

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,
Petitioner

Docket No. 08-12WCPen

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Essex Electric, LLC,
Respondent

For: Anne M. Noonan
Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on September 24, 2012
Record closed on October 26, 2012

APPEARANCES:

Rebecca Smith, Esq., for Petitioner
Richard Goldsborough, Esq., for Respondent

Mailed
State of Vermont

NOV 29 2012

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 covered employees for the period from January 1, 2008 through May 10, 2011 and if so, what administrative penalty should be assessed?

EXHIBITS:

Petitioner's Exhibit 1:	Vermont Secretary of State Limited Liability Company Information, 5/20/2011
Petitioner's Exhibit 2:	NCCI Proof of Coverage database information (Essex Electric), 5/11/2011
Petitioner's Exhibit 3:	Email from Tracy Downing, April 25, 2011 and approved Application for Exclusion (Essex Electric, LLC), 5/11/11
Petitioner's Exhibit 4:	Information Page, policy #MWC0004266-01
Petitioner's Exhibit 5:	NCCI Proof of Coverage database information (Chris Fitzpatrick), 6/21/2012
Petitioner's Exhibit 6:	NCCI Assigned Risk premium rates, 4/1/07-4/1/11
Petitioner's Exhibit 7:	2010 IRS Form 1099s (4 pages)
Petitioner's Exhibit 8:	Payroll information, 2008-2011
Petitioner's Exhibit 9:	NCCI Proof of Coverage database information (Fitzpatrick Electric), 9/19/2012
Petitioner's Exhibit 10:	Approved Application for Exclusion (CJM Electric, LLC), 3/2/09, and Renewal Information Page, policy #WCA0276300-13
Petitioner's Exhibit 11:	Penalty calculations
Petitioner's Exhibit 12:	Yellow Pages advertisement

6. During the period in question Respondent sometimes subcontracted electrical work upon which it had successfully bid to two other electrical contractors – Fitzpatrick Electric and CJM Electric. Respondent did not exercise any control over the manner in which these other contractors performed the work assigned to them. However, the work their employees were doing was electrical contracting work of exactly the same type that Respondent's employees themselves could have carried out as part of Respondent's regular course of business. Neither Fitzpatrick Electric nor CJM Electric maintained workers' compensation insurance coverage for the employees assigned to Respondent's jobs.
7. During the period from January 1, 2008 through May 10, 2011 Respondent paid a total of \$205,984.50 in wages to its direct employees (Christopher Fitzpatrick, Brad Bissonnette and Joseph Eaton) and \$10,581.00 in compensation for work performed by the employees of Fitzpatrick Electric and CJM Electric (Thomas Fitzpatrick and Chuck Maynard, respectively), for a total of \$216,565.50 in compensation paid.
8. During the period in question, the annual workers' compensation premium rates charged in the assigned risk market for employees engaged in electrical wiring (class code #5190) ranged from \$7.23 to \$4.46 per hundred dollars of payroll. I find that these rates reflect a moderate level of hazard associated with this type of work. Voluntary market rates were approximately twenty percent lower.
9. Assuming for the purposes of calculation that Respondent was the statutory employer of both Thomas Fitzpatrick and Chuck Maynard, I find that during the period in question the total amount of workers' compensation insurance premium it avoided paying on account of the individuals referred to in Finding of Fact No. 7 above was approximately \$10,528.00. Had Respondent's principal, Christopher Fitzpatrick, excluded himself from coverage during this period, I find that the total amount of premium avoidance would have been reduced to approximately \$6,176.00.
10. On April 11, 2011 the Department's investigator, Susan Albert, telephoned Christopher Fitzpatrick and informed him that she was investigating Respondent's failure to procure and maintain workers' compensation insurance for its covered employees. Mr. Fitzpatrick cooperated fully with the investigation.
11. Effective May 11, 2011 Respondent procured workers' compensation insurance coverage for its covered employees. On that same date, Christopher Fitzpatrick applied for and was granted an exclusion from coverage in accordance with 21 V.S.A. §601(H). Had he been aware of his rights and obligations under the law, I find it reasonable to assume that Mr. Fitzpatrick would have excluded himself from coverage sooner, at least as of January 1, 2008.
12. There is no record that any of Respondent's employees was ever injured in the course and scope of his employment during the period in question.
13. Respondent's corporate status was terminated effective May 31, 2012 for failure to file a required annual report. Since that time, Christopher Fitzpatrick has continued to operate the business as a sole proprietorship.

14. On his personal income tax returns, Christopher Fitzpatrick reported net business profits of \$10,907.00 in 2008, \$17,968.00 in 2009, \$47,927.00 in 2010 and \$19,955.00 in 2011.
15. Petitioner issued an Administrative Citation and Penalty to Respondent on July 17, 2012. The citation proposed a penalty of \$35,000.00 for Respondent's failure to maintain workers' compensation insurance for its covered employees from January 1, 2008 through May 10, 2011, a total of 1,226 days.
16. Respondent filed a timely Notice of Contest, and an administrative hearing was held on September 24, 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. This obligation extends to both direct and statutory employees. *In re Chatham Woods Holdings, LLC, supra.*
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 Christopher Fitzpatrick or to maintain workers' compensation coverage for him for the period from January 1, 2008 through May 10, 2011.
4. I conclude that Respondent also violated the terms of §687 by its failure to maintain workers' compensation coverage for its electrical workers, Brad Bissonnette and Joseph Eaton, during this period.
5. To determine whether Respondent also violated the terms of §687 by its failure to maintain workers' compensation coverage for Thomas Fitzpatrick and Chuck Maynard, the employees of the other electrical contractors to whom it assigned work, I must consider whether these workers were Respondent's statutory employees. I conclude that they were.
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 or for any other reason, is not the direct employer of the workers there employed." 21 V.S.A. §601(3).

7. As thus defined, 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 *In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶11. The test is simply whether the work performed by individuals who are not directly employed is "a part of, or process in, the trade, business or occupation of the owner or proprietor." *Id.* (quotations omitted); *Frazier v. Preferred Operators, Inc.*, 2004 VT 95, ¶11 (acknowledging preference for "nature of the business" test over "right to control" test for determining existence of statutory employment relationship). If it is, then those workers are considered employees.
8. Having already found that the work Thomas Fitzpatrick and Chuck Maynard were performing was of exactly the same type that Respondent's direct employees could have undertaken as part of Respondent's regular business, I conclude that they were statutory employees. Because they were not otherwise covered, I conclude that Respondent violated the terms of §687 by failing to procure workers' compensation coverage for them itself.
9. 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. Effective July 1, 2010 the statute was further amended to provide for an administrative penalty of not more than \$100.00 for the first seven days of violation, and not more than \$150.00 per day thereafter, again with no maximum penalty.
10. As currently written, Workers' Compensation Rule 45.5100, which became effective in 2001, parrots the language of §692(a) as it existed prior to July 1, 2007. It thus purports to cap the allowable administrative penalty for violations of §687 at \$5,000.00, whereas the statute no longer mandates a maximum fine. Both by virtue of statute, 3 V.S.A. §845(e)(3), and in accordance with Workers' Compensation Rule 46.1000, the amended version of §692(a) now controls, and that portion of Rule 45.5100 that conflicts with it is invalidated. Therefore, applying the penalty rates applicable during the period in questions, I conclude that the maximum penalty that could be assessed against Respondent under §692(a) is in excess of \$137,000.00.


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. As to the first factor, I acknowledge that 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). With this in mind, and except for Christopher Fitzpatrick, I conclude that Respondent's failure to maintain workers' compensation insurance for its direct and statutory employees was neither inadvertent nor the result of excusable neglect.
16. However, as I have already found, it is reasonable to assume that had he known of his rights and responsibilities under the law Christopher Fitzpatrick likely would have acted to exclude himself from coverage during the period in question. I conclude that his failure to do so was entirely inadvertent. As the wages paid to Mr. Fitzpatrick accounted for a substantial portion of the premium Respondent is presumed to have avoided, this mitigating circumstance merits a significant reduction in the proposed penalty.
17. As to the second factor, even considering the premium attributable to Christopher Fitzpatrick's employee status the proposed penalty of \$35,000 is more than three times the amount of Respondent's resulting premium avoidance. Petitioner did not state any rationale for the imposition of such a large fine, nor can I discern one from the evidence presented. I conclude that relative to the premium avoided the proposed penalty is excessive.
18. As to the third factor, I acknowledge that Respondent was a small employer, and also that its employees did not suffer any work-related injuries during the period in question. As reflected by the applicable premium rates, however, the work performed by Respondent's electrical workers was moderately hazardous. I conclude that Respondent merits no special consideration on account of this mitigating factor.

19. 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 \$10,000.00 comports with these goals and represents a reasonable application of the discretion afforded by the statute and rules.¹

ORDER:

Based on the foregoing findings of fact and conclusions of law, for the violations alleged in Petitioner's July 17, 2012 Administrative Penalty and Citation Respondent is hereby assessed a penalty of \$10,000.00.

DATED at Montpelier, Vermont this 28 day of November, 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.

¹ In its pre-hearing memorandum, Respondent raised the question whether, given the fact that its corporate status has been terminated, any penalty imposed could be enforced against Christopher Fitzpatrick individually. This question may be germane to Petitioner's efforts to collect the penalty hereby assessed, but that is a matter beyond the scope of this proceeding. See *Frazier, supra* at ¶6.