

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Workers' Compensation and
Safety Division, Petitioner

Docket No. 28-18WCPen

v.

By: Beth A. DeBernardi
Administrative Law Judge

Lorenzo de Coninck d/b/a LTD & Sons
Property Maintenance, Respondent

For: Michael A. Harrington
Commissioner

OPINION AND ORDER

Hearing held via Skype on July 24, 2020
Record closed on July 24, 2020

APPEARANCES:

Annika Green, Esq., for Petitioner
Lorenzo de Coninck, *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 his employees for the periods from December 3, 2015 through June 12, 2016; November 8, 2016 through June 29, 2017; and December 12, 2017 through April 19, 2018?
2. If so, what administrative penalty should be assessed?

EXHIBITS:

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|-------------------------|---|
| Petitioner's Exhibit 1: | Vermont Secretary of State listing for registered tradename "LTD & Sons Property Maintenance" |
| Petitioner's Exhibit 2: | NCCI Proof of Coverage Inquiry for Respondent |
| Petitioner's Exhibit 3: | Payroll records |
| Petitioner's Exhibit 4: | March 2018 invoice to Raymond Reed |
| Petitioner's Exhibit 5: | March 2018 posts from Respondent's Facebook, Inc. account |
| Petitioner's Exhibit 6: | NCCI Policy Database Inquiry for Respondent |

FINDINGS OF FACT:

1. I take judicial notice of the Administrative Citation and Penalty issued against Respondent on November 13, 2018.

Respondent's Business

2. Respondent owns and operates an outdoor property maintenance business in Jamaica, Vermont. He conducts his business as a sole proprietor, sometimes using the tradename LTD & Sons Property Maintenance.
3. Respondent's business activities include landscaping and snow removal. He has engaged in this business for over 30 years, with a brief interruption in 1995.
4. For many years, Respondent's business flourished. He held contracts with multiple real estate developments for landscaping, snow removal and seasonal clean up. Such contracts typically provided him with a set amount of revenue paid biweekly or monthly, regardless of the work required. Respondent regularly employed people to perform work pursuant to these contracts.
5. Beginning in 2016, Respondent's business entered a declining phase. The real estate developments for which he had provided property maintenance for many years began to hire new property managers, who, in turn, awarded their maintenance contracts to other providers. Respondent credibly testified that he last provided fall clean up services to a real estate development in 2015. Since then, he has mainly been working for individual clients, usually by himself but also with the occasional assistance of employees.
6. In 2018, a contractor named Raymond Reed held the property maintenance contract with the Greenspring townhouse development in West Dover, Vermont. In March of that year, the townhouse roofs were leaking due to the buildup of snow and ice. Mr. Reed needed additional manpower to shovel the roofs, so he hired Respondent to help him. Respondent and several of his employees shoveled snow from the townhouse roofs on five separate dates that month. *See Petitioner's Exhibits 4 and 5* (Respondent's invoice to Mr. Reed and photographs of roof shoveling at Greenspring). Respondent's employees did no other roof shoveling that winter.
7. Respondent was cited for not maintaining workers' compensation insurance once before, in Docket Number 03-15WCPen. The record does not contain evidence of the prior violation date. The parties resolved that citation by consent.

The 2018 Investigation

8. In February 2018, investigator Scott Goodhue of the Workers' Compensation and Safety Division undertook an investigation into whether Respondent was operating without workers' compensation insurance. Respondent cooperated with the investigation by participating in an interview at Mr. Goodhue's office and providing payroll records. Mr. Goodhue testified at the hearing on Petitioner's behalf.
9. Based on Mr. Goodhue's credible testimony and Petitioner's Exhibits 2 and 6, I find that Respondent did not maintain workers' compensation insurance for the following time periods, inclusive of end dates:

- December 3, 2015 through June 12, 2016 (First Gap Period - 193 days)
- November 8, 2016 through June 29, 2017 (Second Gap Period - 234 days)
- December 12, 2017 through April 19, 2018 (Third Gap Period - 129 days)

Respondent therefore had no coverage for a total of 556 days.

- Each gap period occurred because Respondent failed to pay the insurance premium or otherwise failed to comply with the terms of his policy. *See Petitioner's Exhibit 2.* As to the Second Gap Period, Respondent stated to Mr. Goodhue that his coverage was cancelled because he owed money. As to the Third Gap Period, he told Mr. Goodhue that his coverage was cancelled because he failed to make a payment on time.
- The payroll records that Respondent provided to Mr. Goodhue covered the three gap periods. *See Petitioner's Exhibit 3.* These payroll records were created by Respondent's friend Wendy Lackey in response to Mr. Goodhue's request for records. Respondent did not provide any payroll records that he may have kept during the ordinary course of business.
- The payroll records state that Respondent had employees during each gap period as follows:
 - First Gap Period: Five employees who worked from 12 to 25 hours per week.
 - Second Gap Period: No employees.
 - Third Gap Period: Six employees who worked between 3.5 hours and 22.5 hours total during that gap period.
- The First Gap Period payroll records identify five employees, their addresses, their hourly rates, the hours each employee worked, and the amounts paid weekly. I accept these records as an accurate account of Respondent's payroll for the First Gap Period.
- The Second Gap Period payroll records simply state that "there were no employees." *Petitioner's Exhibit 3.* Although I accept Respondent's testimony that his business had substantially decreased by this time, I do not accept his statement that he had no employees for this period for several reasons. First, the payroll record was prepared almost a year after the Second Gap Period ended, which is enough time for memories to fade. Second, Respondent testified that he mostly worked alone but would hire an employee occasionally when he needed help. Third, during the interview with Mr. Goodhue, Respondent stated that he had no insurance during the Second Gap Period because he owed money, not because he had no employees. Finally, the payroll record was created in response to this investigation, and not in the usual course of business. Thus, the bald statement that Respondent had no employees, without any supporting documentation, is suspect. I infer from all these facts that Respondent hired employees occasionally during the Second Gap Period, when he needed help.

15. For the Third Gap Period, the payroll records name six employees, along with the total hours worked and the total dollar amount earned by each. These records are generally consistent with Respondent's credible testimony about his business operations, but they are not entirely consistent with his invoice to Mr. Reed for roof shoveling. The invoice identifies nine people (including Respondent) who provided shoveling, not six. *Compare Petitioner's Exhibit 4* (invoice), with *Petitioner's Exhibit 3* (payroll records). Nevertheless, the hours stated on the invoice for the employees listed are consistent with the hours stated for those employees on the payroll records. Overall, I find the payroll records for the Third Gap Period to be generally credible.¹
16. Based on the payroll records and the applicable coverage rates, Mr. Goodhue calculated that Respondent saved \$839.54 by not having workers' compensation insurance for the three gap periods (the "premium avoidance").
17. I accept the figure of \$839.54 as the amount of premium avoidance here. Although Respondent neglected to include some employee time in his payroll records, that minor omission would not significantly change the premium avoidance calculation.
18. Respondent told Mr. Goodhue that his business had three workplace injuries many years ago, but Mr. Goodhue's investigation found no record of them. No further evidence was offered concerning any workplace injuries by either party.

Citation and Appeal

19. Petitioner issued an Administrative Citation and Penalty to Respondent on November 13, 2018. The citation proposed a penalty of \$33,360.00 for Respondent's failure to maintain workers' compensation insurance for 556 days.
20. Respondent filed a timely appeal. He acknowledges that he failed to carry workers' compensation insurance and that this failure was his responsibility. He seeks a reduction of the penalty amount.
21. Although Petitioner proposed a penalty of \$33,360.00 in the Administrative Citation and Penalty, it now proposes a penalty of \$15,000.00.

CONCLUSIONS OF LAW:

Workers' Compensation Insurance Requirement and Statutory Penalties for Non-Compliance

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.

¹ The invoice includes work by Brian (3 hours), Mike P. (19 hours) and Morgan (19.5 hours), none of whom are listed in the payroll records as employees during the Third Gap Period. *See Petitioner's Exhibits 3 and 4.*

2. Respondent failed to maintain the required coverage for the three gap periods identified above, a total of 556 days. *See* Finding of Fact No. 9 *supra*. Therefore, he violated the terms of 21 V.S.A. § 687.
3. Prior to July 1, 2007, the statute provided that an employer who failed to comply with the requirements of § 687 would be assessed a penalty of not more than \$50.00 per day, with a maximum of \$5,000.00. 21 V.S.A. § 692(a). Effective July 1, 2007, the statute was amended to increase the daily penalty to not more than \$100.00, and the \$5,000.00 maximum was repealed. Effective July 1, 2010, the statute was amended again to provide for a penalty of not more than \$100.00 for the first seven days of violation and not more than \$150.00 for every day thereafter. Most recently, the statute was amended to provide for a penalty of no more than \$100.00 *per day* for the first seven days of violation and not more than \$150.00 for every day of violation thereafter. 21 V.S.A. §692(a) (effective May 26, 2011).
4. Respondent failed to comply with 21 V.S.A. § 687 for a total of 556 days, spanning the period from December 3, 2015 through April 19, 2018. Accordingly, the current statute governs. The maximum penalty under that statute is \$83,050.00.²

Penalty Assessment under Workers' Compensation Rule 45

5. The Commissioner has adopted Workers' Compensation Rule 45 to implement the penalties provided for by statute. Rule 45 underwent a substantive revision on February 13, 2017. 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). Respondent's non-compliance with § 687 between December 3, 2015 and February 12, 2017 is accordingly governed by the prior version of Rule 45, and his non-compliance from February 13, 2017 through April 19, 2018 is governed by the current version of Rule 45.
6. The prior version of Rule 45 became effective on May 5, 2001. Mirroring the statute that was in effect at that time, Rule 45.5100 set the administrative penalty for violations of § 687 at no more than \$50.00 per day, with a maximum penalty of \$5,000.00. *See* Conclusion of Law No. 3 *supra*. Thereafter, the statute was amended several times, but the rule was not amended until 2017.
7. In 2012, the Commissioner held that the maximum penalty set forth in the prior version of Rule 45 was invalid as applied to violations occurring on or after July 1, 2007, when the Legislature repealed the maximum penalty. *See Workers' Compensation and Safety Div. v. Essex Electric, LLC*, Docket No. 08-12WCPen (November 28, 2012) ("Both by virtue of statute, 3 V.S.A. §845(e)(3), and in accordance with Workers' Compensation Rule 46.1000, the amended version of

² (7 days x \$100.00 per day) + (549 days x \$150.00 per day) = \$83,050.00.

§692(a) now controls, and that portion of Rule 45.5100 that conflicts with it is invalidated”).

8. Respondent’s violation occurred after July 1, 2007. Accordingly, no portion of his violation is subject to the \$5,000.00 maximum penalty set forth in the prior version of Rule 45.
9. Although the prior version of Rule 45 did not provide specific guidance for determining the penalty amount for violations of § 687, the Department’s practice dating back to 2016 was to assess penalties based on the degree of hazard posed by an employer’s business and the number of prior violations.
10. Effective February 13, 2017, the Commissioner amended Rule 45. The current Rule 45 employs the North American Industry Classification System (NAICS) to classify how hazardous an employer’s business is. It also takes into consideration whether the employer has prior violations. *See Workers’ Compensation Rules 45.5510 – 45.5513* (effective February 13, 2017). Thus, the current Rule 45 is similar to the Department’s prior practice.
11. Therefore, although Respondent’s 556-day period of non-compliance includes a span of time before the effective date of the current Rule 45, I generally follow the method set forth in the current rule to determine the appropriate penalty.
12. The first step in assessing a penalty under the current Rule 45 is to determine which NAICS industry sector code applies to the employer’s business. Mr. Goodhue found it difficult to determine the NAICS code for Respondent’s business, as none of the codes listed were a close match. After considering the available options, Mr. Goodhue chose NAICS Industry Sector Code 53 (Real Estate and Rental and Leasing). *See Workers’ Compensation Rule 45, Appendix* (effective February 13, 2017). Respondent did not dispute this NAICS code, and Petitioner offered no other codes that might apply. Thus, I accept NAICS Industry Sector Code 53 as the code applicable to Respondent’s business.
13. For employers in Industry Sector 53, Rule 45 provides for a penalty of \$30.00 for each day without insurance for an initial violation. If a second violation occurs within three years of the initial violation, the per day penalty shall be doubled. *See Workers’ Compensation Rule 45.5511* (effective February 13, 2017).
14. Although this is Respondent’s second violation, I am unable to determine from the record the date of his initial violation.³ Accordingly, the provision for doubling the penalty for a second violation is unsupported by the evidence, and I decline to apply it.

³ *See Finding of Fact No. 7 supra*. The Administrative Citation and Penalty at issue here, Docket No. 28-18WCPen, states that Respondent was previously cited in Docket No. 03-15WCPen for not maintaining workers’ compensation insurance. However, the first citation was not offered into evidence, and the second citation does not specify the date of the first violation.

15. Assessing a penalty of \$30.00 per day for Respondent's 556-day period of non-compliance yields a maximum penalty under Rule 45 of \$16,680.00.
16. 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. *Workers' Compensation and Safety Div. v. Peter Leo Goldsmith, LLC*, Docket No. 25-11WCPen (June 21, 2012); *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.

Mitigation Factors

17. Rule 45 provides 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 Rule 45.5520 – 45.5550 (effective February 13, 2017).

18. As to the first mitigation factor, Respondent promptly reinstated his policy after Mr. Goodhue began his investigation. However, Respondent has not demonstrated that his failure to secure the required insurance coverage was inadvertent or the result of excusable neglect. Rather, his explanation for failure to maintain the required insurance was simply that he did not pay the premium. Accordingly, the first mitigation factor does not apply.
19. As to the second mitigation factor, Petitioner now proposes a penalty of \$15,000.00. This proposed penalty is about 18 times the amount of the premium avoidance.⁴ I conclude that the proposed penalty significantly exceeds the amount of premium avoidance and, therefore, mitigation is available under the second mitigation factor. *See, e.g., Peter Leo Goldsmith, LLC, supra* (proposed penalty of more than two times premium avoidance weighs in the employer's favor for mitigation).
20. No additional mitigation is warranted under the third factor. While Respondent is not a large employer, the roof shoveling performed by his employees was inherently dangerous. *See Workers' Compensation and Safety Div. v. Feiner*, Docket Nos. 20-19WCPen and 21-19WCPen (April 6, 2020) (work requiring a ladder is inherently

⁴ \$15,000.00 ÷ \$839.54 ≈ 17.9.

dangerous). Further, there is no convincing evidence that Respondent's business "presented minimal risk to employees." Workers' Compensation Rule 45.5550 (effective February 13, 2017); Workers' Compensation Rule 45.5112 (effective May 5, 2001).

Application of the Second Mitigation Factor

21. Petitioner has proposed a penalty of \$15,000.00 for Respondent's failure to maintain workers' compensation insurance. By failing to maintain that insurance, Respondent avoided paying premiums of \$839.54. Typically, unless there is a strong rationale for a higher penalty, the Department imposes a penalty in the range of two to three times the premium avoidance for an employer's failure to maintain coverage. *See, e.g., Workers' Compensation and Safety Div. v. Labrie*, Docket No. 07-10WCPen (December 14, 2010) (penalty of two times the premium avoidance); *Workers' Compensation and Safety Div. v. Beezco, Inc.*, Docket No. 22-10WCPen (July 22, 2011) (same); *Peter Leo Goldsmith, LLC, supra* (penalty of slightly less than twice the premium avoidance); *Workers' Compensation and Safety Div. v. Henry Vo*, Docket No. 09-12WCPen (October 18, 2012) (same); *Workers' Compensation and Safety Div. v. Rhoades*, Docket No. 07-10 (December 14, 2010) (penalty of three times the premium avoidance).
22. In proposing a penalty of \$15,000.00, Petitioner emphasized that this is Respondent's second offense and that the roof shoveling performed by his employees in March 2018 was a hazardous activity. I agree that these factors justify a penalty of more than two times the premium avoidance. However, I do not find that they justify a penalty of 18 times the premium avoidance. Applying the second mitigating factor, I conclude that a penalty of \$4,000.00 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 November 13, 2018 Administrative Penalty and Citation, Respondent is hereby assessed a penalty of \$4,000.00.

DATED at Montpelier, Vermont this 12th day of August 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.