STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner

v.

Michael Feiner d/b/a Vine Ripe Consulting & Creative Services,[1] Respondent (20-19WCPen)

and

Vine Ripe Greenhouse Construction, LLC, Respondent (21-19WcPen)

Docket Nos. 20-19WCPen and 21-19WCPen

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Interim Commissioner

OPINION AND ORDER

Hearing held in Montpelier, Vermont on February 21, 2020
Record closed on February 21, 2020

APPEARANCES:

Annika Green, Esq., for Petitioner
Richard J. Windish, Esq., for Respondents

ISSUES PRESENTED:

1. Did Respondent Michael Feiner d/b/a Vine Ripe Consulting & Creative Services ("Feiner") violate the terms of 21 V.S.A. § 687 by failing to secure workers' compensation insurance coverage for his employees for the period from April 16, 2016 until November 15, 2018?

2. If so, what administrative penalty should be assessed against Feiner?

3. Did Respondent Vine Ripe Greenhouse Construction, LLC ("the Company") violate the terms of 21 V.S.A. § 687 by failing to secure workers' compensation insurance coverage for its employees for the period from March 9, 2019 until April 12, 2019?

4. If so, what administrative penalty should be assessed against the Company?

[1] The Administrative Citation and Penalty against Feiner refers to two trade names: (1) Vine Ripe Consulting & Creative Services and (2) Vine Ripe Greenhouse Construction. However, Feiner credibly testified that he never did business as Vine Ripe Greenhouse Construction except through the Company, and Petitioner put forth no convincing evidence that Vine Ripe Greenhouse Construction is in fact a registered trade name.

EXHIBITS:

Petitioner's Exhibit 1:	Printouts of Vermont Secretary of State's listings for: (1) Trade name Vine Ripe Consulting & Creative Services, dated June 4, 2019; and (2) Vine Ripe Greenhouse Construction, LLC, dated April 10, 2019
Petitioner's Exhibit 2:	N.C.C.I. Proofs of Coverage Inquiries, dated April 9, 2019
Petitioner's Exhibit 3:	N.C.C.I. Policy Database information, dated May 30, 2019
Petitioner's Exhibit 4:	Spreadsheets showing Respondents' payment to employees
Petitioner's Exhibit 5:	Printout from the Company's website, dated April 9, 2019

FINDINGS OF FACT:

1. I take judicial notice of the Administrative Citation and Penalty issued against Feiner on August 1, 2019, and of the Administrative Citation and Penalty issued against the Company on the same date. These cases are consolidated and resolved together for administrative convenience.

2. Feiner is an organic farmhand, freelance writer, freelance website consultant, ski resort employee, and assembler of prefabricated greenhouses. He resides in Roxbury, Vermont.

3. Sometime before 2016, Feiner traveled to Oregon to work on an organic farm. While there, he helped a farmer assemble a prefabricated greenhouse from a kit. This was his first time engaging in such assembly. The process involved drilling holes in the ground, inserting arch-pieces into the holes, placing plastic over the arch-pieces, building an end wall, and installing a door.

4. After Feiner returned to Vermont, he helped an acquaintance move a greenhouse on a farm in Northfield. Word eventually spread within central Vermont's agricultural community that Feiner had competence related to working with prefabricated greenhouses, and he began receiving requests for greenhouse assembly services in Vermont.

5. Starting in the spring of 2016, several other farm laborers offered to help him assemble greenhouses. Feiner agreed and began performing greenhouse assembly services with their help in April 2016.

6. Feiner's customers were generally farmers seeking greenhouse assembly services. Feiner always served as the primary contact with customers, and he negotiated prices with them, generally consisting of hourly rates for each laborer engaged in an assembly project.

7. Feiner does not dispute that the other laborers who assisted him with greenhouse assembly projects were employees. However, he credibly testified that he did not consider them to be employees before these proceedings began.

8. The greenhouses that Feiner and his employees assembled were delivered directly to farmers in kits intended to be self-assembled with minimal technical construction skills. However, assembling these greenhouses does require some ladder climbing and other work above ground level.

9. Between April 16, 2016 and November 15, 2018, Feiner performed greenhouse assembly services with the assistance of these other laborers. He supplied some of the tools and equipment necessary for the completion of the assembly work, although the customers provided the greenhouse kits and some necessary equipment. He collected payment from the farmers and distributed the funds to his employees according to their agreed-upon hourly rates.

10. Feiner did not use any formal business entity to perform his greenhouse assembly work during this period and did not have a separate trade name for this operation during this period. He accounted for this work under an existing tradename, Vine Ripe Consulting and Creative Services, which he had originally registered for his freelance writing and website design work.

11. Through 2016 and most of 2017, Feiner generally worked full time on work unrelated to greenhouse assembly, and he considered his greenhouse business to be "side work." Nonetheless, the volume of his greenhouse assembly business steadily grew during this period, and by 2018, he reduced his farm labor hours in order to increase his attention to greenhouse assembly services. Even then, however, his greenhouse assembly work remained occasional, part-time work.

12. Feiner tracked his employees' hours on a spreadsheet that showed each employee's name, the date on which work was completed, the number of hours each employee worked, and the wages he paid each employee. Based on the spreadsheet, Feiner's payroll between 2016 and 2018 was as follows:

   - In 2016, Feiner had four employees, to whom he paid a total of $1,654.00 in wages. *See* Petitioner's Exhibit 4.

   - In 2017, Feiner had three employees, to whom he paid a total of $7,983.00 in wages. *See id.*

   - In 2018, Feiner had two employees, to whom he paid a total of $15,275.00 in wages. *See id.*

13. Feiner did not have workers' compensation insurance during any of the times discussed above. He therefore operated with employees but without workers' compensation insurance for 944 days, from April 16, 2016 until November 15, 2018, inclusive.[2] By failing to procure workers' compensation insurance during that time, Feiner avoided approximately $3,369.88 in premiums.

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[2] Feiner contended at the formal hearing that his greenhouse assembly operation was not continuous throughout the entire year, noting that the greenhouse assembly business is inherently seasonal. The evidence shows that most of his assembly jobs occurred between April and November, with occasional services in March. However, he credibly acknowledged that he occasionally performed such services in the winter months if periods of

14. In December 2018, Feiner formed the Company to carry out his greenhouse assembly work. The Company is a Vermont limited liability company, of which Feiner is the sole owner and principal. He testified at the formal hearing both on his own behalf and on the Company's behalf. The nature of the work that the Company performs is the same as the work Feiner performed before forming it. The Company did not initially procure workers' compensation insurance because Feiner was not aware that it was required.

15. After he formed the Company, Feiner did not perform any greenhouse assembly work except through the Company.

16. The Company did not perform any work, and had no employees, from the time of its formation until its first greenhouse assembly job on March 9, 2019.

17. In April 2019, attorney Cassandra Edson, an investigator for the Workers' Compensation and Safety Division, began investigating whether Respondents were operating, or had operated, without workers' compensation insurance. Respondents cooperated with her investigation by participating in an interview and providing business records. Ms. Edson testified at the hearing on Petitioner's behalf.

18. Although the Company did not have workers' compensation insurance before Ms. Edson's investigation, it procured a workers' compensation insurance policy almost immediately after her investigation began. Specifically, it obtained a policy on the normal assigned risk market through Technology Insurance Company effective April 13, 2019, with an annual premium of $1,204.00. *See* Petitioner's Exhibit 3.

19. From the date of the Company's first greenhouse assembly job (March 9, 2019) until the effective date of its workers' compensation insurance policy (April 13, 2019), it had two employees to whom it paid a total of $690.00. *See* Petitioner's Exhibit 4. Thus, the Company operated with employees but without workers' compensation insurance for 35 days. By failing to procure workers' compensation insurance during that time, the Company avoided paying approximately $115.15 in premiums.

20. On August 1, 2019, Petitioner issued two Administrative Citations and Penalties, one to Feiner and one to the Company.

21. The citation against Feiner proposed a penalty of $47,200.00 for his failure to maintain workers' compensation insurance for 944 days. Feiner credibly testified that this amount is more than he earns per year from all sources of income. This amount is more than fourteen times the amount of insurance premiums that Feiner avoided by failing to procure the required insurance coverage.[3]

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warmer weather permitted, and his records reflect work, for instance, on December 10, 2017 and February 22, 2018. *See* Petitioner's Exhibit 4. Considering the totality of circumstances, I find that he was effectively open year-round and would have accepted jobs any time the weather permitted.

[3] $47,200.00 ÷ $3,369.88 = 14.0064.

22. The citation against the Company proposed a penalty of $1,750.00 for its failure to maintain workers' compensation insurance for 35 days. This amount is more than fifteen times the amount of insurance premiums that the Company avoided by failing to procure the required insurance coverage.[4]

23. Both Respondents filed timely appeals. Although they acknowledge that they failed to carry the required workers' compensation insurance for the periods described above, they seek reductions of the penalty amounts.

CONCLUSIONS OF LAW:

1. Under Vermont law, 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. Respondents were required to maintain workers' compensation for their employees but failed to do so during the periods identified above. *See* Finding of Fact Nos. 9, 13, and 19, *supra*. Therefore, they violated the terms of 21 V.S.A. § 687.

3. Failure to comply with § 687 carries a statutory administrative penalty of up to $100.00 per day for the first seven days of violation and up to $150 per day thereafter. *See* 21 V.S.A. § 692(a). The maximum statutory penalty for Feiner's operation without having insurance for 944 days is therefore $141,250.00.[5] The maximum statutory penalty for the Company's operation without having insurance for 35 days is $4,900.00.[6] *See* 21 V.S.A. § 692(a).

4. The Commissioner has adopted Workers' Compensation Rule 45 to implement the penalties provided for by statute. That Rule underwent a substantive revision in February 2017.

5. Between May 5, 2001 and February 12, 2017, Rule 45 provided in relevant part that an employer who failed to procure required workers' compensation insurance would be assessed a penalty of $50.00 per day for every day that the employer neglected to procure or maintain workers' compensation insurance coverage before receiving notice from the Department, up to a maximum penalty amount of $5,000.00. *See* Workers' Compensation Rules 45.5000−45.5100 (effective May 5, 2001). It provided for higher penalties if an employer failed to correct its non-compliance within five days after receiving notice from the Department. *See id.*

6. Effective February 13, 2017, Rule 45 was revised to eliminate the $5,000.00 penalty cap and to 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

[4] $1,750.00 ÷ $115.15 = 15.1975.

[5] (7 days x $100 per day) + (937 days x $150 per day) = $141,250.00.

[6] (7 days x $100 per day) + (28 days x $150 per day) = $4,900.00.

Industry Sector and the number of the employer's prior offenses. *See* Workers' Compensation Rules 45.5510 – 45.5513 (effective February 13, 2017).

7. Both versions of Rule 45 provide the Commissioner with the discretion to reduce the amount of any penalty 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.

   See Workers' Compensation Rules 45.5110 – 45.5112 (effective May 5, 2001); 45.5520 – 45.5550 (effective February 13, 2017).

8. Feiner's 944-day period of non-compliance includes time both before and after February 13, 2017, the effective date of Rule 45's revisions. Thus, determining the maximum amount of his penalty under Rule 45 requires separate analyses of the periods before and after February 13, 2017.[7]

9. Feiner's 303 days of non-compliance between April 16, 2016 and February 12, 2017, inclusive, is subject to the earlier version of Rule 45. A strict application of the version of Rule 45 in effect at that time, before consideration of the mitigation factors discussed *supra* at Conclusion of Law No. 7, yields a maximum penalty of $5,000.00.[8]

10. Feiner's 641 days of non-compliance between February 13, 2017 and November 15, 2018, inclusive, is subject to the current version of Rule 45. During this time, Feiner was in the greenhouse construction business, and therefore its N.A.I.C.S. Industry Sector Code is 23 (Construction).[9] *See* Workers' Compensation Rule 45, Appendix (effective February 13, 2017).

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[7] Because the 2017 revision of Rule 45 removed the penalty cap and changed the formula for computing per diem penalties, it certainly affected the substantive rights of the parties. As such, it cannot apply retroactively. *See Sanz v. Douglas Collins Const.*, 2006 VT 102, ¶ 16 (holding that statutory amendments affecting the parties' substantive rights cannot be applied retroactively); *Smiley v. State*, 2015 VT 42, ¶ 16 (holding that the same retroactivity analysis applies for both statutes and administrative rules).

[8] 303 days × $50.00 per day = $15,150.00, which is greater than the cap of $5,000.00. *See* Workers' Compensation Rules 45.5000–45.5100 (effective May 5, 2001).

[9] Respondents suggested at the formal hearing that they are properly classified under N.A.I.C.S. Industry Sector Code 11 (Agriculture, Forestry, Fishing and Hunting), which carries a lower maximum penalty under the current version of Rule 45. *See* Rule 45.5511 (effective February 13, 2017). In support of this contention, Respondents noted that during the entire period of their noncompliance, their customers were farmers, they performed their work on farms, and the skill set necessary for greenhouse assembly was less technical than what is traditionally thought of as construction work. I do not find these arguments persuasive. Respondents' business consists of assembling prefabricated structures on-site. The fact that those buildings were later used in agriculture does not

11. For employers in that Industry Sector, the current version of Rule 45 provides for a penalty of $50.00 for each day without insurance for a first violation.

12. This case involves Feiner's first violation.[10] Thus, for this second period of non-compliance, strict application of the current version of Rule 45 before applying the mitigation factors yields a maximum penalty of $32,050.00.

13. Thus, Feiner's maximum penalty under Rule 45 for the entire 944-day period of his non-compliance is $37,050.00.[11] Petitioner's proposal of a higher penalty against Feiner, in the amount of $47,200.00, appears to result from a failure to account for the effect of the revision to Rule 45 and the $5,000.00 penalty cap applicable to the first 303 days of Feiner's non-compliance.

14. The Company's entire period of non-compliance occurred after February 13, 2017. Therefore, its penalty is subject only to the current version of Rule 45. Because the Company performed substantially the same work that Feiner performed before forming the Company, its N.A.I.C.S. Industry Sector Code is also 23 (Construction).

15. Petitioner's citation against the Company is for its first violation. A strict application of the current version of Rule 45, before applying the mitigation factors, thus yields a maximum penalty of $1,750.00.[12] This is the amount of Petitioner's proposed penalty against the Company.

16. However, I do not find it appropriate to institute the maximum penalty against either Respondent. Instead, substantial mitigation is appropriate under the factors discussed *supra* at Conclusion of Law No. 7.

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make their services agricultural in nature. I take judicial notice of N.A.I.C.S.'s own description of its codes. Specifically, N.A.I.C.S. Industry Code 236620 (Commercial and Institutional Building Construction, a sub-sector within Industry Sector Code 23) describes precisely the kind of work that Respondents engaged in: "This industry includes establishments responsible for the ***on-site assembly of modular or prefabricated*** commercial and institutional buildings."). *See* N.A.I.C.S. Code Description, 236220, available at https://www.naics.com/naics-code-description/?code=236220 (last accessed March 27, 2020 at 1:31 P.M.) (emphasis added). There is no comparably on-point sub-code within Industry Sector Code 11. Granted, there is a sub-code within Industry Sector Code 11 dealing with greenhouses, *i.e.,* Industry Sector Code 1114 (Greenhouse, Nursery, and Floriculture Production). However, that industry sector "comprises establishments primarily ***engaged in growing crops*** of any kind under cover and/or growing nursery stock and flowers. 'Under cover' is generally defined as greenhouses." *See* N.A.I.C.S. Code Description, 1114, available at https://www.naics.com/naics-code-description/?code=1114 (last accessed on March 27, 2020 at 1:55 P.M.) (emphasis added). There is no evidence that Respondents' greenhouse assembly services ever involved the growing, harvesting, or any other interaction with any crops within the greenhouses they assembled. I conclude that Respondents were at all relevant times within N.A.I.C.S. Industry Sector Code 23 (Construction).

[10] The penalties for subsequent violations within a three-year period are higher. *See id.*

[11] $5,000.00 + $32,050.00 = $37,050.00.

[12] 35 days × $50.00 per day = $1,750.00.

17. As to the first mitigation factor, the Company[13] certainly acted promptly in obtaining an insurance policy after Ms. Edson began her investigation. However, Respondents have not demonstrated that their failure to secure the required insurance coverage was inadvertent or the result of excusable neglect. While I find it credible that they did not know they were required to procure workers' compensation coverage, ignorance of the law is no excuse. *See Workers' Compensation and Safety Division v. Essex Electric, LLC*, Docket No. 08-12WCPen (November 28, 2012), Conclusion of Law No. 15 ("… 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.").

18. The second mitigation factor, however, justifies substantial mitigation of the penalties against each Respondent. Petitioner's proposed penalties against Feiner and the Company were, respectively, more than fourteen and fifteen times than the amounts of their premium avoidance. *See* Findings of Fact Nos. 21−22, *supra*. Petitioner has advanced no reason for such hefty penalties, and none is apparent from the record. The Department has previously held that penalties of just over twice the premium avoidance justified mitigation. *See Workers' Compensation and Safety Division v. Peter Leo Goldsmith, LLC*, Docket No. 25-11WCPen (June 21, 2012). By comparison, the proposed penalties here are approximately twice the Respondents' ***entire payrolls*** for the periods in question. *Cf.* Findings of Fact Nos. 12−13; 19−22, *supra*. To say that the proposed penalties "significantly exceed" the amounts of their premium avoidance would be an understatement. The second factor strongly favors mitigation.

19. I do not find that any additional mitigation is warranted under the third mitigation factor. While Respondents are certainly small employers, construction of any kind is inherently dangerous. Indeed, Respondent's Industry Sector is in the highest risk category under Rule 45.5513. In particular, the necessity of above-ground work, such as using ladders, presents the risk of falls. Despite the lack of any evidence that Respondents' employees sustained injuries while working for them, there is no convincing evidence that would justify a conclusion that their business "presented minimal risk to employees." *Cf.* Workers' Compensation Rule 45.5112 (effective May 5, 2001); Rule 45.5550 (effective February 13, 2017).

20. 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.

21. Based on the totality of the circumstances in this case and applying the second mitigation factor discussed above, I conclude that penalties of $4,825.00 against Feiner and $175.00 against the Company are appropriate. These amounts are adequate to comport with the Department's goals of incentivizing future compliance and

[13] By the time Ms. Edson's investigation commenced, Feiner was no longer performing greenhouse assembly work except through the Company. Thus, while Feiner did not individually procure insurance after the investigation commenced, he was not required to do so.

neutralizing any advantage that Respondents may have enjoyed over competitors by saving money on required insurance premiums.

ORDER:

Based on the foregoing findings of fact and conclusions of law, for Respondents' violations alleged in Petitioner's August 1, 2019 Administrative Penalties and Citations, Feiner is hereby assessed a penalty of $4,825.00 and the Company is hereby assessed a penalty of $175.00.

DATED at Montpelier, Vermont this 6th day of April 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.