STATE OF VERMONT
DEPARTMENT OF LABOR

Workers' Compensation and Safety Division, Petitioner	Docket No. 05-21WCPen
v.	By: Stephen W. Brown Administrative Law Judge
World Famous Monkey House Customs, LLC	For: Michael A. Harrington Commissioner

OPINION AND ORDER

Hearing held via Microsoft Teams on March 14, 2022
Record closed on March 14, 2022

APPEARANCES:

Annika Green, Esq., for Petitioner[1]

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?

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

EXHIBITS:

Petitioner's Exhibit 1:	Investigation Report prepared by Department of Labor Investigator Cassandra S. Edson, Esq.
Petitioner's Exhibit 3:[2]	Vermont Secretary of State Corporations Division details for Assumed Business Name World Famous Monkey House Customs
Petitioner's Exhibit 4:	Vermont Secretary of State Corporations Division details for World Famous Monkey House Customs, LLC

[1] The hearing in this case was scheduled to begin at 9:00 AM on March 14, 2022, with a technical test of Microsoft Teams videoconferencing software to begin at 8:30 AM. Respondent did not appear for either the technical test or the hearing itself. After multiple unsuccessful calls to Respondent's business telephone and its principal's mobile telephone, the hearing began at 9:10 AM with no representative of Respondent in attendance.

[2] At the beginning of the hearing, Petitioner moved for the admission of Exhibits pre-marked as 1, 3, 4, 5, 6, 8, and 9. Those exhibits were admitted without objection. Petitioner did not tender any Exhibit 2 or Exhibit 7 into evidence.

Petitioner's Exhibit 5:	Printout from Respondent's Website, "Ready to Book Your Appointment?"
Petitioner's Exhibit 6:	Payroll Data
Petitioner's Exhibit 8:	Administrative Citation and Penalty
Petitioner's Exhibit 9:	Printout from National Council on Compensation Insurance ("NCCI") Search Results for Employer Name "World Famous"

FINDINGS OF FACT:

1. Respondent is a Vermont limited liability company ("LLC") with a principal place of business in Stowe, Vermont. It was registered with the Vermont Secretary of State on March 7, 2018. Ryann Schofield is its manager and registered agent. The Department of Labor approved an exclusion[3] for Ms. Schofield on September 28, 2018.

2. Respondent is in the business of providing personal services including tattoos, piercings, and permanent makeup. It also houses a gallery for the sale and display of artwork such as paintings and drawings.

3. Between at least September 28, 2018[4] and May 20, 2021 (the "Relevant Period"), Respondent did not have workers' compensation insurance coverage. During those 966 days, between two and five individuals other than Ms. Schofield worked at Respondent's business premises at any given time (the "Workers").

4. During the Department's investigation of Respondent, Ms. Schofield represented to Investigator Cassandra Edson, Esq., that she believed all the Workers were independent contractors and not employees.

5. During the Relevant Period, the Workers generally set their own hours. Although the business generally opened at set times, the Workers were allowed to come and go as they pleased with no set minimum hours.

6. The Workers all provided tattoo, piercing, or permanent makeup services to Respondent's customers and/or sold original artwork at Respondent's premises. These are the same activities that Respondent is in the business of carrying out.

7. During the Relevant Period, Respondent's customers paid Respondent directly. Respondent then paid the Workers on a commission basis. While the fees that each

[3] The Workers' Compensation Act allows a corporation or LLC to exclude, with the Commissioner's approval, up to four executive officers, managers, or members from its provisions. If all the managers or members of an LLC make such election, receive approval, and the business has no employees, then it is not required to purchase workers' compensation coverage. 21 V.S.A. § 601(14)(H); Workers' Compensation Rule 25.0000 *et seq.* Here and elsewhere in this opinion, the term "exclusion" refers to an exclusion pursuant to these provisions.

[4] This is the first date for which Respondent tendered payroll data for individuals other than Ms. Schofield working at Respondent's premises. *See* Petitioner's Exhibit 6.

Worker charged for services varied depending on their respective levels of experience, a "shop minimum" fee of $75.00 applied to any services rendered at Respondent's premises.

8. During at least some portion of the Relevant Period, each of the Workers were also principals of their own LLCs. However, several of them did not form those LLCs until after they had been working at Respondent's premises for several months or even years.

9. Respondent did not form contracts with the Workers' LLCs. It hired the Workers as individuals and paid them directly as individuals. There is no evidence that Respondent ever paid any companies owned by any of the Workers during the Relevant Period. Additionally, Respondent issued IRS Form 1099s to the Workers, not to their companies.

10. Each of the Workers eventually filed workers' compensation exclusions as principals of their respective LLCs, and the Department approved those exclusions. The last such exclusion was approved on May 21, 2021, one day after the last day in the Relevant Period.

11. For the entire duration of the Relevant Period, however, there was at least one Worker providing services at Respondent's premises without an approved exclusion, while Respondent did not have workers' compensation insurance coverage.

12. The cost of workers' compensation insurance premiums is a function of the employer's total payroll multiplied by an annually adjusted rate that corresponds to the employer's NCCI business category.

13. In computing the monetary amount of Respondent's savings resulting from its failure to procure workers' compensation insurance coverage (the "premium avoidance"), Investigator Edson only included the Workers' earnings for the period before the Department approved their respective exclusions.[5] With that adjustment, she calculated Respondent's premium avoidance during the Relevant Period as $3,097.00. I find this computation credible and well-supported.

14. Petitioner recommends an administrative penalty of $4,000.00 against Respondent for its failure to procure workers' compensation insurance coverage.

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. There is no evidence that Respondent was ever approved to self-insure.

[5] Investigator Edson's computation of Respondent's premium avoidance in this case is outlined on page 13 of her Report. *See* Petitioner's Exhibit A, p. 13.

3. To determine whether Respondent violated Section 687 by failing to maintain workers' compensation coverage for its workers, I must determine whether the Workers were employees. *See Workers' Compensation and Safety Division v. On the Rise Construction, LLC*, 08-19WCPen and 09-19WCPen (September 15, 2020).

4. The Workers' Compensation Act 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).

5. Thus, a business's status as a statutory employer depends upon the nature of its business. *Marcum v. State of Vermont Agency of Human Services*, 2012 VT 3, ¶ 9. 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.

6. In this case, Workers working at Respondent's premises during the Relevant Period all provided exactly the same services that Respondent was in business to provide. *See* Finding of Fact No. 6, *supra.* I therefore conclude that they were Respondent's employees during the Relevant Period. As such, Respondent was required to maintain workers' compensation insurance coverage during that period, but it did not do so. *See* Finding of Fact No. 3, *supra*. This constitutes a violation of 21 V.S.A. § 687.

7. Such a violation 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 Respondent's operation without having insurance for 966 days is therefore $144,550.00.[6]

8. The Commissioner has adopted Workers' Compensation Rule 45 to implement the penalties provided for by statute. Rule 45 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 the employer's prior offenses. *See* Workers' Compensation Rules 45.5510–45.5513 (effective February 13, 2017).

9. Respondent's business falls under NAICS category 81, which comprises "Other Services (except Public Administration)." Specifically, NAICS sub-category 812199, "Other Personal Care Services," includes ear piercing services, tattoo parlors, and

[6] (7 days x $100 per day) + (959 days x $150 per day) = $144,550.00.

permanent makeup salons.[7] For employers in that sector, Rule 45.5513 provides for a penalty of $50.00 for each day without insurance for a first violation.[8] Since this case involves Respondent's first violation, a strict application of Rule 45 before applying the mitigation factors yields a maximum penalty of $48,300.00.[9]

10. Rule 45 also provides the Commissioner with the discretion to reduce the amount of any penalty if the employer demonstrates any of the following:

    (1) That the failure to secure or maintain Workers' Compensation insurance was inadvertent or the result of excusable neglect and was promptly corrected;

    (2) 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

    (3) 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).

11. Petitioner acknowledges that the second mitigation factor identified above justifies substantially reducing the maximum penalty in this case. I agree, as a strict application of Rule 45.5513's formula would result in a penalty that exceeds the amount of Respondent's premium avoidance by more than fifteen-fold.[10]

12. In arriving at its recommended penalty amount, Petitioner considered and rejected the application of the first and third mitigation factors. Because Respondent bears the burden of proof on all three mitigation factors[11] but did not appear at the formal hearing, it did not put forth any evidence or argument in favor of the first or third mitigation factors. Therefore, I conclude that it did not sustain its burden of proof as to those factors.

13. Based on the totality of the circumstances in this case and applying the second mitigation factor discussed above, I conclude that Petitioner's recommended penalty of $4,000.00 against Respondent is appropriate. 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*,

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[7] *See* United States Census Bureau, North American Industry Classification System, https://www.census.gov/naics/?input=81&chart=2022&details=812199 (last accessed March 18, 2022 at 4:28 P.M.).

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

[9] 966 days × $50.00 per day = $48,300.00.

[10] $48,300.00 ÷ $3,097.00 ≈ 15.6.

[11] *See* Rule 45.5520 ("…if the employer demonstrates…").

Docket No. 25-11WC (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. Respondent's recommended penalty of $4,000.00 reflects a balanced consideration of the circumstances of this case and is adequate to incentivize future compliance and to neutralize any advantage that Respondent 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 Respondent's violations of 21 V.S.A. § 687, Respondent is hereby assessed a penalty of $4,000.00.

DATED at Montpelier, Vermont this 28th day of March 2022.

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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.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.