

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,
Petitioner

v.

Peter Leo Goldsmith, LLC,
d/b/a Home Care Assistance,
Respondent

Docket No. 25-11WCPen

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 2, 2012
Record closed on May 2, 2012

Mailed
State of Vermont

JUN 21 2012

APPEARANCES:

Rebecca Smith, Esq., for Petitioner
Peter Leo Goldsmith, *pro se*, for Respondent

Department of Labor
Workers' Compensation

ISSUE PRESENTED:

Did Respondent violate the terms of 21 V.S.A. §687 by failing to secure workers' compensation insurance coverage for its employees for the period from February 28, 2007 through March 17, 2010 and if so, what administrative penalty should be assessed?

EXHIBITS:

Petitioner's Exhibit 1:	Vermont Secretary of State business registration information
Petitioner's Exhibit 2:	NCCI Proof of Coverage database information
Petitioner's Exhibit 3:	Affidavit of Tracy Downing, March 22, 2012
Petitioner's Exhibit 4:	Wage records
Petitioner's Exhibit 5:	Email correspondence from Peter Leo Goldsmith to Susan Albert
Petitioner's Exhibit 6:	Information page, Ullico Casualty Co. policy #UWSB491-000015-109
Petitioner's Exhibit 7:	NCCI Assigned Risk premium rates, 4/1/07-4/1/09
Petitioner's Exhibit 8:	Penalty calculation worksheet

FINDINGS OF FACT:

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on December 6, 2011.
2. Respondent Peter Leo Goldsmith, LLC was formed effective February 28, 2007. In March 2007 it registered the trade name Home Care Assistance. The business' stated purpose was to provide non-medical home health care services.
3. Respondent's principal, Peter Leo Goldsmith, had owned and operated at least two prior businesses since the 1970's – first a real estate agency and later a grocery store.
4. Mr. Goldsmith's most recent business venture began with the purchase of a Home Care Assistance franchise. Franchisees provide non-medical home health services, including assistance with activities of daily living, food preparation, transportation for appointments and errands and companionship, to clients who require such support. These services are delivered by individuals who are selected, scheduled and paid by the franchisee. More specifically, the franchisee is responsible for negotiating each service provider's hourly rate (based in part on his or her relevant experience) and also for replacing providers with whom the client is dissatisfied.
5. Mr. Goldsmith determined that the preferred model for operating Respondent's franchise would involve retaining service providers as independent contractors rather than employees. Prior to commencing operations, he telephoned the Vermont Department of Labor (the "Department") to inquire whether this was acceptable. Although he kept no notes of the conversation and could not recall the name or title of the person to whom he spoke, Mr. Goldsmith testified he was told that it was, from both an unemployment insurance and a workers' compensation perspective.
6. While I do not doubt that Mr. Goldsmith in fact made the telephone inquiry to which he testified, I cannot accept as accurate his understanding of the response he received. Particularly with respect to Respondent's employer status from the workers' compensation standpoint, I find it likely that Mr. Goldsmith either misunderstood or misinterpreted the information he was given.
7. From April 2007 until some time in 2009 Respondent had its service providers execute independent contractor's agreements, and reported their compensation to state and federal tax authorities as Form 1099 payments rather than as wages. Because it did not consider these providers to be employees, it did not make any employer-required contributions to the state's unemployment compensation fund on their behalf. Nor did it maintain workers' compensation insurance coverage for these workers.

8. Respondent also did not maintain workers' compensation insurance coverage for its office manager, Brenda Hawthorne, whom Mr. Goldsmith acknowledged had been an employee of the franchise since April 2007. When asked why Respondent had failed to do so, Mr. Goldsmith testified that his understanding of the law, dating back to when he operated a real estate agency in the 1970's, was that an employer with just one employee was not required to maintain workers' compensation insurance. I find that this is, and always has been, an inaccurate understanding of Vermont's workers' compensation statute.
9. Last, Respondent did not maintain workers' compensation coverage for its principal member, Mr. Goldsmith, nor did it file an exclusion on his behalf under 21 V.S.A. §601(14)(H), at any time after its formation on February 28, 2007.
10. In the spring of 2009, the Department's Unemployment Insurance (UI) Division audited Respondent's home care business, determined that its service providers were in fact employees rather than independent contractors and assessed unpaid unemployment insurance contributions retroactive to April 2007. Over the ensuing months, Mr. Goldsmith engaged in what he described as a protracted "conversation" with UI Division personnel regarding (a) the appropriate legal status of Respondent's service providers; (b) the amount of any assessment to be levied; and (c) a reasonable repayment plan.
11. Once its negotiations with the UI Division were concluded, and now comprehending that Mr. Goldsmith's prior understanding as to its service providers' employment status had been incorrect, in March 2010 Respondent purchased workers' compensation insurance coverage. The voluntary market policy provided coverage effective March 18, 2010 at an estimated annual premium of \$7,340.00. The premium rate charged for Respondent's service providers (class code 8835) was \$3.46 per hundred dollars of payroll; for its clerical employee (class code 8810), the rate was \$.41 per hundred dollars of payroll.
12. Except for \$2,750.00 paid to Mr. Goldsmith as salary in 2010, all of the remuneration he received from Respondent during the period when Home Care Associates was in business represented a return on his investment rather than wages. Excluding these monies, which totaled approximately \$82,600.00, from April 1, 2007 through March 17, 2010 Respondent paid a total of \$561,344.62 in remuneration to its service providers and \$105,730.99 in remuneration to its clerical employee, for a grand total of \$667,075.61. With this payroll, and assuming a twenty percent reduction in voluntary market premium rates as compared with assigned risk rates in effect during the same period, I find that the total amount of Respondent's premium avoidance was \$23,201.46.
13. In the years during which Respondent actively operated its Home Care Assistance franchise, it variously employed between four and seventeen workers. No evidence was introduced as to any work-related injuries incurred by any of these workers during this time. Although it is unclear when it did so, according to Mr. Goldsmith, Respondent has now ceased doing business and currently has no assets.

14. Petitioner issued an Administrative Citation and Penalty to Respondent on December 6, 2011. The citation proposed a penalty of \$50,000.00 for Respondent's failure to maintain workers' compensation insurance for its covered employees from February 28, 2007 through March 17, 2010, a total of 1,114 days. The proposed penalty is slightly more than two times the amount of Respondent's premium avoidance during the period in question.
15. Respondent filed a timely Notice of Contest, and an administrative hearing was held on April 2, 2012.

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. A limited liability corporation may elect to exclude its members from workers' compensation coverage requirements, but it must take affirmative action to do so, by filing an application for exclusion with the Department. 21 V.S.A. §601(14)(H); Workers' Compensation Rule 24.0000.
3. I conclude that Respondent failed to comply with the requirements of 21 V.S.A. §687 by neglecting either to exclude Mr. Goldsmith or to maintain workers' compensation coverage for him as of February 28, 2007.
4. I conclude that Respondent also violated the terms of §687 by its failure to maintain workers' compensation coverage for its office manager, Brenda Hawthorne from April 1, 2007 through March 17, 2010.
5. To determine whether Respondent also violated the terms of §687 by its failure to maintain workers' compensation coverage for its service providers, I must consider whether these workers were employees or independent contractors under Vermont law. If they were the latter, then Respondent was under no obligation to insure them, and Petitioner's proposed penalty is likely excessive.
6. Vermont's workers' compensation law 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 . . . is not the direct employer of the workers there employed." 21 V.S.A. §601(3).
7. This statutory definition of "employer" broadens the common law concept to include business operators "who purport to hire, as contractors, minions to carry out the proprietor's own 'regular trade or business' in an attempt to avoid workers' compensation liability for employees." *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶8, quoting *King v. Snide*, 144 Vt. 395, 400-01 (1984).

8. As thus defined, statutory employer status is determined by the nature of the putative employer's business. *Marcum*, *supra* at ¶9, citing *In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶11. The test is simply whether the work performed by the so-called independent contractor is "a part of, or process in, the trade, business or occupation of the owner or proprietor." *Id.* (quotations omitted). If it is, then the worker is considered an employee.
9. The facts in *Marcum* are illustrative for the manner in which they contrast to the facts at issue in this case. In *Marcum*, a nurse contracted with an individual to provide home care services for a disabled child. She was paid for her services through a Medicaid-funded program administered by the Agency of Human Services (AHS). When she suffered an injury in the course of this work, she sought workers' compensation benefits from AHS on the grounds that it was her statutory employer. The Supreme Court affirmed the denial of her claim, concluding that her status was that of an independent contractor, not an employee. In doing so, it specifically noted that "the Agency's business of administering a welfare program was different from the nurse's work of personal care delivery." *Id.* at ¶12. Thus, the nurse could not be said to have been hired to carry on AHS' business, and therefore was not an employee.
10. Here, the essence of Respondent's business was to sell non-medical home health care services to individuals who desired them. Employing service providers was an essential component of the business it purported to carry on, as without them it would have had nothing at all to sell. Unlike the situation in *Marcum*, Respondent did not merely administer funds, furthermore; it hired providers, negotiated their salaries, matched them with clients and reassigned them when necessary. In short, it acted in all respects as the employer of the service providers with whom it contracted. *See, e.g., McNiffe v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008) (based on similar factors, finding foster child placement agency to be foster parent's statutory employer).
11. I conclude that Respondent violated the terms of 21 V.S.A. §687 by its failure to maintain workers' compensation insurance coverage for its service providers from April 1, 2007 through March 17, 2010.
12. Prior to July 1, 2007 Vermont 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 every day that the violation continued, to a maximum of \$5,000.00. 21 V.S.A. §692(a). Effective July 1, 2007 the daily fine was increased to \$100.00, with no maximum penalty.
13. Having failed to procure workers' compensation insurance coverage as required by §687 from February 28, 2007 through March 17, 2010, a period of 1,114 days, the maximum penalty that could be assessed against Respondent under §692(a) is \$104,100.00.

14. 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.
15. Respondent merits no special consideration on account of the first factor. Vermont has long adhered to the legal maxim that everyone is presumed to know the law, and therefore, that ignorance of the law is no excuse. *Rule v. Tobin*, 168 Vt. 166, 175 (1998); *State v. Woods*, 107 Vt. 354, 356-57 (1935). Were the evidence sufficient to convince me that Mr. Goldsmith had been misled by the Department to believe it was not necessary to procure workers' compensation coverage for his service providers, I might conclude that the facts merit a rare exception to this rule, *see, e.g., In re Lyon*, 2005 VT 63, ¶21. Having found that this likely was not the case, I conclude that Respondent's failure to obtain insurance was neither inadvertent nor the result of excusable neglect.¹ *See In re Lund*, 2004 VT 55, ¶5.
16. As to the second factor, the amount of premium avoidance in this case is \$23,201.46. The proposed penalty of \$50,000.00 is substantially less than the maximum allowed by statute, but still more than two times the amount of premium avoidance. I conclude that this factor weighs somewhat in Respondent's favor.
17. Petitioner acknowledges that the third factor weighs in Respondent's favor as well. Respondent was a relatively small employer, and the premium rates charged for its service providers reflected a relatively modest level of hazard associated with this type of work.
18. Given the severe consequences that the employees of an uninsured employer may face in the event of injury, the penalty assessed for violating §687 properly should act as both a punishment and a deterrent. Considering the mitigating circumstances present in this case, I conclude that a penalty of \$45,000.00 comports with these goals and represents a reasonable application of the discretion afforded by the statute and rules.

¹ The same is true of Respondent's failure to maintain workers' compensation insurance coverage for its office manager. For his decades-long misapprehension of the law regarding an employer's obligation to procure coverage even if it employs only one employee, Mr. Goldsmith has only himself to blame.

ORDER:

Based on the foregoing findings of fact and conclusions of law, for the violations alleged in Petitioner's December 6, 2011 Administrative Penalty and Citation Respondent is hereby assessed a penalty of \$45,000.00.

DATED at Montpelier, Vermont this 31 day of June 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.