

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Workers' Compensation and Safety Division,  
Petitioner

Docket No. 33-19WCPen

v.

By: Stephen W. Brown  
Administrative Law Judge

Howell Hospitality Group, LLC  
d/b/a Kingdom Crust Pizzeria,  
Respondent

For: Michael A. Harrington  
Interim Commissioner

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on January 27, 2020

Record closed on January 27, 2020

**APPEARANCES:**

Annika Green, Esq., for Petitioner  
Arend James, *pro se*, for Respondent

**ISSUES PRESENTED:**

1. Did Respondent fail to secure workers' compensation insurance for its employees during the period from April 19, 2019 through June 9, 2019 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 Corporations Division database printout
Petitioner's Exhibit 2:	Proof of Coverage Inquiry dated June 7, 2019
Petitioner's Exhibit 3:	AmTrust North America Policy Information Page
Petitioner's Exhibit 4:	United States Postal Service ("U.S.P.S.") Tracking information
Petitioner's Exhibit 5:	Proof of Coverage Inquiry dated September 5, 2019
Petitioner's Exhibit 6:	Payroll records

**FINDINGS OF FACT:**

1. I take judicial notice of the Administrative Citation and Penalty issued against Respondent on September 20, 2019.
2. Respondent operates a pizza restaurant in Saint Johnsbury, Vermont under the registered trade name Kingdom Crust Pizzeria.
3. At all times relevant to this proceeding, Respondent had employees.

4. Arend James is a principal of Respondent and testified on its behalf at the formal hearing. He began operating Respondent's business in or around September 2018 after purchasing the assets of an existing pizza restaurant. He had worked in the restaurant industry before September 2018 but had never been responsible for handling a restaurant's finances.
5. Around that same time he took over the restaurant's operations, Mr. James contacted insurance brokerage Barrett Insurance Agency, L.L.C. ("Barrett") and obtained a workers' compensation insurance policy through Wesco Insurance Company ("Wesco"), a division of AmTrust North America, Inc. ("AmTrust"). Mr. James expected that Barrett would withdraw the premiums necessary to maintain that insurance coverage through automatic withdrawals from Respondent's bank accounts.
6. On March 4, 2019, Wesco sent Respondent a Notice of Cancellation, advising that Respondent's workers' compensation insurance policy would be canceled effective April 18, 2019 due to nonpayment of premiums. The Notice of Cancellation indicated that the amount due was \$1,001.00, and that it should be remitted directly to AmTrust. *See* Petitioner's Exhibit 3.
7. U.S.P.S. tracking records show that the Notice of Cancellation was delivered to Defendant's Post Office Box on March 13, 2019. *See* Petitioner's Exhibit 4. While the tracking records show that the notice was "delivered," there is no convincing evidence that Mr. James or anyone else associated with Defendant ever signed for or personally viewed it.
8. Respondent failed to come current on its past-due insurance premium, and Wesco canceled its workers' compensation and employers' liability policy on April 18, 2019.
9. In early June 2019, attorney Cassandra Edson, an investigator for the Workers' Compensation and Safety Division began investigating Respondent for failing to maintain workers' compensation insurance.
10. Ms. Edson interviewed Mr. James early in that investigation. He cooperated with her investigation and voluntarily provided all the documents that Ms. Edson requested. He told her that he knew that there had previously been a problem with the automatic deduction of premiums from his bank account, but that he thought the problem had been corrected. I find this credible.
11. When Ms. Edson advised Mr. James that records showed that Respondent had no workers' compensation insurance coverage, Mr. James promptly called Barrett to rectify his lapse in insurance coverage by paying the required premium via debit card over the telephone. As a result of that telephone call, Respondent obtained a new workers' compensation and employers' insurance policy with Wesco effective June 10, 2019.
12. Respondent was uninsured against workers' compensation claims for a total of fifty-three days, from April 18, 2019 until June 9, 2019 (the "Gap Period"). This gap in

coverage was not intentional, but Respondent could have easily prevented it with more vigilant business practices.

13. During the Gap Period, Respondent had twenty-three covered employees<sup>1</sup> to whom it paid a total of \$25,746.40 in collective wages.
14. Respondent secured workers' compensation insurance coverage effective in the voluntary market under the class code 9082 for "Restaurant – N.O.C.," which carried a premium rate of 2% of payroll. *See* Petitioner's Exhibit 5. Based on that premium rate and Respondent's total payroll expenditures during the Gap Period, Respondent avoided approximately \$511.52 in insurance premiums during the Gap Period.
15. On September 20, 2019, Petitioner issued an Administrative Citation and Penalty to Respondent with a proposed penalty of \$2,650.00. Respondent timely contested the citation and penalty.

#### **CONCLUSIONS OF LAW:**

1. Vermont law requires that all employers, except those approved to self-insure, maintain workers' compensation insurance coverage for their employees. 21 V.S.A. § 687. Failure to comply with that requirement can carry statutory administrative penalties of up to \$100.00 for every day for the first seven days of noncompliance, and up to \$150.00 for every day after that. *See* 21 V.S.A. § 692(a).
2. The Workers' Compensation Rules provide a formula for calculating penalties based on the annual North American Industrial Classification System (N.A.I.C.S.) code for the employer's industry sector and the number of the employer's prior offenses within the last three years. *See* Workers' Compensation Rule 45.5510.
3. Because Respondent is in the restaurant industry, its N.A.I.C.S. Sector Code is 72 (accommodation and food services). *See* Workers' Compensation Rule 45, Appendix. For employers in that Industry Sector, the Workers' Compensation Rules provide penalties of \$50 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.<sup>2</sup>
4. The Commissioner has discretion to reduce the amount of any penalty assessed if the employer demonstrates any of the following:

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<sup>1</sup> A covered employee is an employee who is neither excluded nor exempted from coverage under the Act. *See* 21 V.S.A. § 601(14). There is no contention that Respondent had any independent contractors during the Gap Period.

<sup>2</sup> 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.*

- That the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected;<sup>3</sup>
  - 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;<sup>4</sup> or
  - That the small size of the employer and the non-hazardous nature of the employment presented minimal risk to employees.<sup>5</sup>
5. Respondent lacked the required insurance coverage for fifty-three days. *See* Finding of Fact No. 12, *supra*. Therefore, the maximum statutory penalty is \$7,600.00.<sup>6</sup> *See* 21 V.S.A. § 692(a).
  6. Because this citation concerns Respondent's first offense and Respondent is in Industry Sector 72, a strict application of the formula in the Workers' Compensation Rules would yield a penalty of \$2,650.00.<sup>7</sup> *See* Rule 45.5513. That amount is equal to the proposed penalty.
  7. However, I find that mitigation of that penalty is appropriate under the first two factors outlined in Conclusion of Law No. 4, *supra*.
  8. Mitigation under the first factor requires proof of two prongs: first, that the failure to secure or maintain insurance was inadvertent or the result of excusable neglect; and second, that the failure was promptly corrected. *See* Workers Compensation Rule 45.5530.
  9. The first prong of this factor is admittedly a close call. While Respondent believed that its insurance broker would be responsible for ensuring payment of all premiums, it was Respondent's responsibility to ensure that it remained in compliance with the law; employers delegate such responsibility at their peril. Additionally, Wesco sent the Notice of Cancellation to Respondent's Post Office Box, advising Respondent that its coverage would terminate. While it is not clear that Respondent actually saw that Cancellation Notice, it was Respondent's responsibility to review all business-related mailings. Respondent appears not to have done so in this case.
  10. Moreover, whether Respondent received the Notice of Cancellation or not, Mr. James was admittedly aware of some problem with his automatic deductions. While he may have genuinely believed that the problem had been corrected, there is no obvious

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<sup>3</sup> Workers' Compensation Rule 45.5530.

<sup>4</sup> Workers' Compensation Rule 45.5540.

<sup>5</sup> Workers' Compensation Rule 45.5550.

<sup>6</sup> (7 days × \$100.00 per day for the first seven days) + (46 days × \$150 per day for the remaining days) = \$7,600.00.

<sup>7</sup> 53 days × \$50.00 per day = \$2,650.00.

reason why he could not have *ensured* that it was corrected by requesting confirmation from Wesco or Barrett. The apparent ease with which Mr. James was able to correct his lapse of coverage—with a single phone call to Barrett—shows that reasonable business diligence would likely have prevented Respondent’s coverage gap in the first instance.

11. Respondent certainly acted with neglect rather than intent in failing to maintain its insurance coverage. While that neglect was understandable, I cannot conclude that it was “excusable” within the meaning of Worker’s Compensation Rule 45.5540. However, the Rule also allows mitigation if the failure to maintain coverage was “inadvertent.” *Id.* I conclude that Respondent’s failure to maintain coverage during the Gap Period was inadvertent and that it has satisfied the first prong of the first mitigation factor.
12. As to the second prong of that factor, Respondent corrected its noncompliance almost immediately after the commencement of Ms. Edson’s investigation. Therefore, the first factor permits some mitigation of Respondent’s penalty. *See* Worker’s Compensation Rule 45.5530. Under the circumstances of this case, I conclude that some mitigation of the proposed penalty under this factor is justified.
13. The second mitigation factor set forth in in Conclusion of Law No. 4, *supra*, much more strongly justifies a mitigation of the proposed penalty. The amount of the penalty Petitioner proposes is more than five times the amount of insurance premiums that Respondent avoided. I find this to be grossly disproportionate to the amount of premium avoidance. Petitioner has advanced no reason for such a hefty fine, and no reason is immediately apparent from the record. *Cf. Workers’ Compensation and Safety Division v. Essex Electric, L.L.C.*, 08-12WCPen (November 28, 2012) (concluding that proposed fine of three times the employer’s premium avoidance was excessive given the absence of any rationale for the imposition of such a large fine). Accordingly, I conclude that this second factor justifies a significant reduction in the proposed penalty.
14. I do not find that any additional mitigation is warranted under the third mitigation factor outlined in Conclusion of Law No. 4, *supra*. While Respondent is not a large employer, the restaurant industry is inherently dangerous due in large part to the presence of hot surfaces and sharp objects as well as the potential exposure to food-borne illnesses; indeed, Respondent’s Industry Sector is in the highest risk category under Rule 45.5513. While there are certainly industries that are more dangerous, there is no convincing evidence that would justify a conclusion that Respondent’s business “presented minimal risk to employees.” *Cf. Workers’ Compensation Rule 45.5550.*
15. Considering the mitigating factors and the totality of the circumstances in this case, I conclude a penalty of one and one-half the premiums that Respondent avoided is appropriate. This amount is sufficient to incentivize future diligence and to neutralize any advantage that Respondent may have enjoyed over its competitors as a result of saving money on required insurance premiums. Because Respondent avoided \$511.52 in insurance premiums during the Gap Period, I impose a penalty for Respondent’s

failure to maintain workers' compensation insurance covering its employees during the Gap Period of \$767.28.<sup>8</sup>

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, for the violation alleged in Petitioner's September 20, 2019 Administrative Penalty and Citation, Respondent is hereby assessed a penalty of \$767.28.

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

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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.

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<sup>8</sup>  $\$511.52 \times 1.5 = \$767.28$ .