

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,  
Petitioner

Docket No. 21-10WCPen

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

David Howrigan and Peggy Howrigan dba  
Sugar Hill Farm,  
Respondents

For: Anne M. Noonan  
Commissioner

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on February 18, 2011  
Record closed on March 17, 2011

**APPEARANCES:**

Rebecca Smith, Esq., for Petitioner  
David G. Miller, Esq., for Respondents

Mailed  
State of Vermont

MAY 02 2011

Department of Labor  
Workers' Compensation

**ISSUES PRESENTED:**

1. Did Respondents violate the terms of 21 V.S.A. §687 by failing to secure workers' compensation insurance coverage for their employees for the period from January 1, 2007 through December 30, 2009 and if so, what administrative penalty should be assessed?
2. Did Respondents violate the terms of 21 V.S.A. §701 and Workers' Compensation Rules 3.0500 and 3.0700 by failing to timely file various forms relating to the fatal injury suffered by their employee, Jose Obeth Santiz-Cruz, and if so, what administrative penalty should be assessed?
3. Did Respondents violate the terms of 21 V.S.A. §688(a) by failing to pay the transport and funeral expenses relating to Mr. Santiz-Cruz' death and if so, what administrative penalty should be assessed?

## **EXHIBITS:**

### **Joint Exhibit I: Respondents' Responses to Allegations**

Petitioner's Exhibit 1: NCCI Proof of Coverage database printouts  
Petitioner's Exhibit 2: Excerpted pages from policy effective 12/31/09  
Petitioner's Exhibit 3: Employee and wage information  
Petitioner's Exhibit 4: Premium avoidance calculation  
Petitioner's Exhibit 5: [not admitted]  
Petitioner's Exhibit 6: Housing valuation information  
Petitioner's Exhibit 7: Forms 25 and 23 from Santiz-Cruz claim file  
Petitioner's Exhibit 8: Assigned risk rates for class code 0036  
Petitioner's Exhibit 9: Affidavit of Nicolas Santiz-Lopez  
Petitioner's Exhibit 10: Letter from Mexican Consulate, March 3, 2010  
Petitioner's Exhibit 11: Letter from Julie Charonko, April 26, 2010  
Petitioner's Exhibit 12: E-mail from Attorney Joselson, January 13, 2011

Respondents' Exhibit A: Form 15 settlement agreement (with attachments)  
Respondents' Exhibit B: Federal tax returns, 2007-2010  
Respondents' Exhibit C: Unaudited balance sheet, 12/31/2010  
Respondents' Exhibit D: St. Albans Cooperative Creamery statement, Dairy #00172  
Respondents' Exhibit E: St. Albans Cooperative Creamery statement, Dairy #00467

## **FINDINGS OF FACT:**

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondents on December 20, 2010.
2. Respondents, husband and wife, are the partner owners of an unincorporated business known as Sugar Hill Farm, which they have operated since approximately 1992. Their primary business is producing milk from their dairy herd. Additionally, they grow some of the hay and corn needed to feed their cows.
3. Respondents reside at 320 Menard Road in Fairfield, Vermont, a property owned by David Howrigan's mother. Sugar Hill Farm operates at multiple locations, including the 320 Menard Road property and properties owned by Respondents at 1272 Menard Road, on Paradee Road and on North Road in Fairfield, Vermont; on Woodward Road and Tabor Hill Road in Fairfax, Vermont; and on a property in Swanton, Vermont. Together these properties encompass approximately 800 acres and include five houses, a house trailer and various barns and outbuildings. At least some of these structures are in substantial need of rehabilitation and therefore are likely of limited monetary value.

4. Respondents have two separate dairy operations registered with the St. Albans Cooperative Creamery. Dairy #00172 is based at the Paradee Road property, and Dairy #00467 is based at the Woodward Road property. The Creamery collects the milk from each dairy's bulk tank, pays a certain price per hundredweight for it, and after taking various deductions for expenses and creditor assignments issues a biweekly check for the remainder to Respondents.
5. To assist in their dairy operations, Respondents employed at least one non-family employee continuously from January 1, 2007 through December 30, 2009. Respondents' payroll for non-family employees exceeded \$10,000.00 in each of calendar years 2007, 2008 and 2009.
6. For at least three years in the 1990's, Respondents maintained workers' compensation insurance coverage for their employees. For many years thereafter, however, including the period from January 1, 2007 through December 30, 2009, Respondents failed to maintain the required coverage. The decision to forego coverage was financial – Respondents had limited funds and felt it necessary to commit their resources to other expenses.
7. On the afternoon of December 22, 2009 Respondent's employee, Jose Obeth Santiz-Cruz, was fatally injured when he got caught up in a machine at the Paradee Road barn and was asphyxiated. Respondents were quite shaken by Mr. Santiz-Cruz' death and continue to suffer emotionally from it.
8. Shortly after his death, Mr. Santiz-Cruz' remains were transported to his home in Mexico for burial. The final bill from the local funeral home for burial and transport expenses was \$6,305.00. This bill was paid as follows: \$305.00 from Respondents directly, \$4,000.00 from a group of friends and local farmers on Respondents' behalf, and \$2,000.00 from the Consulate General of Mexico in Boston at the request of Mr. Santiz-Cruz' family. There were additional local transportation and burial costs in Mexico, which were paid either by local authorities and/or by Mr. Santiz-Cruz' family, but the record does not specify how much these totaled.
9. On January 13, 2010 Respondents submitted the First Report of Injury (Form 1), Report of Fatal Accident (Form 4) and Wage Statement (Form 25) regarding Mr. Santiz-Cruz' injury to the Department of Labor. Respondents made these filings as soon as they were advised by their attorney of their responsibility to do so.

10. At about the same time Respondents began discussions with Mr. Santiz-Cruz' family as to the workers' compensation benefits due on account of his work-related death. Ultimately these discussions led to an agreement by the terms of which Respondents agreed to pay \$49,910.00 as full and final settlement of Mr. Santiz-Cruz' workers' compensation claim.<sup>1</sup> This amount included both death benefits due Mr. Santiz-Cruz' family under 21 V.S.A. §632 and burial, funeral and transport expenses as mandated by the same statute.
11. The settlement agreement states Mr. Santiz-Cruz' average weekly wage for the 26 weeks prior to his injury as \$550.00. According to the wage statement filed by Respondents, this amount was comprised of \$400.00 in weekly gross wages, plus \$150.00 allocated to the weekly value of employer-provided housing.
12. The settlement agreement calls for biweekly payments by Respondents to Mr. Santiz-Cruz' family. The payments are secured by an assignment of Respondents' milk check and therefore are to be paid directly by the St. Albans Cooperative Creamery to the family's attorney.
13. Effective December 31, 2009 Respondents once again procured workers' compensation insurance coverage for their employees. The total amount due for this coverage, including both estimated annual premium and standard fees and assessments, was \$10,797.00. The estimated annual premium calculation was based on an estimated payroll for the policy year (12/31/09 to 12/31/10) of \$80,000.00. This payroll was allocated entirely to the "Farm-Dairy and Drivers" classification code, numerically identified as 0036. For the policy year beginning December 31, 2009 the applicable rate for this classification was \$12.86 per \$100 of remuneration.
14. The workers' compensation insurance policies that Respondents procured in the 1990's, as well as the policies they have procured since December 31, 2009, have all been written in the "assigned risk" market (also known as the "involuntary" or "residual" market). The payroll classification upon which the premium calculation for all of these policies was based was the 0036 "Farm-Dairy and Drivers" code.

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<sup>1</sup> The evidence does not indicate whether the settlement agreement has yet been approved in accordance with 21 V.S.A. §662(a).

15. For the period from January 1, 2007 through December 30, 2009 the applicable assigned risk market rates for classification code 0036 would have been as follows:

<u>Policy Year</u>	<u>Rate (per \$100 of remuneration)</u>
1/1/07-1/1/08	\$13.10
1/1/08-1/1/09	\$13.80
1/1/09-12/30/09	\$14.88

16. During that same period, Respondents paid cash wages to non-family employees as follows:

Calendar year 2007	\$34,357.63
Calendar year 2008	\$64,813.48
Calendar year 2009	\$84,000.00

17. Applying these rates to these wages, for the period from January 1, 2007 through December 30, 2009 the total amount of Respondents' premium avoidance – the amount of premium they would have paid had they secured coverage as required – is approximately \$25,944.31.<sup>2</sup>
18. In addition to cash wages, Respondents also provided their non-family employees with furnished housing and utilities. The house in which Mr. Santiz-Cruz resided at the time of his death was shared with two other employees. Respondent David Howrigan estimated the total rental value of this housing at \$600.00 per month. Split among three employees, the corresponding non-cash wage equivalent would be \$50.00 per week per employee.
19. Mr. Howrigan acknowledged that both the wage statement he prepared following Mr. Santiz-Cruz' death and the settlement agreement he later executed stated the value of the housing he provided as \$150.00 per week. Mr. Howrigan testified that at the time these documents were prepared he was considering only the total rental value of the housing. It did not occur to him until later that he should have divided that value among all three of the employees who resided there in order to derive a more accurate calculation of the non-cash wages provided to Mr. Santiz-Cruz. I find this testimony to be credible.
20. Petitioner's investigator, Susan Albert, researched fair market rental cost information for housing in the Fairfield and Fairfax area from two sources – the St. Albans City Housing Authority and a website of the federal HUD program. Based in part on this information, Ms. Albert determined that a reasonable estimate for the value of the housing Respondents provided to their employees was \$100.00 per person per week.

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<sup>2</sup> To this amount would have been added various standard fees and assessments, which likely would have totaled a few hundred dollars. There is insufficient evidence in the record from which to calculate these accurately.

21. Factoring in her estimate of the value of the housing Respondents had provided to their employees from January 1, 2007 through December 30, 2009 Ms. Albert calculated that the total amount of Respondents' premium avoidance for the period was \$31,465.14.
22. Ms. Albert acknowledged that the information she obtained in researching the rental value of Respondents' housing did not exactly correlate with what Respondents actually had provided. Some of the data covered both urban and rural locations, for example, and some of it pertained to unfurnished rather than furnished housing. Ms. Albert did not research how the housing provided to employees by other farmers in the area compared with the housing provided by Respondents. I find that the research she did conduct was for housing that is not reasonably comparable to what Respondents provided.
23. Ms. Albert also acknowledged that she did not know whether Respondents' workers' compensation insurance carrier factored in the value of rental housing in calculating the premium due for either the policy year just past (12/31/09-12/31/10) or for the current year. Nor is it clear whether any prior carrier had done so with respect to the policies written in the early 1990's.
24. Ms. Albert testified that her decision to include the rental value of Respondents' housing in estimating the premium they would have paid was based on information she gleaned from the NCCI website, indicating that such amounts were to be included in calculating payroll for workers' compensation insurance premium purposes. Ms. Albert is not an insurance professional, however, and admitted to having only limited familiarity with the process by which insurance premium is calculated.
25. Given (a) the questionable methodology by which Ms. Albert derived her fair rental value estimate; (b) her admitted lack of expertise in the area of insurance underwriting and premium calculation; and (c) the absence of any evidence indicating that either prior insurers or the current carrier had included a rental value estimate in their payroll and premium calculations, I find that Petitioner's estimate as to the amount of Respondents' premium avoidance for the period from January 1, 2007 through December 30, 2009 is flawed. Instead I accept the amount stated in Finding of Fact No. 17 above, \$25,944.31, as a valid estimate of Respondents' premium avoidance for that period.
26. On December 20, 2010 Petitioner issued an Administrative Citation and Penalty to Respondents. The citation proposed a penalty of \$66,200.00 for Respondents' failure to maintain workers' compensation insurance coverage from January 1, 2007 through December 30, 2009. In addition, the citation proposed penalties of \$100.00 each for the three forms (First Report of Injury, Report of Fatal Accident and Wage Statement) that Respondents failed to file in a timely manner following Mr. Santiz-Cruz' work-related accident. Last, the citation proposed a penalty of \$500.00 for Respondents' alleged failure to pay the amounts required by statute for Mr. Santiz-Cruz' burial and transport expenses. The total penalty proposed, therefore, was \$67,000.00.
27. Respondents' timely notice of contest followed.

## 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. An employer whose aggregate payroll for workers engaged in agriculture or farm employment is less than \$10,000.00 in a calendar year is exempt from the requirement that it maintain workers' compensation insurance coverage. 21 V.S.A. §601(14)(C). Respondents' payroll exceeded this amount for each of the years at issue here, and therefore this exemption does not apply.
3. Prior to 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 \$50.00 for each day of violation, to a maximum of \$5,000. 21 V.S.A. §692(a). The statute subsequently was amended to raise the penalty to not more than \$100 daily, with no maximum cap. *Id.* Applying these parameters to the current proceeding, the maximum penalty that could be imposed against Respondents is \$96,400.00.
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. As to the first factor, Respondents admit that their failure to maintain insurance during the period in question was neither inadvertent nor the result of excusable neglect. To the contrary, Respondents truthfully acknowledged that theirs was a conscious financial decision to forego the required coverage so that they could cover other necessary business expenses instead. Vermont's workers' compensation law allows no such discretion, however. I conclude that Respondents have not earned any special consideration on account of this factor.

6. As to the third factor, Respondents' business is relatively small in terms of the number of non-family employees who have worked there during the period in question. As the Vermont legislature specifically has found, however, farming itself is an inherently hazardous business, more so than many other industries. *An Act Relating to Lowering the Cost of Workers' Compensation Insurance*, 2007, No. 208 (Adj. Sess.) at §1(a)(8). This case has demonstrated all too well that farm employment presents much more than just a minimal risk to employees. I conclude that this factor works against Respondents rather than for them.
7. What mitigating evidence there is in this case goes to the second factor. I have found that the amount of Respondents' premium avoidance for the period in question totaled \$25,944.31. Petitioner's proposed penalty is more than two and a half times that amount.
8. Given the severe consequences that the employees of an uninsured employer face in the event of a work-related injury, any penalty assessed ought properly to act as both a punishment and a deterrent. How extensive the penalty must be in order to do so, however, depends on the particular facts and circumstances of each case.
9. In this case I am mindful of the fact that whatever premium Respondents avoided during the period in question has been consumed twofold by the death benefits they now are personally obligated to pay – benefits that would have been paid by their insurance carrier had they been insured. I acknowledge the forthright manner in which Respondents have dealt with Mr. Santiz-Cruz' family and how seriously they now consider their responsibilities to his surviving dependents. With that in mind, I conclude that an appropriate penalty for Respondents' failure to maintain workers' compensation insurance during the period in question is \$30,000.00.
10. I conclude that by failing to file the First Report of Injury (Form 1) and Report of Fatal Accident (Form 4) within 72 hours of Mr. Santiz-Cruz' injury Respondents violated the terms of 21 V.S.A. §701 and Workers' Compensation Rule 3. As for the Wage Statement (Form 25), although Rule 3.0700 does not specify a time frame within which it should have been filed, I conclude that a three-week delay was long enough to make Respondents' filing untimely. I conclude that a \$100.00 penalty for each of these violations is appropriate under the circumstances.
11. Last, I consider Petitioner's proposed \$500.00 penalty for Respondents' alleged failure to pay Mr. Santiz-Cruz' burial and transport expenses, as required by 21 V.S.A. §632. As justification for this penalty, Petitioner cites to 21 V.S.A. §688(a), which allows for a penalty of up to \$5,000.00 to be assessed against an employer who "has refused or neglected to adjust and pay compensation" in accordance with the statute.



12. There is no factual basis for this penalty. To the extent that Mr. Santiz-Cruz' burial and transport expenses were not fully paid either by Respondents directly or by friends and farmers on their behalf, whatever amounts they might still owe are covered by the terms of their settlement agreement with Mr. Santiz-Cruz' family. To the extent that periodic payments are ongoing pursuant to that agreement, Respondents are properly satisfying their obligation. To the extent that payments are not being made, under 21 V.S.A. §675(a) the enforcement remedy lies in whichever court has jurisdiction over the amount involved. In either event, I conclude that Respondents have not violated the terms of §688(a) and that therefore Petitioner's proposed penalty is unjustified.

**ORDER:**

For the violations alleged in Petitioner's December 20, 2010 Administrative Citation and Penalty, Respondents are assessed the following penalties:

- (a) \$30,000.00 for failure to maintain workers' compensation insurance coverage under 21 V.S.A. §687; and
- (b) \$300.00 for failure to file the First Report of Injury (Form 1), Report of Fatal Accident (Form 4) and Wage Statement (Form 25) in a timely manner as required by 21 V.S.A. §701 and Workers' Compensation Rule 3.000.

**DATED** at Montpelier, Vermont this 29 day of April 2011.



Anne M. Noonan  
Commissioner

**Appeal:**

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.