

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and
Safety Division, Petitioner

Docket No. 31-19WCPen

v.

By: Beth A. DeBernardi
Administrative Law Judge

Aardvark Excavating LLC,
Respondent

For: Michael A. Harrington
Interim Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on March 4, 2020
Record closed on March 4, 2020

APPEARANCES:

Annika Green, Esq., for Petitioner
William Hayes, *pro se*, for Respondent

ISSUES PRESENTED:

1. Did Respondent violate the terms of 21 V.S.A. § 687 by failing to secure workers' compensation insurance coverage for its employees for the periods from March 13, 2018 through March 21, 2018; July 11, 2018 through September 24, 2018; and January 14, 2019 through June 17, 2019?
2. If so, what administrative penalty should be assessed?

EXHIBITS:

Petitioner's Exhibit 1:	Vermont Secretary of State's listing for Aardvark Excavating LLC, June 7, 2019
Petitioner's Exhibit 2:	NCCI Proof of Coverage Database information for Aardvark Excavating LLC, June 7, 2019
Petitioner's Exhibit 3:	NCCI Policy Database information for Aardvark Excavating LLC, July 18, 2019
Petitioner's Exhibit 4:	Payroll records

FINDINGS OF FACT:

1. I take judicial notice of the Administrative Citation and Penalty issued against Respondent on August 14, 2019.
2. Respondent is a Vermont limited liability company formed in January 2015 to engage in the excavating business. William Hayes is the company's owner. Before forming the company, Mr. Hayes operated his excavating business as a sole proprietorship.

3. In June 2019, attorney Cassandra Edson, investigator for the Workers' Compensation and Safety Division, undertook an investigation into whether Respondent was operating without workers' compensation insurance. Mr. Hayes cooperated with her investigation by participating in a telephone interview and providing payroll records. Ms. Edson testified at the hearing on Petitioner's behalf.

4. Based on Ms. Edson's credible testimony and the information contained in Exhibits 2 and 3, I find that Respondent failed to maintain workers' compensation insurance for the following time periods, inclusive of end dates:

March 13, 2018 through March 21, 2018	(First Gap Period - 9 days)
July 11, 2018 through September 24, 2018	(Second Gap Period - 76 days)
January 14, 2019 through June 17, 2019	(Third Gap Period - 155 days)

Respondent therefore had no coverage for a total of 240 days.

5. Each gap period came about because Respondent failed to pay the premium.

6. Respondent's payroll records show that it had employees during each gap period listed above, as follows:

First Gap Period	4 employees
Second Gap Period	3 employees
Third Gap Period	5 employees

7. By failing to provide insurance coverage on these employees for 240 days, Respondent avoided paying workers' compensation insurance premiums in the amount of \$5,525.16.

8. Respondent periodically shopped for better insurance rates for its various policies, including vehicle insurance. Sometimes the comparison-shopping process resulted in coverage gaps, but the evidence is insufficient to determine whether comparison shopping played a role in the workers' compensation coverage gaps at issue here.

9. Concerning the Third Gap Period, Respondent's office manager did not pay the premium on time because his personal problems interfered with his job duties. When Ms. Edson advised Mr. Hayes that the policy had lapsed in June 2019, Respondent promptly reinstated coverage, effective June 17, 2019. Although there is no evidence that the Third Gap Period was intentional, Respondent could have prevented the gap with more vigilant business practices.

10. Ms. Edson's investigation found no record of any workplace injuries for this employer. Mr. Hayes attributed the lack of reported injuries to his efforts in creating a safe workplace environment, and I find his testimony credible. Nevertheless, even with an excellent safety program, an employee may still suffer a serious workplace injury.

11. Respondent did not have workers' compensation insurance coverage in place shortly before the hearing.¹ However, Mr. Hayes credibly testified that Respondent's operations are seasonal and that it had no employees other than himself over the winter.² Further, Petitioner did not offer into evidence any payroll records documenting that Respondent had employees in February or March 2020. Accordingly, I find that the lack of coverage shortly before hearing is not relevant to my determination.
12. Petitioner issued an Administrative Citation and Penalty to Respondent on August 14, 2019. The citation proposed a penalty of \$12,000.00 for Respondent's failure to maintain workers' compensation insurance for 240 days.
13. Respondent filed a timely appeal. Mr. Hayes acknowledges that Respondent failed to carry the required workers' compensation insurance for 240 days, but he seeks a reduction of the penalty amount.

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, ¶ 3.
2. Respondent failed to maintain the required coverage for the three gap periods identified above, a total of 240 days. *See* Finding of Fact No. 4 *supra*. Therefore, it violated the terms of 21 V.S.A. § 687.
3. Failure to comply with § 687 carries a statutory penalty of up to \$100.00 per day for the first seven days of violation and up to \$150.00 per day thereafter. The maximum statutory penalty for failing to have workers' compensation insurance coverage for 240 days is \$35,650.00.³ *See* 21 V.S.A. § 692(a).
4. The Commissioner has adopted Workers' Compensation Rule 45 to implement the penalties provided for by statute. Effective February 13, 2017, Rule 45 was revised to provide a formula for calculating penalties based on the annual North American Industrial Classification System (NAICS) code for the employer's Industry Sector and the number of the employer's prior offenses within the last three years. *See* Workers' Compensation Rules 45.5510 – 45.5513.

¹ Ms. Edson checked the NCCI database on either February 28, 2020 or March 2, 2020 and discovered that Respondent had no workers' compensation insurance on that date.

² Mr. Hayes, as a member of the LLC, was excluded from protection under the workers' compensation statute. *See* Respondent's Application to Exclude LLC Member from Workers' Compensation Coverage (Form 29), approved April 6, 2015.

³ (7 days x \$100 per day) + (233 days x \$150 per day) = \$35,650.00.

5. Because Respondent engages in excavating, its NAICS Industry Sector Code is 23 (Construction). *See Workers' Compensation Rule 45, Appendix.* For employers in that Industry Sector, the Workers' Compensation Rules provide penalties of \$50.00 per day for each day without insurance for an initial violation. *See Workers' Compensation Rule 45.5513.* The penalties for subsequent violations within a three-year period are higher.⁴
6. This is Respondent's first violation. A strict application of the formula set forth in Rule 45 would yield a maximum penalty of \$12,000.00.⁵ *See Rule 45.5513.* Petitioner proposes the maximum penalty here.
7. Pursuant to Workers' Compensation Rules 45.5520 – 45.5550, however, the Commissioner has discretion to reduce the amount of any penalty assessed if the employer demonstrates any of the following:
 - That the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected;
 - That the penalty amount significantly exceeds the amount of any premium expenditures that would have been paid if an insurance policy had been properly secured or maintained; or
 - That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.
8. As to the first mitigation factor, Respondent did not demonstrate that its failure to secure coverage was inadvertent or the result of excusable neglect. To the extent that it might have allowed a coverage gap while rate shopping, such a gap would be neither inadvertent nor excusable. Although the office manager's personal problems likely contributed to the Third Gap Period, those problems do not explain the prior gaps, nor do they excuse 240 days of non-coverage. *See Workers' Compensation and Safety Div. v. Beezco, Inc. d/b/a The Hideaway at Cornerstone Commons*, Docket No. 22-10WCPen (July 22, 2011) (employer's failure to pay premiums, while understandable, did not mitigate the penalty).
9. As to the second mitigation factor, the \$12,000.00 proposed penalty is more than two times the premium avoidance of \$5,525.16. I conclude that the proposed penalty significantly exceeds the amount of premium avoidance and, therefore, mitigation is available. *See Workers' Compensation and Safety Div. v. Peter Leo Goldsmith, LLC*, Docket No. 25-11WCPen (June 21, 2012) (proposed penalty of more than two times premium avoidance weighs in the employer's favor for mitigation).

⁴ If a second violation occurs within three years of the initial violation, the per day penalty shall be doubled. If a third violation occurs within three years of the initial violation, the penalty shall be assessed at the full statutory rate. *Id.*

⁵ 240 days × \$50 per day = \$12,000.

10. I do not find that any additional mitigation is warranted under the third mitigation factor. While Respondent is not a large employer, the construction industry is inherently dangerous; indeed, Respondent's Industry Sector is in the highest risk category under Rule 45.5513. Despite Respondent's safety record, there is no convincing evidence that would justify a conclusion that its business "presented minimal risk to employees." *Cf.* Workers' Compensation Rule 45.5550.
11. Given the severe consequences that the employees of an uninsured employer may face in the event of injury, the penalty assessed for violation of 21 V.S.A. § 687 properly should act as both a punishment and a deterrent. *Peter Leo Goldsmith, LLC, supra; Workers' Compensation and Safety Div. v. Essex Electric, LLC*, Docket No. 08-12WC (November 28, 2012). However, a penalty need not be the maximum penalty to ensure these goals.
12. In *Essex Electric, LLC, supra*, the employer failed to maintain workers' compensation insurance coverage for three years on certain employees. The premium avoidance for those employees was \$6,176.00, and the proposed penalty was \$35,000.00. Applying the second mitigating factor, the Commissioner imposed a penalty of \$10,000.00.
13. Respondent here avoided premiums of \$5,525.16. Applying the second mitigating factor and following the guidance of *Essex Electric, LLC*, I conclude that a penalty of \$7,500.00 comports with the Department's goals and represents a reasonable application of the discretion afforded by the statute and rules.

ORDER:

Based on the foregoing findings of fact and conclusions of law, for the violation alleged in Petitioner's August 14, 2019 Administrative Penalty and Citation, Respondent is hereby assessed a penalty of \$7,500.00.

DATED at Montpelier, Vermont this 23rd day of March 2020.

Michael A. Harrington
Interim 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.