

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and
Safety Division, Petitioner

Docket No. 11-17WCPen

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Vermont Confident Home
Health Care, LLC, Respondent

For: Lindsay H. Kurrle
Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on September 27, 2017

Mailed
State of Vermont

APPEARANCES:

Annika Green, Esq., for Petitioner
Abijah Manga, *pro se*, for Respondent

OCT 19 2017

Department of Labor
Workers' Compensation

ISSUE PRESENTED:

1. Did Respondent violate the terms of 21 V.S.A. §687 by failing to secure workers' compensation insurance coverage for covered employees for the period from May 13, 2016 through November 3, 2016?
2. If yes, what administrative penalty should be assessed for the violation?

EXHIBITS:

Petitioner's Exhibit 2:	Copies of various checks payable from LHP Confident Home Care, LLC
Petitioner's Exhibit 3:	<i>Burlington Free Press</i> advertisements
Petitioner's Exhibit 4:	Cassandra Edson investigation report, December 27, 2016
Petitioner's Exhibit 5:	Penalty and premium avoidance calculations
Petitioner's Exhibit 6:	NCCI rate comparison and payroll, advisory loss costs and assigned risk rates
Petitioner's Exhibit 7:	Memorandum from J. Stephen Monahan, October 3, 2016

FINDINGS OF FACT:

1. Judicial notice is taken of the Administrative Citation and Penalty issued against Respondent on July 6, 2017.

2. Respondent Vermont Confident Home Health Care, a limited liability corporation (LLC), was formed effective March 25, 2016. Abijah Manga was the corporation's sole member. *Cassandra Edson Investigation Report (hereinafter "Edson report") (Petitioner's Exhibit 4).*
3. Mr. Manga is trained as a licensed nursing assistant and personal care attendant. His intent in forming the LLC was to provide home health care services to elderly and disabled individuals. *Testimony of Abijah Manga (hereinafter "Manga testimony").*
4. At some point in the spring of 2016, Mr. Manga was contacted by the son of an elderly gentleman, Mr. P., who was in need of home health care services. Mr. P. was already receiving services from two other caregivers – Blandine Comlan, a registered nurse, who worked three days per week, and James Trombley, a licensed nursing assistant, who worked two days per week. Mr. P.'s son invited Mr. Manga to assume caregiving responsibility for the remaining two days per week, and Mr. Manga agreed to do so. *Manga testimony; testimony of Blandine Comlan (hereinafter "Comlan testimony").*
5. Ms. Comlan and Mr. Trombley had been providing home health care services to Mr. P. for some time prior to Mr. Manga's involvement. Ms. Comlan had been employed through an agency, Armistead Home Care, but after scheduling difficulties caused her to terminate her relationship with that employer, Mr. P.'s daughter, Stephanie, sought her out and hired her as a private caregiver. Mr. Trombley was hired in the same manner. *Comlan testimony; Edson report.*
6. During the time that they worked as Mr. P.'s caregivers, Ms. Comlan and Mr. Trombley were concurrently employed by another home health care agency, Tender Loving Care Home Care. This is not uncommon among home health caregivers. Most agencies do not offer as many hours as their caregivers desire, so they typically fill in the gaps with private duty assignments. *Comlan testimony.*
7. Prior to Mr. Manga's involvement with the P. family, Mr. P.'s son had been paying Ms. Comlan and Mr. Trombley by way of separate checks to each of them, issued from his father's personal account. Because the payments were to individuals rather than an agency, Mr. P.'s long-term care insurance company had refused to provide reimbursement, however. When Mr. Manga came on board, Stephanie proposed an alternative arrangement – she would calculate each caregiver's weekly earnings (including miscellaneous expenses, if any) and write one check for the total amount to Respondent's LLC. This would satisfy the insurance company's reimbursement protocol. Mr. Manga would then distribute the funds according to Stephanie's written directive – so much to Ms. Comlan and Mr. Trombley via checks written off Respondent's account, and the balance to remain in the account as payment for Mr. Manga's own weekly earnings. *Manga testimony; Comlan testimony; Edson report.*

8. Mr. Manga, Ms. Comlan and Mr. Trombley all agreed to this arrangement. Beginning on May 13, 2016 and continuing through November 11, 2016, Respondent issued checks totaling \$61,283.00 – \$43,744.00 to Ms. Comlan¹ and \$17,539.00 to Mr. Trombley – as payment for each caregiver’s services (including reimbursable expenses) during that period.² Mr. Manga wrote both the check amounts and any notations exactly as Stephanie directed. When questioned about what certain notations meant, he credibly testified that he never inquired; he simply wrote what Stephanie told him to. *Manga testimony; Petitioner’s Exhibit 2.*
9. The record does not reflect the total amount of funds Stephanie paid to Respondent during the period in question. There is no way to calculate how much it paid out to Ms. Comlan and Mr. Trombley and how much it retained for Mr. Manga’s caregiver services, therefore. Mr. Manga credibly testified that the amounts retained reflected only the hours he had worked as Mr. P.’s caregiver, and did not include any extra monies for Respondent’s role as payment intermediary. Petitioner has not offered any evidence to the contrary. *Manga testimony; Edson report.*
10. By the fall of 2016, Mr. P.’s health was failing. Impressed with the care her father had received, in September 2016 Stephanie suggested that Mr. Manga solicit new clients so that he, Ms. Comlan and Mr. Trombley could continue to work together in the future. To that end, she assisted Mr. Manga in writing two advertisements for Respondent’s LLC, which he placed in the *Burlington Free Press*. The ads described Respondent as “a group of RNs, LNAs and PCs dedicated to providing quality private care to seniors, as well as those with physical and cognitive limitations, who would like to remain at home.” One of the ads included a testimonial from Mr. P.’s family, describing Respondent as an “outstanding group of individuals” who “operate without the strict limitations that larger care companies impose,” and thus offer “not just care, but friendship, healing and independence within the home environment.” *Manga testimony; Comlan testimony; Burlington Free Press advertisements (Petitioner’s Exhibit 3).*
11. Mr. Manga credibly testified that had Respondent secured new clients, he would have hired Ms. Comlan and Mr. Trombley as employees. Ms. Comlan credibly corroborated this testimony, stating that both she and Mr. Trombley had agreed to go to work for Mr. Manga if and when the opportunity arose. As it was, however, Mr. P. died in November 2016, and Respondent’s advertisements failed to yield any new business thereafter. Thus, from the time Respondent’s LLC was created in March 2016 until the corporation’s termination in April 2017,³ Mr. Manga’s work for Mr. P. was its only source of revenue. *Manga testimony; Comlan testimony.*

¹ The amount paid to Ms. Comlan includes a May 13, 2016 check in the amount of \$3,560.00 and made payable to a friend of hers, Mahoule Koudoly. This was at her request, because she did not yet have a bank account at the time. *Comlan testimony.*

² The checks were issued from an account in the name of LHP Confident Home Care, LLC, the name Respondent initially assigned to its business. *Edson report.*

³ I take judicial notice of Respondent’s filing history to that effect, as indicated in the Vermont Secretary of State business database, <https://www.vtsosonline.com/online/BusinessInquire/FilingHistory?businessID=316881>.

12. According to Mr. Manga's credible testimony, Respondent's sole role with respect to Ms. Comlan's and Mr. Trombley's work for Mr. P. was to facilitate insurance reimbursement by acting as the family's payment intermediary. Stephanie set each caregiver's hourly pay rate, arranged their schedules and approved their expenses. Mr. Manga had no authority to hire, fire, supervise or direct any caregiver in any respect. Petitioner has not offered any evidence to the contrary; in fact, its investigator acknowledged as much in her report. *Manga testimony; Comlan testimony; Edson report.*
13. Respondent issued both Ms. Comlan and Mr. Trombley IRS Form 1099 reports to document the income they received for the caregiving services they provided Mr. P. in 2016. *Manga testimony.*
14. On September 27, 2016 the Department's Workers' Compensation and Safety Division investigator, Cassandra Edson, was assigned to investigate an online complaint questioning whether Respondent was properly insured for workers' compensation. *Edson report.*
15. In the course of her investigation, Ms. Edson searched both the Vermont Secretary of State's business database and the National Council on Compensation Insurance (NCCI) database. From these, she determined that Respondent had failed to secure workers' compensation insurance from May 13, 2016 through November 3, 2016. *Edson report.*
16. Ms. Edson interviewed Mr. Manga on or about November 3, 2016. During the interview, she advised him that "at least insofar as the [D]epartment's preliminary assessment," Respondent needed to obtain workers' compensation insurance. Respondent immediately did so, with coverage effective November 4, 2016. As is allowed by statute, Mr. Manga obtained the Department's approval to exclude himself from coverage. *Edson report.*
17. Ms. Edson credibly calculated the amount of premium avoidance for the period from May 13, 2016 through November 3, 2016, a total of 175 days, at \$2,935.46. Pursuant to 21 V.S.A. §692(a), the maximum allowable penalty for this period is \$25,900.00. *Edson report.*
18. Based on instructions contained in an internal Department memorandum, Ms. Edson categorized Respondent's business in "NCCI Hazard Grouping C," and assigned a \$30.00-per-day penalty for its failure to carry workers' compensation insurance. She thus calculated the total penalty at \$5,250.00. *Edson report; NCCI rate comparison and payroll, advisory loss costs and assigned risk rates (Petitioner's Exhibit 6); Memorandum from J. Stephen Monahan, October 3, 2016 (Petitioner's Exhibit 7).*

19. As noted above, Finding of Fact No. 12 *supra*, Ms. Edson acknowledged in her investigation report that Respondent had not assumed any responsibility for hiring, scheduling or supervising either Ms. Comlan or Mr. Trombley. This, she concluded, was “strong evidence” that the two were not Respondent’s employees under the “right to control” test. She reached exactly the opposite conclusion based on her understanding of the “nature of the business” test, however. With reference to Respondent’s *Burlington Free Press* advertisements, Finding of Fact No. 10 *supra*, in which Respondent appeared to claim Ms. Comlan and Mr. Trombley as its “outstanding” group of [caregiving] individuals,” Ms. Edson determined that Respondent had benefited from its agreement to serve as Mr. P.’s payment intermediary. “By paying the other caretakers,” she asserted, “[Respondent] was able to claim that the business had developed to the point of having a team of caretakers and was creating happy customers with that team.” This “benefit,” she concluded, combined with “the act of paying the workers” was sufficient to establish that the two were “unequivocally employees of the LLC.” *Edson report*.
20. The Department’s Administrative Citation and Penalty issued against Respondent on July 6, 2017. Respondent timely appealed.

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; *In re Chatham Woods Holdings, LLC*, 2008 VT 70.
2. 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).
3. As used in the workers’ compensation context, the statutory definition “expands upon the common law concept of ‘employer’ 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, citing *King v. Snide*, 144 Vt. 395, 400-01 (1984). By focusing on the specific language of §601(3), this so-called “nature of the business” test closely effectuates the legislative intent. *In re Chatham Woods Holdings, supra* at ¶10. It is thus preferred over the “right to control” test, in which the touchstone for determining employer versus independent contractor status depends on which party retains the right to dictate the manner and means by which the work is performed. *Id.* at ¶13; *see, e.g., Falconer v. Cameron*, 151 Vt. 530, 532 (1989).

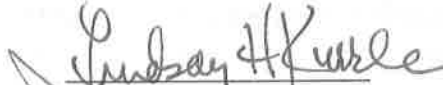
4. Applying the “nature of the business” test here, the basis for Petitioner’s imposition of an administrative penalty must be grounded in the fact that the home health care services Ms. Comlan and Mr. Trombley provided Mr. P. were part and parcel of the business Respondent had held itself out as performing. Without a staff of home health caregivers, the argument goes, Respondent could not carry out its “regular trade or business.” It must be, therefore, that Ms. Comlan and Mr. Trombley were Respondent’s employees.
5. The missing link in Petitioner’s analysis is that it was not Respondent who “purported to hire” Ms. Comlan and Mr. Trombley as its employees; it was Mr. P.’s children who did so. That they later contracted with Respondent to provide similar services through Mr. Manga does not change this result at all. True, the parties’ agreement that Respondent would act as the family’s payment intermediary created a somewhat unusual circumstance. Nevertheless, there is no evidence whatsoever that by doing so Respondent thereby agreed to assume Ms. Comlan’s and Mr. Trombley’s employment contracts, or that it in any way used them “as minions” to execute its own business responsibilities. The only “minion” in Respondent’s service was Mr. Manga.
6. As noted above, Finding of Fact No. 19 *supra*, one basis for Petitioner’s conclusion that Ms. Comlan and Mr. Trombley were Respondent’s employees was that, by touting their “outstanding” work in its advertisements, Respondent had benefited from its agreement to serve as Mr. P.’s payment intermediary. This reasoning is flawed, both factually and legally. Factually, there is nothing to indicate that Respondent’s role as payment intermediary had anything at all to do with its determination that Ms. Comlan and Mr. Trombley were excellent caregivers who would be worthy of hiring if and when new clients were secured. Presumably, Mr. P.’s daughter would have suggested that the three find a way to work together even had Mr. Manga not agreed to be the payment intermediary. There is nothing to suggest otherwise.
7. Legally, Petitioner’s reliance on the advertising value that Respondent purportedly derived from its association with Mr. Comlan and Mr. Trombley as somehow sufficient to bring the relationship within the “nature of [Respondent’s] business” is entirely misplaced. The only benefit with which the “nature of the business” test is concerned is the direct one that a putative employer receives when it purports to hire an independent contractor to do what it would otherwise have to hire an employee to do. Indirect benefits, such as the one Petitioner claims Respondent gleaned here, have no place in the discussion.

8. From the evidence presented, I conclude that Respondent did not purport to hire either Ms. Comlan or Mr. Trombley. Nor is there any evidence that, by agreeing to serve as Mr. P.'s payment intermediary, it thereby assumed any responsibility for hiring, firing, scheduling or supervising them. There is no basis for finding that an employer-employee relationship existed, and therefore no basis for imposing an administrative penalty for failure to secure and maintain workers' compensation insurance.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Petitioner's July 6, 2017 Administrative Penalty and Citation is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this 18 day of October 2017.


Lindsay H. Kurrle
Commissioner

