5,000.00 against an employer who fails to comply with the reasonable rules and regulations of the Department of Labor, or to adjust and pay compensation and medical bills as required. 21 V.S.A. §688. The Workers' Compensation Rules provide more specific guidance, including:
  - A mandatory \$100.00 penalty for an employer's failure to file a First Report of Injury in a timely manner, Workers' Compensation Rule 45.5500;
  - A mandatory \$100.00 penalty for an employer's failure to file any form required by law to be filed with the Department, Workers' Compensation Rule 45.5500; and
  - A \$500.00 penalty for "any administrative or technical violation not otherwise noted in this section," Workers' Compensation Rule 45.5900.
11. I conclude that the penalties proposed as a result of Respondent's failure (a) to file a First Report of Injury; and (b) to file the Wage Statement and Certificate of Dependency forms relative to its employee's work-related injury are appropriate. These penalties total \$300.00.
12. I conclude that the \$500.00 penalty proposed on account of Respondent's failure to advise the Department in a timely manner of its compensability determination is unjustified. Petitioner presented no evidence that Respondent failed to adhere to the 21-day time frame mandated by Workers' Compensation Rule 3.0900 for accepting or denying a work-related injury claim. Under the particular circumstances of this case, I conclude that the proposed penalty is not adequately supported.

**ORDER:**

The June 28, 2011 Administrative Citation and Penalty, as amended on September 8, 2011 is sustained in the amount of \$107,100.00, calculated as follows:

- (a) For failure to maintain workers' compensation insurance coverage under 21 V.S.A. §687, a penalty of \$106,800.00 is imposed; and
- (b) For failure to file a First Report of Injury in a timely manner as required by 21 V.S.A. §702, a penalty of \$100.00 is imposed; and
- (c) For failure to file a Wage Statement (Form 25) and Certificate of Dependency (Form 10/10S) as required by Workers' Compensation Rules 3.0700, a penalty of \$200.00 is imposed.

**DATED** at Montpelier, Vermont this 26 day of October 2011.

  
Anne M. Noonan  
Commissioner

**Appeal:**

Within 30 days after copies of this opinion have been mailed, Respondent may appeal to the Vermont Supreme Court. 3 V.S.A. §815; V.R.C.P. 74. If an appeal is taken, Respondent may request of the Vermont Department of Labor that this Order be stayed pending the outcome of the appeal. No stay is in effect unless granted.