

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,
Petitioner

Docket #09-12WCPen

v.

By: Jane Woodruff, Esq.
Hearing Officer

Henry Vo d/b/a Nail Pro,
Respondent

For: Anne M. Noonan
Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on August 31, 2012
Record closed on October 1, 2012

APPEARANCES:

Rebecca Smith, Esq., for Petitioner
Henry Vo, *pro se*

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State of Vermont

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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, 2008 through June 14, 2011 as required by 21 V.S.A. §687(a)?
2. If so, what is the appropriate penalty for Respondent's violation?

EXHIBITS:

Petitioner's Exhibit 1:	Secretary of State Tradename Information database printout
Petitioner's Exhibit 2:	NCCI Proof of Coverage database printout
Petitioner's Exhibit 3:	Policy Information Page
Petitioner's Exhibit 4:	Copies of 2008 checks issued by Respondent
Petitioner's Exhibit 5:	Copies of 2009 checks issued by Respondent
Petitioner's Exhibit 6:	Copies of 2010 checks issued by Respondent
Petitioner's Exhibit 7:	Copies of 2011 checks issued by Respondent
Petitioner's Exhibit 8:	NCCI Assigned Risk premium rates, 2007-2011
Petitioner's Exhibit 9:	Investigator's penalty worksheet

FINDINGS OF FACT:

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on July 13, 2012.
2. Respondent was the sole owner of Nail Pro, a nail salon in Burlington, Vermont, from February 2003 to March 2011.
3. During Nail Pro's period of operation, Respondent obtained renter's insurance, liability insurance and a federal identification number for his business. However, he did not obtain workers' compensation insurance.
4. From January 1, 2008 through June 14, 2011 Respondent employed between three and seven covered employees as manicurists. 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, 2008 through June 14, 2011 Respondent paid approximately \$331,815.00 in payroll to his employees. Payments to Respondent's daughter and wife are not included in this total.
6. Respondent first secured workers' compensation insurance coverage effective June 15, 2011. The policy was written in the voluntary market and remained in effect until March 2012, when he sold the business.
7. During the period that Respondent failed to have workers' compensation coverage, the involuntary market rates for Respondent's primary class code of employee, manicurist (class code 9586), ranged from \$1.60 to \$1.84 (per hundred dollars of payroll).
8. The rate Respondent obtained in June 2011, \$1.03 per hundred dollars of payroll, was approximately 34 percent lower than the rate he would have paid in the involuntary market.
9. Considering both the rates charged in the involuntary market during the period Respondent did not carry workers' compensation insurance coverage and the estimated differential between those rates and voluntary market rates, I find that Respondent avoided approximately \$3,972.34 in premiums from January 1, 2008 through June 14, 2011.
10. Petitioner issued an Administrative Citation and Penalty to Respondent on July 13, 2012. Petitioner proposed a penalty of \$7,800.00 for Respondent's failure to maintain workers' compensation insurance from January 1, 2008 through June 14, 2011. Respondent timely contested the citation and penalty.
11. Respondent testified credibly that he did not know he was required to have workers' compensation insurance, as he understood that the liability coverage he had obtained was sufficient for all his insurance needs. He hoped the proposed penalty could be reduced by half as he is currently unemployed and 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. Effective July 1, 2007 21 V.S.A. §692(a) provided that an employer who failed to comply with the provisions of 21 V.S.A. §687 would be assessed an administrative penalty of not more than \$100.00 per day with no maximum penalty.
3. On July 1, 2010 the statute was 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. The Legislature again amended 21 V.S.A. §692(a) effective May 26, 2011 to make the \$100.00 per day fine for the first seven days of the violation mandatory. Thereafter, the fine was not more than \$150.00 per day.
5. Respondent operated without workers' compensation insurance from January 1, 2008 through June 14, 2011. This period encompasses 1,261 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 \$140,000.00.
6. 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.
7. I conclude that Respondent merits no special consideration on account of the first factor. Notwithstanding Mr. Vo's sincere misunderstanding of the law, 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). Moreover, Respondent operated without workers' compensation coverage for more than three years, which cannot be said to be prompt correction of the problem.

8. As to the second factor, the amount of the proposed penalty is slightly less than two times the premium avoidance in this case and far less than the maximum possible penalty of \$142,000.00. I conclude this factor does not inure to Respondent's benefit.
9. Petitioner acknowledges that the third factor weighs in Respondent's favor. Respondent was a relatively small employer, and the premium rates charged for its employees reflected a relatively modest level of hazard associated with this type of work.
10. Considering the mitigating factors, I conclude that the appropriate penalty for Respondent's failure to maintain workers' compensation insurance covering its employees from January 1, 2008 through June 14, 2011 is \$7,000.00.

ORDER:

Based on the foregoing findings of fact and conclusions of law, for the violation alleged in Petitioner's July 13, 2012 Administrative Penalty and Citation Respondent is hereby assessed a penalty of \$7,000.00.

DATED at Montpelier, Vermont this 18 day of October 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.