

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,  
Petitioner

Docket #19-11WCPen

v.

By: Jane Woodruff, Esq.  
Hearing Officer

L & L Transit, Inc., d/b/a Yellow Cab,  
Respondent

For: Anne M. Noonan  
Commissioner

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on August 6, 2012  
Record closed on September 7, 2012

**APPEARANCES:**

Rebecca Smith, Esq., for Petitioner  
Robert Kaplan, Esq., for Respondent

Mailed  
State of Vermont

SEP 20 2012

Department of Labor  
Workers' Compensation

**ISSUES PRESENTED:**

1. Did Respondent neglect to secure workers' compensation insurance for its employees during the period from January 1, 2007 through June 28, 2011 as required by 21 V.S.A. §687(a)?
2. Was an Emergency Stop Work Order issued to Respondent on June 27, 2011 and if so, did Respondent employ employees thereafter in contravention of it?
3. If proven, what are the appropriate penalties for Respondent's violations?

**EXHIBITS:**

Petitioner's Exhibit 1:	Emergency Stop Work Order No. 2011-008 and Notice to Employees
Petitioner's Exhibit 2:	Return of Service for Emergency Stop Work Order and photos
Petitioner's Exhibit 3:	Printout from Secretary of State Business Registration database
Petitioner's Exhibit 4:	Printouts from NCCI Proof of Coverage database
Petitioner's Exhibit 10:	Exclusion materials for corporate officers Leo and Larry Bushey
Petitioner's Exhibit 11:	NCCI assigned risk premium rates, 2006 through 2011

**FINDINGS OF FACT:**

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on March 7, 2012.

2. Respondent was a taxi company owned by Leo and Larry Bushey. It operated in Burlington, Vermont between 2001 and 2011.
3. Leo and Larry Bushey were Respondent's executive officers. Larry Bushey was Respondent's president and testified on its behalf. The Busheys first filed for exclusion from coverage under the Workers' Compensation Act on June 27, 2011.
4. On June 28, 2011 Respondent employed 29 covered employees as drivers, mechanics and dispatchers. A covered employee is an employee who is neither excluded nor exempted from coverage under the Act. *See* 21 V.S.A. §601(14).
5. From January 1, 2007 through June 27, 2011 Respondent paid approximately \$2,124,707.70 in payroll to its employees.
6. In early 2006, Respondent's workers' compensation insurance carrier, Travelers Insurance Co., performed an audit and determined that Respondent was \$18,000.00 in arrears on its premium payments. Respondent disagreed that it owed any additional premiums. Both for that reason and also because even if the audit was correct it lacked the necessary funds to pay any arrearage, Respondent did not pay any additional premiums to Travelers. As a result, Travelers cancelled its workers' compensation policy effective February 8, 2006.
7. Mr. Bushey credibly testified that no insurance carrier would underwrite a new workers' compensation policy for Respondent due to the outstanding premiums that Travelers claimed were owed. Nevertheless, Respondent consciously continued to operate its taxicab business without any workers' compensation coverage.
8. The Commissioner issued an Emergency Stop Work Order to Respondent on June 27, 2011. The Department's investigator, Ms. Albert, hand delivered the Order to Larry Bushey on that same day.<sup>1</sup> She also posted a Notice to Employees at the business. The Commissioner issued and Ms. Albert also delivered an Order to immediately obtain workers' compensation insurance.
9. The Emergency Stop Work Order states on its face that it remains in effect until rescinded by the Commissioner. Ms. Albert credibly testified that she described to Mr. Bushey the process for rescinding an Emergency Stop Work Order. Respondent took no steps to have the Emergency Stop Work Order rescinded.

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<sup>1</sup> Respondent objected to the admission of Petitioner's Exhibit 2, a document entitled "Return of Service" regarding Ms. Albert's hand delivery of the Emergency Stop Work Order to Mr. Bushey. Specifically, Respondent objected to this form of "service" on the grounds that Ms. Albert was a party to the proceeding by virtue of her employment with the Department and therefore such "service" was prohibited. I conclude that the exhibit is admissible. The statute does not require that a Stop Work Order be "served" upon an employer. Further, the proscription against parties serving process is contained in V.R.C.P. 45, which pertains to the service of subpoenas. The Stop Work Order was not a subpoena. Its hand delivery by Ms. Albert put Respondent on notice to cease its operations until coverage was obtained or the Order was rescinded.

10. Respondent did stop work at some point on June 27, 2011. However, on June 28, 2011 it recommenced its operations without obtaining workers' compensation insurance. The Emergency Stop Work Order was still in effect.
11. Respondent's prior coverage with Travelers had been written in the assigned risk, or involuntary market. Because workers' compensation insurance coverage is mandatory under the law, if an insurer will not voluntarily underwrite a policy for a high risk business, that business can seek coverage in the assigned risk pool. Policies from this market have higher rates.
12. Respondent's employees performed work in the following class codes: (a) taxicab drivers (7370); (b) mechanic/garage employees (8385); and (c) clerical (8810). For the years 2007 through 2011, the approved rates (per \$100 of payroll) for these class codes were as follows:

	<u>Class Code 7370</u>	<u>Class Code 8385</u>	<u>Class Code 8810</u>
2007	\$10.69	\$6.16	\$0.61
2008	\$10.02	\$5.96	\$0.61
2009	\$ 9.50	\$5.38	\$0.51
2010	\$ 8.90	\$5.78	\$0.54
2011	\$ 8.65	\$5.86	\$0.51

13. The difference in these premium rates reflects the difference in risk among cab drivers, mechanics and office personnel. They are an indication of the relatively hazardous nature inherent in driving a cab and repairing the fleet versus the non-hazardous nature of office work.
14. During the period when Respondent was uninsured, its workforce numbered between 28 and 30 employees. Considering both its payroll and the above class code rates, if Respondent had maintained workers' compensation insurance coverage between January 1, 2007 and June 28, 2011 it would have paid approximately \$156,087.34 in total premium.
15. Petitioner issued an Administrative Citation and Penalty to Respondent on March 7, 2012. Petitioner proposed a penalty of \$168,100.00 for Respondent's failure to maintain workers' compensation insurance from January 1, 2007 through June 28, 2011. This is the maximum penalty allowed by statute.
16. Petitioner also proposed penalties for Respondent's violations of 21 V.S.A. §692(b), specifically:
  - (a) A penalty of \$7,250.00 for Respondent's failure to obtain workers' compensation insurance after the Commissioner issued an order to obtain insurance; and
  - (b) A prohibition from contracting with the State of Vermont or any of its subdivisions for three years.

17. Larry Bushey was credible in his testimony that Respondent no longer owns any assets. In fact, after June 28, 2011 Respondent did not operate its business again. Thereafter, Respondent sold its assets to cover existing liens. Mr. Bushey credibly testified that he has been unemployed for most of the last year and that he personally has no present ability to pay a fine.

#### 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. For any violation occurring prior to July 1, 2007, the statute provided that an employer who failed to comply with the requirements of 21 V.S.A. §687 would be assessed an administrative penalty of not more than \$50.00 for each day that it neglected to secure and maintain coverage, to a maximum of \$5,000.00. 21 V.S.A. §692(a).
3. The statute was amended effective July 1, 2007 to allow a penalty of \$100.00 per day with no maximum. On July 1, 2010 and thereafter, the statute was again amended to provide a penalty of not more than \$100.00 for the first seven days of violation and not more than \$150.00 per day thereafter.
4. Respondent operated without workers' compensation insurance from January 1, 2007 through June 28, 2011. This period encompasses 1,640 days. Using the rates prescribed by 21 V.S.A. §687, the maximum possible penalty in this case for failing to have workers' compensation coverage is \$168,100.00.
5. 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.

6. As to the first factor, Mr. Bushey admitted that he was aware that Travelers had canceled Respondent's policy. Additionally, Mr. Bushey stated that he disputed the \$18,000.00 Travelers claimed Respondent owed in unpaid premiums. He further stated Respondent had no funds to pay the arrearage. This lack of insurance was not promptly corrected, with the result that Respondent knowingly engaged in business for four and a half years without coverage. I conclude that Respondent merits no special consideration on account of this factor.
7. As to the second factor, the amount of the proposed penalty is only eight percent more than what Respondent avoided by not paying premiums for the time period in question. I conclude that this factor does not help Respondent.
8. As to the third factor, Respondent's business employed 28 to 30 employees, many of whom were engaged in moderately hazardous employment. I conclude that this factor works against Respondent rather than for it.
9. I conclude that the proposed penalty assessed against Respondent for its failure to maintain workers' compensation insurance covering its employees from January 1, 2007 through June 28, 2011 is appropriate.
10. I also conclude that Respondent violated the commissioner's order to procure workers' compensation insurance for its employees. Pursuant to 21 V.S.A. §692(b), the penalty for failing to secure coverage after being ordered to do so shall be not more than \$250.00 per day that coverage is not secured. In addition, the commissioner may assess a penalty of \$250.00 per worker per day for every day the employer fails to secure insurance. I conclude that the \$7,250.00 penalty Petitioner has proposed here, which equates to \$250.00 for each of the 29 employees Respondent employed on June 28, 2011, is appropriate.<sup>2</sup> Given the relatively hazardous nature of Respondent's business, which involved offering rides for hire on busy highways and streets, as well as its decision to continue operating without insurance after having been ordered to stop, this is a serious violation.
11. Finally, I conclude that Respondent shall be prohibited from contracting with the State of Vermont or any of its subdivisions for a period of three years from the date this Order is mailed. Given the length of time Respondent operated its business without workers' compensation insurance, the maximum prohibition on contracting with the State is justified.

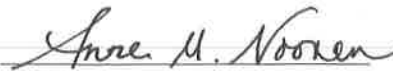
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<sup>2</sup> It is not clear why Petitioner did not also seek the \$250.00 per day penalty mandated by the first portion of §692(a).

**ORDER:**

The Administrative Citation and Penalty issued March 7, 2012 is sustained. Respondent shall pay to the Vermont Department of Labor monetary penalties in the amount of \$175,350.00. Additionally, Respondent is prohibited from contracting with the State of Vermont or any subdivision thereof for a period of three years, commencing on the date this order is mailed.

**DATED** at Montpelier, Vermont this 19 day of September 2012.

  
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.