

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Workers' Compensation and  
Safety Division, Petitioner

Docket No. 01-22WCPen

v.

By: Beth A. DeBernardi  
Administrative Law Judge

Michael Eno Painting LLC,  
Respondent

For: Michael A. Harrington  
Commissioner

**OPINION AND ORDER**

Hearing held via Microsoft Teams on August 29, 2022  
Record closed on August 29, 2022

**APPEARANCES:**

Annika Green, Esq., for Petitioner  
Michael Eno, *pro se*, for Respondent

**ISSUES PRESENTED:**

1. Did Respondent violate 21 V.S.A. § 687 by failing to secure workers' compensation insurance coverage for the period from May 17, 2018 through May 19, 2021, inclusive of end dates?
2. If so, what administrative penalty should be assessed?

**EXHIBITS:**

Petitioner's Exhibit 1:	Scott Goodhue's December 9, 2021 investigation report
Petitioner's Exhibit 2:	Respondent's Vermont Secretary of State business registration
Petitioner's Exhibit 4:	NCCI proof of coverage inquiry
Petitioner's Exhibit 5:	Compliance statement
Petitioner's Exhibit 6:	May 19, 2021 application for workers' compensation insurance
Petitioner's Exhibit 7:	May 26, 2021 insurance policy binder
Petitioner's Exhibit 8:	1099s for tax years 2018, 2019 and 2020
Respondent's Exhibit A:	1099s for tax year 2021

**FINDINGS OF FACT:**

1. I take judicial notice of the Administrative Citation and Penalty issued against Respondent on February 25, 2022 (01-22WCPen).
2. Respondent is a limited liability company registered with the Vermont Secretary of State on January 7, 2004. It engages in the painting business. Michael Eno is the

company owner and manager. *Exhibits 2 and 5*. He testified on Respondent's behalf at the formal hearing.

3. Petitioner alleges that Respondent had employees between May 17, 2018 and May 19, 2021, inclusive of end dates. Therefore, Petitioner contends that Respondent was required to maintain workers' compensation insurance coverage for this period. It did not have such coverage.
4. Respondent contends that it has never had any employees and that all workers who have performed painting services, other than Mr. Eno, are independent contractors.

### Respondent's Operations

5. Mr. Eno worked as a painter for a number of years. In January of 2004, he registered his painting business as a limited liability company with the Vermont Secretary of State. *Exhibit 2*. Around that time, according to Mr. Eno's credible testimony, Respondent decided to grow its business. Accordingly, it bid on some larger jobs, including town halls and churches. In order to perform those jobs, Respondent hired additional workers to provide painting services. Some of those jobs required Respondent to carry workers' compensation insurance and provide proof of insurance. Accordingly, Respondent obtained such insurance. *See Exhibit 4* (workers' compensation coverage in effect from April 15, 2004 to April 15, 2006).
6. Respondent did not renew its workers' compensation insurance policy on April 15, 2006, and its coverage lapsed. *See Exhibit 4*. Mr. Eno credibly testified that he did not want to maintain workers' compensation coverage and therefore decided not to accept jobs that required proof of coverage.
7. Respondent continued its painting business, relying on the labor of Mr. Eno and other workers. Mr. Eno credibly testified that one of those workers, Steven Thomas, did not perform any painting but rather worked only as a carpenter. Mr. Eno further testified that his workers came and went as they pleased and that the only control Respondent asserted over them was to direct the paint color. Mr. Eno maintained that the painters were paid at the end of each week based on invoices that they submitted, although no invoices were offered into evidence.
8. Because Respondent treated the workers as independent contractors, rather than employees, it has no payroll records. Instead, Respondent has produced 1099 tax forms for calendar years 2018 through 2021 to document what it paid to its workers.
  - For calendar year 2018, Respondent produced one 1099, for \$3,714 paid to Joseph Ruggiero/Twin State Management LLC. *Exhibit 8*.
  - For calendar year 2019, Respondent produced five 1099s as follows: Brian Boulay for \$22,400; James Boulay for \$27,800; Joseph Ruggiero/Twin State Management LLC for \$2,830; David Roberts for \$28,800; and Steven Thomas for \$27,265. *Exhibit 8*.

- For calendar year 2020, Respondent produced nine 1099s as follows: Seamus Spendley for \$25,765; Steven Thomas for \$33,067; Chris Wilder for \$2,400; Joseph Ruggiero/Twin State Management LLC for \$4,500; David Roberts for \$31,572; Edgar Simpson for \$9,700; Brian Boulay for \$30,235; James Boulay for \$46,240; and Justin Fiske for \$10,600. *Exhibit 8.*
  - For calendar year 2021, Respondent produced eight 1099s as follows: Brian Boulay for \$32,660; James Boulay for \$45,238; Brockton Corbett for \$5,400; Justin Fiske for \$5,900; David Roberts for \$16,380; Edgar Simpson for \$16,250; Seamus Spendley for \$25,570; and Steven Thomas for \$31,160. *Exhibit A.*
9. Mr. Eno testified, and I find, that Joseph Ruggiero/Twin State Management LLC was a waste disposal contractor. Mr. Ruggiero did not provide labor on Respondent's painting jobs, but rather provided dumpsters on occasion for the removal of construction waste.

*The Investigation*

10. On May 17, 2021, investigator Scott Goodhue of the Workers' Compensation and Safety Division began an investigation into whether Respondent was operating without workers' compensation insurance in violation of 21 V.S.A. § 687. Mr. Goodhue testified at the hearing on Petitioner's behalf, and his investigative report was admitted into evidence. *See Exhibit 1.*
11. In accordance with Department practice, Mr. Goodhue went back three years from the date of his investigation to determine whether Respondent was in violation of the statutory requirement for employers to maintain workers' compensation insurance. Thus, he looked at the period of May 17, 2018 through May 19, 2021.
12. After verifying Respondent's business registration with the Vermont Secretary of State, Mr. Goodhue looked for proof of insurance in the National Council on Compensation Insurance (NCCI) database. The database revealed that Respondent had workers' compensation insurance from April 15, 2004 through April 15, 2006, at which time it did not renew its coverage. The database search further revealed that, as of the date of Mr. Goodhue's search, Respondent had never obtained another workers' compensation insurance policy subsequent to April 15, 2006. *See Exhibits 2 and 4.*
13. On May 18, 2021, Mr. Goodhue went to Respondent's jobsite at the Sterling House in Bellows Falls, Vermont, to observe operations and speak with Mr. Eno. Mr. Goodhue observed Mr. Eno and three other workers painting the exterior of the building. When Mr. Goodhue asked Mr. Eno about his business, Mr. Eno told him that the workers were independent contractors; however, he refused to provide their names and would not allow the workers to speak with Mr. Goodhue. Further, Mr. Eno refused to provide any payroll records or other information at that time.
14. The day after Mr. Goodhue's visit to the jobsite, on May 19, 2021, Respondent completed an application for workers' compensation insurance coverage. On that

application, Respondent stated that it had employees, not subcontractors. *See Exhibit 6.* At the hearing, Mr. Eno testified that he so stated because otherwise Respondent would not be able to obtain the policy that the Department was requiring. I find this testimony credible. Accordingly, I make no inference from the application as to Respondent's position concerning whether it had employees or subcontractors.

15. Respondent obtained workers' compensation insurance effective May 20, 2021. *See Exhibits 1 and 7.* However, the policy was canceled by the insurer for non-payment of premium in July 2021, reinstated in August 2021, and then canceled by Respondent permanently on October 21, 2021. *See Exhibit 4.*
16. At the hearing, Mr. Eno acknowledged his cancellation of the policy in October 2021. He explained that, to reinstate the policy after he canceled it, he would be required to pay a \$1,900 reinstatement fee. Mr. Eno was not willing to pay a reinstatement fee, nor was he willing to negotiate about the fee. Accordingly, to avoid the reinstatement fee and future premiums, Respondent named three of its workers as members of the limited liability company and proceeded to exclude them from coverage under the officer exclusion provisions of the workers' compensation statute. I take judicial notice from the Department's records that those individuals are James Boulay, Brian Boulay and Seamus Spendley.
17. Based on the evidence presented at hearing, including the 1099s and the credible witness testimony, I find that Respondent relied on the labor of at least three painters in 2019, at least seven painters in 2020, and at least seven painters in 2021, in addition to Mr. Eno's labor. As to 2018, the only evidence offered at the hearing was a 1099 issued to Joseph Ruggiero/Twin State Management LLC. Based on Mr. Eno's credible testimony that Twin State Management LLC was a trash hauling service, the evidence is insufficient for me to find that Respondent relied on the labor of any painters other than Mr. Eno in 2018.

*Facts Relevant to Mitigation under Workers' Compensation Rule 45.5520*

*First Mitigation Factor: Inadvertence/Excusable Neglect and Prompt Correction*

18. Respondent had a workers' compensation insurance policy from April 15, 2004 through April 15, 2006 because some painting jobs required proof of insurance during that time. Thereafter, Respondent canceled the policy and simply avoided jobs that required proof of insurance. Accordingly, I find that Respondent's failure to maintain a policy after April 15, 2006 was not due to inadvertence or excusable neglect.
19. Respondent applied for a new workers' compensation insurance policy the day after Mr. Goodhue came to his jobsite, and coverage became effective on May 20, 2021. *Exhibit 4.* However, the policy was canceled for non-payment of premium in July. Although it was reinstated, Respondent permanently canceled the policy on October 21, 2021. *See Exhibit 4.* Under these circumstances, I find that Respondent's failure to maintain insurance was not effectively corrected.

*Second Mitigation Factor: Premium Avoidance*

20. Mr. Goodhue routinely reviews the payroll records of subject businesses and calculates how much workers' compensation insurance premium the businesses avoided paying by not having coverage. The calculation of premium avoidance is based on the rates published by the NCCI on April 1 of each year. To perform the calculation, Mr. Goodhue reviews the payroll records to determine the size of the employer's payroll from April 1 through March 31 for each relevant year and applies the annual rate published by NCCI to each \$100 of payroll.
21. In the absence of payroll records, Mr. Goodhue can perform the calculation using 1099 tax forms, but that calculation is less accurate because 1099s are provided for a calendar year, not for the year running from April 1 to March 31. In order to perform a premium avoidance calculation using 1099s, Mr. Goodhue divides the total amount reported on each annual 1099 by 12, to obtain a monthly figure, and then he allocates those monthly figures to each month of the April 1 through March 31 premium year.
22. Mr. Goodhue attempted to calculate the premium avoidance for Respondent's business, but he could not complete the calculation because he did not have the 1099 forms from 2021. Accordingly, the premium calculation set forth in his report (Exhibit 1) is incomplete, as follows:

Dates	Rates	Wages	Premium Avoidance
5/17/18 - 03/31/19	10.72	\$29,200	\$3,130
4/1/19 - 3/31/20	9.30	\$130,105	\$12,100
4/1/20 - 3/31/21	8.07	\$ ?	\$ ?
4/1/21 - 5/19/21	7.44		
Totals			\$ Unknown

*Third Mitigation Factor: Size and Nature of the Business*

23. As reflected by the 1099s, Respondent's business had three employees in 2019, seven employees in 2020, and seven employees in 2021. A business with fewer than ten employees is considered a "small" business for purposes of penalty mitigation, and I find that Respondent meets this criterion.
24. The North American Industry Classification System (NAICS) is the federal system for classifying businesses for various statistical purposes. NAICS classifies painting businesses as Industry Sector Code 23 (Construction).<sup>1</sup> Under Vermont law, businesses classified under Code 23 are in the highest risk category for workers' compensation purposes. See *Workers' Compensation Rule 45.5513 and Appendix*.
25. Mr. Eno testified that painting is not a hazardous occupation because the only hazard to which painters are subject is lead paint. I find this testimony unpersuasive.

<sup>1</sup> More specifically, painting contractors fall under sector code 23, subsection 238320 (Paint and Wall Covering Contractors). See <https://www.census.gov/naics> (last accessed on September 8, 2022).

Painting is a physically demanding occupation that requires lifting and carrying heavy objects, including large buckets of paint, tools, and ladders. Painters also perform repetitive physical tasks, work on their knees, and stand on ladders. In any event, Respondent's Industry Sector Code is 23, which is deemed hazardous.

Citation and Appeal

26. On February 25, 2022, Petitioner issued an Administrative Citation and Penalty in Docket No. 01-22WCPen to Respondent for failing to maintain workers' compensation insurance coverage for its employees from May 17, 2018 through May 19, 2021, inclusive of end dates. The citation included a proposed penalty of \$54,900.
27. Respondent filed a timely appeal of the citation.

**CONCLUSIONS OF LAW:**

Requirement to Maintain Workers' Compensation Insurance and Statutory Employees

1. Under Vermont law, unless an employer is approved to self-insure, it must maintain workers' compensation insurance coverage for its employees. 21 V.S.A. § 687; *In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶ 3.
2. There is no evidence that Respondent was ever approved to self-insure.
3. To determine whether Respondent violated § 687 by failing to maintain workers' compensation coverage for its workers, I must determine whether those workers were employees or independent contractors under Vermont law. *See Workers' Compensation and Safety Division v. On the Rise Construction, LLC*, 08-19WCPen and 09-19WCPen (September 15, 2020). If the workers were employees, then Respondent was required to insure them.
4. The Vermont Workers' Compensation Act defines "employer" as including "the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed." 21 V.S.A. § 601(3).
5. Under that definition, statutory employer status is determined by the nature of the putative employer's business. *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶ 9, citing *Chatham Woods Holdings, supra* at ¶ 11. Specifically, the "nature of the business" test asks whether the work contracted for is "a part of, or process in, the trade, business or occupation" of the putative employer. *Id.*; *see also Frazier v. Preferred Operators, Inc.*, 2004 VT 95, ¶ 11 (acknowledging preference for the "nature of the business" test over the "right to control" test for determining the existence of a statutory employer relationship). If the work contracted for is a part of, or process in, the trade, business or occupation of the putative employer, then those workers are employees.

6. Applying the “nature of the business” test here, the workers providing painting services on Respondent’s jobsites all provided exactly the same service that Respondent was in business to provide. I therefore conclude that they were Respondent’s employees.

Relevant Time Periods and Specific Employees

7. The investigation looked at whether Respondent had any employees from May 17, 2018 through May 19, 2021. The only entity to whom Respondent issued a 1099 in 2018 was a trash hauler, and Petitioner offered no other evidence of putative employees for 2018. Thus, for the time period from May 17, 2018 through December 31, 2018, the evidence is insufficient to establish that Respondent had any employees.
8. The 1099 forms for subsequent years, however, identified multiple workers who provided painting services to Respondent. Even crediting Mr. Eno’s testimony that Steven Thomas provided no such services, the records establish that Respondent had workers performing painting services for each of 2019, 2020 and 2021. Further, when Mr. Goodhue visited Respondent’s jobsite in May of 2021, he observed three painters, in addition to Mr. Eno. Accordingly, I conclude that Respondent had employees during each of 2019, 2020 and 2021.
9. I therefore conclude that Respondent violated 21 V.S.A. § 687 by failing to maintain workers’ compensation insurance coverage for its employees from January 1, 2019 through May 19, 2021, a period of 870 days.<sup>2</sup>

Applicable Penalties for Non-Compliance with the Insurance Requirement

10. Failure to comply with § 687 carries a statutory penalty of up to \$100.00 per day for the first seven days of violation and up to \$150.00 per day thereafter. The maximum statutory penalty for failing to maintain workers’ compensation insurance coverage for 870 days is \$130,150.<sup>3</sup> See 21 V.S.A. § 692(a).
11. Workers’ Compensation Rule 45 implements the penalties provided for by statute. The rule provides a formula for calculating penalties based on the NAICS code for the employer’s industry sector and the number of its prior offenses within the last three years. See Workers’ Compensation Rules 45.5510 – 45.5513.
12. Respondent’s painting business falls under NAICS Industry Sector Code 23 (Construction). See Finding of Fact No. 24 *supra*; *Workers’ Compensation Rule 45, Appendix*. For employers in this industry sector, Rule 45.5513 provides for penalties of \$50.00 per day for each day without insurance for an initial violation.

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<sup>2</sup> 365 days + 366 days + 139 days = 870 days.

<sup>3</sup> (7 days x \$100 per day) + (863 days x \$150 per day) = \$130,150.

13. This is Respondent's first violation. Application of the formula set forth in Rule 45.5513 yields a penalty of \$43,500.<sup>4</sup> This figure is less than the proposed penalty of \$54,900 set forth in the February 25, 2022 citation because I have removed 2018 from the calculation.

Mitigating Factors

14. Rule 45.5520 provides the Commissioner with discretion to reduce the amount of any penalty if the employer demonstrates any of the following:
- That the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected;
  - That the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained; or
  - That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.

*Workers' Compensation Rules 45.5520 – 45.5550.* The rule places the burden to establish the applicability of any mitigating factors on the employer. *Id.*

First Mitigation Factor: Inadvertence/Excusable Neglect and Prompt Correction

15. Employers must establish *both* inadvertence/excusable neglect *and* prompt correction to be entitled to consideration of mitigation under the first factor. *Workers' Compensation Rule 45.5530.* Respondent has failed to establish either one. *See* Finding of Fact Nos. 18 and 19 *supra*. Accordingly, it is not entitled to mitigation under the first factor.

Second Mitigation Factor: Premium Avoidance

16. Mr. Goodhue could not calculate how much premium Respondent avoided by not having workers' compensation insurance because he did not have the 1099 tax forms for 2021. Respondent has now provided those forms, and I have included the 2021 figures in the calculation of premium avoidance.
17. Crediting Mr. Eno's testimony that neither Joseph Ruggiero/Twin State Management LLC nor Steven Thomas provided any painting services, I have removed their 1099s from the calculation. Accordingly, I have modified the figures set forth in Mr. Goodhue's table as follows:
- The relevant 1099s for 2019 total \$79,000. That figure divided by 12, to represent a monthly estimate, is \$6,583.

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<sup>4</sup> 870 days × \$50 per day = \$43,500.

- The relevant 1099s for 2020 total \$156,512. That figure divided by 12 is \$13,043.
- The relevant 1099s for 2021 total \$147,398. That figure divided by 12 is \$12,283.

18. Based on these modified figures, I calculate the premium avoidance as follows:

Dates	Rates	Wages	Premium Avoidance
1/1/19 - 03/31/19	10.72	\$19,749	\$2,117
4/1/19 - 3/31/20	9.30	\$98,376	\$9,149
4/1/20 – 3/31/21	8.07	\$ 154,236	\$12,447
4/1/21 – 5/19/21	7.44	\$19,811	\$1,474
Totals			\$ 25,187

19. As set forth in the chart, I estimate Respondent’s premium avoidance at \$25,187. This figure is significantly less than the presumptive penalty under Rule 45.5513 of \$43,500. Accordingly, mitigation may be available under the second factor. *See Workers’ Compensation Rule 45.5540.*

*Third Mitigation Factor: Size and Nature of the Business*

20. This factor requires the business to have both a small size and a non-hazardous nature. Although Respondent has a small size, construction work is inherently hazardous, as indicated by the inclusion of Industry Sector Code 23 in the most hazardous category under Workers’ Compensation Rule 45.550. Mitigation is therefore not available under the third factor.

*Penalty Calculation*

21. The presumptive penalty to be imposed in the absence of any mitigating factors here is \$43,500. Neither the first nor the third mitigating factor is applicable here. *See Conclusion of Law Nos. 15 and 20 supra.*

22. As to the second mitigating factor, the amount of premium avoidance, \$25,187, is less than the presumptive penalty of \$43,500. When the premium avoidance is significantly less than the presumptive penalty, the Department may take that into consideration to mitigate the penalty amount.

23. Typically, unless there is a strong rationale for a higher penalty, the Department imposes a penalty in the range of two to three times the premium avoidance for an employer’s failure to maintain coverage. *Workers’ Compensation and Safety Division v. Lorenzo de Coninck d/b/a LTD & Sons Property Maintenance*, 28-18WCPen (August 12, 2020), citing *Workers’ Compensation and Safety Division v. Labrie*, 07-10WCPen (December 14, 2010) (penalty of two times premium avoidance); *Workers’ Compensation and Safety Division v. Beezco, Inc.*, 22-10WCPen (July 22, 2011)

(same); *Workers' Compensation and Safety Division v. Peter Leo Goldsmith, LLC*, 25-11WCPen (June 21, 2012) (penalty of slightly less than twice the premium avoidance); *Workers' Compensation and Safety Division v. Henry Vo*, 09-12WCPen (October 18, 2012) (same); *Workers' Compensation and Safety Division v. Rhoades*, 07-10 (December 14, 2010) (penalty of three times the premium avoidance).

24. In this case, a penalty of twice the premium avoidance would be \$50,374.<sup>5</sup> That amount exceeds the presumptive penalty of \$43,500 and would therefore provide no mitigation to Respondent. Further, I decline to consider a penalty based on less than twice the premium avoidance because the Department's typical penalty range is two to three times the premium avoidance; nothing in this case suggests that Respondent should be penalized at a lower rate than other businesses in similar circumstances. Accordingly, although I have taken premium avoidance into consideration as a mitigating factor, this factor does not lower the presumptive penalty of \$43,500.
25. I therefore conclude that a penalty of \$43,500 against Respondent for failing to maintain workers' compensation insurance for its employees from January 1, 2019 through May 19, 2021 is appropriate under the statute and Workers' Compensation Rule 45.

**ORDER:**

For the violation alleged in Petitioner's February 25, 2022 Administrative Citation and Penalty in Docket No. 01-22WCPen, failing to maintain workers' compensation insurance, Respondent is hereby assessed a penalty of \$43,500.

**DATED** at Montpelier, Vermont this 8th day of September 2022.

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Michael A. Harrington  
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.Civ.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.

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<sup>5</sup> \$25,187 x 2 = \$50,374.