

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,
Petitioner

Docket No. 22-10WCPen

v.

By: Jane Woodruff, Esq.
Hearing Officer

Beezco, Inc. d/b/a The Hideaway at
Cornerstone Commons, Respondent

For: Anne M. Noonan
Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on May 19, 2011
Record closed on June 18, 2011

Mailed
State of Vermont

JUL 25 2011

APPEARANCES:

Rebecca Smith Esq., for Petitioner
Robert and Pamela Audette, *pro se*, on Respondent's behalf

Department of Labor
Workers' Compensation

ISSUE PRESENTED:

What administrative penalty should be assessed against Respondent for its failure to maintain workers' compensation insurance covering its employees as required by 21 V.S.A. §687(a)?

EXHIBITS

Petitioner's Exhibit 1:	VT Secretary of State corporate registration printouts
Petitioner's Exhibit 2:	NCCI Proof of Coverage printouts
Petitioner's Exhibit 3:	Approved exclusions and file email
Petitioner's Exhibit 4:	Acadia Insurance Information and Declaration page, 6/25/2010-6/25/2011
Petitioner's Exhibit 5:	Payroll information for the Audettes
Petitioner's Exhibit 6:	Notice of Cancellation from FirstComp
Petitioner's Exhibit 7:	Letter from FirstComp to Beezco, Inc, 3/27/2009
Defendant's Exhibit A:	BISCHA Letter to Respondent, Robert Audette, 4/11/2011
Defendant's Exhibit B:	Respondent email to FirstComp, 1/24/2011
Defendant's Exhibit C:	Letter from Southern Insurance Co. to Frederick Barrett of BISCHA, 2/25/2011
Defendant's Exhibit D:	FirstComp audit materials

FINDINGS OF FACT:

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on November 9, 2010.
2. Respondent was incorporated in 2007 and operated a restaurant at all times relevant to this matter.
3. Respondent hired workers to perform its business functions and continuously employed one or more employees between March 10, 2009 and June 24, 2010.
4. In October 2007 Respondent secured a one-year workers' compensation insurance policy from Southern Insurance Company (the "01 policy"). When that policy expired, Respondents secured a second one-year policy (the "02 policy"). Both policies were administered on Southern's behalf by FirstComp.
5. For the 01 policy, Respondent estimated its payroll at \$150,000.00. Based on that payroll, Respondent's annual premium was \$5,171.00.
6. After the 01 policy expired, FirstComp notified Respondent that it would need to perform an audit to determine Respondent's actual payroll for that year. This would enable FirstComp to calculate the appropriate final premium for the 01 policy. If the premium Respondent already had paid (based on its estimated payroll) was too high, Respondent would be owed a credit or refund. If the estimated premium was too low, FirstComp would send Respondent a bill for what it still owed on the 01 policy.
7. Respondent did not comply with FirstComp's audit request within the time period specified. As a result, in accordance with the terms of the 01 policy, FirstComp increased Respondent's estimated payroll by 25% and assessed an additional premium of \$1,104.00 on that policy.
8. On December 29, 2008 Respondent provided payroll figures to FirstComp. With those figures in hand, on March 11, 2009 FirstComp completed its audit of the 01 policy. It determined that Respondent's payroll for the 01 policy period was only \$48,428.00, not the \$150,000.00 that originally had been estimated. Considering the lower actual payroll, Respondent was owed a credit on the 01 policy premium totaling \$3,666.00.
9. In the meantime, in October 2008 FirstComp issued the 02 policy, with an estimated premium of \$4,960.00. Respondent made a \$2,000.00 down payment on that policy, and entered into an installment payment plan for the remaining premium due. Payments under that plan were due on December 8, 2008, February 8, 2009 and April 8, 2009.
10. On December 31, 2008 FirstComp received a \$1,000.00 payment from Respondent. Respondent intended the payment to be applied to the 02 policy premium. It assumed that the combination of this payment, the October 2008 down payment and whatever credit was determined to be due on the 01 policy would be sufficient to cover the total premium owed on the 02 policy.

11. According to FirstComp's calculations, however, as a result of the 25% additional premium it had assessed on the 01 policy, Respondent still was in arrears. In accordance with its procedures, FirstComp applied Respondent's \$1,000.00 payment first to that arrearage, and not to the 02 policy premium.
12. Respondent did not make any additional payments on the 02 policy. It continued to assume that sooner or later the overpaid premium on the 01 policy would be applied to the 02 policy, and in that way it would become current.
13. On January 20, 2009 FirstComp notified Respondent that it was cancelling the 02 policy effective March 10, 2009 for nonpayment of premium. In accordance with 21 V.S.A. §696, the notice was provided by certificate of mailing. It was properly addressed and provided the appropriate 45 days' notice prior to becoming effective. I thus find that the cancellation complied in all respects with the requirements of 21 V.S.A. §696.
14. On March 29, 2009 FirstComp notified Respondent that it needed to audit the 02 policy payroll for the period it was in effect, i.e. from October 8, 2008 through March 10, 2009. As it had with the 01 policy audit request, Respondent again failed to provide FirstComp with the requested information within the time period specified. As a result, FirstComp again assessed an additional 25% premium, this time on the 02 policy.
15. On May 29, 2009 Respondent's insurance agent corresponded with Respondent, advising that it had received notice that FirstComp had cancelled the 02 policy. The agent questioned whether the cancellation was proper and offered to work with Respondent "to try to straighten out this matter." Although Respondent never received any notice that coverage had been reinstated, and neither received nor paid any subsequent premium invoices, it assumed thereafter that the outstanding payment and credit issues had been resolved and that coverage had been reinstated. I find that it was not reasonable for it to have done so.
16. On June 3, 2009 Respondent provided the requested 02 policy audit information to FirstComp. On June 11, 2009 FirstComp refunded \$3,666.00 to Respondent as credit for the overpaid 01 policy premium, and \$1,788.00 as credit for the overpaid 02 policy premium.
17. After the 02 policy was cancelled, Respondent did not secure workers' compensation insurance coverage again until June 25, 2010. It did so shortly after Petitioner's investigator contacted it with respect to the prior lapse in coverage. Respondent purchased coverage from Acadia Insurance Company for the period from June 25, 2010 through June 25, 2011. The estimated premium for this policy was \$928.00, based on an estimated payroll of \$22,738.00.
18. Petitioner issued an Administrative Citation and Penalty to Respondent on November 9, 2009. The citation proposed a penalty of \$1,980.00 for Respondent's failure to maintain workers' compensation insurance from March 10, 2009 through June 25, 2010, a total of 472 days. Petitioner derived the proposed penalty by doubling the amount of Respondent's premium avoidance during the period in question.

19. Respondent seasonally contested the Administrative Citation and Penalty. It also filed a complaint with the Vermont Department of Banking, Insurance, Securities and Health Care Administration (BISHCA), raising various issues as to the manner in which FirstComp had administered the 01 and 02 policies. As the issues Respondent raised involved factual disputes, his complaint was referred on to the National Council on Compensation Insurance for resolution. The complaint's current status is unknown.

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. As of the relevant dates in this proceeding, 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 that it neglected to secure and maintain coverage. 21 V.S.A. §692(a). The maximum penalty that could be imposed against Respondents here, therefore, is \$47,200.00.
3. 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.

4. As to the first factor, Respondent failed to produce any evidence to establish that its failure to maintain insurance during the period in question was either inadvertent or the result of excusable neglect. While it may be understandable that Respondent thought FirstComp would apply the overpayments from the 01 policy to the 02 premiums, this misunderstanding did not relieve it of the responsibility to ensure that it had workers' compensation insurance in effect for its second year. Respondent allowed its coverage to lapse for more than fifteen months. Thus, it cannot be said that it "promptly corrected" its violation. Respondent merits no special consideration on account of this factor, therefore.¹
5. The second factor does not mitigate in Respondent's favor either. The proposed penalty is just a fraction of the maximum amount that could have been imposed. At two times the amount of Respondent's premium avoidance, it is a sufficient yet appropriate deterrent.
6. What mitigating evidence there is goes to the third factor. Respondent operated a small restaurant, its business was relatively non-hazardous and there is no record of any work-related injuries among its employees. This evidence certainly mitigates against a more substantial penalty than what already has been proposed. Under the circumstances of this case, however, it is not enough to justify a lesser amount.
5. I conclude that the proposed penalty assessed against Respondent for its failure to maintain workers' compensation insurance covering its employees from March 10, 2009 through June 24, 2010 is appropriate.

ORDER:

The November 9, 2010 Administrative Citation and Penalty is sustained. Respondent shall pay to the Vermont Department of Labor monetary penalties in the amount of \$1,980.00.

DATED at Montpelier, Vermont this 22 day of July 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.

¹ This is especially so because Respondent received its refunds for the overpaid 01 and 02 policies in June 2009, thus effectively terminating its relationship with FirstComp. After that time, it would be unreasonable for Respondent to believe that any workers' compensation coverage was in effect.