

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and
Safety Division, Petitioner

Docket Nos. 08-19WCPen and
09-19WCPen

v.

By: Beth A. DeBernardi
Administrative Law Judge

On the Rise Construction, LLC,
Respondent

For: Michael A. Harrington
Commissioner

OPINION AND ORDER

Hearing held via Skype on August 31, 2020

Record closed on August 31, 2020

APPEARANCES:

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

ISSUES PRESENTED:

1. Did Respondent violate 21 V.S.A. § 687 by failing to secure workers' compensation insurance coverage for covered employees for the periods from August 17, 2017 through September 26, 2017 and from October 30, 2018 through January 5, 2019,¹ and if so, what administrative penalty should be assessed?
2. Did Respondent violate 21 V.S.A. § 690(b) by failing to return a completed compliance statement within 30 days, and if so, what administrative penalty should be assessed?

EXHIBITS:

Petitioner's Exhibit 1:	Vermont Secretary of State listing for Respondent
Petitioner's Exhibit 2:	NCCI proof of coverage inquiry for Respondent
Petitioner's Exhibit 3:	Updated NCCI proof of coverage inquiry and April 30, 2019 email from investigator Scott Goodhue to Petitioner
Petitioner's Exhibit 4:	Affidavit of VOSHA compliance officer Tony Genung
Petitioner's Exhibit 5:	December 22, 2018 letter from Keith Weitzmann to Scott Goodhue with spreadsheet
Petitioner's Exhibit 6:	November 7, 2018 letter from Scott Goodhue to Respondent with compliance statement form and return of service
Petitioner's Exhibit 7:	November 26, 2018 email reminder from Scott Goodhue to Respondent concerning compliance statement

¹ The original citation specified violation periods from July 26, 2016 through August 3, 2016 and from November 18, 2016 through January 5, 2019. At the hearing, Petitioner verbally amended the citation to the violation periods stated here.

Petitioner's Exhibit 8: September 26, 2017 Stop Work Order, return of service and affidavit of Scott Goodhue

FINDINGS OF FACT:

1. I take judicial notice of the Administrative Citations and Penalties issued against Respondent on May 6, 2019 (09-19WCPen) and May 7, 2019 (08-19WCPen).

Respondent's Business

2. Respondent is a Vermont limited liability company formed in July 2015 to engage in the construction business. James Sears is the company's owner, sole member, and registered agent. *Exhibit 1.*
3. Respondent has had workers' compensation insurance policies at various times since its inception. Prior to forming a limited liability company for his business, Mr. Sears had workers' compensation insurance policies in his own name. *Exhibit 2.*
4. Petitioner alleges that Respondent had employees for the periods between August 17, 2017 and September 26, 2017 and between October 30, 2018 and January 5, 2019. Therefore, Petitioner contends that Respondent was required to maintain workers' compensation insurance coverage for these time periods.
5. Mr. Sears contends that Respondent has never had any employees. In his view, Respondent is a "subcontractor" with general liability insurance. On those occasions when a construction job requires more manpower than Mr. Sears' labor, Respondent engages one or more other "subcontractors," each with his own general liability insurance. Respondent contends that no workers' compensation insurance is required under these circumstances.

The Investigation

6. In August 2017, investigator Scott Goodhue of the Workers' Compensation and Safety Division undertook an investigation into whether Respondent was operating without workers' compensation insurance. Mr. Goodhue testified at the hearing on Petitioner's behalf.
7. Mr. Goodhue's investigation revealed that Respondent's workers' compensation insurance was cancelled on November 18, 2016 and that its lack of coverage continued through at least April 30, 2019. *See Exhibits 2 and 3.*
8. Mr. Goodhue requested Respondent's payroll records on multiple occasions. Respondent never provided them, despite Mr. Sears' assurances that he would do so.

Respondent's Operations from August 17, 2017 through September 26, 2017

9. On August 18, 2017, Mr. Goodhue observed a yard sign advertising site work by “On the Rise Construction” at the Fran Zando Kennels in Arlington. Workers were installing siding on the kennel buildings.
10. The kennel owner confirmed to Mr. Goodhue that Respondent was performing construction work on her property. Mr. Sears and one other worker had completed about half the job at that time. As the job was half complete on August 18, 2017, I infer that Respondent likely started the job by August 17, 2017.
11. I find that Respondent had two workers performing construction on the kennel job, including Mr. Sears.
12. On September 18, 2017, Mr. Goodhue observed Mr. Sears driving a vehicle and picking up two workers, Gavin Wilcox and Ryan Hannagan. They drove to a jobsite on Hale Road in Arlington, where they were installing a roof on a two-story residence.
13. Mr. Goodhue approached Mr. Sears at the Arlington residence jobsite and asked him whether Respondent had a workers’ compensation insurance policy in effect. Mr. Sears responded that he was not sure whether the policy was in effect. He stated that he would check with his agent and send a copy of the policy to Mr. Goodhue. Mr. Goodhue did not receive any policy, and in fact the policy had been cancelled the previous November. *See Finding of Fact No. 7 supra.*
14. On September 26, 2017, the Commissioner issued a Stop Work Order to Respondent based on her determination that it was operating without workers’ compensation insurance. Respondent was served with the Stop Work Order on September 26, 2017 at 2:24 p.m. *See Exhibit 8.*
15. I find that Respondent had three workers performing roofing work on the Arlington residence, including Mr. Sears.
16. I therefore find that Respondent had workers performing construction jobs for the period from August 17, 2017 through September 26, 2017, at a time when Respondent lacked workers’ compensation insurance coverage.

Respondent's Operations from October 30, 2018 through January 5, 2019

17. Tony Genung is an occupational safety compliance officer with the Vermont Occupational Safety and Health Administration (VOSHA). He provided an affidavit in this matter dated December 4, 2018. *Exhibit 4.*
18. Based on Mr. Genung’s credible affidavit, I find that Mr. Genung was performing a workplace safety inspection at the Stratton Mountain Resort on October 16, 2018, when he noticed two men working on a roof. At his request, the men rode down to ground level via an aerial lift and identified themselves as Elli Capen and Matt Lovely. Both men stated that they were working for Respondent, and Mr. Lovely provided

Respondent's telephone number for verification. When Mr. Genung drove to the jobsite again on October 18 and 23, he saw Mr. Capen working there both days.

19. Mr. Sears testified that Respondent did not perform any construction work at the Stratton Mountain jobsite. Instead, the jobsite's general contractor, Keith Weitzmann, asked Mr. Sears whether he knew anyone who was available for work, and Mr. Sears suggested Mr. Capen and Mr. Lovely. Mr. Weitzmann then hired the men himself. According to Mr. Sears, once the VOSHA inspector observed a workplace safety violation involving the aerial lift operated by Mr. Capen, Mr. Weitzmann attempted to shift the blame for that violation from himself to Respondent by falsely claiming that the men were Respondent's employees, rather than his own.²
20. I find Mr. Genung's account more credible than Mr. Sears' account. Mr. Capen and Mr. Lovely identified themselves as Respondent's employees immediately after they came down off the lift, and Mr. Lovely provided Respondent's telephone number to the VOSHA inspector. Further, there is no evidence that these two men had any interest in falsely shifting responsibility for a workplace safety violation from the general contractor to Respondent. I therefore find that both men were working for Respondent at Stratton Mountain on October 16, 2018 and that Mr. Capen continued to work on that jobsite through October 23, 2018.
21. Petitioner's amended citation charges Respondent with failing to maintain workers' compensation insurance for its employees from October 30, 2018 through January 5, 2019. However, the evidence establishes only that Respondent had workers at the Stratton Mountain jobsite between October 16, 2018 and October 23, 2018. Petitioner has not offered persuasive evidence that Respondent had workers on any jobsite between October 30, 2018 and January 5, 2019.³
22. Accordingly, the evidence is insufficient for me to find that Respondent had any workers from October 30, 2018 through January 5, 2019, contrary to the allegations in the amended citation.

Compliance Statement

23. On November 7, 2018, Mr. Goodhue served Respondent with a request to complete and return a Vermont Workers' Compensation Compliance Statement within 30 days, as provided by 21 V.S.A. § 690(b) and Workers' Compensation Rule 45.7100. *See*

² Petitioner submitted a December 22, 2018 letter from Mr. Weitzmann to Mr. Goodhue stating that Respondent "was contracted to perform window replacements for a project located at . . . Stratton Mountain Resort." *Exhibit 5*. Attached to the letter is a spreadsheet listing eight payments purportedly made to "On the Rise Construction" between September 19, 2018 and November 1, 2018. Without testimony to explain the circumstances under which the letter and spreadsheet were created, and without any corresponding invoices from Respondent, I do not rely on Exhibit 5 in making my findings.

³ Even if I considered the spreadsheet in Exhibit 5, the last payment listed there was made on November 1, 2018. Given the time it likely takes to prepare, submit and process an invoice, a payment made on November 1, 2018 would not establish that Respondent performed any work at Stratton Mountain on or after October 30, 2018.

Exhibit 6. The served documents included a notice that failure to comply carries a penalty of up to \$5,000.00 per week. *Id.*

24. Mr. Goodhue reminded Mr. Sears more than once to complete and return the compliance statement within 30 days. One of those reminders was an email sent on November 26, 2018, reminding Mr. Sears that the compliance statement was due December 7, 2018. *Exhibit 7.*
25. Allowing time for mailing, the compliance statement was due at the Department of Labor no later than December 11, 2018. *See* Administrative Citation and Penalty, Docket No. 09-19WCPen. As of April 23, 2019, Respondent had not completed and returned the compliance statement.

Citations and Appeal

26. On May 6, 2019, Petitioner issued an Administrative Citation and Penalty in Docket No. 09-19WCPen to Respondent for failing to complete and return a compliance statement within 30 days. The citation included a proposed penalty of \$4,500.00.
27. On May 7, 2019, Petitioner issued an Administrative Citation and Penalty in Docket No. 08-19WCPen to Respondent for failing to maintain workers' compensation insurance coverage for its employees from July 26, 2016 to August 3, 2016, and from November 18, 2016 to January 5, 2019. The citation included a proposed penalty of \$39,350.00.
28. Respondent filed a timely appeal of both citations.
29. At the hearing, Petitioner amended the dates of the alleged violation in Administrative Citation and Penalty No. 08-19WCPen to the more limited period from August 17, 2017 through September 26, 2017 and from October 30, 2018 through January 5, 2019. Petitioner proposes a penalty of \$5,200.00 for this alleged violation.

CONCLUSIONS OF LAW:

Requirement to Maintain Workers' Compensation Insurance for Statutory Employees

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. To determine whether Respondent violated § 687 by failing to maintain workers' compensation coverage for its workers, I must determine whether those workers were statutory employees.
3. Vermont's workers' compensation statute defines "employer" as "any body of persons, corporate or unincorporated . . . includ[ing] 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).

4. As thus defined, statutory employer status is determined by the nature of the putative employer’s business. *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶ 9, citing *Chatham Woods Holdings, supra* at ¶ 11. Specifically, the “nature of the business” test asks whether the work contracted for is “a part of, or process in, the trade, business or occupation” of the putative employer. *Id.*; *see also Frazier v. Preferred Operators, Inc.*, 2004 VT 95, ¶ 11 (acknowledging preference for the “nature of the business” test over the “right to control” test for determining the existence of a statutory employer relationship). If the work contracted for is a part of, or process in, the trade, business or occupation of the putative employer, then those workers are employees. Whether they are designated as “subcontractors” with general liability insurance is not relevant to this determination, notwithstanding Mr. Sears’ assertions to the contrary.
5. For the time period from August 17, 2017 through September 26, 2017, Respondent had workers installing siding at a kennel and roofing at an Arlington residence. This type of work was in the nature of Respondent’s construction business. I therefore conclude that these workers were statutory employees under the “nature of the business” test. Respondent therefore violated 21 V.S.A. § 687 by failing to procure workers’ compensation insurance from August 17, 2017 through September 26, 2017.
6. For the time period from October 30, 2018 through January 5, 2019, the evidence was insufficient to establish that Respondent had workers on any jobsites. *See Finding of Fact Nos. 21 through 22 supra*. Therefore, I need not consider whether it had statutory employees during this time period, and I find no violation of 21 V.S.A. § 687.

Statutory Penalties for Non-Compliance with the Insurance Requirement

7. Respondent violated 21 V.S.A. § 687 by failing to maintain workers’ compensation insurance coverage from August 17, 2017 through September 26, 2017, a period of 41 days. *See Conclusion of Law No. 5 supra*.
8. 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 maintain workers’ compensation insurance coverage for 41 days is \$5,800.00.⁴ *See* 21 V.S.A. § 692(a).
9. Workers’ Compensation Rule 45 implements the penalties provided for by statute. The rule provides 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 its prior offenses within the last three years. *See Workers’ Compensation Rules 45.5510 – 45.5513*.

⁴ (7 days x \$100 per day) + (34 days x \$150 per day) = \$5,800.00.

10. As a construction business, Respondent's NAICS Industry Sector Code is 23 (Construction). *See* Workers' Compensation Rule 45, Appendix. For employers in this industry sector, Rule 45.5513 provides for penalties of \$50.00 per day for each day without insurance for an initial violation.
11. This is Respondent's first violation. A strict application of the formula set forth in Rule 45.5513 would yield a maximum penalty of \$2,050.00.⁵

Mitigating Factors

12. Rule 45 provides the Commissioner with 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 45.5520 – 45.5550. The rules place the burden to establish the applicability of any mitigating factors on the employer. *Id.*

13. Respondent offered no evidence to establish any of the mitigating factors. First, there is no evidence that its failure to maintain insurance was inadvertent or the result of excusable neglect; further it has never reinstated its policy. Second, Respondent never provided payroll records, so I cannot determine the premium avoidance in this case. Third, although Respondent is not a large employer, construction work is inherently dangerous, as indicated by its inclusion in the most hazardous category under the NAICS classification system. *See* Workers' Compensation Rule 45, Appendix. I therefore conclude that mitigation is not available under Workers' Compensation Rules 45.5520 – 45.5550.
14. In the absence of any mitigating factors, I impose the maximum penalty of \$2,050.00 for Respondent's failure to maintain workers' compensation insurance for its employees from August 17, 2017 through September 26, 2017.

Failure to Complete and Return a Compliance Statement

15. Vermont's workers' compensation statute requires any employer, including a subcontractor or independent contractor, to complete and return a compliance

⁵ 41 days × \$50 per day = \$2,050.00.

statement upon written request of the Commissioner. 21 V.S.A. § 690(b)(1). The penalty for failing to complete and return a compliance statement is not more than \$5,000.00 for each week during which the noncompliance occurred. 21 V.S.A. § 690(b)(2).

16. Workers' Compensation Rule 45.7000 implements the penalties provided for by 21 V.S.A. § 690(b). By rule, the penalty shall be \$1,000.00 for the first week of noncompliance and shall increase \$500.00 for each subsequent week, up to a maximum of \$5,000.00 per week. *See* Workers' Compensation Rule 45.72100.
17. Workers' Compensation Rule 45.72200 provides that the Commissioner may reduce the penalty assessed under this section if the employer demonstrates that the failure to provide a compliance statement was inadvertent or the result of excusable neglect and was promptly corrected; or that the assessed penalty is out of proportion with the small size of the employer.
18. Respondent's compliance statement was due on December 7, 2018 and should have been received by mail at the Department no later than December 11, 2018. As of April 23, 2019, Respondent still had not filed it, despite multiple reminders. *See* Administrative Citation and Penalty, Docket No. 09-19WCPen and Finding of Fact No. 24 *supra*. Accordingly, as set forth in the citation, Respondent was non-compliant for 18 weeks before the Department issued the citation. Under Rule 45.72100, the maximum penalty for 18 weeks of non-compliance is \$72,000.00.⁶
19. Although there is no evidence that Respondent's failure to file the compliance statement was inadvertent or the result of excusable neglect, and Respondent has never corrected the lapse, I find that the maximum penalty of \$72,000.00 is out of proportion for an employer of this size. Thus, I conclude that mitigation is available under Workers' Compensation Rule 45.72200.
20. Petitioner has proposed a penalty of \$4,500.00 for Respondent's violation of 21 V.S.A. § 690(b). Such a penalty is the equivalent of the maximum penalty for three weeks of noncompliance under Rule 45. Although \$4,500.00 is still a significant monetary penalty, the Legislature adopted significant penalties for this type of violation because it considers such violations serious. I therefore conclude that this proposed penalty is a reasonable exercise of the discretion afforded under the statute and rules.
21. I impose a penalty of \$4,500.00 for Respondent's failure to complete and return the compliance statement required by 21 V.S.A. § 690(b).

⁶ (1 week x \$1,000) + (1 week x \$1,500.00) + (1 week x \$2,000) + (1 week x \$2,500) + (1 week x \$3,000) + (1 week x \$3,500) + (1 week x \$4,000) + 1 week x \$4,500) + (10 weeks x \$5,000) = \$72,000.00.

ORDER:

For the violation alleged in Petitioner's May 7, 2019 Administrative Citation and Penalty in Docket No. 08-19WCPen, as amended at the hearing, Respondent is hereby assessed a penalty of \$2,050.00. For the violation alleged in Petitioner's May 6, 2019 Administrative Citation and Penalty in Docket No. 09-19WCPen, Respondent is hereby assessed a penalty of \$4,500.00. The total penalty assessed is **\$6,550.00**.

DATED at Montpelier, Vermont this 15th day of September 2020.

Michael A. Harrington
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.Civ.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.